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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—
Appeals against decision of Commission—

2001 WAIRC 04015

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	AWI ADMINISTRATION SERVICES PTY LTD, APPELLANT/ RESPONDENT
	v.
	ANDREW BIRNIE, RESPONDENT/ APPELLANT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER J H SMITH
DELIVERED	FRIDAY, 26 OCTOBER 2001
FILE NO/S	FBA 22 OF 2001, FBA 23 of 2001, FBA 24 of 2001
CITATION NO.	2001 WAIRC 04015

Decision	Appeal No FBA 22 of 2001 dismissed. Appeals Nos FBA 23 of 2001 and FBA 24 of 2001 upheld in part and the decision at first instance varied.
Appearances	
AWI Administration Services Pty Ltd	Mr R L Le Miere (of Queens Counsel), by leave, and with him Mr D Howlett (of Counsel), by leave
Mr A Birnie	Mr S P Kemp (of Counsel), by leave

Reasons for Decision.

THE PRESIDENT—

1 These are three appeals, all brought pursuant to s.49 of the *Industrial Relations Act* 1979 (as amended). They were all heard together, by direction of the Full Bench.

2 The decision appealed against is contained in an order made on 20 April 2001. That order, formal parts omitted, reads as follows—

"(A) DECLARES

(1) That the dismissal of Andrew Birnie was harsh and unfair; and

(2) That reinstatement is impracticable.

(B) ORDERS THAT—

(1) A.W.I. Administration Services Pty Ltd pay, within 7 days of the date of this Order, Andrew Birnie a sum equivalent to eight weeks' salary by way of a further redundancy payment; and

(2) A.W.I. Administration Services Pty Ltd pay, within 7 days of the date of this Order, the sum of $5,000.00 by way of compensation for the injury caused by the dismissal.

(C) (1) DECLARES THAT Andrew Birnie has not been allowed by A.W.I. Administration Services Pty Ltd a benefit to which he is entitled under his contract of service, that is that A.W.I. Administration Services Pty Ltd will at its cost relocate him, his family and reasonable effects to Melbourne.

(2) ORDERS THAT this claim be re-listed for further hearing as to the Order to issue.

(D) ORDERS THAT the application otherwise be dismissed."

3 The order was made upon the hearing of consolidated applications numbered 1198 and 1457 of 2000.

APPEAL FBA 22 OF 2001

4 The first appeal, No FBA 22 of 2001, is an appeal by AWI Administration Services Pty Ltd (hereinafter referred to as "AWI") against the decision of the Commission, constituted by a single Commissioner, given on 20 April 2001 in matters numbered 1198 of 2000 and 1457 of 2000.

Grounds of Appeal FBA 22 of 2001

5 AWI appeals on the following grounds, as amended—

"**Relocation**

The Commissioner—

1. Erred in deciding that the terms of the Individual Employment Agreement, with the exception of the fixed term, did not govern the applicant's employment after 1 March 1997.

2. Erred in not identifying all the terms of the applicant's contract of employment.
3. Erred in not reaching a conclusion about or alternatively not identifying, from the exhibits, or the evidence, the precise terms of the benefits, pertaining to relocation, that the applicant had been denied.
4. Erred in not deciding that the applicant had agreed to be bound by the respondent's policies, as determined by the respondent from time to time, by signing the Individual Employment Agreement.
5. Erred in not deciding that the respondent's policy in relation to relocation had been replaced or modified and provided different benefits than those referred to in declaration (C)(1) of the Commissioner's decision, and that the respondent's policy, at the time of the applicant's termination was as contained at page 66 and 67 of Exhibit 1.
6. Erred in deciding that the document dated 29 June 1995, contained in Exhibit 1, bound the respondent, contractually, when the Individual Employment Agreement, that was valid between 1 March 1994 and 1 March 1997, was an entire agreement.
7. Erred deciding that the applicant was entitled to be relocated or returned to Melbourne on the terms contained at page 21 of Exhibit 1.
8. In reaching the decision in paragraph 7, the learned Commissioner used the wrong test for determining the benefit to which the applicant was entitled. He decided on the basis of fairness and not a judicial approach to ascertaining the entitlements.
9. Erred in deciding that paragraphs 1 to 5 of the document at page 21 of Exhibit 1 applied to the applicant on his return to Melbourne to the extent that it did to his relocation to Perth when the document does not create that entitlement.
10. Erred in deciding that the respondent unilaterally changed the applicant's entitlements under his contract of employment in relation to relocation.
11. Erred in ascertaining the applicant's benefit to relocation by amending the entitlement.
12. Erred in deciding that he had jurisdiction to hear and deal with the application when the Individual Employment Agreement contained a governing law provision that provided that "This Agreement shall be interpreted in accordance with the laws of Victoria and the Parties submit to the jurisdiction of the Courts of Victoria".
13. Erred in deciding that it was common ground that the applicant's written contract of employment expired according to its terms when that was a question of law.
14. Erred in deciding that there was no warrant to find that the terms of the written contract of employment continued in force when there was evidence to decide otherwise.
15. Erred in deciding that the terms of the written contract of employment ceased to apply by the effluxion of time when there was either no evidence to support this or it was contrary to the evidence.
16. Erred in not deciding that most of the terms of the written contract of employment continued in force with the exception of the fixed term itself.

Redundancy Payment

The Commissioner—

17. Erred in deciding that it was unfair for the respondent not to have given the applicant a further 8 weeks pay for severance when he decided that the applicant had no contractual entitlement to a severance payment at all.
18. Erred in deciding that the applicant had lost a fair redundancy payment when the applicant had no entitlement to any redundancy payment.
19. Erred in not deciding that the respondent's policy was to apply the provisions of the Federal Termination Change and Redundancy provisions—and that that policy was applied to the applicant on termination.

Injury

The Commissioner—

20. Erred in not deciding that, to the extent that there was any injury, which is denied, any such injury resulted from the fact of the redundancy and not from any unfair dismissal.
21. Erred in not having any evidence or sufficient evidence to be able to assess the applicant's compensation for injury at the sum of $5,000.00.

Unfairness

The Commissioner—

22. Erred in deciding that the respondent had breached an implied term based on section 41 of the Minimum Conditions of Employment Act 1993 by not having discussions with the applicant about the likely effects of the redundancy and the measures that may be taken to avoid or minimise the consequences, when page 112 of Exhibit 1 and the evidence demonstrated that the respondent gave the applicant the ability to raise any other issues but he declined to do so.
23. Erred in deciding that the applicant's dismissal was harsh in the "circumstances whereby the respondent created a situation where Birnie believed he would be offered a promotion only then to dismiss him", especially when the Commissioner failed to have regard to the evidence of the applicant that neither Mr Gutnik nor Mr Lee advised the applicant that he was being considered for a promotion.
24. Erred in not deciding that the respondents attempts to look for other options for the applicant constituted fair attempts to mitigate the effects of the redundancy on him.

Orders Sought

That the appeal be upheld and the decision and Order of Commissioner Beech be quashed.

Alternatively, that the appeal be upheld and the decision and Order of Commissioner Beech be quashed and the matters remitted to the Commission to be dealt with in accordance with law."

APPEAL NO FBA 23 OF 2001

6 Appeal No FBA 23 of 2001 is an appeal by Mr Andrew Birnie against the decision, insofar as it relates to matter No 1457 of 2000.

Grounds of Appeal FBA 23 of 2001

7 The grounds of such appeal are as follows—

"The appellant appeals against the whole of the decision of the Commission, constituted by Commissioner A R Beech given on 20 April 2001 in matter number 1457 of 2000 on the grounds that, having found that there was an implied term in the appellant's contract of employment entitling him to reasonable notice, the learned Commissioner—

1. Erred in finding that there were two claims for the payment of reasonable notice;
2. Erred by failing to apply the tests identified in paragraph 73 and thereby erred in failing to make a finding of the length of notice to which the appellant was entitled under the implied term of reasonable notice in the contract;

3. Erred in failing, once he had determined that length of notice, to determine whether the respondent had denied the appellant a benefit of his contract by not giving the requisite notice;
4. Erred in finding that the factors for determining what constitutes reasonable notice overlap with the considerations involved in deciding whether a particular redundancy payment is appropriate and, by implication, that an amount paid in lieu of reasonable notice compensates an employee for the same matters as a reasonable redundancy payment;
5. Erred in taking the appellant's entitlement to reasonable severance pay into account in considering what amounted to reasonable notice;
6. Erred in finding that the period of notice given to the appellant was not unreasonable in all the circumstances; and
7. Erred, in consequence, in finding that the respondent had not denied the appellant a benefit under his contract.

Orders sought

That the appeal be upheld and the Order of Commissioner Beech be quashed to the extent that it deals with matter number 1457 of 2000.

That an Order issue in the following terms—

(A) DECLARING—

1. The appellant was entitled to 12 months notice by way of reasonable notice of termination of his contract of employment; and
2. The appellant was denied that benefit upon termination of his contract of employment by the respondent.

(B) ORDERING the respondent pay, within 7 days of the date of the date (sic) of this Order, a sum equal to 48 weeks salary calculated at the full rate of remuneration of $125,846.00 per annum.

Alternatively, that the matter be referred to the Commission to be dealt with in accordance with law."

APPEAL NO FBA 24 OF 2001

8 Appeal No FBA 24 of 2001 is an appeal by Mr Birnie against the same decision, insofar as it relates to application No 1198 of 2000.

Grounds of Appeal No FBA 24 of 2001

9 This appeal is made on the following grounds, as amended—

"The appellant appeals against the following parts of the decision of the Commission, constituted by Commissioner A R Beech, given on 20 April 2001 in matter number 1198 of 2000 on the following grounds—

1. Whether appellant should have been retained in preference to another employee (paragraphs 9 to 11)

   The Commissioner—

   (a) Erred in finding that experience in native title was a relevant factor in the selection of the appellant for dismissal;

   (b) Erred in finding that there was no evidence that the appellant had the requisite native title experience when the respondent's witness conceded that the appellant had adequate experience to perform the tasks required in the remaining position;

   (c) Erred by failing to give any or sufficient weight to the evidence of the respondent's witness that the appellant had adequate experience to perform the functions of the remaining position;

   (d) Erred by failing to give any or sufficient weight to the appellant's greater length of service;

   (e) Erred in finding that the appellant had not demonstrated that he should have been retained in preference to the other employee;

   (f) Erred in finding that the possibility that the dismissal of the other employee would have the appearance of being unfair was a relevant factor; and

   (g) Erred in not finding that the appellant's dismissal was not unfair on this ground.

3. Payment in lieu of notice (paragraphs 46 to 49)

   The Commissioner—

   (a) Erred in finding that there was a term in the appellant's contract of employment that the contract could be terminated by payment in lieu of notice;

   (b) Erred in failing to find that the appellant was entitled to be given proper notice and to use of the motor vehicle during the period of notice;

   (c) Erred in failing to find that the appellant was denied a contractual benefit when he was not allowed to use the vehicle during the period of notice; and

   (d) Alternatively, erred in failing to find an implied term in the appellant's contract of employment entitling the appellant to be paid out in lieu of notice at the rate of his full remuneration package.

   Orders sought

   That the appeal be allowed.

   That Orders B(1) and (D) of the Order of Commissioner Beech be quashed and the matter be referred to the Commission to be dealt with in accordance with law."

Ground 2 was withdrawn by Mr Kemp on behalf of Mr Birnie at the hearing of the appeals.

Reasons for Decision

10 The reasons for decision are contained in one set of reasons which relates to both applications.

THE APPLICATIONS

11 By application No 1198 of 2000, Mr Birnie claimed that he was harshly, oppressively or unfairly dismissed. He claimed compensation equal to a reasonable redundancy payment and payment of $15,000.00 for injury arising out of the dismissal. He also claimed, as a denied contractual benefit, payment of $8,325.00, representing a shortfall calculated by him as the difference between the payments made to him upon termination calculated on his base rate of salary and a recalculation based upon his total remuneration package. He also claimed payment of $25,000.00 in lieu of 10.4 weeks' long service leave under AWI's long service leave policy. In addition, he claimed payment of all amounts which might become payable upon his relocation to Melbourne, in accordance with the terms of a relocation agreed between him and AWI when he was located from Melbourne to Perth in 1995.

12 Application No 1457 of 2000 was a claim for denied contractual benefit by the abovenamed appellant, the benefit alleged to have been denied being payment in lieu of reasonable notice upon termination.

BACKGROUND

13 There was evidence before the Commission at first instance from Mr Birnie and for AWI from Mr Peter James Lee, the Company Secretary of Astro Mining NL (hereinafter referred to as "Astro Mining"), AWI and

certain other companies. An important figure who did not give evidence was Mr Joseph Gutnick, the Chairman of Directors of both AWI and Astro Mining, as I understood the evidence. There was also an amount of documentary evidence.

14 Mr Birnie was an employee of AWI, commencing employment in March 1992, and his employment was terminated on 14 July 2000. From 1997 onwards, he was employed as the Regional Exploration Manager for AWI, being, by profession, a Geologist specialising, in his employment by AWI, in diamond exploration. Astro Mining is and was, at the material times, only an exploration company, exploring for diamonds. AWI employs geologists and provides them to Astro Mining projects covered under service agreements, and it was on Astro Mining projects that Mr Birnie was working whilst he was in AWI's employment.

The Individual Employment Agreement—1994

15 Mr Birnie entered into a written employment agreement signed by him and on behalf of AWI on 7 April 1994. The agreement was referred to in evidence as an Individual Employment Agreement (hereinafter referred to as the "IEA") and was entered into whilst Mr Birnie was in Victoria (see pages 47-63 of the appeal book for FBA 22 of 2001 (hereinafter referred to as "AB")).

16 The IEA was a fixed term written agreement for a period of 3 years which purported to operate from 1 March 1994.

17 Mr Birnie's job title, as identified in the IEA, was "Manager Nabberu Diamond Exploration", which was not the position which he occupied in this State. The IEA recognised the commencement of his employment, for the purposes of annual leave, long service leave and similar benefits, as 26 March 1992 and prescribed his remuneration and leave entitlements, inter alia.

18 By Clause 16 of the IEA, there are prescribed the public holidays which the employee is entitled to take without deduction in pay.

19 Clause 17 of the IEA deals, inter alia, with relocation and, significantly, permits transfer of employees, requiring employers to pay reasonable relocation expenses, and reads as follows—

> "**17. PLACE OF WORK**
>
> (i) The Employee may be employed at any of the establishments of the Employer. The Employee will be deemed to have as a place of work those establishments and the registered place of business of the Employer.
>
> (ii) If the Employer requires the Employee to transfer interstate, the Employer shall pay for reasonable relocation costs."

20 Clause 19 of the IEA binds employees to the policies, procedures and instructions of the employer in the following terms—

> "**19. POLICIES, PROCEDURES AND INSTRUCTIONS**
>
> (i) Policies, procedures and instructions exist for the effective and safe operation of the Employer's business and the welfare and interests of Employees.
>
> (ii) The Employee is expected to comply with all policies, procedures and instructions which are applicable to their work area and responsibilities. When required during the term of this Agreement, the Employer shall exercise its right to replace or modify existing policies, procedures or instructions or introduce new ones with which the Employee will be required to comply.
>
> (iii) A transgression of a policy, procedure or instruction may render the Employee liable to disciplinary action or termination.
>
> (iv) Information about particular policies, procedures and instructions will normally be provided in circulars, on notice boards and otherwise brought to the attention of Employees required to observe them."

21 Mr Birnie admitted in evidence that he was aware from the IEA that the employer could, in accordance with Clause 19(ii), exercise its right to replace or modify any existing policies, procedures or instructions, or introduce new ones and that he had agreed to comply with them if he had been made aware of them (see pages 133-134 of the transcript at first instance (hereinafter referred to as "TFI")). The clause, on a fair reading, gives the right to the employer to replace or modify existing policies or instructions or to introduce new ones. (It gives no right to unilaterally vary terms and conditions of employment.)

22 Clause 28 of the IEA makes provision for the termination of the agreement and no period of notice on either side is prescribed.

23 Clause 33 of the IEA provides that the law of Victoria and the jurisdiction of the Courts of Victoria be applied to the agreement and its interpretation.

24 Clause 34 of the IEA provides that the written agreement, the IEA, is an entire contract containing all of its terms.

Relocation to Perth 1995

25 In 1995, Mr Birnie had been "relocated" (sic) with his family from Melbourne to Perth. When Mr Birnie moved, he and his wife had three young children and his wife was working as a cardiac technician in Melbourne at one of the clinics. She had to give up her work when they moved.

26 Mr Birnie forwarded a memorandum as to relocation expenses dated 26 April 1995 to Mr Neal Stewart, General Manager, Human Resources, of AWI (see page 64(AB)). By a memorandum dated 29 June 1995, Mr Stewart approved a set of relocation terms which, formal parts omitted, reads as follows—

> "1. **Relocation Allowance**
>
> An allowance of one (1) months salary to offset the incidental costs associated with relocation.
>
> 2. **Travel**
>
> 2.1 One transfer economy class travel for the family to Perth from Melbourne.
>
> 2.2 On completion of each twelve (12) months service return economy class fares for the family to Melbourne.
>
> 3. **Removal of Personnel** (sic) **Effects**
>
> Cost of removal of a reasonable amount of effects plus one vehicle from Melbourne to Perth. Insurance in transit is also covered by us.
>
> 4. **Selling and Buying Residence**
>
> We will carry the costs associated with the sale and purchase of your home. These include advertising, fees, stamp duty, commissions and the like.
>
> 5. **Temporary Accommodation**
>
> Th (sic) cost of providing temporary suitable accommodation for a period of up to four (4) weeks while you locate permanent accommodation.
>
> 6. **Redundancy Provisions**
>
> Should your position be made redundant at any time we will at our cost relocate you, your family and reasonable effects to Melbourne."

(See pages 65-66(AB).)

27 By that memorandum, the AWI undertook, inter alia, to pay reasonable costs of relocation in the case of a redundancy, which took the employer's obligations beyond the existing obligation in the IEA to pay for reasonable relocation costs. The employer undertook a specific obligation, in the case of Mr Birnie, to pay the costs of relocating him and his family and reasonable effects to Melbourne. The word "relocate", in the context of the memorandum, obviously meant the payment of the expenses referred to in that memorandum. The evidence was that Mr Birnie accepted this memorandum. This was, as far as Mr Lee, the Company Secretary, was aware, the only memorandum dealing with Mr Birnie's relocation from Melbourne to Perth.

The Contract of Employment after the Transfer to Perth

28 There is no provision in the IEA for the IEA to still have effect after its termination.

29 As to the contract itself, nothing was said when Mr Birnie moved to Perth and, since he was now employed in Western Australia, he was now entitled to the Western Australian public holidays. That was the evidence. His posting to Perth was as second in charge to Mr Stefan Myer, the Exploration Manager, a new position. Nothing happened at the end of February 1997 when his formal contract of employment (the IEA) expired. He heard nothing further from the company and raised nothing with the company about his terms and conditions of employment. It had been explained to Mr Birnie, he acknowledged, that this was a fixed term contract and his belief was that everything in that applied for that fixed term and he reverted to whatever conditions applied to before that. According to Mr Lee, the same terms and conditions as were contained in the IEA would have operated after its expiry.

30 After 1997, when the company had had a number of redundancies, Mr Birnie took on responsibility for a number of other contracts which had been acquired and, at about that time, Mr Myer changed Mr Birnie's title to that of "Regional Exploration Manager" because he was looking after virtually all of the exploration projects in Western Australia. This was not the position which he occupied in Victoria, quite clearly. It was a new one.

The Dismissal

31 Mr Birnie's employment was terminated, it was said, for redundancy. AWI stated that it had restructured its organisation and that, as a result, Mr Birnie's position became redundant. He was paid four weeks' pay in lieu of notice and a further eight weeks' pay by way of severance. The payments made to him were calculated on his salary of $100,000.00 per annum.

32 In the early part of 2000, the AWI and Astro group of companies was requested to put together budgets for exploration for the coming year. (Mr Birnie was manager of a number of projects in various places including India, the Northern Territory and what remained in Western Australia and submitted their budget to Mr Myer.) In due course, Mr Myer advised him that what they requested had not been accepted; Mr Myer told Mr Birnie that Mr Gutnick was still very interested in India and still wanted to pursue the Northern Territory; but Western Australia was an area in which Mr Gutnick thought they had spent long enough looking at. Mr Myer told Mr Birnie that he did not have to worry about the future because exploration was going to continue on in those areas and, as far as work in Western Australia was concerned, Mr Birnie would probably take on some responsibility for the Bow River project in the north of this State.

33 On 28 June 2000, the staff in the Perth office were informed that Mr Gutnick was going to be visiting the office to go through the progress of the various projects which they had been working on and that they should have the relevant information ready. Mr Gutnick did not turn up until late and a number of employees had left by that time, but some remained behind, including Mr Myer and Mr Birnie.

34 After a meeting which Mr Gutnick had with Mr Myer, Mr Gutnick came out and spoke to Mr Birnie and said—

> "I'm sorry I'm late. I've been held up. I can't speak to you fully now, but I wanted to discuss elevating your profile within the company. I'll be back next Wednesday and will speak about it to you then."

(See page 25 (TFI).)

35 Mr Birnie took this to mean that he would have an added role within the company.

36 The next week, on 5 July 2000, Mr Lee telephoned Mr Birnie from a conference room and asked him to come and speak to him. That was at about 11.00 am. Mr Lee told him that Mr Gutnick wished to see Mr Birnie that afternoon, but that he, Mr Lee, wanted to inform him what the discussion would be about. Mr Lee said that Mr Myer was being asked to retire and that Mr Birnie would be taking on his responsibilities. Mr Lee said —

> "Do you have any problem with this?"

(See page 26 (TFI).)

37 Mr Birnie said that he would be willing to undertake the new responsibilities. Mr Lee asked how long the hand over period would be between when Mr Myer left and Mr Birnie took over. Mr Birnie told Mr Lee that, basically, he was aware of the status of all of the projects. However, Mr Birnie said, there were some legal aspects regarding Bow River and Native Title with which he was not familiar. Mr Lee told him that this would not be an issue and that the lawyers in the Melbourne office could update him on that. Mr Lee then said that Mr Gutnick would see him, Mr Birnie, that afternoon.

38 Mr Lee said in evidence that he made it clear that this proposal was subject to the final decision of the Chairman. He said that he discussed the possibility of a wider role for Mr Birnie with him, but made no mention of his taking the position of Mr Myer as Exploration Manager (see page 57(TFI)). The evidence of both witnesses, however, referred to increased responsibilities or a wider role for Mr Birnie.

39 Mr Gutnick left the office that afternoon at about 4.00 pm. He said nothing to Mr Birnie, but smiled and left. Mr Birnie was still happy with what he believed was going to occur.

40 Mr Lee affirmed in evidence that the ability to develop the Northern Territory tenements was subject to Native Title clearance which had not yet been obtained (see page 98(TFI)). Thus, the only active project which Astro Mining was going to continue with was Bow River. At Bow River, there was a geologist in the position, Mr Grant Boxer, and he had occupied that position for eighteen months. He also had experience with Native Title matters. That was as at 5 July 2000. There had also been discussion about Mr Myer leaving, but Mr Lee said that he was unable to remember whether a formal decision had been taken.

41 The next day, 6 July 2000, Mr Birnie was asked to come and speak to Mr Lee. Ms Delwyn Spence, AWI's Human Resources person in Western Australia, called him in and she was present. Mr Lee made a note of the discussions (see page 155(AB)).

42 Mr Lee's first words were "Unfortunately, things have changed since yesterday." He told Mr Birnie that he was being made redundant and that Mr Gutnick was not going to fund exploration, and that all they were going to fund was the Bow River project. Therefore, Mr Lee said, there was no place for him. Mr Lee said that, at this time, Astro's cash position was deteriorating and it had about $120,000 in the bank. The slump applied to all of the client companies of AWI, he said.

43 Mr Birnie was shocked because he had walked in there thinking that he was being confirmed as a sort of Exploration Manager of Astro Mining, and now he was told that he was to be made redundant. He was devastated. He immediately started thinking "Well, you know, where does that leave me? I can't get a job. It will be very difficult, I have specialised in diamond exploration." (see page 28(TFI)). He knew that the industry was in a slump. He asked Mr Lee how things had changed from yesterday and Mr Lee informed him that Mr Gutnick had changed his mind.

44 Mr Lee said that Mr Birnie was very upset. Mr Lee said that he, too, was very upset, having known Mr Birnie since 1992.

45 Mr Lee told Mr Birnie that the exploration industry was tough and that things were tight. Based on his knowledge of Astro Mining's position, Mr Birnie was unaware that it had little or no budget for further activities, he said. He became aware of this when he was made redundant, he said. The industry, Mr Birnie admitted, however, was in a slump. Mr Lee told Mr Birnie that they had to concentrate on what they believed were the best areas and that Mr Boxer would be looking after Bow River.

46 As Mr Lee put it, the decision was made that Mr Boxer was the Project Manager and geologist at Bow River and that he was the best person for the job, given his experience. Then, the next step was to consider Mr Birnie's position and make a decision. They considered whether they had work for Mr Birnie in other projects which AWI were managing on behalf of its other client companies. They were considered and there were no opportunities for Mr Birnie with them (see pages 56-57 (TFI)).

47 Mr Lee said in evidence that they had given up a number of projects, including projects in China and India. They were then left with one project, the Bow River Diamond Project, and some tenements in the Northern Territory which were awaiting Native Title clearance before they could do any work. With only one project to be proceeded with, there were then staff "excess to requirements" (see page 56 (TFI)).

48 Mr Birnie told Mr Lee that he had equal the amount of experience which Mr Boxer had in alluvial diamond exploration and more recent experience, as well as knowledge of other projects.

49 In cross-examination, Mr Birnie admitted that Mr Boxer was in the position at Bow River, and had been for eighteen months. Mr Boxer's position, Mr Lee said, was not being made redundant. Mr Birnie in evidence said that terminating Mr Boxer's position would have appeared unfair. He disagreed, however, with the decision not to make Mr Boxer's position redundant. The decision to make Mr Birnie's position redundant had only been reached on 5 July 2000. Mr Birnie, in evidence, disputed that there was no work for him.

50 Mr Lee gave Mr Birnie a letter on 6 July 2000 (see page 97(AB)). He was paid until 14 July 2000 and paid, too, four weeks' pay in lieu of notice. In addition, he was paid eight weeks' severance pay as a reasonable payment, as the payment was termed.

51 On Monday, 10 July 2000, Mr Birnie rang Mr Lee in Melbourne and told him that the redundancy package which was offered to him was inadequate and because of that inadequacy, he would probably have to sell his house. He said that his wife would not be able to support them so they would have to return to Melbourne. He said that he had been involved in diamond exploration with the company for the last eight years and it was highly unlikely that he could obtain employment in Western Australia.

52 Mr Birnie asked Ms Spence about his long service leave. She told him that he was not entitled to long service leave and that all he was entitled to was four weeks' notice and two weeks' salary for every year of service, capped at eight weeks. He asked her for a copy of the relocation agreement and she told him that he would have to get that from Melbourne.

53 Mr Lee admitted in evidence that it was accepted practice that AWI paid a redundancy payment. There is and was, at the material time, no written redundancy policy (see page 86(TFI)), particularly none specifying quantum to be paid for severance pay.

54 The next day, Mr Birnie telephoned Mr Lee to discuss the relocation policy because he knew that the policy offered more than what he had been paid or was entitled to when he was transferred from Melbourne to Perth. He was told that Mr Lee was too busy and would ring back, which he did not do. Mr Birnie telephoned Mr Lee again, but was told that he was on the phone and could not speak to Mr Birnie. Mr Birnie then e-mailed Mr Lee, asking him to forward a copy of the relocation policy (see page 101(AB)). There was no response. Mr Birnie then searched through the computer network and found a relocation policy and that confirmed the policy as he understood it to be (see pages 103-105(AB)).

55 Mr Lee said that that policy was an old version of the relocation conditions for employees which had since been updated. Mr Lee admitted in evidence that the document at pages 111 to 113(AB) was a copy of the policy current at the time of Mr Birnie's redundancy for interstate relocation. It was, he said, the policy as it existed in mid to late 1999 which had caps on the sale value and purchase value of property (see page 90(TFI)).

56 Mr Birnie e-mailed Mr Lee a further two times and received no response (see pages 102 and 106 (AB)). He then prepared and forwarded a facsimile communication outlining what the cost of his relocating to Melbourne would be and forwarded that on to Mr Lee (see page 107(AB)).

57 On 14 July 2000, Ms Spence came to Mr Birnie, according to his evidence, and handed to him probably the same document which he had been given on the day when he was made redundant. She also gave him a cheque for the amount outlined in it. He reiterated to her that, for a senior employee who had been with the company for 8 years, the redundancy payment being offered was below industry standard and inadequate. He had, at this time, received no reply from Mr Lee informing him what his relocation conditions were. Ms Spence said that Mr Lee was working out the terms of Mr Birnie's relocation.

58 Mr Birnie faxed Mr Lee and reminded him that he was at least entitled to those conditions which he had signed with Mr Stewart when he had been transferred from Melbourne to Perth (see page 108(AB)). There was no response and he heard nothing more from Mr Lee until 18 July 2000, when Mr Birnie received an e-mail at home with a document attached to it outlining what AWI were offering as a relocation package from Perth to Melbourne. The letter acknowledged that, when Mr Birnie was originally transferred to Perth in 1995, AWI indicated that they would pay his reasonable expenses. Mr Lee advised in his memorandum of 18 July 2000 that Mr Birnie was entitled to the following—

"1. Economy class airfares from Perth to Melbourne for your family.

2. Reasonable costs of relocating your family and motor vehicle. Please obtain quotes and send them to me for review prior to me providing any formal authorisation.

3. Reasonable expenses in selling your property in Perth. Please note that there is a cap on these costs equivalent to the costs incurred in selling a property to the value of $300,000. Please advise me of the estimate of these costs. The amount will be reimbursed on production of receipts.

4. Reasonable costs of purchasing a property in Melbourne. Please note that there is a cap on these costs equivalent to the purchase of a house to the value of $300,000. Please advise me of the estimate of these costs. The amount will be reimbursed on production of receipts.

5. Reasonable storage of personal effects in Melbourne for a period of up to 3 months.

6. Accommodation for two nights in Perth prior to your departure.

7. Accommodation in Melbourne for 2 weeks in a company approved serviced unit.

8. A relocation payment to cover incidental costs of $2,000 for yourself, $2,000 for your partner, $1,000 for each dependent school age child and $500 for each dependent sub-school aged child. This relocation payment is subject to PAYG deductions in accordance with current taxation laws. The after tax amount will be paid to you.

9. The reimbursement of relocation costs is only available if relocation to Melbourne occurs prior to 14 October 2000."

(See pages 109-110(AB).)

59 Mr Lee said in cross-examination that he accepted that Mr Birnie was entitled to a relocation benefit. If it was not a contractual, it was a moral obligation, he said. According to Mr Lee, except for the "cut off date", the letter of 18 July 2000 reflected the policy (see page 91(TFI)). Mr Lee said that he read "the guidelines" and came up with what he put in the letter. He modified the guidelines where he thought necessary or appropriate, and excluded some items which were otherwise included (see pages 111-113(AB)).

60 In re-examination, Mr Lee asserted that paragraph 17.2 of the IEA deals with the situation where an existing employee is transferred interstate. That provides for the payment of reasonable relocation costs. He said that the document was not a policy but a guideline (see page 92(TFI)). As a result, i.e. because it was a guideline, he was of opinion that he could omit from the letter the guideline reference to a return airfare, to education assistance, and the reference to the provision by AWI of a professional relocation service. (The guideline, significantly, does not refer to the relocation of redundant employees.)

61 Based on what Mr Birnie knew of other employees' relocation packages and the document which he had printed off the network, it was less than that to which he was entitled, he said. It imposed conditions which he found financially penalising. Mr Birnie's evidence was to the following effect. He had not accepted the offer contained in that letter because he disagreed with the terms (see page 134(TFI). Points 3 and 4 limit the value of a house to be purchased to $300,000.00. The house which Mr and Mrs Birnie purchased in Perth was worth more than that, as was the house which they had sold in Melbourne. AWI were going to reimburse Mr and Mrs Birnie in an amount less than the cost of selling and repurchasing a house in Melbourne and they, AWI, knew this.

62 At the time of his redundancy, Mr Birnie was on a cash salary of $100,000.00 gross. (That had been increased on or about September 1999.) He also had the use of a company four wheel drive vehicle, he said. Mr Lee said that his search of the company's records indicated that there was nothing on file to indicate that Mr Birnie could use a company vehicle for private purposes. The company also paid airfares to Melbourne, annually, for the Birnie family.

63 Mr John Henry Addison, the Western Australia Land Access Officer of AWI, gave evidence that Mr Birnie did have full use of a company Toyota Landcruiser for private and work purposes. This use was agreed to, he said, by Mr Myer. Mr Addison said this both in evidence in chief and in cross-examination.

64 The reportable fringe benefit amount was $25,846.00 (see page 114(AB)). Mr Birnie was also, as Mr Lee pointed out, entitled to superannuation in accordance with the superannuation legislation. Mr Lee said that it was, at the direction of the Managing Director, whether long service leave was paid after three years. It was not paid in all cases. Mr Birnie could point to no policy to the contrary. Mr Lee also said that Mr Birnie, according to his agreement, was only entitled to long service leave after ten years.

65 Mr Birnie also had share options. He received the share option certificates on 5 May 2000 (see page 124(AB)), but one of the conditions of redundancy, it was said in evidence, was that the shares be purchased back from the company.

66 Mr Birnie was well aware of the downturn of the mineral exploration industry in Western Australia and throughout Australia. He made a number of inquiries (see pages 129-130(AB)) and made a number of unsuccessful applications for jobs (see pages 131-143(AB)), but was unable to get other employment. He had contacted fourteen different "entities" in looking for new employment. He also said that he considered that he had experience and qualifications going beyond the diamond exploration industry.

FINDINGS AT FIRST INSTANCE

Claim of Unfair Dismissal

The Reason given for the Dismissal

67 Mr Birnie disputed the reason given to him by Mr Lee for his dismissal. Mr Lee explained that AWI is one of a number of companies in a corporate group. AWI is set up to provide management and geological services to the public. Its only clients are, in fact, the other companies within that group to which AWI provides services. Relevantly, one of those other companies is Astro Mining.

68 Although AWI employed Mr Birnie, it provided his services to Astro Mining. Astro Mining decided that it would no longer pursue diamond exploration in a number of areas and instead concentrate on diamond exploration at Bow River in the Northern Territory, and it decided that Mr Birnie's position was no longer required. As AWI provides services only to the client companies, Mr Lee knew that there was no other client company which required Mr Birnie's services and, accordingly, his position became redundant.

69 Mr Birnie maintained, however, that there was still some exploration work being done in Astro Mining's office which he would have been able to perform, and that, therefore, his position was not redundant.

70 On the evidence, a substantial proportion of Mr Birnie's work was office based. Mr Birnie, in his evidence, acknowledged that he knew that the diamond exploration industry was "in a slump" and that Astro Mining proposed to reduce its exploration activities. He understood, at the time of his dismissal, that there was little funding available for exploration work and admitted that, to his knowledge, there was no other on-the-ground exploration undertaken by Astro Mining other than at Bow River. That evidence agreed with Mr Lee's evidence.

71 Mr Lee's evidence was that the whole mining and exploration industry was a fairly volatile industry; and that it goes through cycles when there are some very good times and some very hard times. Diamonds, he said, are an even more difficult area. There are few diamond mines, and only one in Australia. When things are going badly, there is very little employment and people tend to come and go.

72 The Commissioner was not persuaded by the evidence of Mr Birnie that there was alternative work still available for him to do. He concluded that, because of the evidence of a slump in the industry, AWI's reasons for the termination of his employment was valid and, therefore, that this part of Mr Birnie's claim was not made out, given that Astro Mining needed to reduce the number of geologists. Mr Lee, the Commissioner found, did not suggest that there was work for Mr Birnie in any other of the client companies.

The Commissioner found that Mr Birnie should not have been retained in preference to another employee

73 The evidence before the Commission referred to another geologist employed by AWI called Mr Boxer. Mr Birnie's position was made redundant, but Mr Boxer was retained. Mr Birnie claimed that his dismissal was unfair because he should have been retained in employment in preference to Mr Boxer. Mr Birnie relied upon his greater length of service than that of Mr Boxer to support his claim.

74 Mr Boxer was employed on the Bow River project at the time of Mr Birnie's redundancy and had been employed there for some time. There was also evidence that Mr Boxer had experience in Native Title matters and there was no suggestion that Mr Birnie had that experience. Mr Lee admitted that Mr Birnie's experience was adequate enough for him to have taken over the Bow River project.

75 The Commissioner found that the balance of evidence overall did not establish that Mr Birnie should have been retained in employment in preference to Mr Boxer. The Commissioner noted that Mr Birnie bore the onus of proving this part of his claim, but was not persuaded on the evidence that, even if discussion had occurred, there could have been a different result.

76 The Commissioner noted, from his reading of the Astro Mining NL Annual Report, which was tendered in evidence, that Native Title was an issue relevant to that company's operations and the experience of Mr Boxer was, therefore, in the Commissioner's view, a factor of relevance.

The Requirement under s.41 of the *Minimum Conditions of Employment Act* 1993

77 Mr Birnie complained that there was no consultation with him regarding his redundancy. He claimed that he was presented with a *fait accompli* and that his redundancy was unfair as a result of the lack of consultation.

78 Mr Birnie relied, in large part, on a term which is implied into every contract of employment to which the *Minimum Conditions of Employment Act* 1993 (hereinafter referred to as "the MCE Act") applied.

79 The Commissioner held that even a breach of s.41 of the MCE Act was not determinative of Mr Birnie's claim. Rather, the issue was whether or not AWI was in breach of the contract of employment between it and Mr Birnie for the purposes of the claim before the Commission (see *Gilmore and Another v Cecil Bros and Others* 78 WAIG 1099 (IAC) per Kennedy J at page 1100).

80 The Commissioner held that the term implied into Mr Birnie's contract of employment by the MCE Act entitles him to be informed by AWI, as soon as reasonably practicable after the decision has been made to make him redundant, and for him to discuss with AWI the likely effect of the redundancy and the measures which might be taken by him or AWI to avoid or minimise the effect of the elimination of his job. It is not a right to be consulted, it is a right to have a discussion.

81 Mr Birnie was informed of the decision to make him redundant as soon as practicable after the decision to do so had been made, but there was not a discussion, as envisaged by the implied term. A meeting did occur between Mr Lee and Mr Birnie in the presence of Ms Spence. Mr Lee said words to the effect that "unfortunately, things have changed from yesterday, you are to be made redundant and there is to be no further diamond exploration other than Bow River". Mr Birnie was told that Mr Gutnick had changed his mind, that the exploration industry was tough and that funds were tight.

82 Mr Birnie raised the question of Mr Boxer's position, but Mr Lee replied with words to the effect that Mr Birnie's comments were noted, but that the decision had been made.

83 The Commissioner accepted Mr Birnie's evidence that he was presented with a *fait accompli*, noting that after Mr Gutnick had advised Mr Lee a day before that Mr Birnie was to be made redundant, there was "no alternative".

84 He was given no reasonable opportunity to put to AWI any alternatives. He was not given the opportunity to discuss Mr Boxer's position relative to his own. Mr Lee's evidence was that he had used his knowledge of the client companies and had reached a conclusion that there was no other position available for Mr Birnie. However, Mr Birnie was never given an opportunity to try to persuade Mr Lee that there was any alternative.

85 AWI was in breach of the statutorily implied term in the contract of employment that there would be discussions between AWI and Mr Birnie regarding the likely effects of the redundancy and measures that may have been able to be taken by Mr Birnie or AWI to avoid or minimise its consequence.

86 The Commissioner found that there was no substantial compliance with the requirements of s.41 of the MCE Act, even if substantial compliance was applicable. The finding that AWI was in breach of the contract of employment, the Commissioner held, was a finding which supported Mr Birnie's claim that his dismissal was unfair.

87 I would add, by way of footnote to the findings, that the word "discuss" is defined in the Macquarie Dictionary (3rd Edition) as follows—

> "1. To examine by argument; sift the consideration for and against; debate; talk over."

88 The noun "discussion" is defined as follows—

> "1. The act of discussing; critical examination by argument; debate."

The Timing of the Dismissal

89 Mr Birnie claimed that an additional reason why his dismissal was unfair was that, when he went into the meeting on 6 July 2000, he was expecting to be told that he would be promoted and not that he would have no job at all.

90 The Commissioner found that Mr Gutnick, when he came to Perth on 28 June 2000, said to Mr Birnie that he had wanted to discuss elevating Mr Birnie's profile in the company and that he would be returning the following Wednesday. The Commissioner also found that Mr Birnie was entitled to assume that these words might herald a promotion for him. The Commissioner found that he preferred Mr Birnie's evidence to Mr Lee, when Mr Birnie gave evidence that Mr Lee said to him words to the effect that "Mr Meyer would be retiring and you are to take over Mr Meyer's responsibilities".

91 The Commissioner therefore found that Mr Birnie was entitled to infer from the comments of Mr Gutnick and Mr Lee that he was to take over Mr Meyer's job and that this involved some kind of promotion. Thus, when Mr Birnie entered the meeting on 6 July 2000, believing he was to be offered a wider role within the company, he was in fact told that he would have no future role in the company at all. He was shocked and devastated and his evidence in this respect was accepted. It was supported by the evidence of Mr Lee that Mr Birnie was visibly shocked and upset and that that was understandable.

92 The Commissioner found that the circumstances whereby AWI created a situation where Mr Birnie believed he would be offered a promotion only then to dismiss him, rendered Mr Birnie's dismissal harsh, oppressive and unfair. He applied the principle in *Miles and Others t/a Undercliffe Nursing Home v FMWU* 65 WAIG 385 (IAC). The well known implied term requiring an employer to be good and just to his employees (see *Nettlefold v Kym Smoker Pty Ltd* (No 469 of 1996) (unreported) delivered 4 October 1996 (IRC of Aust) and the Full Bench's approval of it in *Gilmore and Another v Cecil Bros and Others* 76 WAIG 4434 (FB)), would apply and it could be said was thereby breached.

Quantum of Severance Pay

93 AWI paid Mr Birnie eight weeks' salary as an ex gratia "severance" payment. It is common ground that there was not a term in Mr Birnie's contract of employment entitling him to a redundancy payment if he were made redundant. Mr Birnie relied upon *Rogers v Leighton Contractors Pty Ltd* 79 WAIG 3551 (FB) to argue that eight weeks' salary is not a fair severance package and, for that reason, that his dismissal was unfair (see also *Thompson v Gregmaun Farms Pty Ltd* 80 WAIG 1733 (FB)).

94 The Commissioner held that the issue was whether or not a dismissal for redundancy, without the payment of a redundancy payment sufficient to compensate the employee for matters such as age, length of service, seniority, period of notice, availability of alternate employment, benefits forgone and the reasons for retrenchment, depending on circumstances, might be harsh to the employee.

95 The Commissioner then held that the determination of the claim involved an assessment of the circumstances and the adequacy of the payment made. It was not necessary, he held, for Mr Birnie to prove an industry standard for redundancy payments against which the severance payment may be compared, nor does the test of adequacy require a distinction to be made between "adequate" and "totally inadequate".

96 Within the reasoning of *Rogers v Leighton Contractors Pty Ltd* (FB)(op cit) and *Thompson v Gregmaun Farms Pty Ltd* (FB)(op cit), the Commissioner found that Mr Birnie's dismissal was unfair by reason of the inadequate severance payment made to him, holding that a payment of eight weeks' was inadequate compensation for his loss.

Rate at which payments were made

97 Mr Birnie also claimed that his dismissal was unfair because "certain benefits due under his contract of employment" were based only on the cash component of his salary and not upon "his entire remuneration package". The difference between the two to which Mr Birnie referred included, for example, the value of the motor vehicle supplied to him.

98 The Commissioner held that it was not immediately apparent that payment of termination payments at the employee's salary rate, rather than at a rate reflecting the employee's total remuneration, may constitute a ground,

of itself, to find a dismissal unfair. The claim was therefore not made out.

99 To an extent, the claim under this heading overlapped with the claim made that payment of the salary rate constituted a denial of Mr Birnie's entitlement under his contract of employment, the Commissioner held, too.

Commissioner's Conclusion

100 The Commissioner held that Mr Birnie's claim of unfair dismissal was made out by reason of—

(a) AWI being in breach of the implied term referred to earlier.

(b) Being made redundant when he was expecting to be given a wider role.

(c) The inadequacy of the severance payment made to him.

Remedy

101 The Commissioner noted that reinstatement was not sought and therefore considered the remedy of compensation.

102 The Commissioner held that the loss of a fair redundancy payment was the measure of loss. He therefore ordered a further eight weeks' salary to be paid to Mr Birnie by way of redundancy payment, noting that a redundancy payment equivalent to sixteen weeks' salary would have been a reasonable payment for the long service leave credit forgone and his length of service and position, together with the reduced likelihood of him finding suitable alternative employment.

103 The Commissioner then went on to hold that, although Mr Birnie was indeed entitled to believe that he was likely to be playing a wider role within the company, there was no evidence that he had, in reliance upon that belief, altered his position to his detriment. The Commissioner held that he had no doubt that there was injury suffered by Mr Birnie in this regard and assessed compensation at $5,000.00.

Mitigation of Loss

104 The Commissioner held that it had not been demonstrated that Mr Birnie failed to mitigate his loss.

Claim for Contractual Benefits

105 Mr Birnie claimed that he had been denied benefits due to him under his contract of employment. The Commission was therefore required to determine whether the items claimed by him were benefits due to him under his contract of employment which had been denied him.

Payment in Lieu of Notice

106 The Commissioner was unable to find that it was a term of Mr Birnie's contract of employment that he would be paid in lieu of notice at the package rate. Further, Mr Birnie's contract of employment did not provide for a payment to be made upon redundancy and, thus, there could not be a valid claim that it was a benefit under the contract that the redundancy payments made would be paid at the value of his remuneration.

Long Service Leave

107 Mr Birnie claimed that it was a term of his contract of employment that he would be paid pro rata long service leave after three years of employment, but this claim was dismissed.

Relocation

108 Mr Lee admitted that, if Mr Birnie was made redundant, AWI would relocate him back to Melbourne. Indeed, Mr Lee's evidence was that, at the meeting at which Mr Birnie was dismissed, he referred to the term of his contract regarding relocation. The Commissioner therefore found that Mr Birnie had been denied a benefit to which he was entitled under his contract of employment, that is, that he would be relocated with his family and reasonable effects, to Melbourne.

Reasonable Notice

109 The Commissioner held that Mr Birnie was not entitled to an award of monies in lieu of reasonable notice because of the redundancy payment.

ISSUES AND CONCLUSIONS

110 The decision appealed against is a discretionary decision, as such a decision 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)). To succeed, the appellant must establish that the Commission at first instance erred in the exercise of discretion, and that that error was of the kind identified in *House v The King* [1936] 55 CLR 499 (see also *Gromark Packaging v FMWU* 73 WAIG 220 (IAC)).

111 Unless it is established that the Commission erred in that manner, the Full Bench can have no warrant to interfere with the decision made at first instance and, in particular, cannot substitute the exercise of its discretion for that of the Commission at first instance.

What was the Contract?

112 It is necessary to ascertain what the contract of employment was, so that the benefits said to be contained in it can also be ascertained. This is not easy and depends on the actions of the parties and their evidence of conditions which were agreed to apply. As I said in *Sargant v Lowndes Lambert Australia Pty Ltd* 81 WAIG 1149 at 1155 (FB)—

> "It is always necessary, if a contract is relied upon, to determine the terms of a contract (whether it is an employment contract or any other contract) (see *Re Transport Workers Union of Australia* (1993) 50 IR 171 at 196 per Munro J). A contract may be oral or in writing, partly oral and partly in writing, the contractual terms may be express or implied, there may be a series of contracts, and indeed the written terms of the contract may not reflect the substance of the agreement between the parties. There may be terms of the contract derived from custom and usage too (see Macken, McCarry & Sappideen "The Law of Employment", 4th edition, at page 94)."

(See also my discussion of contracts and contractual benefits in *Hotcopper Australia Ltd v Saab* (FB) (unreported) (No FBA 15 of 2001) 2001 WAIRC 03827 (delivered 21 September 2001) and *Ahern v AFTPI* 79 WAIG 1867 (FB).)

113 In this case, it is fair to observe that the actions of the parties and the implication of some terms, in accordance with cases like *Lawson and Others v Joyce Australia Pty Ltd* 76 WAIG 20 (FB), demonstrate which terms continued as part of the new contract, and what terms were possibly added or removed by variation. Then, the question was what terms should be implied.

114 Mr Birnie and AWI indisputably entered into a written contract of employment on 7 April 1994 (the IEA), which, by its express terms, expired on 1 March 1997 (see Clause 35 (page 62(AB))). Further, there was clearly no express agreement to extend its operation or to otherwise apply its terms to Mr Birnie's employment. By virtue of a written memorandum dated 26 April 1995 from Mr Birnie to Mr Stewart, and Mr Stewart's reply dated 29 June 1995, there was a variation of the IEA to provide for relocation expenses (see pages 64 to 66 (AB)). That variation did not purport to relate to anything but the relocation from Melbourne to Perth and any relocation because of redundancy.

115 Alternatively, this was a separate agreement evidenced by the memorandum of 29 June 1995 and not terminated at the time that Mr Birnie was made redundant and dismissed. It was therefore a term of the written variation to the IEA (a new separate agreement) that, should Mr Birnie's position be made redundant "at any time" (my emphasis), AWI would, at its own cost, relocate him and his family to Melbourne. The entitlement to relocation expenses on redundancy was express and unlimited as to time.

116 The variation specifically prescribed relocation expenses, as I have identified them above, in the event of redundancy. Those relocation expenses were, as defined in that memorandum. That agreement applied to any future redundancy unless specifically varied, revoked or discharged.

117 Significantly, the agreement or variation to agreement, in its terms, did not purport to vary the provision in Clause 17 requiring AWI to pay reasonable relocation costs of an interstate transfer. However, what it did do significantly was to make specific provision for Mr Birnie's entitlements on relocation in the event of his being made redundant. That was new.

118 It was common ground that the IEA was not renewed, at least, expressly at its expiration.

119 It was submitted, too, that the undisputed evidence was that Mr Birnie would be relocated on terms no less favourable than those which applied when he was relocated to Perth in 1995. That, I think, is implicit on a fair reading of that term of the agreement or variation.

120 In my opinion, the evidence of Mr Lee and Mr Birnie disclosed that the actions of the parties meant that, insofar as it was possible to do so, except where it was clearly inapplicable, and notwithstanding that there were changes in position and remuneration, the terms of the IEA would apply and did, as part of a new contract of employment following the expiry of the IEA. The IEA in its terms, of course, contained no provision that it should continue or that its terms should continue past the date of its prescribed expiry. What the evidence clearly shows was that that agreement was evidence of the new agreement, which did not contain all of its terms and which new agreement included implied terms of the agreement of 29 June 1995 and variations as to matters such as public holidays.

121 Mr Lee's clear evidence in chief and in cross-examination was that the IEA set out the terms and conditions of Mr Birnie's employment after 1 March 1997 (see pages 51, 63 and 64 (TFI)). Mr Birnie's evidence was that he had, he thought, reverted back to the terms which applied before he entered the IEA on 1 March 1997. Mr Birnie, as he said, did not seek to "clarify" the matter with his employer.

122 The evidence was expressly and by inference that there was no reversion to the terms and conditions of employment which applied to Mr Birnie's employment prior to the parties entering into the IEA. There was no attempt to reverse them, nor could there be. It had been replaced by the IEA.

123 First, the pre-IEA agreement could only be renewed and it was agreed that it was not renewed. It could not, it is trite to say, be unilaterally renewed by Mr Birnie. Next, it had been replaced by the IEA.

124 Further, as I indicate later in these reasons, Mr Birnie acknowledged that other terms of the IEA applied after its expiry, such as Clause 19. Moreover, he had been promoted to a new position as Regional Exploration Manager. He did not revert to Project Geologist, as he was in 1992. His salary was plainly different. The evidence was that some of the terms of the IEA became terms of a new contract. However, there were a number of "new" and significant terms. In addition, there was no express extinguishment of the separate agreement or agreement to vary of 29 June 1995 as to relocation expenses.

125 In my opinion, the evidence was that the parties applied no conditions except those of the IEA, as varied and applicable from time to time, to a new agreement between them. There were, however, both oral and written variations to it and other oral agreements. Mr Birnie, himself, admitted, for example, that Clause 19 of the IEA, which provided for employees to be bound by policies and alterations of policies provided that they were advised of them, bound him.

126 What clearly occurred, looking at the evidence, the conduct of the parties, and their performance on either side of the contract of employment, was that the relevant conditions of the IEA expired, and that the parties, however, agreed to some of its terms as part of, but not the entire, new contract of employment. There were agreements as to new employment, increased salary, provision of a motor vehicle and others. The 29 June 1995 agreement continued until after Mr Birnie was made redundant and until it was repudiable.

127 Significantly, it was not submitted for Mr Birnie that a number of its terms did not apply. There was no evidence of any entire written contract being in force. Indeed, the evidence, as I have indicated, was to the contrary, that the new contract was part writing and part oral and some of the terms of the IEA were incorporated in the new contract.

128 Neither party said that none of the terms of the IEA did not apply. There were clear variations, however, such as relocation provisions, salary increases, use of motor vehicles, all of which were specific variations. Another clear variation was that Victorian law and, in particular, Victorian public holidays, did not apply to Mr Birnie's contract of employment and had not, by admission, after his arrival in Western Australia. Further, there was a separate agreement as to relocation for transfer and for redundancy still afoot, evidenced by the memorandum of 29 June 1995.

What then was the policy and what was its effect, if any?

129 Mr Birnie's evidence was that he believed that the policy as to relocation had changed (see page 31(TFI) because he thought that the current policy was contained at pages 103-105(AB). It was not the policy. Further, Mr Birnie was not made aware of the change in policy, if there was one, which there was not.

130 Mr Birnie could and did rely on the memorandum dated 29 June 1995 (see page 65(AB)) as to relocation costs. He was entitled to. It was an agreement or a part of an agreement which was not revoked or extinguished or varied, on the evidence. It could certainly not be revoked, varied or extinguished by a policy or by guidelines not advised to Mr Birnie and not agreed to by him, because it was an express agreement and it was inconsistent with Clause 19 of the IEA. The entire agreement provisions of the IEA did not apply because of the actions of the parties which had effected a number of variations and additional agreements, which might have been said to be an agreed variation of the IEA and a negation of the clause prescribing the IEA to be an entire contract. Alternatively, as I have said, a new agreement was entered into of which the basis was the IEA with agreed variations, such agreements as I have outlined them being reached from time to time. Accordingly, the memorandum dated 29 June 1995 was contractually binding on AWI. What Mr Birnie was entitled to was said to be that prescribed by that document, because of his redundancy. The entitlement is that AWI pay the reasonable costs of relocation of Mr Birnie and his family to Melbourne, as evidenced by and prescribed in Mr Stewart's memorandum of 29 June 1995.

131 Mr Birnie's evidence that he knew that there was an updated policy which delivered better terms can be given no weight. It is, in fact, evidence that he did not know the policy. It is evidence not derived that, even if Clause 19 applied, he was not bound by any purported policy because he was not made aware of it as Clause 19 required. When he located what he thought was the policy on a computer, he was told that it was not the policy and had been replaced by what Mr Lee described as, not a policy, but a set of guidelines, which he was free to vary to suit his view of the circumstances. No policy had been brought to Mr Birnie's notice. Further, there was no policy but a set of guidelines which, on Mr Lee's evidence, enabled him to unilaterally vary what was to be paid to an employee, in this case, Mr Birnie.

132 Significantly, there was a similar vagueness about what redundancy payments were payable, even though AWI did have a policy of making redundancy payments. However, there was evidence of an express agreement to pay employees redundancy payments. Such findings are the consequence of the finding which should have been made, that most of the terms of the IEA remained in force as part of the new contract of employment, as varied. An obligation to pay reasonable redundancy payments was acknowledged and, in any event was an implied term, as I hereinafter observe.

133 For those reasons, the contract of employment, as I find, at the time of dismissal was contained in or evidenced by—

(a) The written terms of the IEA, as varied by oral or written agreement and, as the evidence revealed, were applied or applicable.

(b) Oral agreements or agreements evidenced by writing or performance in relation to new positions and remuneration.

(c) Oral agreements or agreements evidenced by writing or performance as to holiday pay, use of cars, etc.

(d) Policies and instructions of which the employee had been given proper notice, it being trite to observe that Mr Birnie could not be subject to a term of the contract contained in a policy or instruction of which he had no notice, as a matter of his contract or of law.

(e) Implied terms, such as but not restricted to, the entitlement to severance pay or redundancy, or an agreed term that Mr Birnie be paid a redundancy payment (but said to be unilaterally quantifiable by AWI, which term was not agreed), which would impliedly be a promise to pay a reasonable payment. Such a term would not exist, in my opinion, if its wording evidenced merely a unilateral or gratuitous intention to pay a redundancy amount.

(f) The term requiring payment of the cost of relocation on redundancy contained in Mr Stewart's memorandum of 29 June 1995 (supra). That agreement which applied to a redundancy "at any time" could not be unilaterally extinguished by a policy, but required an express variation by agreement. There was none.

(g) There was no prescription for the giving of notice of termination in the contract.

Such an approach is, I think, consistent with that referred to in *Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 74 ALJR 1094 at 1098 per Gleeson CJ, Gaudron, McHugh and Hayne JJ, and *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312 at 316 per Gleeson CJ, Gaudron and Gummow JJ.

What then was the contractual entitlement to relocation expenses?

134 In my opinion, properly read, the cost undertaken for relocation on redundancy was for the same items as expressed in Mr Stewart's memorandum of 29 June 1995. The cost of providing those items, which are numbered 1 to 6 in that memorandum, as quantified in terms of that agreement, is and was Mr Birnie's contractual benefit. He was denied it.

135 I would dismiss the appeal, there being no cross appeal, and would make no other order.

Was the dismissal unfair because of any inadequacy in a redundancy payment?

136 It was submitted on behalf of AWI that it was unfair for AWI to have to give Mr Birnie a further eight weeks' pay for severance, when the Commission decided that Mr Birnie had no contractual entitlement to a severance payment at all. There was, of course, although the contract was partly evidenced by written terms, no express entitlement to payment in the event of a redundancy.

137 There is and was in this contract an implied term, even if there was no policy, that, whilst employees would be paid benefits including, in the case of Mr Birnie, relocation expenses, an employee is entitled to be paid a reasonable severance payment (see *Rogers v Leighton Contractors Pty Ltd* (FB)(op cit); *Thompson v Gregmaun Farms Pty Ltd* (FB)(op cit); *Coles/Myer Ltd t/a Coles Supermarkets v Sweeting and Others* 73 WAIG 225 (FB); and *Lawson and Others v Joyce Australia Pty Ltd* (FB)(op cit)).

138 AWI accepted that it had an obligation and its practice was to honour that obligation to pay severance pay in accordance with industry standards. AWI unilaterally applied Termination Change and Redundancy Standards (see pages 59, 60 and 86 (TFI)). These are not applicable in this State by any express provision. Instead, the criteria to be applied in assessing what is a fair redundancy payment where none is prescribed are those to be laid down as prescribed in *Thompson v Gregmaun Farms Pty Ltd* (FB)(op cit) and *Rogers v Leighton Contractors Pty Ltd* (FB)(op cit) (see also *Lawson and Others v Joyce Australia Pty Ltd* (FB)(op cit)).

139 It might also be properly submitted and held that, in the case of Mr Birnie, given his circumstances, an amount for relocation, even if there was no prescription for it in his contract, should be provided for in any severance pay and that would itself justify a substantial severance payment.

140 Accordingly, in the absence of a cross-appeal, the amount ordered cannot be set aside as excessive, but the payment of a plainly inadequate amount for a severance payment patently rendered the dismissal unfair (see *Rogers v Leighton Contractors Pty Ltd* (FB)(op cit) and *Thompson v Gregmaun Farms Pty Ltd* (FB)(op cit)).

141 The Commissioner, except as to quantum, made no error. I will deal with the question of quantum hereinafter.

Unfairness—Other Aspects

142 I have already held that the dismissal was unfair in that the amount paid by way of a severance payment was inadequate. In my opinion, the dismissal was also unfair because no notice was given, because Mr Birnie's hopes were raised, then dashed, overnight in a most inconsiderate and unfair manner, and that the conduct of AWI also was such as to constitute a breach of the term that AWI should have been good and just to Mr Birnie, its employee (see per Lee J in *Nettlefold v Kym Smoker Pty Ltd* (IRC of Aust) (op cit) (referred to in *Gilmore and Another v Cecil Bros and Others* (FB)(op cit)).

143 S.40 of the MCE Act prescribes "redundant" as follows—

> "**"redundant"** means being no longer required by an employer to continue doing a job because, for a reason that is not a usual reason for change in the employer's work-force, the employer has decided that the job will not be done by any person."

144 Further, s.41 of the MCE Act applied. It was clear that the abolition of Mr Birnie's position was a redundancy. It could be nothing else. There was no position left for him. His position was abolished and Mr Boxer's was not (see s.40 of the MCE Act). S.41 of the MCE Act reads as follows—

> "**41. Employee to be informed**
>
> (1) Where an employer has decided to—
>
> (a) take action that is likely to have a significant effect on an employee; or
>
> (b) make an employee redundant,
>
> the employee is entitled to be informed by the employer, as soon as reasonably practicable after the decision has been made, of the action or the redundancy, as the case may be, and discuss with the employer the matters mentioned in subsection (2).
>
> (2) The matters to be discussed are —
>
> (a) the likely effects of the action or the redundancy in respect of the employee; and
>
> (b) measures that may be taken by the employee or the employer to avoid or minimize a significant effect,
>
> as the case requires."

145 By s.41 of the MCE Act, conditions are implied into contracts of service. One obligation cast on an employer in redundancy situations by s.41 of the MCE Act is to enter into discussions with the employee. In this case, AWI had decided on the evening of 5 July 2000 to make Mr Birnie, an employee, redundant. The employee was then entitled to be informed by the employer as soon as the decision to make him redundant was made. The employee was also entitled to discuss with the employer the likely effects of the redundancy in respect of the employee and the measures to be taken by either or both to avoid or minimise a significant effect, as the case requires.

146 The word "discuss" has a plain and clear meaning, as outlined earlier in these reasons (supra). It is not a neutered word, such as the words "consult" or "consultation" are

these days, within the plain meaning of "discussion", in its definition in the Macquarie Dictionary. There was no discussion, within the meaning of the section. There was a redundancy, within the meaning of the section. Moreover, there was no or no sufficient discussion of the likely effects of redundancy and certainly no or no sufficient discussion of measures that might be taken to avoid or minimise a significant effect. There was some talking over, some sifting of the considerations for and against, but the decision had been made. (The attempts to find other employment do not remedy this defect.) S.41 of the MCE Act was not complied with.

147 Significantly, no offer was made to provide counselling or assistance to or for Mr Birnie. Mr Lee, significantly, took it upon himself to exclude such assistance from the relocation benefit offered. Evidence of the inadequacy of discussion and indeed an element of clear unfairness was the failure by Mr Lee to reply to Mr Birnie when he rang and forwarded e-mails to inquire what relocation benefits would be offered. Mr Birnie had been retrenched without notice and no offer of relocation benefit was made for twelve days. He was treated with discourtesy and unfairness. This was entirely unjustified. The dismissal was harsh, oppressive and unfair, within the meaning applied in *Miles and Others t/a Undercliffe Nursing Home v FMWU* (IAC) (op cit), for all of those reasons.

Injury

148 The Commissioner held that Mr Lee had, with authority, given the clear impression that Mr Birnie was being considered for promotion. Further, Mr Birnie was given no warning that he was to be dismissed. Within 24 hours of his being advised and implicitly relying on the advice that he was being considered for promotion, Mr Birnie, who had served the company well for over six years, was dismissed as redundant on 6 July 2000. He was upset. He was shocked. He was humiliated and treated with callousness. That was exacerbated by his being ignored for some days when he sought to establish and agree his entitlement to a relocation payment. There was ample evidence of shock and humiliation and of the nature of the actions which caused it (see pages 25 to 29, 59, 67, 71 to 74, and 113 to 115 (TFI)). He was injured. The Commissioner was right to so find. There was no error in that approach or that finding (see *Rogers v Leighton Contractors Pty Ltd* (FB)(op cit) at 3552).

Redundancy—Unfair by Selection?

149 I now deal with Mr Birnie's appeals.

150 The redundancy, however, was not unfair, because of Mr Birnie's selection instead of Mr Boxer. It was quite clear, as Mr Birnie admitted and on all of the evidence, that there was going to be only one active project, namely the Bow River project, which was to be pursued. Mr Boxer had managed that project for eighteen months. There was no criticism of his work or ability. There was no complaint that his work was not competent. The Northern Territory project was not even active, whether Native Title experience was required or not, nor was there evidence as to when it would become active. It would have been, as Mr Birnie himself admitted, on the face of it, wrong to dismiss Mr Boxer from a project which he had managed and, it would seem, competently, for eighteen months.

151 Mr Birnie established no unfairness, as he was required to do, in the selection of his position for redundancy, nor was there any evidence, that there were no other positions available to him in AWI or through AWI or associated companies other than Astro Mining. The Commissioner's detailed reasons for so finding were open to him.

Reasonable Notice and the Redundancy Payment—Adequacy

152 The appeal is against the finding as to reasonable notice, since there was no express provision for notice of termination in the contract, as I have found. Reasonable notice was required to be given, such a term being implied in the contract.

153 An order was sought that there be paid, as a contractual benefit denied, in lieu of notice, a sum equal to the remuneration which would have been earned during the period of reasonable notice. That is within jurisdiction and power, having long been the view of this Commission and it has recently been decided in *Hotcopper Australia Ltd v Saab* (FB)(op cit).

154 There was no term which permitted the payment of a sum of money in lieu of reasonable notice. (That is, of course, different from a valid claim for that amount in lieu of reasonable notice.) There was no reasonable notice given in this case. An amount for reasonable notice in monetary terms was, however, claimed.

155 The primary claim was for an amount by way of a severance package. There was an implied term requiring that it be paid, as I have said. Further, the payment of no or no adequate amount would, in this case, render the dismissal unfair, or be a factor, which it is open to find and should have been found, rendered the dismissal unfair. Similar factors can be taken account of in quantifying an amount for severance pay, as are taken into account to identify a period of reasonable notice (see *Rogers v Leighton Contractors Pty Ltd* (FB)(op cit) and *Thompson v Gregmaun Farms Pty Ltd* (FB)(op cit); see also *Tarozzi v WA Italian Club (Inc)* 71 WAIG 2499 (FB)). They are not necessarily the same factors, however, and are not a finite or exclusive range of factors. The factors can include age, seniority, length of service, opportunities for new employment, amount of remuneration, the opportunity given to prepare for redundancy, and what other assistance the employee received.

156 In considering the question of the severance pay, I consider, too, the following:

157 In this case, no provision was made for relocation. Mr Birnie had been employed and given good service for nine years. He had moved across a continent at some disadvantage to his family and for the benefit of his employer and himself. He was a Project Manager, but not the senior manager in the State, was dismissed during a slump when prospects of obtaining employment were bad, and he had, for his employer's benefit, limited himself to the narrow employment area of diamond exploration. He was earning $100,000.00 in salary, together with other remuneration. His redundancy was not discussed before he was made redundant so that he had time to prepare for it. He was not given "outsourcing" assistance and, indeed, it was specifically denied to him. He should have received "outsourcing" assistance or its equivalent in money.

158 It has not been established to me that Termination Change and Redundancy methods of calculation, if any, are applicable. AWI's unilateral assessment of a reasonable payment for a redundancy payment was neither binding nor reasonable in the context of what I have referred to in the preceding paragraph.

159 Even if that was the policy, it could not be established to apply unless Mr Birnie had been made aware of it, and there was no evidence to that effect. In any event, Clause 19 of the IEA, in my opinion, did not apply to matters of redundancy. There is a strong argument, not canvassed for and against, for the proposition that Clause 19 relates to matters of duty, safety and discipline in the workplace (on a fair reading) and does not empower the employer to unilaterally determine benefits which are a part or should be part of the terms of the contract of employment. In any event, I am not, on this occasion, persuaded otherwise.

160 For those reasons, six months' pay would be an adequate redundancy payment or severance pay. In my opinion, a sum equivalent to six months' or 24 weeks' salary, having regard to those factors was reasonable. That amount of severance pay would not obviously include other separate entitlements such as holiday pay, long service leave, etc.

161 The quantum of the amount ordered for severance pay, namely an amount equal to eight weeks' salary which was to be added to eight weeks paid by the employer, was not the subject of appeal. However, the amount paid by the employer was manifestly inadequate and rendered the dismissal unfair.

Reasonable Notice

162 I wish now to deal with the question of reasonable notice.

163 There was no provision in the contract of employment which enabled the contract to be terminated by pay in

lieu of notice or prescription of what notice of termination of the contract might be or was required to be given.

164 As a matter of law, a period for the giving of reasonable notice is impliable as a matter of law (see *Tarozzi v WA Italian Club (Inc)* (FB)(op cit); see also *Thompson v Gregmaun Farms Pty Ltd* (FB)(op cit)). It was not possible to find that there was no implied term as to reasonable notice because such a term is implied as a matter of law.

165 By the appeal, it is sought that Orders B(1) and (D) be quashed and the matter be conferred to Commissioner Beech to be dealt with according to law. Those orders are, first, by Order B(1), that AWI pay an amount of eight weeks' salary by way of redundancy payment on top of the amount unilaterally paid by the employer. By order (D), the application was otherwise dismissed. The Commissioner had found that the notice period of eight weeks given to Mr Birnie in lieu of the redundancy payment was not unreasonable and dismissed the claim for a sum of money equal to the salary for a period of implied reasonable notice.

166 I would also add, on reflection, that the appeal against the dismissal of the application by an order that AWI pay Mr Birnie an amount equal to a period of twelve months' reasonable notice is raised more directly by Appeal FBA 23 of 2001.

167 There are a number of observations which I now make.

168 First, a reasonable redundancy payment was payable by virtue of an implied term of the contract (see *Coles Myer Ltd t/a Coles Supermarkets v Coppin and Others* 73 WAIG 1754 (IAC); and see *Rogers v Leighton Contractors Pty Ltd* (FB) (op cit) and *Thompson v Gregmaun Farms Pty Ltd* (FB)(op cit)).

169 Second, the failure to pay a reasonable redundancy payment is also recoverable as a loss, in the alternative, directly caused by the unfair dismissal. Although it might be regarded as somewhat unnecessary to so observe, an applicant could not claim such an amount as a loss if he/she received it as a contractual benefit to which he/she was entitled, because there would then be no loss suffered.

170 Next, I deal with a matter which was the subject of submissions on this appeal.

171 As a contractual benefit, Mr Birnie was entitled to reasonable notice or to an amount in wages equal to the value of that reasonable notice. First, the redundancy payment awarded was inadequate. As I have observed above, the quantum of the redundancy payment was not challenged upon this appeal because Ground 2 of Appeal No FBA 24 of 2001 was abandoned. Hence, Ground 3(d), as I understand the submissions, is not now an alternative ground and effectively seeks an order that Mr Birnie be paid a sum equal to the reasonable notice of termination which he should have been given.

172 For the reasons which I have advanced above (and conditionally) in relation to the adequacy of the redundancy payment, I am of opinion that reasonable notice would be a period of six months, not the twelve months urged upon us by Mr Kemp.

173 Mr Birnie's contractual benefit is quantifiable by the amount of six months' salary. I am not at all certain, nor was it adequately submitted, what other amounts should be taken into account in assessing the value of the contractual benefit constituted by a term of six months' reasonable notice. As I indicate in these reasons, the use of his employer's vehicle or its value is a separate contractual benefit.

174 I now turn to the question considered by the Full Bench in *Rogers v Leighton Contractors Pty Ltd* (FB) (op cit) and the subject of submissions in these proceedings. I do not purport to decide this issue finally. I would require more detailed submissions.

175 However, I would say this. An employee may be entitled to be awarded contractual benefits separately, being for his/her express or implied entitlements under a contract of employment to a redundancy or severance payment on the one hand, and being an amount equal to reasonable notice of termination on the other.

176 Insofar as a redundancy or severance payment contains an element to provide for notice and/or to provide an amount to enable the employee to "recover from" the redundancy and/or to retrain and/or seek other employment, there will often be an amount payable which, in quantum and nature, could be either an amount equal to a term of reasonable notice, or severance pay. In that event, there is not and will not be an entitlement to both under the contract. In particular, one such benefit will not be wholly denied or may be only partially denied if it is comprehended within the other.

177 Whether that is the case will depend on notice implied as reasonable, and the nature and quantum of the severance or redundancy payment, and the elements which are required to be comprehended in such a payment. In this case, the elements of the redundancy payment, on a reasonable examination, did not manifest themselves in a quantum which would account for an amount payable as reasonable notice. The amount paid by the employer, as I have found above, for redundancy and notice combined was an insufficient amount for that payment and for reasonable notice of termination.

178 The amount ordered to be paid for notice and redundancy, under either head, was inadequate for the reasons expressed above. Further, nothing was advanced to persuade me that, in accordance with *Rogers v Leighton Contractors Pty Ltd* (FB) (op cit) and *Tarozzi v WA Italian Club (Inc)* (FB)(op cit) and the sort of factors identified in both and referred to me above, a reasonable redundancy payment would be greater than or should not be absorbed as a contractual entitlement in the overall requirement for an amount by way of quantification of reasonable notice.

179 Alternatively, I was not persuaded that the elements (and I do not include entitlements to separate benefits such as long service leave, holiday pay and others in this) of a redundancy payment are so different or quantifiable so differently as to represent a contractual benefit different in nature and quantum from the benefit represented by the value in salary of reasonable notice. By way of example, there might be a difference where there was a substantial cost reasonably attendable upon relocation otherwise denied, or upon assistance with finding new employment or being retrained.

180 In this case, Mr Birnie was entitled to reasonable notice equal to six months' salary. He was entitled to a redundancy payment in the same amount. I am not persuaded that these benefits did not coincide. Accordingly, the amount of the order would be reduced by the amount received for both, namely twelve weeks.

181 Accordingly, I would find that the Commissioner had erred in failing to find that a total equal to twenty-four weeks' salary should not be paid for reasonable notice, a benefit which Mr Birnie was entitled and which he was denied.

182 I would uphold the appeal and order that, by way of varying the order appealed against, that AWI pay to Mr Birnie, within seven days, a sum equal to twelve weeks' salary for reasonable notice.

183 That, added to the amount of four weeks' salary for notice, and eight weeks' salary for severance pay, already paid to him by AWI, makes for a total equal to twenty-four weeks' salary (six months' notice).

The Use of a Motor Vehicle

184 As to the claim for the use of a motor vehicle, according to Mr Addison's uncontroverted evidence, had the contract been complied with and reasonable notice been given, Mr Birnie would have had the use of the vehicle, both at work and partly for private benefit during the period of notice, namely six months (twenty-four weeks). I would vary the order at first instance to order that an amount be paid as the value of that benefit.

AN OBSERVATION

185 At common law, a month means a lunar month (i.e. 28 days) prima facie, unless that meaning is displaced by the terms of a contract or instrument (see *Development Underwriting (Queensland) Pty Ltd v Weaber* [1971]

Qd.R.182 and *Police v Maindonald* [1971] NZLR 417 at 419). In written laws, both Commonwealth and State (including Federal awards), unless a contrary intention appears, a month means a calendar month (see s.62 of the *Interpretation Act* 1984 (WA) and the *Acts Interpretation Act* 1901 (Cth)).

186 The reference to months in an implied term in a contract of employment should therefore, in the absence of cogent submissions to the contrary and where it is the case, as here, that the express terms of the agreement do not displace that rule, be read as a lunar month.

187 In any event, I am of opinion that notice in the event should best be expressed in weeks to coincide with the order made and the amounts calculated and paid, for consistency's sake (see paragraphs 182, 183 and 184 (supra) for example).

FINALLY

188 Accordingly, I would find, for those reasons, that there was no miscarriage in the exercise of the Commissioner's discretion insofar as he found that Mr Birnie's dismissal was unfair, and as to his findings on the question of injury. Appeal No FBA 22 of 2001 is not made out. I would dismiss it.

189 As to Appeal No FBA 23 of 2001, it will be clear from what I have said that the appeal should be upheld, the Commissioner's discretion having miscarried, having regard to the principles laid down in *House v The King* (HC)(op cit). In my opinion, the Full Bench can and should substitute the exercise of its discretion, making the findings which I have identified above as requiring to be made by way of variation.

190 That appeal is upheld, for the reasons which I have expressed and in the terms which I have expressed above. The appeal should be upheld to that extent, but otherwise dismissed.

191 As to Appeal No FBA 24 of 2001, that appeal should be upheld in relation to Ground 3(b), (c) and 3(d) in part. The discretion miscarried and the appeal should be upheld to that extent, but otherwise dismissed. I would observe that there was no cross appeal as to the quantum of severance pay.

192 I would therefore uphold the appeal and vary the order made at first instance by deleting Order B(1) and substituting an order that the amount equivalent to reasonable notice of termination of contract, namely an amount equal to twelve weeks' salary, be paid by AWI to Mr Birnie within seven days of the date of the Full Bench's order.

193 I would make an order varying the orders made at first instance by ordering that AWI pay an amount equal to the value of the benefit of the AWI car provided to Mr Birnie to be paid to him within seven days of the date of the Full Bench's order.

194 I would also order that, if that amount or any amount, is in dispute, then the matter be remitted to the Commission at first instance for hearing and determination.

195 I would otherwise dismiss the appeals.

196 Finally, I would issue a minute to reflect these reasons.

CHIEF COMMISSIONER W S COLEMAN & COMMISSIONER J H SMITH—

197 These are our joint reasons for decision.

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

199 We agree for the reasons set out by the President that FBA 22 of 2001 should be dismissed. As to Ground 21, we would add that Ground 21 should be dismissed for the reasons set out below. In relation to FBA 23 of 2001, we are of the view that for the reasons set out below Grounds 2, 6 and 7 should be upheld and the remaining grounds be dismissed. As to FBA 24 of 2001, Ground 2 was abandoned at the hearing of the Appeal. We are of the view that for the reasons set out in the President's decision Grounds 1(a) to (g) and Grounds 3(a) and (d) of FBA 24 of 2001 should be dismissed. Further, we are of the view for the reasons set out below that Grounds 3(b) and (c) of FBA 24 of 2001 should be upheld.

Injury—Ground 21 of FBA 22 of 2001

200 It is accepted that there is an element of distress associated with almost all employer initiated terminations of employment. For injury to be recognised by way of compensation and thereby fall outside the limits which can be taken to have normally been associated with a harsh, oppressive or unfair dismissal there needs to be evidence that loss of dignity, anxiety, humiliation, stress or nervous shock has been sustained. Injury embraces the actual harm done to an employee by the unfair dismissal. It comprehends "all manner of wrongs" including being treated with callousness (*Capewell v Cadbury Schweppes Australia Limited* (1998) 78 WAIG 299). The injury may be manifested by the detrimental impact on the physical or emotional wellbeing of the person whose services were terminated. However dismissals will impact to varying degrees on individuals and while the need for professional care may be evidence of that impact, this will not necessarily always be the case in order to establish the causal link between the termination of employment and the injury. While it is necessary to exercise a degree of caution to ensure that compensation is confined to reasonable limits (*Timms v Phillips Engineering Pty Ltd* (1997) 70 WAIG 1318 and *Burazin v Blacktown City Guardian Pty Ltd* 142 ALR 144) that is not to say that every claim for injury necessarily involves expert evidence of emotional trauma.

1 The circumstances in which the dismissal from employment has been effected may be sufficient to demonstrate the injury which is experienced. Situations where an employee is locked out of the workplace or is escorted from the premises, or the termination has been conducted in full view of other staff are examples of callous treatment justifying recognition for compensation for injury (*Lynham v Lataga Pty Ltd* (2001) 81 WAIG 986).

2 However, the Commission is not able to adjust the measure of compensation according to the opinion of the employer or employee or of the conduct of the respective parties (*Capewell v Cadbury Schweppes Australia Limited* (op cit)).

3 In the circumstances of this matter on the day before he was made redundant, Mr Birnie was given to believe that his career prospects were promising; he was told that he would have a position with a higher profile in the company. The next day it all changed. He was shocked when he was told that there was no longer a position for him at all. The Managing Director had changed his mind. The Company Secretary who informed Mr Birnie that he was being made redundant noted the shock that he experienced. The callous treatment was compounded by the actions of the respondent in ignoring Mr Birnie's repeated requests for information concerning the terms of the redundancy and in particular his entitlement for relocation to Melbourne.

201 On the evidence before him it was open to the Commissioner to find that the distress felt by Mr Birnie was exacerbated by the failure to hold discussions and by the comments made to him the previous day. It has not been shown that the discretion miscarried.

Implying a term of Reasonable Notice

202 Mr Birnie was employed by AWI Administration Services Pty Ltd for a period of approximately 8 years and 3 months. On termination of his employment Mr Birnie was given 1 week's notice and paid 12 weeks' salary, being 4 weeks' pay in lieu of notice and 8 weeks' severance pay. The 12 weeks' pay was calculated on his salary of $100,000 per annum.

203 Mr Birnie claims he has been denied a benefit due under his contract of employment in that he should have been paid 12 months' remuneration as pay in lieu of notice and that the rate of remuneration should have been calculated by having regard to the value of the use of a fully maintained motor vehicle during the period of notice.

204 We agree with the President for the reasons that he expresses, that Mr Birnie's contract of employment was partly in writing and partly oral and there was no express term as to termination of the contract by the giving of notice or payment in lieu of notice.

205 It is well established that if parties to a contract of employment make no provision about the circumstances of bringing the contract to an end, the law will imply a term to the effect that either party can terminate the contract by the giving of notice. (*Richardson v Koefod* [1969] 1 WLR 1812 and *McClelland v Northern Ireland General Health Services Board* [1957] 1 WLR 594). It is, however, not clear at law whether a term should be implied that where no reasonable notice is given, payment in lieu of notice should be made. However, determination of this question is not in our view necessary. Where reasonable notice is not given the Commission awards an amount equivalent to the amount, which would have been paid if notice were given (see for example *Tarozzi v WA Italian Club (Inc)* (1991) 71 WAIG 2499). This approach was approved recently by the Full Bench in *Hotcopper Australia Ltd v Saab* unreported [2001] WAIRC 3827 in which it was held that the Commission has power to make an award of damages if the specific terms of the contract cannot be awarded. It is clear that where a contract of employment should have been terminated by the giving of notice but notice has not been given, there is no scope for the Commission to make an order in the nature of specific performance.

Period of Reasonable Notice and Redundancy Pay

206 The requirement to make a severance payment and the calculation of a period of reasonable notice are distinct. There is, however, some interdependence between the two (*Thompson v Gregmaun Farms Pty Ltd* (2000) 80 WAIG 1733 and *AFMEPKI v Goldfields Contractors Pty Ltd* [2000] WAIRC 1469 at [29]—[30]; (2000) 80 WAIG 5346 at 5347). The difference between the two was clearly explained by Justice Moore in *Black v Brimbank City Council* [1998] 74 FCA where he observed;

> "A period of notice is to give an employee the opportunity to adjust to the change in circumstances which is to occur and to seek other employment; *Mathews v Coles Myer Ltd* (1993) 47 IR 229. The period may be worked out, as s 170DB allows, and it often is, as it is recognised that the employee's prospects of obtaining other employment may be better if the search is undertaken while the employees remain in employment: see for example *Sinclair v Anthony Smith & Associates Pty Ltd* (IRC of A, von Doussa J, 1 December 1995, unreported at 8).
>
> A severance payment, however, is intended to provided (sic) a payment as compensation for the loss of non-transferable credits and entitlements that have been built up through length of service such as sick leave and long service leave, and for inconvenience and hardship imposed by the termination of employment through no fault of the employee: *Termination, Change in the Redundancy Case* (1984) 8 IR 34 at 62, 73. The inconvenience and hardship includes the disruption to the employee's routine and social contacts and the competitive disability to long term employees arising from opportunities foregone in the continuous service of the employer: *Food Preservers Union of Australia v Wattie Pict Ltd* (1975) 172 CAR 227. Such a payment is taxed on the favourable terms which apply to an eligible termination payment. It is quite inconsistent with the nature and purpose of the payment, and the taxation regime, that the severance entitlement should be worked out as if the number of weeks used to calculate the entitlement were weeks of notice."

207 Madgwick J made similar observations in *Westen v Union des Assurances de Paris* IRCA No 419/96 (28 August 1996). Other authorities have, however, expressed the view that some of the same factors are covered by the requirement to give notice and the payment of redundancy. The factors can overlap and there should be no double counting (see *Caulfield v Broken Hill City Council* [1995] NSWIRC 33 (24 March 1995)).

208 A determination of what constitutes a period of reasonable notice by the Commission is also a discretionary decision. The range of issues which are relevant factors to consider in determining a period of reasonable notice are well established and were enunciated by the Full Bench in *Tarozzi v WA Italian Club (Inc)* 71 WAIG 2499 at 2501. These are—

> "(a) The high or low grade of the appointment.
>
> (b) The importance of the position.
>
> (c) The size of the salary.
>
> (d) The nature of the employment.
>
> (e) The length of service of the employee.
>
> (f) The professional standing of the employee.
>
> (g) His/her age.
>
> (h) His/her qualifications and experience.
>
> (i) His/her degree of job mobility.
>
> (j) What the employee gave up to come to the present employer (e.g. a secure longstanding job).
>
> (k) The employee's prospective pension or other rights."

209 The Learned Commissioner had regard to criteria in *Tarozzi's* case and to the fact that the factors set out in *Tarozzi* overlap with the considerations relevant to considering whether a particular redundancy payment is reasonable. He then concluded that in light of the fact that the diamond exploration industry is an industry in which employment opportunities fluctuate from time to time that a payment of 4 weeks' pay in lieu of notice could not be considered unreasonable in light of his decision that Mr Birnie be paid a further 8 weeks' redundancy pay (being a total of 20 weeks' pay). In making this determination, the Learned Commissioner held that Mr Birnie should have been paid 16 weeks' redundancy pay on termination of his employment.

210 Whilst it is clear that an award of severance or redundancy pay and damages for reasonable notice should be global, the factors that apply to each should be first considered separately.

211 In relation to the factors to be applied to reasonable notice it is relevant that—

> (a) At the time of his dismissal the Applicant was aged 38 years and is a qualified Geologist specializing in diamond exploration.
>
> (b) AWI Administration Services Pty Ltd employed Mr Birnie for over 8 years. Initially he was engaged as a project geologist to work out of Melbourne. In 1995 he was re-located to Perth. From 1997 he was employed as the Regional Exploration Manager. There is only one operating diamond mine in Australia and at the time of termination the diamond industry was undergoing very hard times, so that there were very few employment opportunities. Given that Mr Birnie had been principally engaged in the diamond industry for over 8 years, it was likely to be some time before he could obtain alternative employment.
>
> (c) His personal circumstances are that he is married with 3 children. His wife was a cardiac technician in Melbourne and had to give up her employment when they were transferred from Melbourne to Perth.

212 Having regard to the matters set out in the preceding paragraph we are of the view that a reasonable period of notice without having regard to any payment for severance pay would be 4 months' notice.

213 In relation to redundancy pay, in addition to the factors set out above regard must be had to the loss of non-transferable credits. The Learned Commissioner, in our view, did not err in determining that Mr Birnie should have been paid 16 weeks' redundancy pay, as Mr Birnie had 8 years' service towards long service leave. However

when regard is had to this award and to the additional factors required to be considered in relation to reasonable notice, the Learned Commissioner erred in holding that 4 weeks' pay in lieu of notice was not unreasonable. It is our view that if a payment of 16 weeks' pay were made as a redundancy payment, a period of reasonable notice would have been 8 weeks' notice. As Mr Birnie was paid 4 weeks' pay in lieu of notice we would order that Mr Birnie be paid an additional 4 weeks' pay, as pay in lieu of notice.

Period of Reasonable Notice and Redundancy Pay

214 It is inherent in the concept of a payment or an award of pay in lieu of notice, that the payment made should be equivalent to the amount an employee would have earned had he or she been given notice. Mr Birnie was entitled, under his contract of employment, to the private use of a motor vehicle. Accordingly, we would after having regard to the fact that AWI Administration Services Pty Ltd paid Mr Birnie 4 weeks' pay as notice, make an order that AWI Administrative Services Pty Ltd pay Mr Birnie an amount equal to the value of the use of the motor vehicle for a period of 8 weeks. If the value of the private use is in dispute, we would order that the matter be remitted to the Commission at first instance for hearing and determination.

Summary of entitlements to pay in lieu of notice and redundancy pay

215 In summary, we are of the view that after having regard to the payments made to Mr Birnie on termination, (namely 4 weeks' pay in lieu of notice and 8 weeks' redundancy pay) together with the order made at first instance that he be paid an additional 8 weeks' pay as a redundancy pay, we are of the opinion that Mr Birnie should have been paid a total of 24 weeks' pay being—

(a) 8 weeks' salary in lieu of notice, calculated by having regard to the fact that he would have had the use of a motor vehicle if he was given notice; and

(b) 16 weeks' salary as a redundancy payment, calculated without regard to the value of the private use of a motor vehicle.

THE PRESIDENT—

216 For those reasons, appeal No FBA 22 of 2001 is dismissed; and appeals Nos FBA 23 of 2001 and FBA 24 of 2001 are upheld in part and the decision at first instance varied.

———

2001 WAIRC 04092

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	AWI ADMINISTRATION SERVICES PTY LTD, APPELLANT/ RESPONDENT
	v.
	ANDREW BIRNIE, RESPONDENT/ APPELLANT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER J H SMITH
DELIVERED	Tuesday, 6 November 2001
FILE NO/S	FBA 22 OF 2001, FBA 23 OF 2001, FBA 24 OF 2001
CITATION NO.	2001 WAIRC 04092

Decision	Appeal No FBA 22 of 2001 dismissed. Appeals Nos FBA 23 of 2001 and FBA 24 of 2001 upheld in part and the decision at first instance varied.
Appearances	
AWI Administration Services Pty Ltd	Mr R L Le Miere (of Queens Counsel), by leave, and with him Mr D Howlett (of Counsel), by leave
Mr A Birnie	Mr S P Kemp (of Counsel), by leave

Order.

These matters having come on for hearing before the Full Bench on the 6th and 7th days of September 2001, and having heard Mr R L Le Miere (of Queens Counsel), by leave, and with him Mr D Howlett (of Counsel), by leave on behalf of AWI Administration Services Pty Ltd (hereinafter referred to as "AWI") and Mr S P Kemp (of Counsel), by leave, on behalf of Mr Andrew Birnie, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 26th day of October 2001, it is this day, the 6th day of November 2001, directed, declared and ordered as follows—

(1) THAT appeals no. FBA 22 of 2001, FBA 23 of 2001 and FBA 24 of 2001 be heard together.

(2) THAT AWI in appeal no. FBA 22 of 2001 be and is hereby granted leave to substitute a new page 3 for the existing page 3 in the Appeal Book.

(3) THAT AWI in appeal no. FBA 22 of 2001 be and is hereby granted leave to amended the grounds of appeal in the Notice of Appeal filed herein by—

(a) deleting the word "no" in the second line of ground 14; and

(b) deleting the word "if" in the first line of ground 16 and inserting in lieu thereof the word "of".

(4) THAT leave be and is hereby granted to Mr Andrew Birnie in appeal no. FBA 24 of 2001 to withdraw ground 2.

(5) THAT appeal no. FBA 22 of 2001 be and is hereby dismissed.

(6) THAT appeal no. FBA 23 of 2001 be and is hereby upheld in part, and—

(a) THAT grounds 2, 6 and 7 of the Grounds of Appeal be and are hereby upheld.

(b) THAT grounds 1, 3, 4 and 5 of the Grounds of Appeal be and are hereby dismissed.

(7) THAT appeal no. FBA 24 of 2001 be and is hereby upheld in part, and—

(a) THAT grounds 3(b) and 3(c) of the Grounds of Appeal be and are hereby upheld.

(b) THAT grounds 1(a) to 1(g) and 3(a) and (d) be and are hereby dismissed.

(8) THAT the decision of the Commission in application No. 1198 of 2000 and 1457 of 2000 made on the 20th day of April 2001 be and is hereby varied by deleting order B(1) and substituting therefor the following—

"B(1) (a) THAT the balance of the amount of twenty-four weeks' salary for reasonable notice and redundancy, namely an amount equal to twelve weeks' salary, be paid by AWI to Mr Andrew Birnie within seven days of the date hereof.

(b) THAT a sum equal to the value of the provision of a motor vehicle by AWI to the said Mr Birnie for a period of eight weeks be paid by the said AWI to Mr Birnie within seven days of the date hereof."

(9) THAT if the value of the provision to Mr Andrew Birnie of the said motor vehicle is in dispute, then the matter be remitted to the Commission at first instance for hearing and determination.

(10) THAT the said appeals be and are otherwise dismissed.

By the Full Bench

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

2001 WAIRC 03987

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	BGC (AUSTRALIA) PTY LTD, APPELLANT/RESPONDENT
	v.
	IAN PHIPPARD, RESPONDENT/ APPELLANT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER S WOOD
DELIVERED	22 OCTOBER 2001
FILE NO/S	FBA 7 OF 2001, FBA 12 OF 2001
CITATION NO.	2001 WAIRC 03987

Decision	Appeals dismissed
Appearances	
BGC Australia Pty Ltd	
	Mr M C Hotchkin (of Counsel), by leave, and with him,
	Ms R L Amey (of Counsel), by leave
Ian Phippard	Ms W F Buckley (of Counsel), by leave

Reasons for Decision.

INTRODUCTION

1 These are two appeals, brought pursuant to s.49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act"). They were heard together, by direction of the Full Bench. The decision appealed against is contained in an order made on 28 February 2001. That order reads, formal parts omitted, as follows—

"1 THAT the applicant's claim for compensation pursuant to s 23A of the Act be and is hereby dismissed.

2 THAT the respondent pay to the applicant within seven days of the date hereof of contractual benefits in the sum of $93,507.60 less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1936 and actually paid comprised of the following amounts—

(a) $86,250.00 being six months payment in lieu of notice at the applicant's annual salary package of $172,500.00; and

(b) $7,257.60 in respect of accrued annual leave.

3. THAT the respondent's set off and counter-proposal be and is hereby dismissed."

FBA 7 OF 2001

GROUNDS OF APPEAL

2 The appellant, BGC (Australia) Pty Ltd (hereinafter referred to as "BGC"), appeals against that decision on the following grounds, as amended—

"1. The Learned Commissioner erred in law in misdirecting himself as to the proper legal principles in determining whether the Respondent (Applicant) had been guilty of misconduct such as would justify his summary dismissal.

PARTICULARS

(i) the Commissioner held that there must have been a "wilful course of conduct" by the Respondent (Applicant) in relation to his expenses, to justify summary dismissal;

(ii) the correct test was whether the Respondent (Applicant) had engaged in a deliberate flouting of an essential contractual condition, such as to show the repudiation of the contract or one of its essential conditions;

2. The Commissioner erred in law in failing to draw the inference that the evidence constituted a deliberate flouting of an essential contractual term, that is the implied term of good faith and fidelity, when the Commissioner found that:

(i) The Respondent (Applicant) had the responsibility to be diligent in regard to reconciliation and keeping track of expenses;

(ii) The Respondent (Applicantt) (sic) had sole accountability, and was ultimately responsible for expense account matters within the Appellant's (Respondent's) operation;

(iii) The Respondent's (Applicant's) own expenses were not the subject of any further review by the Appellant (Respondent);

(iii) (sic) the Respondent (Applicant) had a cavalier attitude to expenses claims;

(iv) the Respondent (Applicant) made a claim for an expenses (sic) (the Midland Disposal Store) not knowing what the expenses (sic) was for, which was quite improper;

(v) the Respondent (Applicant) sought to recover monies from the Appellant (Respondent) to pay for parking fines, which was "completely inappropriate conduct for any employee, particularly one in the Applicant's (Respondent's) position";

(vi) the Respondent (Applicant) was casual in his responses to the Appellant (Respondent) when these matters were put to him;

(vii) the Respondent (Applicant) claimed for parking expenses at the Perth International Airport which clearly was not a business expense;

(viii) the Respondent (Applicant) allowed other members of his family to use the Appellant's (Respondent's) fuel card and for vehicles not part of his remuneration package;

(ix) other examples of laxity and poor judgement by the Respondent (Applicant), which would probably not have been discovered had the Appellant (Respondent) not undertaken a review of the Respondent's (Applicant's) expenses;

(x) the Respondent (Applicant) demonstrated a lack of diligence as to an important matter of internal corporate governance, namely the management of expense accounts.

3. The Learned Commissioner erred in law in failing to make any or sufficient findings of fact regarding specific allegations by the Appellant (Respondent) of dishonesty and impropriety or give adequate reasons for refusing to find that there was no dishonest or impropriety in respect of each such allegation on the part of the Respondent (Applicant).

4. The Learned Commissioner erred in law and reached findings which were manifestly against the weight of the evidence, in failing to find that the Respondent (Applicant) had been guilty of various acts of dishonesty and/or impropriety, as

the only reasonable inference open to the Learned Commissioner, in that:

(a) After admitting on two occasions that he had wrongly claimed for reimbursement of the cost of a flight to and from Albany by "mistake", the Respondent (Applicant) was unable to explain how he made the "mistake when:
  (i) the document (the Diners Club Statement) clearly showed that the flight was to and from Albany, and
  (ii) he had expressly endorsed it as the Appellant's (Respondent's) expense;

(b) After admitting that he had wrongly claimed full reimbursement for staying overnight at the Duxton Hotel by "mistake", the Respondent (Applicant) was unable to explain how he made the "mistake", when:
  (i) He had given evidence that it was his practice to note on the Diners Club Statements which items were his and which were company expenses; and
  (ii) He had expressly endorsed the whole expense as the responsibility of the Appellant (Respondent);

(c) After admitting that he had wrongly claimed reimbursement of the cost of parts for his Feroza vehicle by "mistake", his explanation of the "mistake" (that he overlooked putting the registration number of the Feroza on the envelope into which he placed the invoice) was inadequate, in that:
  (i) it fails to explain why he placed the Feroza invoice with the invoice for the Toyota Landcruiser into the same envelope, to substantiate his claim for reimbursement of a company expense;
  (ii) the Feroza invoice was clearly for Nissan parts, and could not reasonably be confused with an invoice for Toyota parts;
  (iii) the envelope was written up by the Respondent (Applicant) as a claim for reimbursement of maintenance on the Toyota Landcruiser;
  (iv) the existence of a full stop immediately after the letters "LV" on the envelope suggests the Respondent (Applicant) decided not to write the registration number, rather than merely over-looking it;

(d) The Respondent (Applicant) was unable to explain how he wrongly claimed reimbursement as "lunches, meals and incidentals" for purchases from the Midland Disposal Store;

(e) The Respondent's (Applicant's) explanation (that he had bought a gift for an employee) for his claim of reimbursement of $85.00 in respect of "meals", apparently purchased from Get Smart Merchandising was inadequate, when:
  (i) it fails to explain why he wrongly claimed the expense as "meals";
  (ii) the evidence of Teo and Buckeridge was that the Respondent (Applicant) had confirmed at his interview on 2 December 1999 that it was for meals, when they questioned him about it;
  (iii) no evidence was adduced from the alleged employee to corroborate the Respondent's (Applicant's) story;

(f) After admitting that he had wrongly claimed a parking fee for the Perth International Airport on Sunday, 4 October 1998, by "mistake", the Respondent (Applicant) was unable to explain how he made the "mistake" when:
  (i) the summary he typed up to substantiate the claim refers to the Perth Domestic Airport instead of the Perth International Airport;
  (ii) all other details in the summary he typed up correctly records the information contained in the parking vouchers attached to the summary;
  (iii) the parking voucher for the Perth International Airport clearly displayed all information, including that it was a Perth International Airport voucher;
  (v) the Respondent (Applicant) was unable to explain why the difference regarding the Perth International Airport parking voucher was the only difference in the summary;

(g) The Respondent's (Applicant's) explanation for wrongly claiming reimbursement of other parking vouchers, namely when he visited his daughter at Fremantle Hospital (that he didn't check the vouchers properly when he lodged his claim) fails to explain why he sought to continue to justify the expense as that of the Appellant's (Respondent's), when:
  (i) he typed up the summary (annexure "T" to Teo's Affidavit), clearly showing Alma Street, Fremantle as the location where he parked;
  (ii) he knew that he only parked there to visit his daughter in hospital;
  (iii) he failed to explain under cross-examination why he did not acknowledge that it was not a proper claim when he was required to justify his expenses;

(h) The Respondent's (Applicant's) explanation for claiming reimbursement of the Liquorland purchase (that he bought a bottle of Spumante to celebrate with staff the next morning), is inadequate, when:
  (i) the explanation was not given to Teo or Buckeridge when they interviewed him;
  (ii) the explanation is inconsistent with the line of questioning put to Teo by the Respondent's (Applicant's) counsel on the issue;
  (iii) the Respondent (Applicant) was unable to recall under cross-examination what his instructions to his counsel were that caused her to conduct the line of questioning she put to Teo;
  (iv) no evidence was adduced by a staff member or by Sweet to corroborate the story;

(i) after admitting he had wrongly claimed reimbursement for a McDonalds' meal, by "mistake" the Respondent (Applicant) was unable to explain how he made the "mistake", when:
  (i) he typed up the claim as for a "lunch";
  (ii) the invoice showed the purchase as having been made at 11.13pm; and
  (iii) no adequate reason could be given as to why a McDonalds' meal for the Respondent (Applicant) could ever be a proper expense payable by the Appellant (Respondent);

(j) after having given evidence that he had given his fuel card to his daughter to buy fuel for herself while she was on holidays

because of an "arrangement" the Respondent (Applicant) had with the Appellant (Respondent), whereby the Appellant (Respondent) was obliged to pay the fuel costs of anyone using his or his wife's, car at any time, the Respondent (Applicant) subsequently admitted under cross-examination that no such "arrangement" existed;

(k) the Respondent's (Applicant's) explanation for wrongly using his fuel card to acquire petrol for a non-company vehicle (that he overlooked it), is inadequate, when his evidence was:

(i) the fuel card was in his wallet;

(ii) he had other means in his wallet to pay for the fuel;

(iii) his evidence under cross-examination was that his real reason for using the fuel card on both vehicles was to take the benefit of the cheaper fuel, using the fuel card.

5. The Learned Commissioner erred in law and in fact in failing to draw the inference that the matters pleaded in paragraph 4 hereof, together with the Respondent's (Applicant's) conduct in:

(a) Claiming reimbursement of parking fines, especially when he could not adequately explain how he parked unlawfully by "mistake";

(b) Claiming reimbursement for telephone calls at a higher rate than was reasonable or appropriate;

(c) Claiming reimbursement of purchases made by his wife on a fuel card and fuel purchased while he was on holiday by third parties;

(d) Claiming reimbursement of purported expenses supported by his own hand-written documents (which conduct the Learned Commissioner found to be improper);

(e) Failing to see the impropriety of perpetuating a process where such purported verification was considered sufficient by him for not only allowing his claims, but also those of subordinate employees;

(f) maintaining claims for reimbursement of "unreadable" expenses or of expenses which were labelled "don't know", when there were instances (as pleaded in paragraph 3 hereof) of false claims having been made;

were such as to reasonably undermine the Appellant's trust and confidence in the Respondent.

6. The Learned Commissioner erred in law and made findings of fact that were manifestly against the weight of the evidence in finding that Teo had accepted that all or any of the hand-written documents purportedly substantiating the Respondent's (Applicant's) claim for reimbursement were for legitimate business expenses, and that by implication this was relevant to the Learned Commissioner's finding that the Respondent's (Applicant's) conduct was not a "wilful course" of misconduct, in that:

(a) Teo's evidence was that he did not know, and could not verify, whether such expenses were incurred at all or on legitimate company business because the hand-written notes were not capable of independent verification;

(b) Teo's evidence is in any event irrelevant because he was not the mind of the Appellant (Respondent) and he did not make the decision to terminate the Respondent's (Applicant's) employment;

(c) The evidence that the Respondent (Applicant):

(i) had made false claims for reimbursement, even on his own admission, as pleaded in paragraph 3 hereof;

(ii) had made improper claims, as pleaded in paragraph 4 hereof and found by the Learned Commissioner;

(iii) admitted under cross-examination he was unsure of at least one claim, when his summary of the expense materially differed from his note (the Wogina matter, at pages 301-302a of transcript);

was such as to cause there to be sufficient doubt about the veracity of the Respondent's (Applicant's) claims for re-imbursement supported by his hand-written notes, such that no finding should have been made that the expenses were incurred on legitimate company business.

7. The Learned Commissioner erred in law in that there was no evidence to support his finding that Buckeridge's evidence regarding the prime reason for terminating the Respondent's (Applicant's) employment was his casual response to the Appellant's (Respondent's) concerns, when the evidence of Buckeridge was that:

(a) He decided to dismiss the Respondent (Applicant) because he could trust him no longer;

(b) The matters presented to the Respondent (Applicant) by the Appellant (Respondent) constituted serious breaches of trust;

(c) Although he could not say with hindsight what he would have done if the Respondent (Applicant) had not been so casual in his response, and had been contrite, he may not have had his employment terminated if the manner of his response had been different.

8. The Learned Commissioner erred in law in failing to take into account, either by way of adjustment to the contractual benefits found to be due to the Respondent (Applicant), or by way of set-off:

(a) The sum of $15,042.67 incurred on his Diners Club Card paid by the Appellant (Respondent);

(b) $12,032.66 paid by the Appellant (Respondent) for purchase of materials supplied to the Respondent (Applicant); and

(c) $2,501.67 borrowed from the Appellant (Respondent) by the Respondent (Applicant);

when the evidence was that all of these transactions took place pursuant to a term of the Respondent's (Applicant's) contract with the Appellant (Respondent), in the form of the salary sacrifice scheme (sic) Respondent's (Applicant's) conditions of employment, and that the Respondent (Applicant) and the Appellant (Respondent) reconciled such amounts as between themselves in the course of the Respondent's (Applicant's) employment.

10. (sic) The Learned Commissioner erred in law in failing to exercise his jurisdiction to consider and uphold the Appellant's (Respondent's) claim for payment by the Respondent (Applicant) of the balance of the employment debt claimed by the Appellant (Respondent) in the sum of $17,097.76, or such lesser sum as the Learned Commissioner might have found to be owing after accrued contractual benefits had been taken into account."

3 BGC seeks upon this appeal the following orders—

"1. The Orders made on the 28 February 2001 be set aside;

2. In lieu thereof, the Application be dismissed; and

3. The Respondent do pay the Appellant $17,097.76."

CROSS-APPEAL—FBA 12 OF 2001

4 There is a cross-appeal by the abovenamed respondent, Mr Ian Robert Phippard, against the same decision on the following grounds, as amended—

"1. The Learned Commissioner erred in law and in fact in determining that the Applicant's dismissal, although unlawful was not harsh, opressive (sic) or unfair when, having regard to—

(a) the absence of any wilful misconduct or intention to deceive or defraud such as to justify instant dismissal;

(b) the unintentional nature of the conduct of the Applicant;

(c) the decision to dismiss being based on the alleged dishonesty of the Applicant which dishonesty was not established;

(d) the Respondent having decided dismissal was inevitable unles (sic) the Applicant apologised for the alleged dishonesty;

(e) the dismissal being summary in nature when summary dismissal was not warranted;

(f) the dismissal being accompanied by intimidatory conduct consisting of threats of legal proceedings and claims for significant and unsubstantiated sums said to be owing to the Applicant; and

(g) the Applicant's long record of faithful service,

the Learned Commissioner ought have found that the Applicant's dismissal was harsh, oppressive and unfair."

5 Ground 2 was withdrawn by Ms Buckley on behalf of Mr Phippard at the hearing of the appeals.

6 Mr Phippard sought orders in the following terms—

"1. The orders made on 28 February 2001 be set aside;

2. In lieu thereof, the following orders be made;

(a) the Respondent do pay the Applicant the sum of $86,250.00 by way of compensation pursuant to section 23A of the Act;

(b) The Respondent do pay to the Applicant contractual benefits in the sum of $179,757.50 comprising the following amounts—

(i) $172,500.00 being 12 months payment in lieu of notice; and

(ii) $7,250.50 in respect of accrued annual leave;

(c) The Respondent's set-off and counter proposal be and is hereby dismissed."

BACKGROUND

7 Evidence in this matter consisted of oral evidence, written statements and documentary evidence. There was evidence on behalf of the applicant at first instance, Mr Phippard, given by himself and Mr Joseph Ronald Sweet. On behalf of BGC, evidence was given by Mr Leonard Walter Buckeridge, the Chairman of BGC, which was a number of a group of companies, Mr Andrew Boon San Teo, the Company Secretary of BGC and Secretary of related companies, Mr Neil George Edwards, BGC's Commercial Manager, Mr Geoffrey Stephen Newman, BGC's Finance Systems Manager and Mr Phillip Ng, the Group Financial Controller.

8 At all material times, Mr Phippard was engaged as and employed as the General Manager of the contracting business by BGC. The Chairman of the company was Mr Buckeridge, and I infer that he occupied a similar position in relation to other related companies. Mr Sweet was Managing Director of BGC.

9 Mr Phippard was responsible for the overall control of the BGC contracting business, its day to day operations, project outcomes, profitability and the maintenance of business objectives and business development. Apart from Mr Sweet, the only other more senior person than Mr Phippard was Mr Buckeridge. As General Manager, Mr Phippard was a senior executive reporting only to Mr Sweet. Mr Phippard did not have a great deal to do with Mr Buckeridge. Mr Newman and Mr Edwards were Mr Phippard's subordinates.

10 Relevantly, at all material times, Mr Phippard and his family owned and used a holiday home at Albany in this State. He had a family home at Mandurah, too.

11 Mr Phippard commenced proceedings in this Commission, complaining that his dismissal was both unfair and unlawful in that—

(a) He did not receive the notice payment of one month's salary or any other amount.

(b) He was given no reasons for his dismissal.

(c) BGC did not provide Mr Phippard with any particulars relating to his alleged performance or conduct shortcomings.

(d) He was not advised that his employment was in jeopardy.

(e) He was not provided with any reasonable opportunity to respond to the allegations made by BGC.

12 Mr Phippard claimed at first instance that BGC unfairly dismissed him, and he claimed compensation for that unfair dismissal. He also claimed, as a contractual benefit, six months' salary in lieu of notice in the sum of $86,250.00 and annual leave benefits in the sum of $14,264.42. The claim in relation to salary in lieu of notice was increased to twelve months in closing submissions. The total of the contractual benefits claimed was, therefore, $186, 764.42.

13 The whole of the claim was opposed by BGC.

14 BGC's case was that Mr Phippard had, by reason of the misuse of the expense system, abused his position of trust as a General Manager and that this justified his dismissal. Further, it was submitted that Mr Phippard was substantially indebted to BGC in the sum of $29,576.90 and that, if Mr Phippard was to succeed in his claim, this sum should be set off against any amount awarded to him by the Commission.

15 There was a great deal of evidence, both oral and by written witness statements, in the matter. The evidence related to Mr Phippard's alleged abuse of BGC's expense claim system which ultimately led to his effective summary dismissal on 2 December 1999. As the evidence unfolded, there were really no substantial criticisms by BGC which went to Mr Phippard's work performance in other respects.

16 The case for BGC was that Mr Phippard, in one of the most senior managerial positions in BGC's group, breached his duty of fidelity and good faith to BGC in engaging in what was described by Counsel for BGC as a course of "petty rorting", otherwise making manifestly excessive expense claims and also furnishing claims without adequate documentary proof.

17 Mr Phippard's employment commenced in or about November 1994, pursuant to the terms of an oral contract of employment, and came to an end on 2 December 1999 in circumstances which were disputed in the proceedings, but to which I will refer hereinafter.

18 Mr Phippard's total remuneration as at the date of the termination of his employment comprised the following—

(a) A base salary of $125,800.00.

(b) Three novated car leases to a total value of $32,372.00.

(c) Superannuation contributions in the sum of $11,951.00.

(d) A salary sacrifice amount of $2,377.00.

19 By the salary sacrifice arrangement which was in place, Mr Phippard was able to use the allocated sum for private expenses. In doing this, he would deal with either Mr Newman or Mr Edwards to order particular items. These purchases would then be debited against Mr Phippard's salary sacrifice account. Mr Phippard gave evidence that the process used to determine the amount for his salary sacrifice was that he nominated an amount to be allocated to the salary sacrifice towards the end of the preceding financial year, which amount would be the relevant amount for the following financial year (see also paragraphs 179 to 181 hereof).

20 Mr Phippard gave evidence, too, that he often found it difficult to reconcile his salary sacrifice position because the system would only be updated infrequently and, generally, on an annual basis. There was no evidence that he attempted to have this done more frequently.

Events Leading up to the Meeting of 2 November 1999

21 Mr Phippard gave evidence that, on or about 27 October 1999, Mr Sweet ceased to be employed by BGC. At this time, Mr Phippard was away on business. Mr Sweet telephoned Mr Phippard and told him of his departure from BGC. Given the position of Mr Phippard in BGC, Mr Phippard tried to contact Mr Buckeridge on 28 October 1999, to discuss his own position. Mr Buckeridge was not available so he attempted to contact Mr Teo. By the time that he spoke to Mr Teo, he had received a copy of a memorandum from Mr Buckeridge to all employees of BGC advising of the appointment of a new Managing Director.

22 Mr Buckeridge told Mr Phippard that a meeting would be arranged to discuss the situation. Mr Phippard said that he was practically ignored by BGC's senior executives and Mr Buckeridge, and he was not included in discussions with the new Managing Director who arrived on 25 November 1999; nor was he even introduced to that gentleman whilst he was on site.

23 Mr Teo gave evidence that, in the final week of October 1999, Mr Buckeridge asked him to arrange a meeting with Mr Phippard to discuss his expense claims. Mr Buckeridge told Mr Teo that he thought Mr Phippard's expense claims were excessive and that Mr Phippard was living like "Mr Hollywood" and a meeting was required to discuss these arrangements, Mr Buckeridge said. Mr Teo was asked by Mr Buckeridge to go through Mr Phippard's expense accounts in order to prepare for the meeting and this was duly done with the assistance of other employees in the accounting department. A summary of expenses incurred by Mr Phippard was annexed to Mr Teo's witness statement, with all supporting documents in relation to the expense claims. Mr Teo gave evidence that he then showed the summary of expenses to Mr Buckeridge prior to the meeting with Mr Phippard which had been arranged for 2 November 1999.

The Meeting of 2 November 1999

24 On 2 November 1999, there was a meeting at which were present Mr Buckeridge, Mr Teo and Mr Phippard. It was common ground that, at no time before the meeting, was Mr Phippard notified by BGC of its concerns in relation to any of the matters raised with him at the meeting. The meeting arose because Mr Buckeridge had concerns brought about by information from another employee at the Hazelton office about Mr Phippard's expense claims. There was also a question of Mr Phippard's performance, he said.

25 At the meeting, Mr Buckeridge told Mr Phippard that he was unhappy with Mr Phippard's performance in running BGC's business. Accordingly to Mr Phippard, he had not received any indication before this from anyone that his work performance was unsatisfactory. Mr Buckeridge then proceeded to refer to a bundle of Mr Phippard's Diners Club card statements and questioned him about expense claims contained in them. Mr Phippard answered the questions put to him as best he could, but requested that he be given the statements in order for him to go through them in detail and respond to the issues raised. The statements related to the period October 1997 to October 1999.

26 Mr Teo also gave evidence about the meeting of 2 November 1999. He said that Mr Phippard was shown the summary of expenses for those two years and was asked questions, by way of examples, from the Diners Club statements. He referred to certain statements; in particular, a statement dated 8 September 1998 in which it was shown that Mr Phippard had visited a particular restaurant twice in one week. It was Mr Teo's evidence that Mr Buckeridge was not pleased with this and said so. Mr Phippard's response was that he had to entertain clients and staff frequently.

27 A further Diners Club card statement of 8 April 1998 was shown to Mr Phippard, containing a number of entries with the letters "IP" and Mr Phippard was queried as to why BGC was paying for Mr Phippard's personal expenses. Mr Teo's evidence was that Mr Phippard said that this would be acceptable. This allegation was inconsistent with the evidence of Mr Phippard, Mr Edwards and Mr Newman as to the system of reimbursement for expenses, both business and private. Mr Teo also referred to expense claims contained in a Diners Club card statement dated 8 October 1997 for an Ansett ticket to Albany and return. Mr Phippard said that he would look into this matter, but later admitted that this claim was a mistake; it was for a personal expense and not one to be incurred by BGC.

28 At the conclusion of this meeting, Mr Buckeridge agreed to give Mr Phippard all relevant documents and requested that Mr Phippard provide an explanation for each and every expense item which Mr Phippard had claimed over the entire two year period. He gave him ten days to respond and, in the meantime, directed Mr Phippard not to incur any further expenses on behalf of BGC without Mr Buckeridge's written consent.

29 On 10 November 1999, a memorandum confirming the outcome of the meeting was forwarded by Mr Buckeridge to Mr Phippard (see page 220 of the appeal book (hereinafter referred to as "AB")). BGC agreed to an extension of the deadline for response from 12 November 1999 to 24 November 1999, at Mr Phippard's request (see page 223(AB)).

30 On 24 November 1999, Mr Phippard sent to Mr Buckeridge a memorandum containing the information requested concerning his expense claims and the memorandum refers to Mr Phippard's perceiving an intention on the part of BGC to terminate his employment. Mr Phippard also noted that there was no indication, before 2 November 1999, that BGC had any concerns about his performance or conduct other than Mr Buckeridge's comments at the meeting as to his luncheon habits (see page 225(AB)). There was no response from Mr Buckeridge in relation to this memorandum, according to Mr Phippard.

31 Mr Phippard's evidence was that he reviewed all of his Diners Club card statements for the two year period and noted "incorrectly claimed" expenses amounting to $182.00 out of a total amount of expenses claimed, for the entire period, of $42,000.00. He found it extremely difficult to go back over his expense claims for the two year period to justify each and every claim, given the lapse of time and the need to locate records for each claim.

32 Mr Teo, in cross-examination, admitted that such a process would have been difficult for Mr Phippard in the time given him for this task. Mr Phippard's evidence was that, when he did his reconciliation of his Diners Club card statements for the two year period, he noted a number of errors and miscoding about which he gave evidence. One item of this type related to a computer carry bag which he had purchased for use in business travel. A further example was an item for travel described as "Ansett $157.00" being a credit on an unused flight between Perth and Albany.

33 Mr Teo conceded that, during the course of the meeting on 2 November 1999, he had no reason to doubt that the expense claims which were discussed were genuine business expenses.

34 After he received Mr Phippard's response of 24 November 1999, Mr Teo went through the various documents in support of the expense claims and noted a number of matters which he raised with Mr Buckeridge. These appear at pages 84-86 (AB). He was also provided with other documents in relation to expense claims made by Mr Phippard which caused Mr Teo some concern. These included a receipt for "Get Smart Merchandising" in the amount of $85.00 issued on 6 March 1999, which Mr Phippard described on his expense claims as reimbursement for "meals". There was a further receipt for drinks at the "Baccarat Bar" at the Crown Casino on 7 March 1999 for the amount of $35.00 which Mr Phippard described as "entertainment".

35 On 1 December 1999, Mr Phippard said that he received a telephone call from Mr Buckeridge's secretary requesting his attendance at a meeting on the next day with Mr Buckeridge. He was not told the purpose of the meeting. There was considerable common ground between Mr Phippard, Mr Teo and Mr Buckeridge as to the events as they unfolded at this particular meeting.

36 Before the meeting, Mr Teo had prepared a letter of dismissal to be signed by Mr Buckeridge and used if no satisfactory explanation was received at the meeting. No alternative letter was prepared.

The Meeting of 2 December 1999

37 At that meeting, Mr Buckeridge told Mr Phippard that he had been "double dipping" in relation to some expense claims. Mr Buckeridge commented to Mr Phippard that, as a result of the investigation into his claims, he considered that there were grounds for instant dismissal and Mr Phippard's conduct was unbecoming for a senior manager and set a bad example for the rest of management.

38 Mr Buckeridge's evidence in cross-examination (see pages 975-976(AB)) was pertinent and I reproduce it hereunder—

> "MS BUCKLEY: Now Mr Teo told you that there were — told you before the meeting of 2nd of December that he'd uncovered things that warranted summary dismissal, didn't he?
>
> MR BUCKERIDGE: Yes.
>
> MS BUCKLEY: Did you make an independent assessment of those things?
>
> MR BUCKERIDGE: Well, I did after seeing Mr Phippards' conduct during that second meeting. He was — his response was, well, sort of, "So what?" If someone was contrite, I think you may — and I can't judge in hindsight what I would have done. I can tell you in 40 years of business it's not the first time I've discovered theft in my organisation and I have some people who've admitted to theft who still work in the organisation. And I have a number who have admitted or have not admitted to theft who I've fired. The decision to fire Phippard was made in response to his casual attitude to responding to the questions made in the second meeting which I think is early December. Theft in my view is a pretty serious matter and for someone to just sort of brush it off is not good enough."

39 A number of other items were then discussed, including a claim on Mr Phippard's Diners Club card statement for a parking ticket on 28 July 1998 in the sum of $12.00. A further item raised was for a claim for $85.00 for "Get Smart Merchandising" for the purchase of a shirt at the Melbourne Grand Prix for one of BGC's managers as an award for his ongoing performance.

40 Mr Phippard said that Mr Buckeridge told him that he had been entertaining friends at BGC's expense and that this was a reference to competitors of BGC. Mr Phippard took issue with this and told Mr Buckeridge that those companies that he had entertained were not only competitors, but were also clients in some respects.

41 Mr Buckeridge then made reference to a claim for a $70.00 parking fine incurred in Subiaco. Mr Phippard's evidence was that this was for client entertainment at the football. He thought he could park at that location and was running late, he considered it was a legitimate business expense and could claim it accordingly.

42 Mr Buckeridge then asked Mr Phippard why he was purchasing lunches and drinks on his trips out of Perth and he responded that it was established custom and practice at BGC and in industry generally.

43 Mr Buckeridge accused Mr Phippard of using BGC as a "private bank" in getting BGC to pay his credit card accounts, which included private expenditure, and that Mr Phippard was indebted to BGC in the sum of $24,822.00. No particulars of how this was calculated were put to Mr Phippard and Mr Phippard disputed this, telling Mr Buckeridge that he considered that BGC owed him money because of the salary sacrifice arrangement. Mr Phippard said that he had only become aware of this aspect of BGC's case following the completion of BGC's evidence.

44 It was common ground that not all of the expense claims canvassed in evidence in the proceedings, which were a voluminous number, were put to Mr Phippard in the meeting of 2 December 1999 for his comment and explanation. Apart from those noted above, matters specifically raised by Mr Buckeridge and Mr Teo in the meeting, of which there were five items, were set out at pages 50-51(AB).

45 As a result of summarising the issues, Mr Buckeridge gave evidence that he told Mr Phippard that his answers to questions about his expense claims were unsatisfactory and he considered that Mr Phippard had breached his trust, given his senior position within the company. As a result, Mr Buckeridge handed Mr Phippard a letter dated 2 December 1999 terminating his employment with BGC, effective immediately. The letter required him to cease employment on that day and offered to pay him one month's salary in lieu of notice, calculated by reference to an annual salary of $125,800.00 (see page 484(AB)). However, it was common ground that no such payment was ever made.

46 Mr Buckeridge, in his evidence, said that he decided to dismiss Mr Phippard because he could no longer trust him. He regarded Mr Phippard's answers to his questions as unsatisfactory and, in his evidence, described Mr Phippard's demeanour and his answers as "casual".

47 Mr Phippard said that, at no time prior to the meeting of 2 December 1999 at which he was dismissed, was he ever told that BGC had any concerns as to the documents which he relied upon to support his expense claims, nor was there any suggestion that Mr Phippard had made fraudulent claims against BGC. According to Mr Phippard, the only issues raised prior to the meeting were the level of his expenses and his conduct as General Manager. Mr Teo also gave evidence in cross-examination that he had no reason to believe at the time that Mr Phippard was deliberately rorting the expense claim system and, as at the time of the proceedings at first instance, still maintained that view.

48 It was also Mr Buckeridge's evidence in cross-examination that the prime reason for Mr Phippard's dismissal was his casual response to Mr Buckeridge's questions on his expense claims and that, if Mr Phippard had apologised, he may not have been dismissed. There were other matters where Mr Phippard had correctly claimed expenses which came to light after his dismissal. These are set out at pages 52 to 62 (AB).

Expense Account System

49 Mr Phippard and other witnesses, both for Mr Phippard and BGC, gave evidence as to the expense claims system used at the material time. Mr Phippard said that, during the course of his employment he had a Diners Club card, a Visa card and a Mastercard, all of which were in his own name. BGC supplied him with fuel cards as part of his three novated leases under his remuneration package. Mr Phippard's Diners Club card was for both business and personal expenses, but he said that he primarily used it for entertaining both existing and prospective clients of BGC. He did have other credit cards but, primarily, he used his Diners Club card. On the Diners Club card, he would incur expenditure, BGC would pay all of the

amounts incurred, and Mr Phippard would reimburse BGC for his personal expenditure. On his Westpac Mastercard and his Visa card, he would personally pay for all expenditure and seek reimbursement for expenditure on behalf of BGC.

50 Mr Phippard said that, shortly after he commenced employment, Mr Teo told him that he would not receive a corporate credit card and should use his own personal credit cards for any business related expenses and seek reimbursement from BGC. There were no company credit cards.

51 The evidence of Mr Phippard was that, at no stage during the course of his employment with BGC, was he given any direction or guidance as to what he could claim as a business expense, there being no written company policies or procedures in relation to this matter. It was, he said, a question of judgement to be exercised by the relevant executive.

52 The evidence of Mr Phippard was that the Managing Director, Mr Sweet, actively encouraged him to entertain clients, prospective clients and other staff members. Mr Phippard said that he viewed client entertainment and liaison as important and gave evidence that he entertained clients and staff about twice each week. He said that, at all times, Mr Sweet was aware of his entertainment expenses and its frequency. He gave examples as to the types of client entertainment he engaged in, including restaurant meals, functions and taking clients to the football and to the theatre.

53 Mr Phippard outlined the usual process with respect to expense claims. He said that he would gather together his claimed expenses, including his telephone account, and attach a front sheet setting out what was claimed by way of reimbursement. He gave evidence that, if he did not, for whatever reason, receive a receipt for his expenditure, then he made a contemporaneous note of the amount, date and location on a piece of paper and submitted that with the bundled expenses to Mr Edwards to be processed. In relation to his Diners Club card statement, his practice was, when he received a statement, to mark against each itemised expense either "BGC" or "IP" to indicate whether the item was a business expense of BGC or personal expense of Mr Phippard. This was relevant to what I will describe hereinafter as "the Albany airline ticket claim", for example.

54 Once this was done, Mr Edwards would, on the evidence, irregularly perform a reconciliation in order to determine whether BGC owed money to Mr Phippard or vice versa. There was, in effect, an offsetting arrangement because BGC would pay Mr Phippard's entire Diners Club card account.

55 Mr Phippard gave evidence that, as General Manager, he was responsible for authorising the business expense claims of his subordinate managers. He said that he applied the same method of assessment in determining these claims as he used himself.

56 Mr Sweet, who was called to give evidence on behalf of Mr Phippard, gave evidence as to the general position regarding business related expenses of BGC whilst he was employed as Managing Director. He confirmed that neither the BGC group, nor BGC, had any policy, procedure or guidelines in relation to the claiming of business expenses. His evidence was that there was a general unwritten rule that staff could claim those expenses used in the genuine promotion of the BGC group. He said that his own practice, in relation to claiming business related expenses, was similar to that adopted by Mr Phippard. That is, when making expense claims, he would bundle the relevant receipts together and note on the back of the bundle what he was claiming as business expenses, whether it was meals, fuel for rental cars on business trips, repairs for cars that he had under novated leases, etc. Once collated, he would give the bundle of documents to Mr Edwards to be processed. Mr Sweet said that, at no time, were his expense claims queried by Mr Buckeridge.

57 Mr Sweet also said that he had occasion to discuss entertainment of clients with Mr Buckeridge who apparently, at one time, did not favour client entertainment, but, after Mr Sweet had explained that it was an important aspect of maintaining and developing clients, Mr Buckeridge accepted it as being necessary. Mr Sweet encouraged Mr Phippard to engage in client entertainment because Mr Sweet was not particularly interested in doing it. He said that he was aware that Mr Phippard was entertaining clients frequently and he had the view that Mr Phippard was doing the required amount of entertainment to maintain and develop clients in what was a growth division within the group.

58 Mr Sweet was not, however, aware of the actual amount of expenditure incurred by Mr Phippard in relation to client entertainment. Mr Sweet also said in evidence that he was never spoken to by Mr Buckeridge about the level of expenses incurred by Mr Phippard. Mr Sweet also said that he considered that Mr Phippard's expenditure in relation to the entertainment of BGC's own staff as being justified in order to maintain good staff relations and morale. I should observe that there was no evidence that Mr Phippard's level of expenditure or the nature of his claims for expenses was raised by anyone with him before those events.

59 Mr Edwards gave evidence that he always found Mr Phippard to be open in claiming his business expenses and he did not engage in the practice of shifting some expense account claims onto other staff members, as did some other managers. He said that he trusted Mr Phippard and had no reason to question his judgement.

60 Mr Sweet also gave evidence about a trip which Mr Phippard undertook to the United States of America in 1999 to attend the "Con Expo". He said that he discussed the matter with Mr Phippard and suggested that, if he was interested, Mr Phippard should go and, after he returned, they could discuss to what extent the costs of the trip would be apportioned between business and personal expenses. On Mr Phippard's return from this trip, Mr Sweet testified that the payment reimbursement was not resolved as at the time that Mr Sweet departed from BGC's employ at the end of October 1999.

61 Mr Edwards also gave evidence that BGC consented to employees using their own personal credit cards for both personal and business expenses. Mr Phippard, he said, had been authorised by the company to use his Diners Club card in this manner. Mr Edwards confirmed in evidence that BGC would pay the entire Diners Club card account submitted by Mr Phippard, but there would be notations on it to identify those account items which were Mr Phippard's personal expenses and those which were business related expenses. Mr Phippard would then be required to either reimburse BGC by submitting a personal cheque or by electing to offset the relevant amount against any salary sacrifice arranged with the company.

62 Mr Edwards said that, after reviewing the accounts, he calculated that there was an amount of some $15,052.67 still owing to BGC from Mr Phippard for his private purchases which were charged to his Diners Club card and paid for by BGC following the above system. Mr Edwards also gave evidence generally about BGC's system of giving cash advances to employees for travelling. He said that, because Mr Phippard travelled very frequently, on his evidence as often as every week or ten days, Mr Phippard would sometimes wait for several months to claim a number of trips for cash advance purposes at one time.

63 Once every six months, Mr Edwards would raise with Mr Phippard any outstanding cash advances for travel purposes that had not been reconciled. He gave evidence that, up to and including March 1999, a total sum of $4,524.00 in cash advances had been given to Mr Phippard which had yet to be reconciled with Mr Phippard's expenditure whilst travelling.

64 BGC also had a policy to allow employees to utilise BGC's purchasing power to purchase goods from some of BGC's suppliers. Mr Edwards outlined three different bases on which this could occur, the third being that the employee would elect to purchase an item on a purchase order and forward a copy to him for recording as a salary

sacrifice claim. He gave evidence that this system was only available to senior management who had access to a salary sacrifice arrangement. The details of these purchases were then periodically forwarded to Mr Ng, who would then arrange a salary sacrifice adjustment against the relevant senior manager.

65 Mr Edwards said that, as at the date of the termination of Mr Phippard's employment, Mr Phippard had purchased items to the approximate value of $12,030.00 from various suppliers to BGC and, as far as he was aware, Mr Phippard had yet to reimburse BGC for this amount.

66 Mr Edwards confirmed in evidence that hand written documents, which he had seen in connection with the proceedings, in relation to expenses receipts, were in Mr Phippard's hand writing. He gave evidence that, at the time when he worked with Mr Phippard, there were a number of occasions where Mr Phippard would submit receipts in his own hand. Mr Edwards said that he did not query these occurrences because he acknowledged that receipts were not always issued for certain expenses and that, in his position as the General Manager, Mr Phippard had to determine himself what were the appropriate expenses to claim from the company.

67 Mr Edwards said that, whilst he was aware that there was a number of hand written receipts, this fact needed to be considered in the context of the entire period over which Mr Phippard's expenses were scrutinised. Mr Edwards did say that he recalled a few occasions when he received a hand written receipt from Mr Phippard for client entertainment in relation to which he requested the names of the persons who had been entertained. He then said that confirmation of this was sufficient for him to accept Mr Phippard's claim.

68 Mr Phippard said in evidence that, at no time, did his expense account claims cause concern to BGC during the whole period of his employment, notwithstanding that BGC's accounts were audited twice a year.

69 Mr Teo gave evidence that the process of audit was such that relatively small items such as individual expense claims would not be the subject of scrutiny by the auditors, and Mr Smith, a partner in Pannell Kerr Forster, BGC's auditor, who was called to give evidence, confirmed this. Mr Smith did, however, say that, if it had come to the attention of the auditors that Mr Phippard was using hand written notes to support expense claims and had claimed questionable items as business expenses, then those matters would have been regarded as irregular, but they would only be the subject of a report to BGC if they had occurred on a regular basis.

Indebtedness of Mr Phippard

70 The evidence before the Commission at first instance as to the level of the alleged indebtedness of Mr Phippard to BGC, comprising various amounts, was set out in the amended answer and counter proposal (see pages 15A-29(AB)).

71 Mr Ng said that he was unsure whether Mr Phippard would have known whether he was indebted to BGC at any point in time from the expense reimbursement and salary sacrifice system used by BGC. Mr Ng's main area of contact with Mr Phippard was in relation to his salary package arrangements and he confirmed in evidence that the motor vehicles in Mr Phippard's remuneration package were for both business and private usage.

72 Mr Ng gave evidence about the salary sacrifice system applying to employees of BGC. He said that the allocation of an amount was effected annually, and there was, at some point during the year, a reconciliation of amounts to be debited against the employee's salary sacrifice. He said that he would rely on an employee to inform him as to that employee's spending during the year and, if all of an employee's salary sacrifice were not spent, it would be carried over to the following year.

73 Mr Ng said that, in relation to Mr Phippard, as he was very busy and difficult to meet with, reconciliations were only done sporadically in relation to Mr Phippard's salary sacrifice arrangements. On Mr Ng's evidence, the last reconciliation for Mr Phippard was done in November 1999. A copy of his salary sacrifice arrangements for 1998 and 1999 was annexed to Mr Ng's witness statement (see pages 705-706(AB)). In 1998, Mr Phippard overspent some $3,452.00 on his salary sacrifice, and, as at the end of 1999, Mr Phippard had overspent an amount of $22,404.00. This latter amount included expenditure in relation to meals and accommodation of approximately $10,000.00 for Mr Phippard's trip to the United States to attend "Con Expo". This issue was a matter in dispute between Mr Phippard and BGC.

74 Mr Ng said that every vehicle which was in the senior employees' salary packages had a fuel card "attached" to that vehicle. Thus, if Mr Phippard incurred personal expenses on such fuel cards, the system was that the employee should note this in order that adjustments can be made to the salary sacrifice reconciliation. This occurred approximately at six monthly intervals.

FINDINGS

75 The Commissioner at first instance made the following findings—

(a) That he had no reason, on the whole, to doubt the general veracity of the evidence of those witnesses called in support of the parties' respective cases. On matters such as the relevant meetings, there was considerable common ground.

(b) That Mr Phippard was one of the most senior managers with BGC and had authority to incur and authorise his own business expenditure and, in the absence of specific guidelines in this regard, such expenditure was a matter of judgement and a discretionary decision.

(c) That it was an important aspect of Mr Phippard's position with BGC that he engage in a considerable amount of client entertainment. This was encouraged by his immediate superior, Mr Sweet, and done with his knowledge.

(d) Mr Phippard, because of his responsibilities, was also required to travel very frequently and, in the course of so doing, incurred expenses in relation to both clients and staff of BGC. There was nothing inherently unusual in this, in the Commissioner's opinion.

(e) The Commissioner accepted the evidence of Mr Phippard, supported by Messrs Edwards and Newman, and that meant that Mr Phippard, having had BGC pay his credit card, which he used for both business and personal practices, and this was the arrangement in place in relation to expenses and salary sacrifice.

(f) The Commissioner was not persuaded that Mr Phippard did anything other than what was a practice at BGC in this regard.

(g) This system appeared to operate in conjunction with the salary sacrifice arrangements in place for senior managers, such as Mr Phippard.

(h) That the practice was, in relation to Mr Phippard, that there would be reconciliations, albeit somewhat irregular, of Mr Phippard's credit card expenditure to determine the extent to which either Mr Phippard or BGC was indebted to one another.

(i) The salary sacrifice scheme in place was also reconciled infrequently.

(j) That Mr Phippard may well not have known to what extent, if at all, he was indebted to BGC at any given point in time without specifically requesting such information.

(k) That the irregularity of these events had no doubt made Mr Phippard's task of reconciliation and keeping track of expenses more difficult.

(l) That it was Mr Phippard's responsibility to be diligent in this regard.

(m) That it was not valid for Mr Buckeridge and Mr Teo to challenge the method by which Mr Phippard managed the process of expense reimbursement in relation to his Diners Club credit card.

(n) That, in or about October 1999, for unspecified reasons, BGC came to inquire as to expense claims made by Mr Phippard over the two year period 1997—1999.

(o) That, of a total of some $57,000.00 in expense claims over this period, a number were called into question by BGC, with only some of those being actually put to Mr Phippard directly. Of these, some were incorrect and described as "errors" by Mr Phippard and the Commissioner accepted his evidence in this regard, but it is important to note that, at no point in the evidence, that it appeared that BGC suggested that the disputed claims were not for business purposes. Nor was this established on the evidence.

(p) That also of some importance was the evidence of Mr Teo that he did not consider at the time or subsequently that Mr Phippard had, in any way, defrauded BGC.

(q) That Mr Phippard was required to retrospectively justify his expenditure over the period 1997—1999 within a period of some three weeks. The evidence was that this would have been difficult and he found this to be so.

(r) That Mr Phippard had difficulty making sense of some of the documents used in support of his various claims with the passage of time.

(s) That Mr Phippard could also not remember the details of some claims and, with the failings of human memory, this was not surprising, given the lapse of time involved and the volume of material to be considered.

(t) That the Commissioner accepted that, on occasions, receipts for business expenditure may not be convenient to obtain and there was evidence that the use of hand written notes was not the sole province of Mr Phippard, but, on occasions, other staff had used the same method. However, the ability to verify such expenditure is obviously difficult in the event of an audit process occurring.

(u) Whilst this practice must be regarded as questionable, the evidence was that this was not a regular occurrence over the whole period of the review conducted. While it was clear on the evidence, in particular the memorandum of 10 November 1999, that Mr Phippard was required to not only particularise the expenses, but also to provide supporting documents or receipts.

(v) That Mr Phippard's work performance, as such, was not an issue relied on by BGC.

(w) That Mr Phippard, given the events prior to the dismissal and the way in which BGC's case unfolded, did not have full appreciation of the claims and conduct he was to answer until the proceedings at first instance in this matter were part heard.

(x) That the system for expenses claims with BGC was based on judgement to be exercised with discretion as to whether an expense should be claimed against BGC. There were no fixed rules in this regard. Accordingly, a high degree of trust was part of the arrangement, and this was particularly so in the case of Mr Phippard, as a very senior manager who had sole accountability for matters such as these within his own operation.

(y) That, as to the prior years in Mr Phippard's employment with BGC, the Commissioner found that, at no time prior to in or about October 1999, was there any concern raised with Mr Phippard as to the conduct of his expense accounts.

(z) That the external auditors of BGC would not have ordinarily detected problems with Mr Phippard's expense claims, but Mr Phippard did incur very large sums of money on business expenses. However, what may seem excessive to one person in an organisation may not be so for another, relative to that person's responsibilities and degree of interaction with clients.

(aa) That Mr Phippard did not deliberately set out to deceive BGC, but that he did have a cavalier attitude to expenses claims, an example being the Midland Disposal Store claim.

(bb) That there was evidence that Mr Phippard sought to recover from BGC monies to pay for parking fines incurred as a result of his own wrongdoing and it mattered not that he was entertaining clients on these occasions. This was inappropriate conduct, as was his making a claim in relation to the Midland Disposal Store when he did not know what the claim was for.

(cc) That Mr Phippard was casual in his responses to Mr Buckeridge in the meeting of 2 December 1999. This was also reflected in the manner in which he gave some of his evidence, with some of his answers bordering on flippant.

(dd) That there were other examples which the Commissioner set out in some detail to demonstrate laxity and poor judgement by Mr Phippard.

(ee) That some of these expense items were able to be set off under Mr Phippard's salary sacrifice arrangement in any event.

(ff) That, were it not for the review undertaken by BGC, many of these matters would probably not have been discovered.

(gg) That some of Mr Phippard's conduct was not appropriate for a senior officer, on Mr Sweet's evidence.

(hh) That, whilst some of these claims might seem minor in isolation, taken together they demonstrate a lack of diligence as to an important matter of internal corporate government.

(ii) That, whilst BGC could have handled the matter better, clearly on Mr Phippard's own evidence, he knew that the matters raised by BGC were serious and that loss of employment was a possible outcome.

(jj) That the Commissioner observed Mr Phippard closely in the witness box when, in cross-examination, he admitted this. There was no doubt in his mind that Mr Phippard was well aware that he was in serious trouble. This was also self-evidently the case in the terms of his memorandum to Mr Buckeridge of 24 November 1999, and that this was as a result of the first meeting on 2 November 1999.

(kk) That, in the context of the seniority of the position held by Mr Phippard, he was aware of possible dismissal and, therefore, the Commissioner rejected Mr Phippard's submissions in this regard.

(ll) It was open to BGC to have regard to the matters discovered after dismissal. The issues raised in the evidence were clearly central to the allegations against Mr Phippard and were not peripheral. Further, BGC did undertake reasonable inquiries as to Mr Phippard's conduct, but some of these matters were not uncovered as a result until some time after Mr Phippard's dismissal.

(mm) That Mr Phippard was not guilty of conduct warranting summary dismissal in all of the circumstances of the case. The Commissioner was not persuaded that it had been established by BGC, on the evidence, that Mr Phippard engaged in a wilful course of conduct in relation to his expenses to justify BGC applying the employer's ultimate sanction of summary dismissal.

(nn) That the dismissal was wrongful or unlawful at common law.

(oo) The Commissioner was not persuaded that this was a situation in which the dismissal, although effected unlawfully, was also unfair. Although the

conduct of Mr Phippard fell far short of that expected of a senior executive entrusted with the authority to approve all of his own expenses without further consideration by BGC, he was careless in the extreme in the conduct of his affairs as to his expense claims. Mr Phippard clearly knew that he was in jeopardy of losing his employment if he was not able to explain his expense claims. Mr Phippard was the final port of call as to what acceptable conduct in relation to expense claims, and this was a very important factor. If he were in a more junior position, subject to scrutiny and review by others, then this may have been a relevant consideration. He was on notice, from the meeting of 2 November 1999, that there were serious issues arising as to his expenses management and he was acutely aware of this. The Commissioner was not therefore, on balance, of the view that BGC abused its right to dismiss Mr Phippard.

(pp) That six months' notice would be a reasonable period of notice to imply in this case and that, in relation to the contractual benefits claimed, the benefits under his contract of employment, he had been denied six months' salary in lieu of notice.

(qq) That Mr Phippard had not failed to mitigate his loss.

76 Mr Phippard claimed 21.5 days' annual leave in the sum of $14,264.62. There was 232 hours owing to him, according to Mr Edwards, as at December 1999, not including Mr Phippard's trip to America. The Commissioner accepted Mr Phippard's evidence that he took two weeks' holiday on this trip, which would leave some 112 hours, leading to an entitlement of $6,773.76.

77 The Commissioner did not accept that a set off was available because of *Conti-Sheffield Real Estate v Brailey* (1992) 72 WAIG 1765.

78 In the end, the Commissioner decided, in his supplementary reasons for decision, that the contractual entitlements should be 120 hours of accrued annual leave and this is reflected in the order of the Commission issued.

ISSUES AND CONCLUSIONS

79 The decision at first instance was a discretionary decision, as that term 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)). Thus, on appeal, the appellant must establish that the exercise of the discretion miscarried, according to the principles laid down in *House v The King* [1936] 55 CLR 499 (see also *Gromark Packaging v FMWU* 73 WAIG 220 (IAC)). The Full Bench may not interfere with the exercise of the discretion at first instance, or substitute the exercise of its own discretion, unless error is established in the manner which I have described above.

80 Further, insofar as the findings made depended on the advantage enjoyed by the Commissioner at first instance in seeing and hearing the witnesses, the principle which applies is the well known principle in *Devries and Another v Australian National Railways Commission and Another* [1992-1993] 177 CLR 472, which is as follows—

> "A finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against—even strongly against—that finding. If the finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the judge has failed to use or has palpably misused his advantage, or has acted on evidence which was inconsistent with facts incontrovertibly established by the evidence or which was glaringly improbable."

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The Dismissal—Was Summary Dismissal Justified?

81 It was not, of course, in issue that Mr Phippard was summarily dismissed for misconduct. He was told that he would be paid one month's salary in lieu of notice but this was never paid. It was alleged and submitted that the learned Commissioner applied the wrong test in considering whether a summary dismissal was justified and, therefore, failed to make material findings of fact.

82 The complaint was that, whilst the Commissioner cited the reasons for judgment in *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698, he then fell into error in endeavouring to restate the principle and apply it to the facts of the case.

83 It was submitted that there were three effective tests propounded by the Commissioner at paragraphs 108 and 109 of his reasons. Those were, it was submitted—

(a) Whether the conduct of Mr Phippard constituted such a deliberate flouting of his contract of employment such as to warrant BGC summarily dismissing him.

(b) Whether the punishment fitted the crime.

(c) Whether Mr Phippard had "engaged in a wilful course of conduct in relation to his expenses to justify BGC in applying the employer's ultimate sanction of dismissal.

84 This was a dismissal for breach of fiduciary duty, it was submitted, and the proper principle was that laid down by Kirby J in *Concut Pty Ltd v Worrell* [2000] 75 ALJR 313 at 321 and 322. His Honour said—

> "The ordinary relationship of employer and employee at common law is one importing implied duties of loyalty, honesty, confidentiality and mutual trust. At common law:
>
> > "[c]onduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal. ... [T]he conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found. It is not enough that ground for uneasiness as to its future conduct arises."

and

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

85 The test is as laid out, too, in *Sargant v Lowndes Lambert Australia Pty Ltd* 81 WAIG 1149 (FB) at 1156-1157, where the Full Bench said—

> "As to the question of summary dismissal, the Commission, constituted by Full Benches, has applied the well known principles expressed in *North v*

Television Corporation Ltd (1976) 11 ALR 599 at 609 (FCFC) per Smithers and Evatt JJ, as follows—

> "For purposes of the application of the common law principles to the facts of this case, the remarks of the Master of the Rolls in *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285 at 287 and 289 are in point. He said—
>
> > '... since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service ... I ... think ... that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and ... therefore ... the disobedience must at least have the quality that it is "wilful"; it does (in other words) connote a deliberate flouting of the essential contractual conditions.'
>
> ... Until the terms of the contract are known and identified it is impossible to say whether or not any particular conduct is in breach thereof or is a breach of such gravity or importance as to indicate a rejection or repudiation of the contract.
>
> One cannot begin the inquiry without ascertaining what work ... the employee was employed and had undertaken to perform. It is also necessary to ascertain what particular obligations the parties had agreed upon as important or even vital."

This approach is also expressed by Dixon and McTiernan JJ in the well known passage from their joint judgment in *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66 at 81-82.

.....

The Commissioner found (see pages 31-32(AB)), and found correctly, that the relationship of employer and employee is ordinarily recognised as fiduciary (see *Hospital Products Ltd v United States Surgical Corporation* (HC)(op cit) per Gibbs CJ at 68, per Mason J at 96 and per Dawson J at 141). In *Concut Pty Ltd v Worrell* (HC)(op cit) at page 315, per Gleeson CJ, Gaudron and Gummow JJ, it was said to be one of the accepted fiduciary relationships. Their Honours observed, too, at pages 315-316, as follows—

> "Their critical feature is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion that will affect the interests of that other person in a legal or practical sense"

86 (See the discussion of repudiation and summary dismissal in *Sargant v Lowndes Lambert Australia Pty Ltd* (op cit) at pages 1156-1157.)

87 In *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66 at 81-82, Dixon and McTiernan JJ said—

> "Once he was enabled to supply the customers' requirements, he might easily divert the greater part of its business to his own company. In these circumstances, it is said, the appellant was not bound to wait until its reasonable apprehensions were realized, but might avert the danger by dismissing the respondent. Conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal (*Boston Deep Sea Fishing and Ice Co. v. Ansell* (1888) 39 Ch D 339 at pp 357-8 and 362-4; *English and Australian Copper Co. v. Johnson* (1911) 13 CLR 490; *Shepherd v. Felt and Textiles of Australia Ltd.* (1931) 45 CLR 359). But the conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found. It is not enough that ground for uneasiness as to its future conduct arises. In the present case, many circumstances were given in evidence from which it might have been inferred that in all that he did the respondent was actuated by one design, namely, to prepare a position to which he could retreat with a considerable part of his employer's business, if it should become necessary or desirable to vacate the managership of Jaques Proprietary Limited. If any such finding had been made, the learned Judge would clearly have been entitled, if not bound, to hold that the respondent had been guilty of misconduct. But, although there was evidence from which such an inference might have been drawn, the respondent's conduct was capable of an innocent construction."

88 It was submitted by Ms Buckley on behalf of Mr Phippard that the Commissioner made no error, that he applied the correct test, and that paragraphs 107 and 108 of his reasons for decision reflected this. There, inter alia, the Commissioner posed himself this question—

> "Whether the conduct of the applicant constituted such a deliberate flouting of his contract of employment with the respondent to warrant the respondent summarily dismissing him."

(See page 70(AB).)

89 An act or acts of misconduct can justify summary dismissal only if it is of a nature to show that the employee is repudiating the contract or one of its essential conditions. In this case, Mr Phippard was a senior manager. He was the General Manager and second only in the hierarchy to the Managing Director, Mr Sweet. He reported to no-one except Mr Sweet and, of course, was responsible in the end to Mr Buckeridge.

90 It is trite to observe that, like all employees, Mr Phippard had a fiduciary duty to his employer. Further, as I have expressed above, as a managerial employee, he was, by virtue of his position, closely identified and identifiable with his employer's interests. This, of course, puts a manager in a different class from other and subordinate employees and this is very much more the case for a General Manager, as Mr Phippard was.

91 As *Concut Pty Ltd v Worrell* (HC)(op cit) and *Sargant v Lowndes Lambert Australia Pty Ltd* (op cit), and a number of the cases cited in both say, it is an inflexible rule of equity that a person in a fiduciary position is not, unless otherwise expressly provided, entitled to make a profit or not allowed to put himself in a position where his interest and duty conflict (see *Sargant v Lowndes Lambert Australia Pty Ltd* (op cit) at page 1157). I adopt again, too, what was said in *Canadian Aero Service Ltd v O'Malley* [1994] SCR 592 and applied in *Sargant v Lowndes Lambert Australia Pty Ltd* (op cit) at page 1157 by Laskin J (as he then was)—

> "The general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively. Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the

company, and the circumstances under which the relationship was terminated, that is whether by retirement or by resignation or discharge."

92 Whilst those dicta related to the use of confidential information and preparations made by a senior officer to leave his employment and compete against his employer, they are sufficiently general to identify the duty and to characterise the breaches of duty of a senior officer or manager.

93 As the General Manager and a senior officer, Mr Phippard was required, to a great extent, to stand in the shoes of his employer and to conduct his duties of management entirely according to his duty. This included the responsible and prudent management of the employer's assets, property and money. In practical terms, of course, this included his own claims for expenses and use of company money and property. This was manifested in his being in fact his own supervisor and approving his own claims for expenses. Part of this duty involved reconciling his own personal expenses and BGC incurred expenses, and making proper and properly substantiated claims for expenses.

94 That this was so was accentuated by the fact that no-one, in fact, supervised his claims for expenses, his use of fuel and other credit cards and his decisions to claim reimbursements or salary sacrifices. He, on the other hand, was required to supervise other employees, including divisional managers, and to approve their expenditure.

95 As the General Manager, he was given a wide discretion in the use of monies to entertain customers, competitors, potential customers, staff and to buy rewards for them. That, he clearly did. His expenses, on the evidence, over the period 1997-1999 to which I have referred above were $57,000.00 which, on Mr Teo's uncontroverted evidence, were far greater than those of any other manager.

96 As the Commissioner correctly found, it was Mr Phippard's responsibility (and duty) to be diligent in keeping track of his expenses and of his reconciliation of them. Further, it was his duty not to misuse or wrongly claim, deliberately or negligently, expenses for reimbursement, as the Commissioner correctly found. He was, as the Commissioner correctly found, too, ultimately responsible for the operation of his expense account, since there was no further review. Mr Edwards was his subordinate. It goes without saying, and the Commissioner correctly found, that a high degree of trust was part of the "arrangement" between BGC and Mr Phippard. That was implicit in his duty as a very senior manager. I have already adverted to the extent and nature of his duties above.

97 The Full Bench was referred to a number of instances which, it was submitted, justified the Commissioner finding that summary dismissal was justified. There were a number of particular claims which the Commissioner considered and which the Full Bench was invited to consider again.

The Albany Airline Ticket Claim

98 At page 171(AB), there is a copy of a Diners Club card written statement with a reference on it to an expense incurred in relation to an Ansett flight ticket. The initials "BGC" (the usual way of identifying company expenses which could be claimed for reimbursement as distinct from personal expenses identified by Mr Phippard's initials "IP" which would not be claimed for reimbursement) appear against the amount claimed. Mr Teo first raised the matter with Mr Phippard on 2 November 1999 (see page 81(AB)), where he said in his statement, paragraph 11, as follows—

> "I also showed Ian document "RD3" dated 8 December 1997 (see annexure RD3"). I noted that it contained an entry of an Ansett ticket to Albany and return which was noted as a company expense. I was aware that Ian had a holiday home in Albany, and BGC Contracting do not do business in Albany. I asked him why that was a company expense. He said words to the effect "I don't know. I'll look into it". In his response on 24 November 1999, he credited it back to BGC, claiming it was "mis-coded" and "wrongly claimed" (see annexure "G")."

99 In fact, as was correctly submitted, there was no miscoding at all. The claim was certainly wrongly made because Mr Phippard wrongly identified the expense as one incurred on behalf of BGC and therefore reimbursable. It was neither. To properly identify the expense, all that he had to do was write "IP" beside it and not "BGC". He admitted that it was an error to claim that amount. He said that he found it when he was doing his reconciliation of expenses claimed, after the meeting of 2 November 1999. However, on Mr Teo's evidence, this was brought to his attention by Mr Teo on 2 November 1999. Mr Phippard said that, once he found the error, he conceded in his response of 24 November 1999 that the claim was incorrect. He did not or could not explain how the error came about.

100 In my opinion, it is quite clear that, if Mr Phippard had kept or obtained a receipt or voucher, such an error would not so readily have been made or, more likely, would not have been made at all. Mr Phippard, in the end, admitted that it was a claim for reimbursement of an expense which was of a personal nature only and which was wrongly claimed. He also admitted in cross-examination that his evidence that he discovered this error after the 2 November 1999 meeting was not the truth. He then said that the only explanation which he could offer was that he was going down to Albany for holidays and had to come back for a meeting. He was unable to explain how he made this mistake.

Telephone Calls

101 BGC agreed to pay for Mr Phippard's telephone accounts, excluding international telephone calls. Mr Phippard said that he was entitled to claim reimbursement of the cost of all of his telephone calls, local and STD, but not others.

102 Ms Joan Earnshaw's uncontradicted evidence was that, in one month, Mr Phippard made 28 STD calls from his home in Mandurah, of which only two were for business purposes. These were the only calls which were identified when answered as business or answered by a person prepared to identify himself or herself. Nonetheless, he claimed the cost of half of his telephone calls from home, even from his holiday home at Albany. Mr Sweet said in evidence that Mr Phippard could be on duty at home or even at Albany. However, Mr Phippard did not unequivocally say that he was.

103 The rate of reimbursement for telephone calls was exceptionally high. There was, on the evidence, a disproportionate number of personal calls (not refundable) or unverifiable business calls including calls to and from his holiday home at Albany. It was open to so find. Those claims, therefore, were, at best, carelessly made.

Albany Telephone Claim

104 This was the claim for reimbursement for telephone expenses in the sum of $314.00 for Albany. It was dated 11 November 1997. Mr Phippard admitted in evidence, after being confronted about it at the first interview, that is was miscoded. It was submitted that it was not miscoded. No code was applied. Mr Phippard put "BGC" beside it on his reconciliation statement to indicate that it was BGC's responsibility, instead of putting "IP" to note that it was his Diners Club card statement. He could not, in evidence, explain why. In my opinion, the claim was, at least, careless and, at most, dishonest.

Duxton Hotel Accommodation

105 Mr Phippard claimed $337.80 reimbursement for personal accommodation at the Duxton Hotel. This claim was made as part of an amount claimed for the alleged entertainment of BGC clients at the Duxton Hotel. Again, he did not mark this expense as "IP", being a private expense. It therefore was identified for the purposes of claiming a reimbursable BGC expense. Whilst he did not identify it as a separate expense, he claimed reimbursement as if it was a BGC expense.

106 Again, the use of and presentation of a voucher or receipted account might have assisted. Mr Phippard said that he advised Mr Edwards before the claim was reconciled (see page 1111 (AB)). He did, however, list

the names of the people who attended dinner that night and handed that to Mr Edwards. He denied that he had deliberately decided to overlook that the claim for personal accommodation was not a BGC expense. He said that, at the time he had not sorted out what expenses were owed by or to whom. This was because the reconciliations were done every six months only. He was unable to explain why the expense was not properly identified on the statement when the names of the persons attending dinner that night and for whose dinner he claimed the expenses as a BGC expense, were produced by him to Mr Edwards.

107 He was unable to explain why he wrongly claimed it, but said that he did inform Mr Edwards that it was wrongly claimed and not separately identified. He said that he did not remember that it was an item of personal expense at the time when he made the claim. Again, this claim was made, at least, carelessly and, at most, dishonestly, and it was open to so find.

Feroza Motor Vehicle

108 This was a claim for expenses, being $247.48, for the cost of replacing a tail light on Mr Phippard's Feroza motor vehicle on 13 November 1999. Mr Phippard had claimed an authorised refund of an expense, namely the cost of repairs to his Toyota Landcruiser, a cost which he was entitled to claim as reimbursable. Again, by the same claim, he claimed reimbursement of the cost of repairing the tail light of a vehicle called a "Feroza" without identifying it as a non-refundable private expense which should have been applied to salary sacrifice. He placed the invoice in the same envelope as the Toyota Landcruiser invoice. He did not separately describe the costs on the envelope.

109 Further and significantly, he produced a typewritten summary which clearly identified the expense as an expense in relation to the Toyota Landcruiser, in relation to which he was entitled to be reimbursed, as a company expense. There was no reference to the make or registration number so that the expense to the Feroza was not separately identified and appeared as part of an authorised claim for reimbursement of expenses (see page 742(AB), paragraph 71). Again, he offered no explanation other than that he had made a mistake.

110 What he did was simply to transfer the information on the front of the envelope to the summary sheet, he said. Then, he contradicted that evidence and referred to the receipt in the envelope as the source of his information. It was submitted that he was dishonest in putting the receipt for the cost of the Feroza part in the envelope as a claimable expense and then, by claiming that expense on the summary sheet as if it was a claimable reimbursement expense relating to the Landcruiser.

111 The Feroza repair bill, if it were to be claimed, could only be claimed as a personal expense against salary sacrifice. He was unable to explain how he did this or why. He claimed as a company and reimbursable expense an amount of $247.48, which he knew or ought to have known, should have gone to salary sacrifice as a personal expense. It was open to find that this claim was dishonestly made by Mr Phippard, who well knew that it was not a refundable expense and who sought to conceal it, whilst claiming it as refundable.

The Midland Disposal Store Claim

112 Mr Phippard sought reimbursement for two expenses from the Midland Disposal Store. One was an amount of $14.95 on 24 December 1997, and the other was $49.95 on 9 February 1998. When asked to justify these expenses, he described the $49.95 expense on the basis of a note saying "Diary says ring Phil Lockyer re Lunch" (see page 657(AB)), and the amount of $14.95 as "unreadable" under the title "lunches/meals/incidentals" (see page 658(AB)). Mr Teo ascertained at page 112(AB) that these were claims for expenses from the Midland Disposal Store. Mr Phippard said that those two entries justified the claim for expenses.

113 Mr Teo's evidence was that, on the face of it, one could not tell what evidence this was to justify the accounts. However, and ACN number of the till receipt led to the identification of the company concerned as the Midland Disposal Store. Mr Phippard admitted that this was not a company expense but that he had sought reimbursement as if it were. He said that he had assumed that the expense related to lunch with Mr Phil Lockyer (the representative of a BGC client). He admitted that the invoice was not for that lunch (see pages 1083-1084(AB)).

114 Mr Phippard was unable to offer a reason for claiming the other Midland Disposal Store receipt for $14.95. It was amongst all of the receipts in his drawer. He did admit that he had put the receipts in the drawer for claiming (see page 1083(AB)). His only explanation was that, somehow or other along the line, the receipts had become mixed up. He admitted, significantly, that, if he had looked at the receipt, he would have realised that it was not payable and disposed of it. In this case, he admitted that he had claimed the expenditure on those receipts not knowing what it was for. Mr Phippard's explanation was that, when he came to look at the receipt and did not know what it was for, he claimed it from the company anyway (see page 1083(AB)).

115 At best, such conduct was careless, at worst it was dishonest. It was his manifest duty not to claim an expense which was not validly, in his opinion, claimable. His habit of keeping all receipts in his drawer, whether for company expenses or private, was extraordinarily careless and contributed, in part, to this erroneous claim. It might also be inferable that he either intended to claim or took no reasonable care to avoid claiming personal expenses as reimbursable company expenses.

Get Smart Merchandising

116 Mr Phippard claimed reimbursement for meals of $85.00 for 20 March 1999 (see page 661(AB)) with an invoice in support issued by "Get Smart Merchandising" (see page 662(AB)). His explanation was that this was a shirt which he bought in Melbourne as a reward for Mr Don Patterson, the BGC Area Manager at Karratha in this State. There was no evidence from Mr Patterson, for example, to corroborate that evidence.

117 Mr Phippard denied that he had told Mr Teo and Mr Buckeridge that he had told them the expense was for meals. Mr Teo and Mr Buckeridge raised this matter with Mr Phippard. They asked him if he expected them to believe that the receipt was a receipt for expenditure on meals and they said that he answered "Yes.", and he said "I don't know, I will have to look into it." Either was an unsatisfactory answer. It was also unsatisfactory that it was not until the hearing that Mr Phippard gave an explanation that he purchased it as a gift for Mr Patterson. Thus, he claimed an entitlement to reimbursement.

118 Mr Phippard admitted in evidence that this claim was wrong and was not for meals at all. However, he was once again entirely unable to explain why he made the claim. He did say that he believed that the expense claimed was legitimate. He was unable to say why he thought that it was a claim for a refund for the purchase of meals. He also said that it was a mistake (see page 1113(AB)).

119 It was submitted that the reference to the claim was that, whether he bought the shirt for someone else or not, he expected to be reimbursed without any complaint if he put down the word "meals" rather than "shirt". Again, it was, at least, a careless claim.

Parking Vouchers

120 There was a claim for a number of parking expenses, very minor and some as little as 60c. Of course, by examination, one does not know which ones were incurred on BGC's business.

121 Mr Phippard made false claims for reimbursement of parking fees, inter alia, for occasions when his daughter was at Fremantle Hospital and for when he was at Perth International Airport to farewell his daughter on 4 October 1998. He described it as "Perth Domestic Airport", when the claim was not.

122 He took a long time to admit this in cross-examination (see page 1107(AB)). His answers could properly be described as evasive for the most part, nor did he

specifically deny it when it was put to him in cross-examination that he was guilty of "petty rorting". He did, however, admit that he had no justification and that those claims were wrong. He was unable to say why he had not credited the amount of these claims back to BGC.

123 It was submitted that a reasonable employer would have doubt about all of the claims for company expenses because Mr Phippard had typed up a typewritten summary, seeking to justify the expenses which he had previously claimed (as submission which I understood was made to have general reference) and, further, because this was a case where Mr Phippard made a mistake and then insisted in claiming it as a company expense when it was not.

124 In my opinion, it was open to find that Mr Phippard was, in making these claims, guilty of petty rorting.

Liquorland

125 Mr Phippard bought a bottle of Spumante from Liquorland one evening, in fact, late on Christmas Eve. He said that he could claim it as a business expense. He said that he had bought it in order to take it into the office next day to enable staff to celebrate a contract entered into with BHP. He did not deny that he might have bought it for a client. This was again a claim which was so uncertain in its origins that it should not have been made. When there was an apparent discrepancy between his evidence and his Counsel's cross-examination, he was unable to explain it. He was asked, without objection, what his instructions to his Counsel were, but could not satisfactorily answer. However, I attach little weight to that.

McDonalds

126 Mr Phippard claimed $6.80 for lunch at McDonalds on 4 September 1998. The time on the receipt was for 23.13 pm, i.e. close to midnight, not lunchtime, and he was unable to explain why he had claimed this expense when he admitted that it was an incorrect claim. This claim was plainly not justified. Mr Phippard knew, or ought to have known, that it was not justified. This could also be properly accounted as "petty rorting".

Fuel Card Claims

127 Between 18 March 1999 and 10 April 1999, during the period when Mr Phippard and his wife were in the United States, there were four purchases of unleaded petrol (see page 496(AB)). Having given evidence that he had a BP fuel card which was generally kept in his wallet (see page 1099(AB)), Mr Phippard conceded that he used the fuel card to buy petrol for his Land Rover to take the benefit of a discount that was not available to him if he paid for the petrol personally (see page 1100(AB)), which he merely overlooked, and that he gave the card to one of his children when he was on holidays, because of an arrangement that he had with BGC, apparently through Mr Sweet (see pages 1102-1103(AB)). When questioned further about this approved "arrangement", he admitted that there was not one (see page 1104(AB)). Again, his explanation that he had been doing this all of the time he was with the company was unsatisfactory.

128 Mr Phippard admitted using the fuel card to fill his Landrover for private purposes and not putting it on his salary sacrifice, as he should have. He obtained a better discount using the company card, a BP card, but he claimed it as a company expense, not a personal expense. His only explanation was that he overlooked it.

129 Mr Phippard also said that there was an arrangement which he had with the company that they would enable the company to pay for the fuel used in his vehicles, even though someone else was driving the vehicle. Thus, he gave his fuel card to his daughter to purchase fuel whilst he was on holiday in the United States (see pages 1102-1104(AB)). This even ran to his neighbour up the road, he said. This was an arrangement which he reached with Mr Sweet.

130 Then, he went on to say that any permission to give the card to anyone to use was not discussed and admitted that his previous evidence to that effect was not quite right.

131 Mr Phippard's wife purchased items, which were not fuel, from shops on her fuel card; so did Mr Phippard. He did not explain why his wife was buying goods on the fuel card, nor did he offer to pay it back. Further, his explanation of his own purchases for items other than fuel on the card were hesitant. He then admitted that he was buying things from the shop, especially when he was away.

132 It was submitted that his acts were not simply cavalier, but were the acts of a dishonest person. These claims were again careless and irresponsible, at least, and, in relation to the purchasing of goods from the shop on his fuel card, petty rorting. His failure to refund the amounts paid for wrongly claimed expenses by his wife was thoroughly irresponsible.

Car Cleaning Invoice

133 This was a claim for the expense of car cleaning, said to have occurred on 4 March 1998. The claim is in Mr Phippard's handwriting on a yellow sticker. The sticker does not specify to whom he paid the money. Mr Phippard admitted that the claim could not be checked (see page 1077(AB)). He said that, whilst ultimately the next person to whom he reported was Mr Sweet, in effect, these expenses went no further than him and, therefore, he approved his own handwritten receipts.

134 Mr Phippard admitted that there was independent handwritten evidence of claims for expenses (see page 1056(AB)), but said "... but that's the way it was done." He did not think, he said, that it was unreasonable for his subordinate to do the same. This, again, demonstrated a careless and cavalier approach.

Parking Fines

135 Mr Phippard also, it was submitted, approved various expenses in circumstances which should properly be described as either dishonest, improper or in breach of his fiduciary duty to act in good faith because he approved reimbursement of two parking fines, one at the football in Subiaco at the weekend and the other in West Perth where he overstayed his time. He claimed it because he had illegally parked by mistake and was not careless, he said (see page 1096(AB)). That he should have asked his employer to refund expenses occasioned by his own carelessness and his breaches of the law was improper, it was submitted. That was clearly the case and it was open to be so found. In any event, there was no independent verification of the alleged expense.

Evidence of Expenditure

136 There were a lot of instances, too, where the only evidence of Mr Phippard's expenditure consisted of his own handwritten notes on Post-it stickers, backs of business cards, pieces of paper and illegible till receipts. He was unable to see the impropriety of making and approving claims supported by that material, compiled by his subordinates (see pages 1055-1061 and 1077-1078(AB)). There were no written guidelines requiring the production of vouchers and receipts, but as Mr Teo observed, to do so would be "prudential" (sic). As he also said and which is obvious, such claims are unverifiable. Mr Phippard's making claims which were not supported by independent evidence was, in my opinion, negligent and incompatible with his duty as a senior manager.

Unreadable Claims

137 There was, for example, a claim for entitlement in the sum of $138.00 for August 1998. Mr Phippard could not explain where this came from. It is supported by a handwritten note. The information which he gave to support it was inconsistent with the typewritten summary which he supplied.

138 Mr Phippard also claimed claims where he did not even know were legitimate claims upon his employer or when he was unable to read his own notes. That he should do so was entirely improper, Mr Sweet said in evidence. Mr Teo, of course, also criticised strongly the unidentifiable claims supported by handwritten pieces of paper.

139 Let me say, too, that Mr Teo's evidence that the claims were not, in his opinion, fraudulently made, was irrelevant and also answered a question answerable only by the Commissioner.

The Findings Open to be Made

140 I have already said that, as General Manager, Mr Phippard stood, for many purposes, in his employer's shoes. The Commissioner found that Mr Phippard had a cavalier attitude to expense account claims and made findings as to examples of this attitude, manifested. It was open to so find that, at least. Further, Mr Phippard made a claim for expenditure at Midland Disposal Store, and the Commissioner found that this was "quite improper". It was obviously open to him, on all of the evidence which I have referred to above, to so find.

141 The claim for reimbursement of parking fines incurred by his own illegal parking and which he admitted was found to be inappropriate conduct for an employee, particularly one in his position. The Commissioner also found that Mr Phippard made other claims which demonstrated laxity and poor judgement by him; examples being his claim for refund of a parking fee at Perth Domestic Airport which was a private expense, the "very liberal" use of his company fuel cards by members of his family for vehicles not part of his remuneration package, and excessive claims for reimbursement for telephone usage. The Commissioner found that all of this demonstrated "a lack of diligence as to an important matter of corporate governance". It was submitted on Mr Phippard's behalf that he was not dishonest, but that he made errors and admitted them when he discovered that he had made them.

142 It was submitted that all of these findings were sufficient to enable the Commissioner to have found that the summary dismissal was justified. However, the submissions went further. It was submitted that a glaring example, not cited by the Commissioner at first instance, was the practice of approving as claims for expenditure his own "receipts" (the quotation marks are mine). In fact, there was a practice whereby expenses were claimed, not by receipt or voucher, but by the handwritten note of the claiming employee. Mr Phippard said in evidence that it worked well. These handwritten records of expenditure, whether made contemporaneously or not, took the place of receipts or vouchers and were evidence of expenditure tendered for claims for reimbursement. They were wrongly described as handwritten receipts when they are not receipts at all, but handwritten claims. That claims evidenced in such a way are entirely inappropriate, unreliable and improper is self evident.

143 There was evidence of claims made in this way relating to private expenditure, wrongly characterised, and unreadable either contemporaneously with or after the claim. Further, Mr Phippard permitted himself the extraordinary practice of reconciling these claims every four to six months. Were he to use receipts or vouchers, he could have claimed amounts almost contemporaneously, one would have thought. The fact that there might be the odd exception where drinks were bought over a bar in circumstances where receipts are not readily handed out, is not a reason for a General Manager to adopt the practice which he did.

144 The errors and omissions and misuses which occurred are clear evidence, if it was needed, that his practices were quite unsatisfactory and demonstrated poor judgement, at least.

145 The Commissioner placed some weight on the fact that Mr Teo did not think Mr Phippard's acts were fraudulent, which evidence could be of no weight, as I have observed. That was a question to be determined by the Commissioner and not by Mr Teo.

146 It was submitted that the Commissioner had erred in finding that the prime reason for Mr Phippard's dismissal by Mr Buckeridge was that his response to Mr Buckeridge's questions was casual (see page 52(AB)). Mr Buckeridge made it clear that Mr Phippard's answers were unsatisfactory, that they were a disgrace for a person in his position, that he had acted in breach of trust and his position was untenable (see page 711(AB)). The Commissioner's findings, it was submitted, were not in accordance with that evidence.

147 Mr Teo said that he had no reason to believe that the expenses claimed were not incurred (see pages 836-838, 841 and 855-856 (AB)).

148 It was submitted that, if a proper test had been applied at first instance, the Commissioner would have been compelled to find that Mr Phippard had been dishonest, improper or in breach of his fiduciary duty to act in good faith and had acted in a manner fundamentally inconsistent with or repugnant to his contractual obligations, and in circumstances where the trust and confidence required of him no longer existed and could not reasonably be expected to exist.

149 In my opinion, it was open to find as the Commissioner did that Mr Phippard had demonstrated a cavalier attitude, laxity, poor judgement or a lack of diligence. He had also acted, in some instances, with deliberate dishonesty or carelessly.

150 The misclaimed expenses were for a few hundred dollars only. The amounts which he had misclaimed were small in the context of $57,000.00 claimed for expenses, but that is counterbalanced by his recklessness, negligence and, at times, deliberate false claiming. One main flaw in all of his behaviour is that he continued, as General Manager, a system of claiming expenses which permitted or could be used and was used to allow false, unidentifiable or unestablishable claims for reimbursement.

151 This was such a serious breach of his duty as General Manager, standing in the shoes of his employer, that it almost warranted summary dismissal.

Conclusions

152 It is noteworthy that the evidence of mistaken and deliberate misclaims and of making unverifiable claims was, as the Commissioner observed, not in dispute. It was admitted by Mr Phippard in evidence-in-chief and in cross-examination. What Mr Phippard clearly did, and it was open to find, was as follows—

153 He permitted a system of claims for reimbursement of expenses where the claims were unsupported by receipt, invoice or voucher. He identified claims incurred on his Diners Club card solely by his own knowledge, offering no account or voucher. He made unsubstantiated claims clearly as a result. He did not reconcile the claims much more than twice a year and then complained that it was difficult to identify claims.

154 He made claims on his employer, not caring whether they were valid or not. He "petty rorted" his employer to claim refunds of parking fines and parking expenses at Perth Domestic Airport and in Alma Street, Fremantle (private occasions). He allowed himself refunds on unverifiable claims. He permitted a system whereby claims were not verified, where so called "receipts" consisted of his handwritten notes which he then used as instruments for refunding.

155 He did not separate his own personal documents from his legitimate claims for reimbursement. There were mistaken claims for meals and accommodation at the Duxton Hotel. His explanation of making that claim was not credible. There was a mistaken claim for a shirt claimed as food. There was the permitted misuse of his fuel card by his daughter.

156 There were in evidence a lot of inadequate explanations for errors and misclaims. There were failures to refund claims which were erroneous, such as his wife's fuel card. There were admissions of mistaken claims long after the event and only after he was confronted on 2 November 1999 with evidence of errors and misclaims.

157 There was confusion about his long service leave entitlements and disputes about his salary sacrifice. There was a system which he permitted and used which had his subordinates processing his unproved claims. There was his quite implausible explanation of how he claimed reimbursement for the purchase of a car part. There were claims for unidentifiable items, unauthorised telephone call reimbursement claims and a process of minor dishonesty and systematic carelessness.

158 There were also his unsatisfactory attempts to say that the system worked when it did not, nor could it have.

159 That he did nothing to properly deal with those problems until 2 November 1999 is a manifestation of his breach of duty to his employer.

160 From it, of course, Mr Phippard benefited. He benefited to the extent of a few hundred dollars only, and that was a small amount compared to his employer expenses of $57,000. It was noted in evidence by Mr Teo that Mr Phippard had by far the greatest expense incurrence of any of the managers.

161 It was open to the Commissioner to find, on all of the evidence above, that there were no fixed rules for the claim of expenses and the claims were a matter of judgement and the exercise of a discretion. The honest and responsible judgement in that regard was a manifestation, as I would find, of Mr Phippard's fiduciary duty to his employer.

162 That he continued such a manifestly faulty and unreliable method of approving and proving his own claims and benefiting accordingly was a breach of his fiduciary duty. That he breached the high degree of trust place in him as a senior manager by so acting, when he had, in effect, sole accountability for these claims, was a breach of his duty.

163 The Commissioner did find that Mr Phippard did not deliberately set out to deceive BGC, but that he had a cavalier attitude to expense claims. It was open to so find and, as I have observed, it was open to find that some of his claims were dishonest or improper, as I have discussed them above. The Commissioner gave as an example the Midland Disposal Store claims where he misrepresented the claims as for meals.

164 The Commissioner went on to find—

> "The applicant conceded in evidence that he did not know what this was for but made a claim anyway. That in my opinion was quite improper. There was also evidence that the applicant sought to recover from the respondent monies to pay for parking fines incurred as a result of his own wrong doing. In my opinion, it matters not that the applicant was entertaining clients on these particular occasions. This was also completely inappropriate conduct for any employee, particularly one in the applicant's position. The respondent quite rightly took issue with these matters in my view. I also accept Mr Buckeridge's evidence that the applicant was casual in his responses in the meeting of 2 December 1999. This was also reflected in the manner in which the applicant gave some of his evidence, with some of his answers bordering on flippant in my view.
>
> There are other examples that I have set out in some detail above that demonstrate laxity and poor judgement by the applicant. Whilst the applicant's counsel submitted, as did the applicant in his evidence, that some of these expense items were able to be set-off under the applicant's salary sacrifice arrangement in any event, this misses the point. Were it not for the review undertaken by the respondent, many of these matters would probably not have been discovered. In particular I note that on the applicant's summary of expenses submitted to the respondent, he particularised an item for parking at the Perth International Airport that clearly was not a business expense. Other examples included the very liberal use of fuel cards by the applicant to include family members and for vehicles not part of his remuneration package. As to the telephone accounts, in the case of the Albany holiday home account this did involve a considerable number of private calls from the sample dealt with in evidence. This certainly suggests usage in excess of the 50% allocation for business. I also note the evidence of Mr Sweet, the applicant' former superior officer at the respondent, that he agreed that conduct of the type referred to above was not appropriate for a senior manager. Whilst some of these claims may seem minor in isolation, taken together they demonstrate a lack of diligence as to an important matter of internal corporate governance."

(See page 66(AB).)

165 All of those findings, and findings of some dishonesty, were, as I have foreshadowed, open to be made on the almost undisputed evidence. The question is whether they were of such a nature as to justify a summary dismissal.

166 As Ms Buckley submitted, in essence, the Commissioner did not apply the wrong test. BGC's case was that many of the acts of commission and omission were dishonest, that the cause of conduct was dishonest, and that this dishonesty justified his summary dismissal and it should have been so found.

167 In my opinion, it was open to be found that the claim for refund of parking fees was dishonest and petty rorting, but these were very minor. The claims for refund of parking fines were not justified and Mr Phippard knew or ought to have known that.

168 Other claims such as the Midland Disposal Store claims were claims which misrepresented the nature of the claim. This was repeated with the Get Smart claim. These might be said to be dishonest claims, but might equally be accounted as culpably careless. A similar observation can be made about the Feroza claim and some others.

169 The real nature of Mr Phippard's sin can be characterized thus. He allowed there to be in place, as a very senior manager, a system of claims for expenditure in his own case which allowed mistaken, unverifiable claims and several dishonest claims. He was lax even within that system in adopting an irregular and permittent reconciliation process to protect his employer's interests, which he did not. As a senior manager, he was required to set the example and to stand in his employer's shoes.

170 His inability to explain why he misclaimed (even when the claim was not improper or dishonest) was proof of how obviously and fundamentally the system was flawed. It constituted a breach of Mr Phippard's fiduciary duty to allow and claim on such a system, in some cases dishonestly. As the Commissioner found correctly, it was lax and cavalier and a failure in proper corporate administration. He explanations in evidence were, on a fair reading, often cavalier and flippant.

171 The question is whether Mr Phippard's omissions and commissions fitted within the tests outlined above and, therefore, justified summary dismissal. In my opinion, within the helpful dicta of Dixon and McTiernan JJ in *Blyth Chemicals Ltd v Bushnell* (HC)(op cit) at pages 81-82, for example, this was not conduct in respect of matters which were so important as to be incompatible with the fulfilment of his employee's duty. The several small dishonest claims were in conflict between his interest and his duty to his employer.

172 However, in my opinion, there was not sufficient evidence to justify the inference that Mr Phippard was calculatedly, by unverifiable claims, stealing systematically from his employer. There simply were not enough such claims nor were the amounts large enough to lead to that conclusion. He was, in fact, dismissed for stealing or the suspicion of stealing, not just for flippancy. Mr Buckeridge's evidence made that clear. His carelessness and minor dishonesty, in my opinion, might have been enough to be destructive of the necessary confidence or involve the incompatibility, conflict or impediment to constitute an actual repugnance between his acts and relationship.

173 However, in characterising it otherwise, there was sufficient evidence to justify the Commissioner at first instance finding as he did. I am not disposed to say that there was so much dishonesty or that the breach of fiduciary duty was so great, within the tests I have laid down above, as to justify summary dismissal and the Commissioner did not err in that respect. I would add that, in my opinion, read as a whole, the Commissioner's reasons for decision did not reveal his application of the wrong test. Further, he did not err, as I have indicated, in the context of the application of the right test.

174 However, manifestly in all of the circumstances, a dismissal on notice was not unfair, for the reasons advanced by the Commissioner.

Set Off and Counterclaim

175 BGC claimed that Mr Phippard owed BGC, arising out of his contract of employment, the amount of $29,576.90.

176 Primarily, although the Commissioner found that there was a gap in the evidence and that that claim was not substantiated, the Commissioner found that a debt due by an employer to an employee cannot be the subject of a set off or counterclaim in an application for contractual benefits, applying the decision of the Full Bench in *Conti-Sheffield Real Estate v Brailey* (op cit). The reasons for decision in that case relied principally upon the terms of the *Truck Act* 1993 (since repealed).

177 The first question is whether this was an "industrial matter", as defined in s.7 of the Act.

178 The Full Bench held in relation to the *Truck Act* 1899-1904 in *Conti-Sheffield Real Estate v Brailey* (op cit), s.17B, C and D of the *Minimum Conditions of Employment Act* 1983 (hereinafter referred to as "the MCE Act") covers the same ground presently. S.17B replaces s.3 of the *Truck Act* and prevents the Commission entertaining a claim by an employer that the employee owes him money.

179 The question of set-off and counterclaim arose in relation to the operation of s.17B, C and D of the MCE Act to circumstances of this kind, where there is a salary sacrifice which forms part of the conditions of employment.

180 In practical terms, the salary sacrifice worked in this way. Mr Phippard would arrange for BGC to pay for purchases of goods or services, for example, parts for cars, overseas travel and accommodation. He would then pay for it on his own Diners Club card and the payments would then be reimbursed by direct payment by Mr Phippard to BGC or by salary sacrifice to him. There were also cash borrowings which were reconciled from time to time. Mr Phippard used this system, as a person in a senior position, to have the benefit of the discounts which his employer could obtain on purchases for supplies. He would then, as I have said, pay direct or refund by salary sacrifice.

181 As was correctly submitted by BGC, s.17B, s.17C and s.17D of the MCE Act essentially now establish the statutory scheme in relation to payment of wages or salary and deductions therefrom. As was submitted, the nature of salary sacrifice was that, as a condition of employment, Mr Phippard authorised the employer to spend money on his behalf which was then debited against his salary entitlements, subject to fringe benefits tax adjustments, or was repaid by him direct.

182 One of the benefits, as submitted, was quite clearly that this scheme enabled Mr Phippard to take advantage of BGC's greater purchasing power and therefore obtained the benefit of discounts and other benefits for the purchase of goods and services such as accommodation, travel and vehicle parts.

183 I now turn to consider what is the effect of the relevant sections of the MCE Act.

184 S.17B of the MCE Act, to paraphrase it, prohibits an employer from directly or indirectly compelling an employee to accept goods, accommodation or services instead of money as part of his/her pay, nor to spend any part of his or her pay in a particular way.

185 S.17C of the MCE Act prescribes that an employee, to the extent that he/she receives his/her pay in money, is entitled to be paid in full by cash, cheques or money orders, or direct to a bank or financial institution, or as required by a workplace agreement, award or contract of employment. In the case of payments other than by cash, or pursuant to an award, contract or workplace agreement, payments can only be so made if authorised by the employee.

186 Generally speaking, by virtue of s.17D(1) of the MCE Act, the employer is authorised to deduct monies and pay them on behalf of the employee, if authorised in writing.

187 The Commission, it is submitted, is required to consider whether, pursuant to his conditions of employment, Mr Phippard has an entitlement and what that entitlement is. That involves consideration of what he owes his employer.

188 Mr Hotchkin submitted as follows—

> "We say the evidence here was quite different. The evidence here is that the parties engaged in a course of conduct over a number of years which was part and parcel of his contract of employment that enabled him to take the benefit and which would be reconciled at the end of each year or at some intermittent stages during the period of employment. Some detail in that regard is contained at pages 667 to 709 of the Appeal Book. Unlike the Truck Act, ... section 17D subsection (1) paragraph (b) of the Minimum Conditions of Employment Act expressly permits the employer to do so in these circumstances."

189 Further, it was submitted that, if it were found that BGC was correct in summarily dismissing Mr Phippard, there was in fact an amount due to the employer. It should be considered in calculating the benefit. If BGC was not justified in dismissing him, then it should be set off against the amount ordered for reasonable notice.

190 The evidence established that the salary sacrifice and obligation to reimburse formed part of the employment relationship. This was within jurisdiction, so the submission went. The evidence as to what was owing is clearly set out in the evidence of Mr Ng and Mr Edwards so that there is no gap in the evidence, it was further submitted. The cost of the United States trip is a large portion of the salary sacrifice.

191 It was submitted by Ms Buckley on behalf of Mr Phippard that the amount claimed was rightly within the definition of "wages", for the purposes of the *Truck Act* in *Conti-Sheffield Real Estate v Brailey* (op cit). That Act was repealed and the MCE Act was enacted.

192 Ms Buckley rightly conceded that, as a term of Mr Phippard's contract, the employer was entitled to deduct amounts from Mr Phippard's wages and that this was demonstrated by the operation of the salary sacrifice account. Mr Phippard's uncontradicted evidence was that he could take part of his wages in the form of salary sacrifice and that he could, within reason, choose the items which he wished to be included in that salary sacrifice.

193 It was never suggested, it was submitted, that this constituted authority to the employer to deduct income from Mr Phippard's salary. Accordingly, it was submitted, there was no provision in his contract of employment which would bring the matter within the definition of "industrial matter", as defined in s.7 of the Act. Further, since there is no condition, the matter does not fall within the exception to s.17B of the MCE Act. Accordingly, s.17B and C of the MCE apply and no deduction is permissible.

194 It was submitted that the ratio in *Conti-Sheffield Real Estate v Brailey* (op cit) applies because the *Truck Act* provisions referred to in that case have been "picked up" by the MCE Act. Further, on the authority of *Conti-Sheffield Real Estate v Brailey* (op cit), the claim for a debt due and owing was beyond power, and thus not an "industrial matter", as defined. The claim for debt does not arise out of the employment relationship or because the parties were employer and employee in an industry, within the meaning of s.7 of the Act.

195 In my opinion, the employer cannot compel the employee to spend his pay or any part of it in any particular way and, therefore, he/she/it cannot compel the employee to apply his/her wages to the liquidation of a debt, unless it was authorised to be deducted and paid in writing, and such deduction was to be paid under the contract.

196 Essential to a consideration of this matter is that the contract of employment provided (see Mr Teo's evidence) that Mr Phippard could take part of his wages in a salary sacrifice, and I have discussed that matter and the evidence relating to it above.

197 However, there was no evidence that, by this arrangement, the employer was authorised to deduct items at will from Mr Phippard's wages to meet his expenditure. Firstly, there was no authority conferred by the contract to make those deductions and, further, there was no authority to deduct those amounts unless, as the evidence seems to reveal, it was given when figures were agreed on. That

that authority did not exist is borne out in part by the evidence that such expenditure was also refunded by direct repayments by Mr Phippard. These provisions are not ambiguous and exist clearly to protect employees from statutorily unauthorised payments in lieu of wages or salary and statutorily unauthorised deductions from wages or salary.

198 In my opinion, the MCE Act did not and does not authorise the deductions which, it was said, could be made without the authority of Mr Phippard and, for the reasons expressed above, were not so authorised. Particularly, there was no evidence that any deduction was authorised in writing, as s.17D of the MCE Act requires. In particular, the amount claimed of $29,576.90 was not deducted and not authorised to be deducted at any time, because the amount claimed was disputed and still remains in dispute.

199 The similarity between the provisions of s.17B, C and D of the MCE Act and the *Truck Act*, as I have discussed them, and as they are referred to in *Conti-Sheffield Real Estate v Brailey* (op cit), are sufficient to justify that view.

200 Further, the recovery by set off or counterclaim, which was not directly raised on appeal, is beyond power and outside jurisdiction, for the same reasons as were expressed in *Conti-Sheffield Real Estate v Brailey* (op cit). I will not reproduce here the well known words of s.7 of the Act, where the words "industrial matter" are defined (see also *ADSTE v Building Management Authority* 72 WAIG 2162 (FB) which is authority for the proposition that the recovery of a debt (in that case, an overpayment) by an employer from an employee is generally not an "industrial matter".)

201 In this case, to add to that argument, I observe that this debt is sought to be recovered in a s.29(1)(b)(i) proceeding, after the employer/employee relationship has terminated. The matter is not, in my opinion, one which affects the rights of employers and employees, qua employers and employees in an industry (as defined in s.7 of the Act). In that connection, too, I would add that the debt, if it exists, has a clear life of its own, giving rise to a cause of action existing outside the jurisdiction and power conferred by this Act and continuing after the expiry of the employer employee relationship. (As a matter of interest, there is a useful discussion by Steytler J of the distinction between the termination of a contract of employment and an employment relationship in *Conway-Cook v Town of Kwinana* (FC) [2001] WASCA 250. *Belo Fisheries v Froggett* 63 WAIG 2394 (IAC) is not an authority to the contrary.)

202 There is or was, as submitted by Ms Buckley, no jurisdiction to hear an action for debt, as the set off and/or counterclaim in reality was, as I so observe. Further, there is no power, in my opinion, conferred by s.29(1)(b)(ii) of the Act, to entertain such a claim. It will be clear that Mr Hotchkin's submissions to the contrary are, for those reasons, not accepted.

The Evidence of Debt—Insufficient

203 Further, the Commissioner was correct in finding that there were gaps in the evidence of liability. These gaps arose in relation to the crucial question of the amount in dispute. For example, as Mr Phippard said and as Mr Edwards admitted, the extent of the debt owed by Mr Phippard for his trip to the United States was not agreed or "sorted out". There was evidence from Mr Sweet confirming Mr Phippard's version of his liability. Part of the $29,576.90 said to be owing includes an amount of $14,000.00 for the journey to the United States and accommodation. That is only one of the amounts in dispute.

204 There is also an issue as to what amount was available to be spent for salary sacrifice. Even Mr Teo admitted in evidence that some of the amounts claimed as part of that sum of $29,576.90 may have been included in the salary sacrifice amount. Further, there were no documents produced to support what had been taken out and there were also amounts which were attributable to fringe benefits tax. (See Mr Teo's evidence at pages 874-875(AB) and see Mr Ng's evidence at pages 955-956(AB), in particular in relation to the assessing of fringe benefits tax and what expenses attracted it.) For example, too, Mr Teo confirmed that $22,000.00 was not spent out of Mr Phippard's salary in 1997. Some debits, too, related to the Diners Club account.

205 Mr Ng's evidence was that some amounts now claimed pursuant to the purported set off and counterclaim may have already been taken up by way of salary sacrifice. Mr Ng referred to a figure of overspent salary sacrifice in the sum of $22,000.00 (not $29,576.90) and including $10,000.00 for overseas travel and accommodation (see page 701(AB)).

206 Thus, it is quite clear that there was a gap in the evidence and, given the burden on BGC to establish the set off and counterclaim, it has not established it on the balance of probabilities, there being gaps in the evidence, as I have observed.

What is alleged to be owing?

207 Mr Phippard maintained that, at the end of 1997, he had a considerable amount of money available, as part of his wages, in his salary sacrifice account and that was available and carried forward to the next year of his employment in 1998. There was offset against that amount by way of salary sacrifice a number of items which form part of the $29,576.90 which is outstanding or which have already been deducted from his wages, as part of the amount of salary sacrifice said to be outstanding.

208 The Commissioner said that there was a gap in the evidence about this figure and that this finding had not been appealed against. Mr Teo said that amounts relating to the Diners Club expenses and personal expenditure otherwise incurred, including the trip to the United States and cash reconciliation, were owing (see pages 95-96(AB)).

209 On 2 December 1999, Mr Phippard was told that he owed $24,820.00 to BGC. At page 705(AB), appears the amount which Mr Teo said was owing as at 23 December 1999, namely $22,404.00. As at the time of the hearing, Mr Phippard was said to owe $29,576.90. Mr Teo admitted that some of the amounts claimed as forming part of that $29,576.90 may have been included in the salary sacrifice account (see pages 862, 874-875(AB)).

210 Further, there was no documentation produced which set out exactly what had been taken out of Mr Phippard's salary for self sacrifice. Mr Teo also confirmed that it included amounts attributable to fringe benefits tax.

211 That finding of fact is not appealed against. There are, on the evidence, disputes about the applicability to Mr Phippard's account. All of these things support the claim for $29,576.90. The final reconciliation document (exhibit A3) was not produced until the hearing (see, too, Mr Ng's evidence at pages 955-956(AB)). At page 701(AB), Mr Ng said—

> "In 1998, Ian overspent $3,452.00 on his salary sacrifice. At the end of 1999, he had over-spent $22,404.00 on his salary sacrifice. That included our expenditure on his overseas travel for airfares and accommodation of about $10,000.00. If he repays that to BGC, his salary sacrifice allowance would be largely satisfied."

212 There is another significant question and that is the amount of $7,076.31 extra claimed by Mr Phippard (see page 501(AB)) handed to Mr Teo and Mr Buckeridge. It is not at all clear what he owed to BGC. It is certainly not $29,576.90.

213 It would be unsafe to rely on the evidence led in support of the claim by BGC because the figures given by BGC failed to take into account the extent to which some of those amounts may already have been debited. Mr Phippard's salary, in accordance with the salary sacrifice arrangement, and a dispute between the parties as to claiming fringe benefits, too, from BGC on items where there was no agreement to debit fringe benefits tax (Mr Ng's evidence (exhibit A2 and A3 and Mr Teo's evidence)). There is simply insufficient evidence to establish that claim, for those reasons, even if the claim were competent.

214 That ground must fail.

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215 Mr Phippard cross-appeals pursuant to the Notice of Appeal appearing at pages 1240-1242(AB).

Was the dismissal unfair?

216 It was asserted that the dismissal was unfair because there was an absence of any wilful misconduct or intention to deceive or defraud, and because of the unintentional nature of the conduct of Mr Phippard, such as to justify instant dismissal.

217 Further, it was submitted that the decision to dismiss was based on the alleged dishonesty of Mr Phippard, which was not established, or his failure to apologise for that dishonesty. It was also submitted that, given his long record of faithful service and that a summary dismissal was not warranted, and that there was a threat of legal proceedings which was intimidatory, the Commissioner ought to have found that the dismissal was harsh, oppressive and unfair.

218 It was also submitted that the Commissioner erred when he said that what needs to be considered is whether the actual act of dismissal, even if wrongful at law, would have been unfair had the contract been terminated lawfully. It was also submitted that, where a summary dismissal is not warranted, it would fall within the concept of harsh and unfair treatment. That does not always follow.

219 Mr Phippard described what occurred. It was submitted that Mr Buckeridge had berated him on some bases not relevant to his dismissal. He was summarily dismissed, threatened with Supreme Court litigation and was the subject of demands for significant amounts of money. This treatment was harsh and unfair, it was submitted.

220 For the reasons which I have already expressed, Mr Phippard's conduct fell far short of that expected of a senior executive entrusted with authority to approve all of his expenses and not subject to supervision in that regard. The Commissioner was entitled to so find.

221 Further, Mr Phippard was aware that he might be dismissed if he could not justify his expenses. He had a month's notice to justify his expenses and was unable to do so. It was open to so find.

222 Further, it was open to find and the Commissioner did find that Mr Phippard was guilty of laxity and poor judgement. In particular, he allowed himself a regime of unverified and unverifiable claims which, not surprisingly, he could not justify to some extent. He was, as a senior manager, careless and, in some instances, dishonest in his claims. He was unable to justify them in evidence and incapable of seeing or admitting how unsatisfactory his conduct was. His inability to understand the inappropriateness was also a matter for criticism. That, too, was relevant and could have been so found.

223 Mr Phippard did not frequently ensure that he paid money owing to his employer, or discover and refund his employer for expenses mistakenly and wrongly claimed. It was open to so find. It was also open to find that his laxity and carelessness and a lack of contrition could and would destroy his employer's confidence and render the dismissal not unfair.

224 The course of conduct, viewed as a whole, demonstrated a lack of diligence, some dishonesty and a lack of responsibility in an area which, as a senior manager, Mr Phippard was required to be diligent, responsible and trustworthy.

225 It follows that the Commissioner did not err in finding that these matters cancelled out or overweened the other matters mentioned above. In particular, it was not at all unfair to decide on dismissal in the absence of apology, given the relevant considerations which I have mentioned. Further, the mention of litigation by Mr Buckeridge was not intimidatory or unfair in circumstances where Mr Phippard was casual and unrepentant and remained so, and where there was alleged to be an amount of money owing. Further, this was not a minor employee, but a senior manager who was alleged to have owed money. There was more robustness than intimidation in that.

226 It was open, as the Commissioner found, that the dismissal, although unlawful, was not unfair. The unlawful conduct of the employee is a relevant consideration. It will, by the nature of these matters, be unusual to find that an unjustified summary dismissal is not unfair. The Commissioner found, in this case, that the dismissal was not unfair. The reasons for him so finding have been canvassed in detail in these reasons.

227 In my opinion, for the reasons which I have set out above, the summary dismissal, although not lawful, was not unfair, or alternatively not established by Mr Phippard to be unfair. Even were that wrong, the summary dismissal was fair, for those reasons. For that reason, the cross-appeal fails. Were I wrong in that view, the appropriate notice was twelve months because of the factors referred to in paragraph 2 of the grounds of cross-appeal (see page 1242(AB)) (see *Tarozzi v WA Italian Club (Inc)* 71 WAIG 2499 (FB)).

228 That ground of the cross appeal is, for those reasons, not made out.

FINALLY

229 There was no error in the exercise of the discretion established, having regard to the principles in *House v The King* (HC)(op cit), on either appeal, for those reasons.

230 For all of those reasons, I would find appeal, No FBA 7 of 2001, not made out and dismiss it. I would find the cross appeal, No FBA 12 of 2001, not made out and dismiss it.

CHIEF COMMISSIONER W S COLEMAN

231 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:

232 I have had the benefit of reading the Reasons for Decision of the Hon. President. The grounds of appeal and background are covered in his reasons and do not require repeating. I concur with the Hon. President that there has been no error in the exercise of the Commissioner's discretion on either appeal and hence both the appeal and cross appeal should be dismissed. In saying this, I have come to the same conclusion that summary dismissal was not warranted in all the circumstances of the case, but that a termination of employment, on notice, would otherwise have been fair.

233 The method used by the respondent for claiming and reconciling expenses was clearly casual and inadequate. This system is something which Mr Phippard must take some responsibility for given the seniority of his position and his duty to the company. Notwithstanding Mr Phippard's long service with the company, or the limited amount of expenses queries compared to the extensive amount of yearly expenses (about $57,000), his actions display something more than carelessness in the extreme in the conduct of his affairs. This can be seen in the Midland Disposal Store claim, a claim made without knowing what it was for, the excess and errant usage of telephone and fuel accounts, and the wrongly claimed expenses for parking, a parking fine, car maintenance and an Albany flight. These matters are suggestive of a very liberal approach to claims and on occasion an attitude of "when in doubt, claim".

234 It was open to find that the conduct of Mr Phippard was not wilful so as to warrant summary dismissal. It was also open to find, as the Commissioner did, that he knew that his job was in jeopardy if he could not properly explain his expenses claims. Similarly Mr Phippard did not properly address himself to explaining to his employer the bases of his claims. I make nothing of the claim that the employer acted harshly in threatening legal action, given the circumstances of the discussion. I adopt the reasoning of the Hon. President in relation to the set-off and counterclaim.

THE PRESIDENT

235 For those reasons, the appeals are dismissed.

Order accordingly

2001 WAIRC 04010

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	BGC (AUSTRALIA) PTY LTD, APPELLANT/RESPONDENT
	v.
	IAN PHIPPARD, RESPONDENT/ APPELLANT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER S WOOD
DELIVERED	THURSDAY, 25 OCTOBER 2001
FILE NO/S	FBA 7 OF 2001, FBA 12 OF 2001
CITATION NO.	2001 WAIRC 04010

Decision	Preliminary orders granted
Appearances	
BGC (Australia) Pty Ltd	
	Mr M C Hotchkin (of Counsel), by leave, and with him
	Ms R L Amey (of Counsel), by leave
Ian Phippard	Ms W F Buckley (of Counsel), by leave

Order.

These matters having come on for hearing before the Full Bench on the 27th and 28th days of August 2001, and having heard Mr M C Hotchkin (of Counsel), by leave, and with him Ms R L Amey (of Counsel), by leave on behalf of BCG (Australia) Pty Ltd (hereinafter referred to as "BGC") and Ms W F Buckley (of Counsel), by leave, on behalf of Mr Ian Robert Phippard, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 22nd day of October 2001, it is this day, the 22nd day of October 2001, directed, declared and ordered as follows—

(1) THAT appeals No. FBA 7 of 2001 and FBA 12 of 2001 be heard together.

(2) THAT the applications filed herein to extend time to file and serve the Appeal Books out of time in appeal no. FBA 7 of 2001 be and is hereby granted.

(3) THAT BGC in appeal No. FBA 7 of 2001 be and is hereby granted leave to amend the Grounds of Appeal in the Notice of Appeal filed herein by substituting the Amended Grounds of Appeal filed herein for the existing Grounds of Appeal and to add the Amended Grounds of Appeal to the Appeal Book at pages 1243 to 1251.

(4) THAT leave be and is hereby granted to add the Proof of Evidence of Rosalea Anne Earnshaw to the Appeal Book at pages 1252 to 1260A.

(5) THAT leave be and is hereby granted to add pages 208 to 217 of the transcript at first instance to the Appeal Book at pages 1261 to 1271.

(6) THAT leave be and is hereby granted to add exhibit A3 (at first instance) to the Appeal Book at page 1272.

(7) THAT leave be and is hereby granted to Mr Ian Robert Phippard in appeal No. FBA 12 of 2001 for Ground 2 of the Grounds of Appeal to be deleted.

By the Full Bench

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

[L.S.]

2001 WAIRC 03988

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	BGC (AUSTRALIA) PTY LTD, APPELLANT/RESPONDENT
	v.
	IAN PHIPPARD, RESPONDENT/ APPELLANT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER S WOOD
DELIVERED	MONDAY, 22 OCTOBER 2001
FILE NO/S	FBA 7 OF 2001, FBA 12 OF 2001
CITATION NO.	2001 WAIRC 03988

Decision	Appeals dismissed
Appearances	
BGC (Australia) Pty Ltd	
	Mr M C Hotchkin (of Counsel), by leave, and with him,
	Ms R L Amey (of Counsel), by leave
Ian Phippard	Ms W F Buckley (of Counsel), by leave

Order.

These matters having come on for hearing before the Full Bench on the 27th and 28th days of August 2001, and having heard Mr M C Hotchkin (of Counsel), by leave, and with him Ms R L Amey (of Counsel), by leave on behalf of BCG (Australia) Pty Ltd and Ms W F Buckley (of Counsel), by leave, on behalf of Mr Ian Robert Phippard, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 22nd day of October 2001, it is this day, the 22nd day of October 2001, ordered as follows—

(1) THAT appeal No. FBA 7 of 2001 be and is hereby dismissed.

(2) THAT appeal No. FBA 12 of 2001 be and is hereby dismissed.

By the Full Bench

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

[L.S.]

2001 WAIRC 04053

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	BRIAN TURVEY, APPELLANT
	v.
	PEEDAC PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER S WOOD
DELIVERED	THURSDAY, 1 NOVEMBER 2001
FILE NO/S	FBA 41 OF 2000
CITATION NO.	2001 WAIRC 04053

Decision	Appeal dismissed.
Appearances	
Appellant	No appearance by or on behalf of the appellant.
Respondent	Ms J M Stevens (of Counsel), by leave

Order.

This matter having come on for hearing before the Full Bench on the 1st day of November 2001, and there being no appearance by or on behalf of the appellant and having heard Ms J M Stevens (of Counsel), by leave, on behalf of the respondent, and the Full Bench having determined the matter, the Full Bench was satisfied and found—

(1) WHEREAS the notice of the hearing had been duly given to the appellant pursuant to s.27(1)(d) of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act") in that notice was given to the only address provided to the Commission and the appellant not having advised of any other address;

(2) WHEREAS the said notice was given to the appellant according to the *Industrial Relations Commission Regulations* 1985 (as amended) on the 16th day of October 2001 and, notwithstanding that the said notice was returned on the 24th day of October 2001;

(3) WHEREAS the Notice of Appeal was filed in the Commission on the 17th day of August 2000 and served on the 17th day of August 2000;

(4) WHEREAS the Commission was advised on 21st day of June 2001 that the Solicitors acting on behalf of the appellant no longer acted on behalf of the appellant and further that the Solicitors were not aware of the whereabouts of the appellant;

(5) AND WHEREAS the Commission being satisfied that, in accordance with Practice Direction No 2 of 2000 (80 WAIG 5680), no or no sufficient step has been taken by the appellant to advance the proceedings for more than 12 months and that, therefore, the said appeal should be dismissed for want of prosecution pursuant to s.27(1) of the Act;

The Full Bench now does order and declare and it is this day, the 1st day of November 2001, declared and ordered as follows—

(1) THAT the notice of the hearing, having been duly given to the abovenamed appellant and respondent, the matters should be heard and determined in the absence of the appellant pursuant to s.27(1)(d) of the Act;

(2) THAT appeal No. FBA 41 of 2000 be and is hereby dismissed.

By the Full Bench,

(Sgd.) P.J. SHARKEY,

[L.S.] President.

COMMISSION IN COURT SESSION— Matters dealt with—

2001 WAIRC 04086

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	CHIEF EXECUTIVE OFFICER WESTERN AUSTRALIAN ("WA") TOURISM COMMISSION, RESPONDENT
CORAM	COMMISSION IN COURT SESSION
	COMMISSIONER P E SCOTT
	COMMISSIONER S J KENNER
	COMMISSIONER J H SMITH
DELIVERED	TUESDAY, 6 NOVEMBER 2001
FILE NO	PSACR 5 OF 2001
CITATION NO.	2001 WAIRC 04086

Result	Application dismissed.
Representation	
Applicant	Ms J van den Herik
Respondent	Mr J Lange

Reasons for Decision.

1. The matter before the Commission in Court Session is one referred pursuant to s 44(9) of the Industrial Relations Act 1979 ("the Act") in relation to a dispute between the applicant and the respondent, concerning rates of pay for some 22 employees of the respondent.

Background

2. On or about 8 June 2001 the respondent notified some 124 of its employees, previously covered by a workplace agreement under the Workplace Agreements Act 1993, that despite the expiry of the workplace agreement on 30 April 2001, the employees concerned would continue to receive the salary rates applicable under it. Those salary rates are in excess of the salary rates having application to the remainder of the respondent's employees, covered by an industrial agreement of this Commission, known as the Western Australian Tourism Commission Enterprise Bargaining Agreement 1999 ("the Agreement").

3. The applicant alleges that the respondent, in doing this, has unfairly treated those employees covered by the Agreement, and it seeks an order that they have their salaries increased to the same salary rates as paid to the other 124 employees of the respondent.

4. The respondent submitted that the employees previously covered by the workplace agreement have had their salaries maintained at the existing rates as a consequence of government policy and the applicant's claim is premature, as the additional salaries paid are an interim measure, pending finalisation of public sector wide negotiations for a framework agreement to create parity in wages and conditions. Furthermore, the respondent says that the affected employees have not had their salaries and conditions reduced in any way.

5. A preliminary issue as to the jurisdiction of the Commission to deal with this matter has been raised. The respondent submitted that the Agreement continues in force and effect by the terms of the Act, notwithstanding its nominal expiry and therefore, the Commission is without jurisdiction and power to vary it by order, which is the effect of the present application.

6. The Commission in Court Session determined that this issue would be dealt with as a preliminary point and directed the parties to file and serve written submissions. The parties were also afforded an opportunity to make brief oral submissions to the Commission which they did. These reasons relate only to the preliminary point of jurisdiction.

Contentions of the Parties

7. The respondent submitted that the Agreement, as made pursuant to s 41 of the Act, was made for a term of two years commencing 30 April 1999, with its nominal expiry date being 29 April 2001. By the terms of s 41(6) of the Act however, notwithstanding the expiry of its nominal term, the Agreement continues in force and effect until the parties to it retire from it, or a new agreement or an award is made in substitution for the Agreement. None of these matters have occurred.

8. It was submitted that an industrial agreement which remains extant, cannot be varied by an order of the Commission, in the absence of consent by the parties to the instrument. In this connection, the respondent made reference to and relied upon the decision of the Industrial Appeal Court in *Director General of the Ministry for Culture and the Arts v CSA and Others (2000)* 80 WAIG 453 and a decision of the Commission in Court Session in *ALHMWU v Burswood Resort (Management) Ltd (2001)* 81 WAIG 2432.

9. The respondent therefore submitted that in the absence of jurisdiction, the application must be dismissed.

10. The applicant put a number of submissions to the Commission in Court Session. First, it was submitted that

the jurisdiction and powers of a Public Service Arbitrator ("Arbitrator") are very broad and empower an Arbitrator to inquire into and deal with any industrial matter relating to a Government officer, a group of Government officers or Government officers generally. It was submitted that by reason of the provisions of ss 80E and 80G of the Act, the jurisdiction and powers of the Arbitrator were broader than those of the Commission exercising its general jurisdiction and powers. Furthermore, it was said that this scheme was separate to and distinct from the exercise by the Commission of its general jurisdiction and powers arising out of matters dealt with under ss 32 and 44 of the Act.

11. On this basis, the applicant submitted that the decision of the Commission in Court Session in *ALHMWU* was distinguishable because that matter involved the referral of a claim pursuant to s 44(9) and relied upon the general jurisdiction and powers of the Commission and not those of the Arbitrator, as the submission went. In this respect, the applicant submitted that the order sought in these proceedings was not one varying the Agreement, but rather to settle a dispute. It was said that to make such an order would be consistent with equity, good conscience and the substantial merits of the case pursuant to s 26(1)(a) of the Act.
12. An alternative argument was put by the applicant, that the claim before the Commission was based upon an implied term of the employees' contracts of employment, that they would not suffer inconsistent treatment by the employer, compared to other employees. The source of this implied term was said to be s 8 of the Public Sector Management Act 1994 ("the PSMA"), which requires an employer to treat employees fairly and consistently and not subject them to arbitrary or capricious acts.

Conclusions

13. For the following reasons, we are not persuaded by the applicant's submissions and we are of the view that the claim must fail for want of jurisdiction.
14. Whilst it is the case that the applicant has invoked the jurisdiction and powers of the Arbitrator in this claim the fact remains, that the Agreement, as a consequence of the provisions of s 80G of the Act, is a creature of s 41 of the Act. That being so, and by reason of s 41(6), notwithstanding the expiry of its nominal term, the Agreement continues in full force and effect until one of the events occurs as specified in that sub-section.
15. The Act provides a specific scheme for the registration, effect, amendment, renewal and cancellation of industrial agreements in ss 7, 41 and 43. Sections 41 and 43 expressly apply to the jurisdiction and powers of an Arbitrator. This is made clear by s 80G, which puts beyond doubt that the provisions of Division 2 of Part II that apply to or in relation to the exercise of the jurisdiction of the Commission, apply with such modifications as are prescribed or may be necessary, to the jurisdiction of an Arbitrator. With respect, we agree with the observations of Fielding SC in *Dragicevich v Department of Resources Development (2000)* 80 WAIG 428 where at 429, he noted that reference to these provisions in s 80G(1) are declaratory and not exclusive. They do not mean that other provisions of the Act have no application to the exercise of jurisdiction by an Arbitrator. What s 80G(1) does, is to put the matter beyond doubt.
16. An industrial agreement only has force and effect as such, once it is registered under the Act. This applies to all industrial agreements, whether they are made by the Commission in its general jurisdiction or by the Commission constituted as an Arbitrator. Once so registered, and until such time as a party retires from it, or it is varied, renewed or cancelled by a new agreement between the same parties as those bound by its terms, an industrial agreement is an instrument reflecting consensus between those parties to it.
17. However one views the present application, its effect in our opinion, is to seek an increase in salary rates for persons bound by an existing industrial agreement in a manner not permissible under the statutory scheme. Put another way, it seeks to impose rights and obligations upon parties to an industrial agreement, in respect of subject matter of the agreement, that being salaries, to which both parties to the instrument do not consent: *Ministry for Culture and the Arts* at 456-457 per Anderson J. In our opinion, the circumstances of the present claim are not in principle, distinguishable from those before the Commission in Court Session in *ALHMWU.*
18. Finally, as to the argument of the applicant relating to an implied term by reason of the PSMA, that argument cannot succeed. It is the case that terms may be implied into a contract, including contracts of employment, as a matter of fact, common law, or by statute. In the latter case, implication of a term by statute requires express reference. That is, the statute itself must express the condition or warranty to be implied. Common examples of this occur in sale of goods legislation throughout the country and in the Trade Practices Act 1974 (Cth). A further example of implication by statute in the employment setting is s 5 of the Minimum Conditions of Employment Act 1993.
19. No such provisions exist in the PSMA in relation to s 8 of that Act. Important though it is, what s 8 of the PSMA does is to state certain general principles in relation to human resource management in the public sector. It does not support the implication of a term into contracts of employment by statute. We are also not persuaded that such a term ought to be implied by common law, applying the established tests as to the implication of terms into contracts. Alternatively, even if such term ought to be implied either by statute or common law, it would not, by itself, confer jurisdiction on the Commission in this matter that it does not otherwise have.
20. The application is therefore dismissed.

2001WAIRC 04087

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT *v.* CHIEF EXECUTIVE OFFICER WESTERN AUSTRALIAN ("WA") TOURISM COMMISSION, RESPONDENT
CORAM	COMMISSION IN COURT SESSION COMMISSIONER P E SCOTT COMMISSIONER S J KENNER COMMISSIONER J H SMITH
DELIVERED	TUESDAY, 6 NOVEMBER 2001
FILE NO	PSACR 5 OF 2001
CITATION NO.	2001 WAIRC 04087

Result	Application dismissed.
Representation	
Applicant	Ms J van den Herik
Respondent	Mr J Lange

Order.

HAVING heard Ms J van den Herik on behalf of the applicant and Mr J Lange on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed.

(Sgd.) P. E. SCOTT,
[L.S.] Commission in Court Session.

NOTICES—
Award/Agreement matters—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Application No. 1568 of 2001

APPLICATION FOR VARIATION OF AWARD
ENTITLED "DAMPIER SALT AWARD 1990"

On the 24 October 2001 a Notice of Application was published in the Western Australian Industrial Gazette (81 WAIG 2563) for a variation of the Dampier Salt Award 1990, along with the parts of the Award variation that related to the area of operation or scope.

FURTHER NOTICE is given that a Notice of Answer and Counter Proposal has been lodged in the Commission by the Australian Workers' Union, West Australian Branch, Industrial Union of Workers & Others which contains a **"Counter Proposal Award" entitled "Dampier Salt Pty Ltd Port Hedland Salt Processing and Production Award 2001".**

As far as relevant, those parts of the proposed **"Counter Proposal Award"** that relate to area of operation or scope are published hereunder.

5.—AREA AND SCOPE

(1) This award shall apply to employees eligible to be members of any of the respondent unions in the classifications mentioned in this award and employed by the employer in the area occupied and operated upon by the employer in Port Hedland and surrounds and;

(2) This award is restricted in its operations to that area of the State between the 18th and 26th parallels of south latitude.

A copy of the proposed **"Counter Proposal Award"** may be inspected at my office at 111 St Georges Terrace, Perth.

(Sgd.) J. A. SPURLING,
Registrar.

6 November 2001.

PUBLIC SERVICE ARBITRATOR—
Matters Dealt With—

2001 WAIRC 03986

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	MONDAY, 22 OCTOBER 2001
FILE NO	P 26 OF 2001
CITATION NO.	2001 WAIRC 03986

Result	Application granted
Representation	
Applicant	Ms M in de Braekt
Respondent	Mr D Matthews (of Counsel)

Reasons for Decision.

1 The Commission has already issued reasons for decision in this matter relating to an application for an interim order in respect of disciplinary processes involving Mr Peter Han in response to allegations make by Ms Barbara Silvester.

2 The Commission convened on 11 October 2001 to hear the substantive application. During that hearing the applicant gave evidence, and the parties made submissions in respect of the substantive application and the respondent, without prior warning raised an issue of jurisdiction. The applicant sought and was granted leave to respond to the submission regarding jurisdiction in writing. The hearing was able to proceed notwithstanding the issue of jurisdiction being raised as the issue of jurisdiction related only to a number of grounds of the application and not to the application in its totality. The applicant then filed written submissions regarding the issue of jurisdiction. As I understand the respondent's written submission in reply, the issue of jurisdiction raised at the hearing is no longer pursued, and does not require consideration.

3 As to the merits of the claim, the history of this matter is set out in the evidence of Mr Peter Han, Manager of the Community Skills Training Centre ("the Training Centre") of the respondent. He has been employed by the respondent for just over two years. He says that his main job is to manage the training function and, in cross examination, gave evidence that the prime responsibility of the respondent is the care and protection of children who are unable to be cared for by a parent or guardian, and he agreed that the Department has a particular vision and purpose. The Training Centre which he manages has a staff complement of some 12 officers, 9 of whom are women. The Training Centre provides training in a range of skills. Sixty per cent of the training provided is to workers in the sector who are not employees of the respondent, and 40 per cent to employees of the respondent involved in working in the field including social workers and welfare officers. Some of the persons involved in the training include police officers and the like. Not only does Mr Han provide management of the Training Centre but he is also involved in training delivery.

4 Mr Han's role as Manager of the Training Centre is set out in the Job Description Form and includes the following outcomes—

"BRIEF SUMMARY OF OUTCOMES REQUIRED IN DESCENDING ORDER OF IMPORTANCE

Duty No.	Details	Freq.	%
1	Manages and supervises the day to day operation of the Centre within priorities and directions set by the Service Delivery Management Team of the Department.	D	25
2	Designs, develops, conducts and evaluates training programs	D	20
3	Provides—	D	15
	—professional support, development and leadership for training staff and		
	—executive support to the Provider Support training forum.		
4	Consults with the Non-Government sector and relevant Departmental staff on identifying and analysing training needs, and orders their priorities in line with broad service delivery priorities.	D	10
5	Develops educational policy and procedures on all aspects of accreditation, evaluation and quality assurance.	R	10
6	Provides a training consultancy service to funded non-government organisations and department's service delivery staff.	R	10

Duty No.	Details	Freq.	%
7	Develops innovative approaches to training within resources and distant constraints.	R	5
8	Responsible for significant input into the development of the departmental and non-government training calendar.	R	5
9	Performs other duties as required.	O	

(Exhibit 1)

5 The selection criteria for the position of Manager Level 6 are as follows—

"**ESSENTIAL**

Demonstrated competency in—

1. providing leadership and managing staff and resources.
2. application of communication and interpersonal skills.

Demonstrated substantial knowledge and experience in—

3. design, conduct and evaluation of training programs.
4. identifying, analysing and prioritising training needs.
5. Demonstrated knowledge of trends, issues and practices within the community services sector including aboriginal and ethnic communities.
6. Demonstrated knowledge of competency based training and accreditation based processes applicable to Government and Non-government services sector.
7. Demonstrated commitment to the application of EEO principles and practices.

DESIRABLE

1. Relevant tertiary qualifications.
2. Experience in providing training programs to small organisations.
3. Knowledge of distance learning techniques."

(Exhibit 1)

6 Mr Han's evidence was that on 21 February 2001, he travelled to Kalgoorlie for work purposes to participate in the Critical Incidences Stress Debriefing Training course. At a training course on the same subject in Carnarvon some time previously, Mr Han had met Ms Barbara Silvester, a 23 year old Graduate Welfare Officer employed by the respondent who had undertaken that course in Carnarvon. They had also met in Perth on another occasion. Mr Han gave evidence that when Ms Silvester became aware that he would be in Kalgoorlie she contacted him and invited him to meet her and others for drinks after the training course on 21 February 2001. However, as I understand it, Ms Silvester did not participate in the course in Kalgoorlie. Mr Han gave evidence that a number of other officers of the respondent and other persons, some six or so in total, had also been invited. At the end of the training course for that day, the 21 February 2001, Mr Han went back to his hotel to freshen up and then was picked up by Ms Silvester and a colleague. They went to Flannigan's Hotel at about 6.00pm where they met the remainder of the group. The group stayed there until approximately 7.30pm and then went to dinner. Mr Han was driven to the restaurant where the group had dinner and the group remained there for approximately two and a half hours until around 9.30—10.00pm. It was decided by members of the group that they would continue their entertainment together and the group then went to the Commercial Hotel in Kalgoorlie. Mr Han says that Ms Silvester had suggested they go back to his hotel room for a party. However, he did not think that that was appropriate and they then went to an Irish pub, the name of which he did not know. They remained there from approximately 10.00pm until midnight playing pool. He says that the core group was there, someone had taken Ms Day, a member of the group who was not an employee of the respondent, back to her hotel. After being at the Irish pub for some time, the group was invited by Ms Silvester to go to her house and there were about five of them at that point. Mr Han gave evidence that he stayed at the applicant's house until around 2.00am when he left. He went back to his hotel and in the morning he checked out of the hotel and went back to the training centre where he continued his work and returned to Perth that evening.

7 Mr Han heard nothing further about any matter associated with his Kalgoorlie visit until on 23 March 2001 he received a telephone call from a Detective Foley from Kalgoorlie Police regarding an allegation. She asked for him to go to CIB headquarters to discuss the matter. He rang the Union who put him onto a lawyer who represented and advised him. He met with the police and in accordance with advice received from his lawyer declined to make comment in response to allegations made. The interview with him was terminated and he was charged with sexual penetration without consent pursuant to the Criminal Code 325 and was bailed.

8 Mr Han said that the next day he gathered his staff together and explained that he had been charged by the police. He contacted Mr Lex McCulloch, his Director, and met with him and Phil Riley, the Acting Human Resources Director, and explained that he had been charged but said that it was a private matter. He says that they replied to the effect that if it was a private matter they did not need to know the details, they offered him assistance and it was suggested that he take some stress leave, which he did.

9 Mr Han gave evidence of the arrangements made for him to appear in court on 27 March 2001 for the purpose of an election date being set at which time he was to enter a plea. This was scheduled for late May 2001. He says his lawyer then contacted the Director of Public Prosecutions and the election date was delayed until 6 June 2001. On 6 June 2001, upon attending in court, he was discharged on the basis that the Director of Public Prosecutions indicated that he would not be presenting evidence, and the applicant was not required to enter a plea. Mr Han rang Mr McCulloch and advised him that he had been discharged.

10 On 12 June 2001 Mr Han wrote to Mr McCulloch confirming that the prosecution of the charge against him had been discontinued, the complaint dismissed and he discharged. By letter dated 20 June 2001, Mr Han was advised that on 11 June 2001 Mr McCulloch had received a complaint from Ms Barbara Silvester detailing serious allegations arising from his conduct towards her following the training exercise in Kalgoorlie on 21 February 2001. Mr McCulloch also advised Mr Han that he was presently investigating the nature and extent of those allegations and would advise Mr Han of his intentions in due course. By letter dated 6 July 2001, Mr McCulloch advised Mr Han of his—

> "intent to investigate the nature and extent of serious allegations relating to (your) behaviour towards Ms Barbara Silvester following training exercise in Kalgoorlie on 20 July 2001".
>
> "I consider the matters raised within the complaint to be very serious and, if proven, strike at the core of your duties and responsibilities as an officer and senior manager of this department. Accordingly, I have appointed Dr Maureen Smith, as nominated by the Public Sector Standards Commission, to conduct a formal and independent investigation into these matters and determine whether there is any substance to matters raised within Ms Silvester's complaint."

(Exhibit 6)

11 The letter went on to advise Mr Han that he would be contacted by Dr Smith and directed him in respect of certain procedures. The letter concludes that—

> "Should you fail to comply with my directions, you are on notice that formal disciplinary proceedings may be commenced against you pursuant to Section 81 of the Public Sector Management Act (PSMA)

1994. Copies of Ms Silvester's complaint and relevant sections of the PSMA 1994 are attached for your reference."

(Exhibit 6)

12 Mr Han says that around lunch time 19 July 2001 he was contacted by Dr Smith who sought to have him attend an interview. After seeking advice from the Union Mr Han declined to be interviewed. Approximately a week later Dr Smith contacted him again and again invited him to attend for interview and he declined and referred Dr Smith to the Union.

13 Mr Han then received a letter dated 31 August 2001 from Mr McCulloch the relevant parts of which read as follows—

"Dear Peter

NOTICE OF SUSPECTED BREACHES OF DISCIPLINE

I refer to my letter dated 6 July 2001 in which I advised you of the appointment of Dr Maureen Smith to conduct a preliminary investigation on my behalf into a complaint regarding your conduct towards Ms Barbara Silvester.

On 9 August 2001 I received a report from Dr Smith. I have considered the contents of the report and have made some preliminary inquiries into matters raised in it and by it. I now give you notice that, pursuant to Section 81(1) of the Public Sector Management Act (PSMA) 1994, I suspect you have committed the following breaches of discipline—

1. On 22 February 2001 you sexually penetrated Ms Barbara Silvester without her consent and thereby committed an act of misconduct;
2. On 22 February 2001 you sexually penetrated Ms Barbara Silvester without her consent and thereby contravened the WA Public Sector Code of Ethics, specifically the key principles of Justice, Respect for Persons and Responsible Care;
3. On 22 February 2001 you sexually penetrated Ms Barbara Silvester without her consent and thereby contravened a provision of the PSMA 1994 applicable to you, namely Section 9(b), in that you failed to act with integrity in the performance of official duties;
4. On 22 February 2001 you sexually penetrated Ms Barbara Silvester without her consent and thereby contravened a provision of the PSMA 1994 applicable to you, namely Section 9(c), in that you failed to exercise the proper courtesy, consideration and sensitivity expected of you in your dealings towards a fellow employee;

In accordance with Section 81(1) I am giving you the opportunity to submit an explanation to me in relation to the allegations. You have until close of business Friday 7 September 2001 to submit your written response to these allegations.

Copies of Dr Smith's report and relevant provisions of the Public Sector Management Act 1994 and the Western Australian Public Sector Code of Ethics are attached.

Yours sincerely

signed

Lex McCulloch

EXECUTIVE DIRECTOR

METROPOLITAN SERVICE DELIVERY"

(Exhibit 9)

14 Dr Smith's report indicates that the alleged conduct referred to took place at Ms Silvester's home in the early hours of the morning on 22 February 2001.

15 The applicant seeks a number of orders in respect of this matter, the most significant being an order that the investigation by Dr Maureen Smith was unlawful and void ab initio. A number of consequential orders would follow according to the application.

16 The grounds for the application are lengthy, however in summary they include that—

1. Any investigation into suspected breaches of discipline must be conducted under s.81 of the Public Sector Management Act 1994 ("PSMA") and as it was not conducted in accordance with s.81 of the PSMA the investigation and report by Dr Smith are unlawful, beyond power and therefore ultra vires.
2. The respondent exceeded its power by investigating a matter which did not occur in the workplace or in the course of an employee discharging authorised duties in the employment relationship, and did not sufficiently relate to the workplace.
3. The respondent failed to commence disciplinary action within a reasonable period of time of receiving the relevant information. (It is noted that this ground was not elaborated on or pursued during the course of the hearing.)
4. The respondent was attempting to pursue a criminal matter in the guise of a disciplinary action and further that this placed Mr Han in double jeopardy.
5. Mr Han was denied natural justice and procedural fairness, and there are allegations in respect of bias, denial of nature justice and procedural fairness both in the process, and in the terms of Dr Smith's investigation and report.
6. The process is now so tainted as to mean that a proper investigation could not reasonably proceed.

17 The grounds of the application in particular contain more detail than I have noted in this recitation. However, I will deal with those matters in greater detail when appropriate and necessary.

18 The respondent says that Mr Han's alleged conduct relates to the performance of his duties in that it "touches on the employment". Further the respondent says that the applicant has not discharged the onus which rests with it particularly in respect of an application for permanent stay. There needs to be a vital connection between what is alleged to be wrong and what should occur.

19 The respondent also says that the commissioning of the Smith Report related to s.81(1) of the Public Sector Management Act 1994 in that the respondent had an obligation to have grounds for its suspicion before entering into a formal investigation. He says that if the Smith Report goes too far in arriving at conclusions and making findings then that is of no consequence. Once a reasonably held suspicion arises the employer institutes a s.81(2) enquiry and the investigation proceeds. He says that there is no evidence that Mr McCulloch did any thing but use the Smith Report to ground a suspicion, and that Exhibit 9, the letter from Mr McCulloch, and the Smith Report show that Mr McCulloch did not rush to suspicion.

20 As to whether or not the matter involved Mr Han in his workplace or performing his duties, the respondent says that it is premature to deal with that matter at this point. He says that the appropriate test is in *Hussein v Westpac Banking Corporation* 59 IR 103 where Judicial Registrar Staindl said—

"… It seems to me that an appropriate test is whether or not the conduct has a *relevant connection* to the employment.

Deputy President Lawrence used this test in the case of *HEF of Australia—v- Western Hospital* (1991) 4 VIR 310 at 324 where he said—

"The conviction of an individual for a criminal offence does not necessarily have any effect upon that person's employment. The question of the relevance of a conviction or an employee's alleged misbehaviour to the employee's work should be considered in terms of whether or not the employee has breached an express or implied term of his or

> her contract of employment. Whether events occurring outside the actual performance of work will be relevant to the employment relationship will vary from case to case. For example, an accountant who has committed an act of dishonesty (for which he may have been charged and convicted) in the course of some activity outside his employment might be said to have breached a term of his contract of employment.
>
> The contractual right of an employer to dismiss an employee summarily on the ground of serious and wilful misconduct is a right which is limited to cases where the misconduct has a relevant connection with the performance of his or her work as an employee. The position has been summarised by E I Sykes and H J Glasbeek, *Labour Law in Australia*, (1972), p 71 in the following terms—
>
> > 'In relation to criminal or quasi-criminal offences, it appears that commission of one of these at the place of work is enough. Where, however, the criminal conviction is in respect of an act which is committed away from the place of work and not in the hours of duty, it appears that the crucial test is whether the criminal conduct touches the course of duties of the workman or his abilities in relation to such duties.'
>
> In dealing with such issues in unfair dismissal claims, two questions will need to be asked. First, did the employee do the things which are alleged against him? Second, did the action have any relevant connection to the performance of his duties as an employee? These two questions have relevance to the present case because it will be necessary to determine if the employees misbehaved themselves, as alleged by the hospital, and whether any misbehaviour had a relevant connection with the performance of their duties as employees."

The test proposed by McCullum, Pittard and Smith in *Labour Law: Cases and Materials* (2nd Edition, 1990), is to a similar effect: they see the crucial issue as being whether the criminal conduct "touches the employment" (at p. 140).

21 The respondent says that in this case the nature in the Department's work, being the care of children who cannot live with their families; the nature of work done by the Training Centre; the nature of Mr Han's duties, including the responsibility of providing leadership; that Mr Han was in Kalgoorlie for work purposes; that the complainant Ms Silvester was a fellow employee and junior to Mr Han; that Mr Han is involved in training people of a class to which Ms Silvester belongs and had been involved in training by Mr Han previously, make the allegation relevant to the employment in that the allegation of sexual assault relates to a person of the class who Mr Han trains.

22 As to this issue of whether the alleged conduct has sufficient relationship to Mr Han's status as an employee of the respondent, I note the following circumstances. The applicant travelled to Kalgoorlie from Perth to undertake and participate in a training course as part of his duty as an employee of the respondent. He received no direction to attend any social functions, no social functions were arranged by his employer, no social activities, food, drink or the like were provided by the employer. The social activity engaged in by Mr Han was arranged by a person, Ms Silvester, who while she was an employee of the respondent and fellow employee of Mr Han, junior to Mr Han and had participated in a training course previously conducted by him, she was not involved in the training course in which Mr Han participated in Kalgoorlie in February 2001. It was Ms Silvester who invited Mr Han to attend the social activities. Mr Han finished work for the day and went back to his hotel. He was then picked up from his hotel by Ms Silvester and another person who was also a colleague. He went to the hotel, then to a restaurant, then to two other hotels and finally to Ms Silvester's private residence, at her invitation, with the rest of the group, albeit that a number of the group dropped out during the course of the evening. It could not be suggested that at the time the alleged incident occurred Mr Han or Ms Silvester were in any way involved in a work-related function or activity. The time, venue and circumstances of the alleged misconduct are distanced from the workplace by a number of hours, by a number of changes of venue, and by a clearly private social evening.

23 However, the question arises as to whether or not the alleged misconduct "touches the employment" in accordance with the test proposed by McCullum, Pittard and Smith in *Labour Law: Cases and Materials* (2nd Edition, 1990) at page 140—

> "**[4.53]** ***Criminal offences***. Criminal offences, such as fraud or assaults on other workers, if committed at work, will usually constitute misconduct. The crucial issue is whether the criminal conduct touches the employment. Thus, as Sykes, *op cit*, states "a conviction for a sexual offence would seem to be irrelevant to the employment of a factory hand" but "relevant in the case of a school teacher". Similarly, "a conviction for drunken driving out of the hours of employment would be relevant to the employment of a chauffeur but not to the employment of a cook" (at 70). In the case of, say, a commercial traveller, conviction on a driving charge and consequent suspensions of a driver's license may not warrant summary dismissal. In such circumstances it was pointed out in *Hands v Simpson Fawcett & Co* (1928) 44 TLR 295 that the commercial traveller could engage someone else to do the driving. However, it is unlikely that a chauffeur could do the same, as a chauffeur is arguably contracted for his or her driving skills."
>
> **[4.54]** An assault of a superior even if not criminal may nevertheless constitute misconduct. In *Re Dispute-Transfield Pty Ltd; Re Dismissal of Union Delegate* [1974] AR (NSW) 596, where a union delegate (Turner) assaulted a foreman (Giust) at a hotel after hours, it was held by Sheehy J that summary dismissal was justified (at 599)—
>
> > The assault took place before a number of persons, most of whom were workers at the … construction site and the evidence shows that the hotel was a place where it was customary for workers to gather. I consider that it would have become generally known at the site that the foreman had been attacked by the union delegate and in the circumstances I consider that this would tend to undermine his authority and that of management. It would also lead to fear on the part of Mr Giust and other foremen that there could be further assaults on them unless the strongest measures were taken against Mr Turner.
> >
> > In my view it does not matter that the events took place beyond working hours and outside the working area and I regard Mr Turner's actions as misconduct of such a nature as to justify his summary dismissal. I observe that in *Halsbury's Laws of England*, 3rd ed, under the heading of "Dismissal of Servant without Notice" it is stated at p 486—
> >
> > > A servant may also be summarily dismissed if he has been guilty of an offence outside his employment of such a character as to make it unsafe for the master to retain him…
> >
> > In the present case I would regard it as unsafe for the company to continue to employ Mr Turner, in the sense that his presence on the site could embarrass Mr Giust and other foremen in the execution of their duties and give rise to a situation where the authority of management would be eroded.
>
> **[4.55]** ***Breach of professional standards***. A serious breach of professional standards may constitute

misconduct. That this is so clearly follows from the decision of Scott J in *Sim v Rotherham Metropolitan Borough Council* [1986] 3 WLR 851 (in [3.17]), and is implicit in the decisions of the Tasmanian Supreme Court and of the High Court of Australia in *Orr v the University of Tasmania* [1956] Tas SR 155 (Green CJ) and (1957) 100 CLR 526 (Dixon CJ, Williams and Taylor JJ). In that case a university professor was found to have seduced one of his students (the affair having "developed under the guise of the discussion of philosophical problems"). In the decision of Green CJ (which was upheld by the High Court) it was said (at 159-60)—

> Such conduct amounts to a complete repudiation of the duty which a professor owes to his University. If it could be permitted it would have the most grave consequences for the University, would inflict a very real injury upon it, and would destroy its standing and influence in the eyes of the world. (cf *Williston on Contracts*, revised edition par 1013).
>
> But I go further than this. Even if the plaintiff had not used his position to seduce Miss Kemp; even if all that had happened was that he and she had entered into a sexual relationship without any attempt on his part to influence her to that course, I still think the fact that he had intercourse with one of his own students would constitute misconduct, justifying his summary dismissal. It seems to me to be essential, if the integrity of the University is to be preserved, that a professor should maintain a detached and dispassionate attitude towards his students. I am quite unable to understand how it could be thought that a professor could teach, examine, recommend for prizes and honours, or present as a fit and proper person to receive a degree, a student who has in her academic life been his mistress. If such a thing could be then the integrity of the University degrees would disappear."

24 Although the above references include reference to criminal offences, the assault of a superior or breach of professional standards, the latter is most relevant. However, the comments made in respect of criminal offences and assault on a superior also has some relevance even though this matter does not involve a conviction for a criminal offence. However, what is alleged to have occurred may constitute misconduct within the purview of the employer if it is misconduct relevant to employment and touches on the employment. The examples cited, that a conviction of a sexual offence would seem to be irrelevant in the employment of a factory hand but relevant in the case of a school teacher, or a conviction for drunken driving out of hours might be relevant in respect of chauffeur but not in respect of the employment of a cook. In this case, it has not been suggested by the respondent that the alleged misconduct was by a superior over a subordinate. Although Mr Matthews, for the respondent, used the term "subordinate" on one occasion, he conceded that it would be more appropriate to describe the status of the relationship between Mr Han and Ms Silvester as being that she was junior to Mr Han rather than subordinate. The two do not work together. The contact between them has been on one occasion where Mr Han was conducting a training course in which Ms Silvester participated. On another occasion they met when Ms Silvester attended in Perth but she does not appear to have been attending any training courses conducted by Mr Han. Unlike the situation in reference to the duties of a university professor, there is no evidence that there is any ongoing obligation or relationship for training or other work purposes between Mr Han and Ms Silvester, certainly none was drawn to my attention.

25 It was suggested by the respondent that Mr Han's position as a manager requires that he provide leadership to a group of staff who include a number of women. However, it is true to say that most, if not all, supervisory, management or executive positions require the provision of leadership. I am not satisfied that it could be said that the conduct alleged in respect of Mr Han touches his capacity to provide leadership to the group he manages. There is certainly no evidence to that effect.

26 The role of the Department, its purpose, vision and responsibility in respect of protection of children, and the Training Centre's role in the provision of training does not sufficiently relate to or touch upon the alleged conduct such as to create the necessary connection to bring the alleged conduct within the purview of an employer.

27 In those circumstances, I find that the alleged conduct did not touch the employment in circumstances which would mean that the employer is entitled to enquire into that conduct. There is not a relevant connection between the conduct and the employment. If the test were that referred to by the applicant, then I am not satisfied that the conduct alleged has, in the words of the applicant, related to Mr Han's performance of his duties or his working relationships.

28 In those circumstances, there is no need to consider the remainder of the grounds for the application as the employer is not entitled to investigate alleged misconduct which is beyond the employment relationship. Accordingly, I would grant the application in so far as its seeks an order that the investigation by Dr Maureen Smith for and on behalf of the respondent, in relation to allegations of misconduct against Mr Han is void ab initio.

29 The second order sought is that the respondent remove documentation from Mr Han's personal file connected with and or flowing from the unlawful investigation undertaken by Dr Smith on behalf of the respondent. This is an appropriate order in the circumstances. There is nothing of a particular nature before me to demonstrate the need for order three that the respondent provide written notification to all persons interviewed during the investigation carried on by Dr Smith that the investigation and subsequent report was unlawful. An order declaring the investigation void ab initio, and further an order that the respondent is prohibited from investigating the allegations made by Ms Silvester would be adequate.

30 Order accordingly.

2001 WAIRC 04046

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	TUESDAY, 30 OCTOBER 2001
FILE NO	P 26 OF 2001
CITATION NO.	2001 WAIRC 04046

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

1. THAT the respondent shall cease any and all disciplinary action against Mr Peter Han in relation to allegations made by Ms Barbara Silvester, and is prohibited from re-instigating any such action in relation to those allegations.

2. THAT the investigation and report by Dr Maureen Smith for and on behalf of the respondent in relation to allegations of misconduct against Mr Peter Han is hereby void ab initio.
3. THAT within 7 days of the date of this Order the respondent shall remove from Mr Peter Han's personal file all documentation connected with or flowing from the investigation and report by Dr Maureen Smith.

(Sgd.) P.E. SCOTT,
[L.S.] Commissioner,
Public Service Arbitrator.

2001 WAIRC 03893

ASSESSMENT OF PERFORMANCE

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT *v.* DIRECTOR GENERAL, DEPARTMENT OF TRANSPORT, RESPONDENT
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DELIVERED	TUESDAY, 2 OCTOBER 2001
FILE NO	P 19 OF 2001
CITATION NO.	2001 WAIRC 03893

Result Application pursuant to Section 80E dismissed

Order.

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

WHEREAS on the 18th day of July 2001 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties sought time to consider their positions; and

WHEREAS on the 28th day of September 2001 the Applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

(Sgd.) P. E. SCOTT,
[L.S.] Public Service Arbitrator.

2001 WAIRC 03993

FAILURE TO PROVIDE A COPY OF A REPORT

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT *v.* DIRECTOR GENERAL, MINISTRY OF JUSTICE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DELIVERED	TUESDAY, 23 OCTOBER 2001
FILE NO	P 27 OF 2001
CITATION NO.	2001 WAIRC 03993

Result	Application for Discovery Dismissed
Representation	
Applicant	Ms M in de Braekt
Respondent	Mr R Andretich (of Counsel)

Extempore

Reasons for Decision.

1 This is an application for discovery in relation to application P27 of 2001. Application P27 of 2001 seeks a number of orders, they being that—

1. the decision of the respondent to deny Messrs McColl, Fisher and McClue access to the Hedges Report and related documents is void ab initio;
2. the respondent is to provide to the applicant and to Messrs McColl, Fisher and McClue complete and unedited copies of the Hedges Report and all related documents within 7 calendar days of the date of the order;
3. within 7 days of the date of this order the respondent is to provide a written apology to the employees for any detriment they suffered as a result of the disciplinary proceedings taken against them and subsequently discontinued by the respondent; and
4. the respondent is to pay Messrs McColl, Fisher and McClue damages within 7 days of the date of this order for breaching its obligations to maintain faith and confidence in the employment relationship by failing to provide them with a copy of the Hedges Report.

2 The applicant says that it reserves the right to address the Public Service Arbitrator on the quantum of damages payable by the respondent in the event that the applicant proves its case, and accordingly a specific amount of damages would need to be inserted in order 4.

3 The respondent filed a Notice of Answer and Counter Proposal in which the respondent challenged the jurisdiction of the Arbitrator to deal with the substantive application. The matter of jurisdiction is to be heard on 2 November 2001 by written submissions and an opportunity for the parties to speak to their submissions.

4 Subsequent to the jurisdiction matter being set down for hearing, on 8 October 2001 the applicant filed an application for discovery, production and inspection of all documents in relation to application P27 of 2001 and requested that the matter be heard within a week if possible.

5 The question that arises, which I have noted today, is whether the application for discovery relates to documents necessary to be available to the applicant for the purposes of its arguments as to jurisdiction, or does it relate to the substantive matter? If it is the former, that is, in respect of arguments as to jurisdiction, then how does it relate?

6 I have noted the authorities to which the applicant has referred, and I note that they provide some useful principles regarding discovery generally. However, I am not satisfied that they address the issue of discovery in the circumstances before me today. I note the decision of the Industrial Appeal Court in *Springdale Comfort Pty Ltd trading as Dalfield Homes v The Building Trades Association of Unions of Western Australia*, 67 WAIG 325, which dealt with a similar issue, made clear that the issue of jurisdiction is to be dealt with first and then any matters of an interlocutory nature which relate to the substantive matter would then be appropriate to be dealt with. It does not specifically appear to deal with the issue of interlocutory orders for the purposes of determining jurisdiction, but one would assume that as the Commission has power to determine whether it has jurisdiction that that would be a power that the Commission has.

7 But it is necessary to determine whether this interlocutory application is necessary for the purpose of dealing with the issue of jurisdiction or whether it arises only in respect of the substantive matter. I have considered the

submissions and the authorities put to me, and it seems to me from what has been put that, whilst it may or may not be that the substantive application is one which falls within the jurisdiction of the Commission, there is nothing before me to establish that the discovery application relates to the issue of the Commission's jurisdiction, but rather it relates to the substantive matter. Accordingly, the application for discovery will be dismissed. Whether it is appropriate for discovery should jurisdiction be found might be a different matter altogether.

2001 WAIRC 04088

WESTERN AUSTRALIA POLICE SERVICE ENTERPRISE AGREEMENT FOR POLICE ACT EMPLOYEES.

No. AG 129 of 1999.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

PARTIES	WESTERN AUSTRALIAN POLICE UNION OF WORKERS, APPLICANT
	v.
	COMMISSIONER OF POLICE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	TUESDAY, 6 NOVEMBER 2001
FILE NO	P 18 OF 2001
CITATION NO.	2001 WAIRC 04088

Result Consent order issued

Order.

WHEREAS this is an application pursuant to s.46 of the Industrial Relations Act, 1979; and

WHEREAS on the 4th day of October 2001 and the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS arising from that conference the parties advised that they had reached an agreement in respect of the application and sought to have that agreement reflected in an Order;

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

1. THAT those officers accommodated overnight at the Mornington facilities in Harvey, who are supplied with a cook and food, will be paid a special "Mornington" allowance of $23.81 per day in lieu of incidentals allowance or any other camping allowance of the Western Australia Police Service Enterprise Agreement for Police Act Employees 1999 or 2001.
2. THAT the allowance referred to in Order 1. shall have effect from the 1st day of January 2001.
3. THAT the application be and is hereby otherwise dismissed.

[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

Complaint No. 226 of 1999

Date Heard: 25 October 2001

Date Delivered: 25 October 2001

BEFORE: G. Cicchini I.M.

BETWEEN—

Christopher Lawrence Peters

Complainant

and

James Turner Roofing Pty Ltd

Defendant

Appearances—

Ms R Cosentino instructed by *Messrs Gibson & Gibson, Solicitors,* appeared for Mr Peters.

Mr D Taylor instructed by *Messrs D Taylor, Solicitors,* appeared for the Defendant.

Supplementary 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 matter was adjourned from l0 October 2001 so the parties could prepare arguments to be presented to me today on the issue of penalties. However, the Defendant today seeks that the matter be adjourned so that certain submissions can be made in respect to my findings relating to allowances. In short, the Defendant contends that I have fallen into error in making findings relating to breaches of the award constituted by the failure to pay various allowances.

The issue of breaches of the award constituted by the alleged failure to pay allowances was clearly in issue on the pleadings. It was a matter that was specifically addressed by the Complainant in submissions. Regrettably it was not addressed by the Defendant in any way. There is no specific contest raised in relation thereto. Having failed to argue the matter previously, the Defendant now seeks to have a second opportunity to do so. In my view, the Defendant's request is unreasonable in all the circumstances. It is a matter that could have been and should have been addressed previously but was not. In any event, I reject any contention that I have fallen into error on that issue. To allow the matter to proceed, as suggested, would be inappropriate in all the circumstances and, accordingly, I reject the defendant's request for an adjournment of this matter.

Turning to the issue of penalty, I accept that this Court should have regard to the nature of considerations required to be considered under the *Sentencing Act 1995*. Although the *Sentencing Act 1995* is not applicable in respect of the imposition of penalties under section 83 of the *Industrial Relations Act 1979*, it is nevertheless useful to treat it as a guide with respect to the imposition of penalties under section 83. Regrettably, the legislation that I am dealing with here, unlike the *Sentencing Act 1995*, does not permit imposition of a global penalty. That matter ought to be addressed. Of course that is a matter for Parliament.

It follows that I am called upon to consider each breach and apply a penalty or a caution in each instance. Having said that, I am cognizant of the totality principle in sentencing and I am mindful of the fact that it is equally applicable here as it is to a sentence in criminal proceedings. Accordingly, the Court must look at the overall consequences of the defendant's actions and the circumstances in which the breaches were committed.

A consideration of the particular nature of the breach in each instance is also important. In my view there are 204 identifiable breaches. The Complainant, in the schedule prepared by him through his solicitors, puts the breaches at being 204 or alternatively 84. The authorities make it clear that each

breach must relate to a particular pay period and in that regard the higher number is the appropriate way in which to approach the number of breaches in this matter.

There are some breaches that must be considered as fundamental breaches, just by their very nature. In my view, those breaches are those which relate to the matters other than allowances. I say that they are fundamental because they involve significant amounts of money and because of the circumstances in which they were committed.

By contrast, the breaches which relate to the failure to pay allowances, by their very nature and commission are to be regarded as minor and technical. Indeed I do regard them as minor and technical. They are to be distinguished from the others, in my view, having regard, as I say, to the nature of the breaches, the circumstances in which they were committed and the money involved in each instance. They attract a different penalty regime.

As to the non-allowance breaches, it is important that a penalty be imposed to reflect the seriousness of the breaches and to ensure that the penalty has both a personal and general deterrent aspect to it.

In considering the appropriate penalty the Court must have regard to the totality of the amount of under-payment, the fact that the respondent, in the main, operated in ignorance of the provisions of the award rather than a wilful disobedience of the award. I take into account also, and importantly, that there has not been demonstrated any prior breach of the award.

I take those factors into account. I also take into account the totality principal, which overrides my considerations in sentencing. It is clear that the effect of the penalty should be one so as not to be crushing upon the Defendant. Nevertheless the penalty should reflect the seriousness of the Defendant's conduct and the consequences of its conduct. Accordingly, I have concluded that the appropriate way to deal with the matters is as follows. I consider that an appropriate penalty for each of those breaches, which I refer to as fundamental breaches, is the sum of $50.00. Those fundamental breaches are listed as follows—

- Failure to pay overtime—18 breaches at $50.00 per breach $900.00
- Failure to pay rest and meal breaks —8 breaches at $50.00 per breach $400.00
- Failure to pay public holidays— 6 breaches at $50.00 $300.00
- Failure to pay Rostered Days Off—8 breaches at $50.00 $400.00
- Failure to pay superannuation (clause 50)—20 breaches at $50.00 $1000.00
- Failure to pay Industry Fund—20 breaches at $50.00 $1000.00
- Failure to pay superannuation (clause 38)—1 breach at $50.00 $50.00
- Failure to pay redundancy— 1 breach at $50.00 $50.00
- Failure to pay annual leave— l breach at $50.00 $50.00
- Failure to pay annual leave loading—l breach at $50.00 $50.00

The total penalty in respect of those fundamental breaches is $4,200 00.

As to the remaining 120 breaches arising from the failure to pay allowances, I intend to impose a caution. In my view, a caution is appropriate in each instance in the light of the totality of the sentence having regard to the nature of the breaches which are technical in nature and having regard for the relatively low amounts of money being involved. Therefore a caution will be imposed with respect to the 120 breaches relating to the failure to pay allowances.

Turning to the question of whom the penalty is to be paid to, I take the view that the penalty ought be paid to the Complainant. The process in section 83 enables self-policing. In that regard, the provision is not too dissimilar to the provisions found in the *Mining Act 1978* which encourages and enable parties to take action in a self-policing process and reward those who assist in achieving the integrity of the system. In my view the provision in section 83 is in the same mould. The same considerations apply. Given that the Complainant has had to prosecute the matter himself and in the light of the policy thrown up by the Act, I take the view that the payment of the penalty should be made to him. I will order that the penalty be paid to the Complainant.

There will be orders accordingly

G. CICCHINI,
Industrial Magistrate.

THE INDUSTRIAL MAGISTRATE'S COURT OF WESTERN AUSTRALIA
HELD AT PERTH

Claim No. M 42 of 2001

Date Heard: 17 October 2001

Date Delivered: 25 October 2001

BEFORE: G. Cicchini I.M.

BETWEEN—

Paul Smith

Claimant

and

Rockingham Bowling Club (Inc.)

Respondent

Appearances—

Mr TC Crossley of *TC Crossley & Associates* appeared as agent for Mr Smith.

Mr DM Jones of *The Chamber of Commerce and Industry of Western Australia* appeared as agent for the Respondent.

Reasons for Decision.

The Claim

On 28 February 2001 Paul Smith filed a claim alleging that the Rockingham Bowling Club (Inc) (the Respondent) on 24 February 2001 harshly, oppressively or unfairly dismissed him. In that regard and in the alternative he alleges that the Respondent has failed to pay him an adequate redundancy payment. Additionally Mr Smith alleges that the Respondent has, contrary to the provisions of his workplace agreement, failed to pay a 17 ½ % loading upon the annual leave payments made to him upon termination.

Mr Smith therefore seeks the payment of $11,170.60 being the equivalent of 14 week's pay. He also seeks the payment of a loading on annual leave payment made. Pre-judgment interest is also claimed with respect to both heads of claim. The imposition of a penalty is also sought.

Findings

The Respondent is a non-profit organisation, which provides bowling facilities to its members. The facilities include a clubhouse and four bowling greens. In late 2000 the bowling greens consisted of two grass greens and two synthetic greens. The synthetic bowling greens, by their nature, require very little maintenance. Mr Smith was the Respondent's Greenkeeper. His primary duty was to maintain the grass bowling greens. He also maintained the club's surrounds. His responsibilities included the procurement of fertilisers, chemicals and spare parts for the machinery used in the upkeep of the grass greens and surrounds. He reported to the Chairman of the Greens and worked in closely with him. The Respondent also employed a general manager and some bar staff. The club's other labour requirements were augmented by volunteer members who performed a number of duties including assisting in the upkeep of the grass greens and club surrounds.

Mr Smith's employment commenced on or about 11 December of 1989. A state award originally governed the terms of his employment until 24 February 1998. On 25 February 1998 he entered into a workplace agreement which took effect immediately upon execution. The agreement was registered as number 98/3338.001. Mr Smith was paid a gross weekly wage of $797.90. His hours of work were irregular.

He generally worked longer hours during the busy summer period. In winter his hours reduced. On average he worked about 38 hours per week.

Leading up to 2001 the club had, for successive years, suffered operating losses. It accordingly was looking at ways to reduce its operating costs. One way of achieving that end was to replace the grass greens with synthetic greens. In the months leading up to November 2000 there had been widespread talk about the issue and a strategic planning committee had been set up to report on the same. The proposal to replace the grass greens was clearly aimed at eliminating the costs of maintaining the grass greens. It was designed to do away with the Greenkeeper's position. It would also have the added effect of eliminating expenditure on fertilisers, chemicals and machinery. Mr Smith was well aware of the proposals. Indeed the Respondent's President, Mr Colin Taylor, specifically informed Mr Smith some time prior to October 2000 that the club was considering the installation of further synthetic greens. It must have been obvious to Mr Smith that any move in that direction would necessarily result in his position becoming redundant. Indeed Mr Smith in his own testimony conceded that Mr Taylor had told him that the club was looking at the installation of synthetic greens as a means of eliminating the need for a Greenkeeper. The resultant annual savings to the club from such a move would be in excess of $50,000.00 per annum.

Notwithstanding the committee's desire to move to the installation of additional synthetic greens the club did not have the necessary savings to construct the same. Its strategic planning committee was accordingly set up to consider amongst other things the feasibility of obtaining a loan for the purpose. In that regard it entered into talks with the Rockingham City Council with a view to the provision of a self-supporting loan. Those talks were successful. Indeed Mr Brandsma, the Respondent's Secretary, testified that the club had received "in principal" approval for the loan from the Rockingham City Council prior to the respondent's half-yearly meeting held on Sunday 5 November 2000.

At the half-yearly meeting on 5 November 2000 the strategic planning committee's report was tabled and discussed. The recommendation of the committee with respect to the installation of additional synthetic greens was carried. In effect it was agreed that the two existing synthetic greens be upgraded and a new one be installed. The fourth green was to be left as a grass green that would be maintained on an ad hoc basis by the volunteer labour provided by members. In consequence of the decision made by the meeting with respect to the installation of synthetic greens the members agreed that the Greenkeeper's position be made redundant at a date left to the discretion of the executive committee.

Mr Brandsma testified that Mr Smith was not at work on 6 November 2000. On 7 November 2000 Mr Brandsma went to see Mr Smith in order to advise him on the outcome of the meeting on 5 November. He did so prior to the minutes being posted on the notice board. He wanted, as a matter of courtesy, to advise Mr Smith of the outcome particularly given its implications for him. For his part Mr Smith denies that the meeting ever took place. However I am satisfied on the balance of probabilities that the meeting did take place. I accept Mr Brandsma's evidence in that regard. I accept that he spoke to Mr Smith in the Greenkeeper's shed and made him aware of the fact that the meeting had decided to install synthetic greens. I further accept that Mr Brandsma accurately recalled the meeting. One of the triggers for his recollection of the meeting is Mr Smith's rebuke of him for having discussed the matter with him. Mr Smith made it clear to him that club policy required that the club President make such approach to him on the issue. Having viewed Mr Smith in the witness box I have no doubt that Mr Smith would have rebuked Mr Brandsma as alleged. I also accept Mr Brandsma's evidence that Mr Smith, during that meeting, questioned the club's ability to finance what had been proposed. Indeed his stance in that regard is reflected in his pleadings. In my view Mr Brandsma's approach was entirely appropriate in the circumstances. He felt that any bad news should be given personally before it was read from minutes posted on the club's notice board.

On the following day, 8 November 2000, Mr Smith was called into a meeting with the executive committee of the club comprised of the President, Secretary and Treasurer namely Mr Kite. He was told at the meeting that his position was made redundant and that his workplace agreement would not be renewed at the end of February 2001. Indeed the workplace agreement was to expire on 24 February 2001. Mr Smith was asked whether he was prepared to continue to work for the respondent for an extra couple of months beyond 24 February 2001 so that match fixtures could be completed. Mr Smith responded by telling the executive committee that he wanted his employment to carry on through to 31 May 2001 in order to coincide with the taking of planned annual leave for an overseas trip.

There is conflict in the evidence as to whether there was a concluded position at the meeting as to when Mr Smith would finish up. Mr Smith says that there was a concluded agreement that he would work through to 30 April 2001 and that the club would get back to him as to whether he could work through to 31 May 2001. The Respondent, through the evidence of Mr Brandsma and Mr Kite, maintains that there was no concluded agreement at that time. Mr Brandsma said that Mr Smith's counter-offer to work to 31 May 2001 was rejected and that no concluded position was ever reached.

On 9 November 2000 a letter was prepared formally detailing the decisions of the club. It outlined inter alia that Mr Smith's job had become redundant and that his workplace agreement would not be renewed. The letter also confirmed the Respondent's request that Mr Smith continue to work for a couple of months. Interestingly the letter does not refer to any concluded position that Mr Smith was to work to 30 April 2001. Had that agreement been reached it no doubt would have been reflected in the letter. It clearly was not. The letter reflects that the decision remained with Mr Smith. I am confident that the letter accurately reflects the terms of the discussions. Mr Brandsma impressed as a person with a professional outlook. The way in which he gave his evidence is demonstrative of a careful and considered approach. He impressed as being concerned with the need for accuracy. Where there is conflict between the evidence of Mr Smith and Mr Brandsma I prefer the evidence of Mr Brandsma. I find therefore that there was no concluded agreement that Mr Smith work to 30 April 2001.

Mr Brandsma's evidence, which I accept, is that the Respondent had anticipated that work on the new synthetic greens would commence in or about mid-March 2001. The club's main carnival was scheduled for the long weekend in early March 2001. Given Mr Smith's lack of commitment the club was looking at volunteers to maintain the greens during the anticipated relatively short period between Mr Smith's workplace agreement coming to an end and the commencement of construction. There was accordingly no further discussion on the issue of the date of termination.

On 20 December 2000 Mr Smith was called into the clubhouse by the President of the club and was handed a letter (exhibit 4). The letter confirmed the previous discussions and correspondence. It notified Mr Smith that he was being given two month's notice of termination and that his last working day would be Saturday 24 February 2001. Mr Smith challenged him about the termination date and asked him about the 30 April 2001 finishing date. Mr Taylor responded by saying that: "*Its just something we have to do*." In my view nothing turns on that. The response is equivocal and does not confirm any agreement that Mr Smith would remain working until 30 April 2001.

Mr Smith continued to work for the Respondent until and including 24 February 2001. Upon termination Mr Smith was paid the following gross payments—

• Wages—3 days	$319.16
• Annual leave—35 days	$5,585.30
• Long service leave	$7,606.65
• Severance pay—8 weeks	$6,382.30

By letter dated 22 February 2001 (exhibit 5) that accompanied his termination pay the Respondent made it clear that severance pay was still under negotiation and subject to adjustment. In that regard Mr Brandsma, on behalf of the Respondent, during the course of his evidence conceded that the Respondent is prepared to pay a further three week's pay so that the total redundancy payment reflects payment of one week's pay for each year of service.

Mr Smith was unhappy with his final payment. He claims that he should have received a greater redundancy payment. Furthermore he complains that annual leave loading was not paid on untaken annual leave paid out upon termination. However the mainstay of his claim centres on the fact that he did not earn an income for the period 25 February to 30 April 2001 which he says was agreed between the parties to be worked by him.

Subsequent to termination Mr Smith has remained unemployed notwithstanding his attempts to find employment in the same field of work.

Following the termination of Mr Smith's employment the Respondent's Chairman of the Greens together with a group of volunteers continued to maintain the greens until such time as work commenced on the synthetic greens. No one was paid for those services. The services were rendered gratuitously for the benefit of the club.

Conclusion

Mr Smith says that the termination of his employment by the Respondent was in all the circumstances harsh, oppressive or unfair. In determining whether the termination was harsh, oppressive or unfair I apply the dicta enunciated in ***Miles and others trading as The Undercliffe Nursing Home v. FMWU* (1985) 65 WAIG 385.** In that case Kennedy J. stated, at p. 387, that the question to be investigated—

> "…is not a question as to the parties' respective legal rights, but a question as to whether the legal right of the employer has been exercised so harshly or oppressively against the employee as to amount to an abuse of that right."

In that regard I am to assess the industrial fairness of the decision of the employer based on the quality of the conduct involved and an assessment of what is just and equitable upon the substantive merits of the matter. Clearly there must not only be substantive fairness displayed to Mr Smith but also procedural fairness.

Given that the ground for dismissal is one based on redundancy then the burden of establishing that ground lies upon the Respondent. Having discharged that burden it is up to Mr Smith to discharge the burden of proving that the exercise of the employer's right of dismissal has been exercised harshly or repressively against him as to amount to an abuse of that right.

The evidence overwhelmingly dictates that Mr Smith was terminated on account of redundancy. The club had made a loss for the two years preceding the decision made to change to synthetic greens. It is clear that the major cost faced by the club at that time was the upkeep of the greens of which Mr Smith's wage comprised the most significant component. If that cost were removed then the club's financial position would improve permitting the club to trade profitably. There was no secret about all of that. Mr Smith knew about such moves, which would necessarily, and inevitably result in redundancy. He was kept informed at all times as to what was happening in that regard. The Respondent's conduct through its officers was in my view nothing short of exemplary. There was no secrecy or subterfuge. Everything was out in the open. It is clear that Mr Smith, for obvious reasons, disagreed with the approach taken by the club. It is also apparent that Mr Smith believed that the club did not have the financial resources to convert to synthetic greens. However that was a matter for the club. As it turned out the club was able to achieve what it set out to do. Regrettably for Mr Smith he was caught up in modern day economic pragmatism which resulted in his position becoming redundant. There was a genuine redundancy situation in his case. He simply had to go. Furthermore, given the club's circumstances, there was no real prospect of redeployment.

Once the decision had been made that Mr Smith had to go he was advised almost immediately, initially by Mr Brandsma, and thereafter, formally by the executive committee. That was confirmed by letter dated 9 November 2000. There was, in that regard, compliance with sections 40 and 41 of the *Minimum Conditions of Employment Act 1993*. Indeed it is difficult to imagine what else the Respondent could have done in all the circumstances to keep Mr Smith informed of the redundancy and its effect upon him.

In view of the fact that Mr Smith's "job" would come to an end and given that the parties could not agree on the date of actual termination it was reasonable for the Respondent, in all the circumstances, to terminate Mr Smith's employment with effect on 24 February 2001. It was reasonable because it was anticipated that work on the new greens would commence in mid-March. It was also reasonable because there was a need to save money in order to minimise the projected loss for the financial year. Any savings in that regard would also assist in accumulating funds to ameliorate the shortfall for the synthetic greens project.

Mr Smith maintains that the situation that faced him at the time of termination did not amount to a genuine redundancy situation. It is submitted that his purported redundancy was premature in that other "persons" ended up carrying out the work that he did. In that regard I am referred to the definition of "redundant" in section 40(1) of the *Minimum Conditions of Employment Act 1993* which provides—

> **"redundant"** means being no longer required by an employer to continue doing a job because, for a reason that is not a usual reason for change in the employer's work force, the employer has decided that the job will not be done by any person.

Mr Smith argues that, given that following his termination volunteers carried out the work that he formerly did, his job had not in fact become redundant within the meaning of section 40(1). I respectfully disagree. In my view "person" referred to in the definition must mean a person who is paid for carrying out that job. No one who carried out the job after Mr Smith's termination was ever paid for that work. The work carried out by the volunteers was only a stopgap measure aimed at tiding the Respondent over and assisting it with its difficult financial situation. Indeed the job was not "on-going". The paid job carried out by Mr Smith ceased to exist upon his termination and indeed all the tasks that he formerly carried out ended completely upon construction of the synthetic greens.

For the reasons previously stated I find that the redundancy was genuine as at the date of termination. The Respondent displayed both procedural and substantive fairness throughout. The Respondent did not in the entire circumstance act in any way, which on an objective analysis could be considered to be harsh, oppressive or unfair.

A termination for redundancy which is not accompanied by a reasonable redundancy payment is harsh, unjust and unfair (see ***Rogers v Leighton Contractors Pty Ltd 79 WAIG 3551***). In so far as this claim relates to the failure to pay an adequate redundancy payment it is similarly without merit. I say that because the redundancy payment made in the light of the Respondent's circumstances was reasonable. In any event the Respondent was always willing to further negotiate in that regard (see exhibit 5). It was only Mr Smith's actions and further demands that left that issue unresolved. In any event the Respondent now concedes a further payment of three week's wages. Accordingly the total redundancy payment made to Mr Smith equates to one week's wages for each year of service. That is clearly adequate having regard to the Respondent's financial position and its ability to pay. In my view the authorities support that such a payment is adequate. I do not propose to say anything further in relation to this issue.

It follows from what I have said that Mr Smith is not therefore entitled to damages for unfair dismissal. Further he is not entitled to any payment for the period 25 February to 30 April 2001 given that there was no agreement that he would be retained working during that period.

I now move to deal with the issue of annual leave loading. The workplace agreement provides in clause 7 (12)—Annual Leave—

> "(12) For each completed year of service you are entitled to a loading of 17 ½ % on your annual leave to be paid at the time when annual leave is taken." (my emphasis added)

It is axiomatic that Mr Smith did not take annual leave upon termination. There is no legislative provision of which I am aware which deems him to have taken his leave upon termination. Given that he did not take his leave upon termination it is obvious upon the plain reading of clause 7(12) that he is not entitled to annual leave loading. This very issue was

considered by Fielding C (as he then was) in ***Bryant v Hamersley Iron Pty Ltd 71 WAIG 1917*** in which he said at p 1918—

"The concept of leave loading is, as Cort C. (as he then was) stated in West Australian Branch, Australasian Meat Industry Employees' Union, Industrial Union of Workers, Perth v. W.A. Meat Export Works (1975) 55 WAIG 1951 at 1952, referring to the West Australian Branch, Australasian Meat Industry Employees' Union, Industrial Union of Workers, Perth v. The Meat and Allied Trades Federation of Australia (Western Australian Division), Union of Employers, Woolworths (W.A.) Ltd, G.J. Coles and Coy. Ltd and Others (1980) (supra), to ensure that an employee would not be paid a lesser amount whilst on leave than he would have earned had he remained at work. The loading is not to be considered as a bonus for an employee when going on leave and thus "is not applied to the situation of pro rata payments upon termination, that situation not being one of being on leave as such" (see: Amalgamated Metal Workers and Shipwrights Union of Western Australia v A.C. Electrical Engineering Pty Limited (1977) 57 WAIG 881 at 883)."

It is apparent that the aforementioned authority is on all fours with this matter on this issue. Mr Smith's claim in this regard cannot succeed particularly in the light of the decision in ***Bryant.***

Result

It follows for the reasons given that Mr Smith is entitled, given the concession made, to three week's pay by way of additional redundancy payment to that already made. Mr Smith is therefore entitled to $2393.70. In view of the circumstances the claim for interest thereon is not maintainable.

Finally the claim for the imposition of penalties cannot succeed. I am not empowered by the *Workplace Agreement Act 1993* to impose penalties other than for offences committed under that Act. It is not contended that the Respondent has committed an offence under the Act. Such claim is misconceived and inappropriate.

G. CICCHINI,
Industrial Magistrate.

WORKPLACE AGREEMENTS— Matters pertaining to—

2001 WAIRC 04041

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	MILLIGAN FOUNDATION HOUSING ASSOC INC, APPLICANT
	v.
	LAWRENCE ALAN LEWIS, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	MONDAY, 29 OCTOBER 2001
FILE NO	WAG 9 OF 2001
CITATION NO.	2001 WAIRC 04041

Result	Application pursuant to s.7F discontinued.
Representation	
Applicant	Ms N. White
Respondent	Ms L. Richardson (as agent)

Order.

WHEREAS an application was lodged in the Commission pursuant to section 7F of the *Industrial Relations Act 1979*;

AND WHEREAS a conference between the parties was convened;

AND WHEREAS the Commission advised the parties that it had formed the view that this application was not properly before the Commission for the reasons set out in the Commission's letter to the parties dated 10 October 2001;

AND WHEREAS the Commission invited the applicant to put submissions to the Commission on the issues raised by the Commission at the conference within a specified period of time;

AND WHEREAS the Commission advised the parties that an order discontinuing this application would issue if nothing if the applicant did not put forward any submissions within that specified period of time;

AND WHEREAS that period of time has lapsed and the Commission has not heard from the applicant;

AND HAVING HEARD Ms N. White on behalf of the applicant and Ms L. Richardson (as agent) 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 application be discontinued.

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

2001 WAIRC 03985

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	IAN WORTHINGTON, APPLICANT
	v.
	HAMERSLEY IRON PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	FRIDAY, 19 OCTOBER 2001
FILE NO/S	WAG 8 OF 2000
CITATION NO.	2001 WAIRC 03985

Result	Order issued.
Representation	
Applicant	Mr A Lovell as agent
Respondent	Mr G Smith of counsel and with him Mr D Cronin of counsel

Order.

HAVING heard Mr A Lovell as agent on behalf of the applicant and Mr G Smith of counsel and with him Mr D Cronin of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders—

THAT the application be and is hereby dismissed.

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

UNFAIR DISMISSAL/ CONTRACTUAL ENTITLEMENTS—

2001 WAIRC 03966

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	MICHAEL JAMES CLARK, APPLICANT
	v.
	INDUSTRIAL GALVANIZERS WA, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	TUESDAY, 16 OCTOBER 2001
FILE NO	APPLICATION 802 OF 2001
CITATION NO.	2001 WAIRC 03966

Result	Application alleging unfair dismissal dismissed.
Representation	
Applicant	No appearance
Respondent	Ms C. Hannington (of counsel)

Reasons for Decision.

1 The application before the Commission by Mr Clark is that he was unfairly dismissed on 17 April 2001. This application was listed for hearing on 16 October 2001. As a courtesy to Mr Clark the Commission rang his home telephone the day before the hearing to ensure that he did not overlook the hearing scheduled for the next day. At approximately 9:20 this morning Mr Clark rang the Commission and stated that he was not aware that the hearing was listed for today and he asked whether the hearing could be adjourned. Mr Clark was advised that he should really attend the Commission to explain what has occurred and put his request formally. Mr Clark indicated that he might have trouble getting into Perth because he had to rely on public transport and the Commission indicated that even if the hearing started late the Commission would allow for that. Mr Clark indicated that he would make his way into Perth.

2 Mr Clark rang back some 15 minutes later and indicated that he would not be able to come into Perth. He gave no reason for his changed position. He asked for the respondent's solicitor's telephone number so that he could call them.

3 When the matter came on for hearing Mr Clark did not attend. The respondent, however, attended with counsel, with the General Manager of the respondent and with its witnesses. The Commission was informed that the respondent would not agree with the request for an adjournment and it requested that the application be dismissed.

4 I will deal first with Mr Clark's application for an adjournment. When one party applies for an adjournment and it is opposed by the other side, where the refusal of an adjournment would result in serious injustice to one party an adjournment should be granted unless in turn this would mean a serious injustice to the other party. In this case, if an adjournment is not granted and Mr Clark's claim is dismissed for want of prosecution the prejudice he suffers is the dismissal of his claim. Mr Clark will not be able to make a further claim because a claim of unfair dismissal must be made within 28 days of the day the employee's employment terminated. That is a serious injustice to Mr Clark.

5 That serious injustice then needs to be assessed against the serious injustice occasioned to the respondent if the adjournment is granted. The Commission was informed that the respondent is concerned to bring this matter to a conclusion. The respondent is experiencing some difficulty and in the past few months has had to retrenched further staff and has closed a factory. The issue of cost is a matter of concern to the respondent. It has incurred costs in the time taken to prepare for this morning's hearing as well as the costs of the persons who have attended the Commission today for the purposes of giving evidence. If the adjournment is granted, the respondent will have to incur some of those costs again. The respondent submits that there may be some difficulty in securing payment of those costs from Mr Clark.

6 On the basis of the submissions put to the Commission I find that the position of the respondent is one where there will be a serious injustice to it if the adjournment is granted. The respondent has as great an interest as the applicant in having this matter brought to an end and it has devoted time and resources for that purpose which it is ill able to afford. Those efforts are presently in vain and they are costs which are lost to it which, on the submission before me, is a cost it is most unlikely to be able to recover. On balance, I am not persuaded that the adjournment should be granted.

7 Further, there is some support for the submission then made by the respondent that Mr Clark's application should now be dismissed. Although Mr Clark had said that he was unaware of the hearing today, the record suggests otherwise. The Notice of Hearing which was sent to him on 31 July 2001 at the address contained in his Notice of Application has not been returned to the Commission as not received. Further, if, as Mr Clark may suggest, he was simply unaware of this matter being listed for hearing, it would mean that he has not enquired about the finalizing of his application since the conference before the Commission in June, a period of over three months. It was not part of his query to the Commission on 6 August 2001 following up on the information to be produced to him by the respondent after the conference. It permits a conclusion that he had lost some interest in pursuing his claim. Finally, I am not satisfied on the brief explanation he gave to my Associate this morning that he was unable to have attended the Commission even if he was late to at least attempt to persuade the Commission himself, and be questioned by the Commission regarding his circumstances, regarding his request for an adjournment. The point is made by Ms Hannington, on behalf of the respondent, that as Mr Clark had not himself made contact with the Commission until 9:20am, notwithstanding the telephone call received from my Associate the night before, supports the view that his application is not a priority for him.

8 The Commission is entitled to expect an applicant to take an active interest in matters brought to the Commission. The number of applications brought to the Commission and the demand for matters to be dealt with relatively speedily provide a background why the circumstances presented by Mr Clark this morning do not assist him. An Order will issue that dismisses his application.

9 Order accordingly.

2001 WAIRC 03967

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	MICHAEL JAMES CLARK, APPLICANT
	v.
	INDUSTRIAL GALVANIZERS WA, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	TUESDAY, 16 OCTOBER 2001
FILE NO	APPLICATION 802 OF 2001
CITATION NO.	2001 WAIRC 03967

Result	Application alleging unfair dismissal dismissed.
Representation	
Applicant	No appearance
Respondent	Ms C. Hannington (of counsel)

Order.

HAVING HEARD Ms C. Hannington (of counsel) on behalf of the respondent and there being no appearance on behalf of the applicant, 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 03780

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	STEVEN CROCKETT, APPLICANT
	v.
	HIRE INTELLIGENCE PTY LTD, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DELIVERED	WEDNESDAY, 19 SEPTEMBER 2001
FILE NO	APPLICATION 1441 OF 2000
CITATION NO.	2001 WAIRC 03780

Result	Alleged unfair dismissal dismissed except in relation to delay in paying redundancy pay
Representation	
Applicant	Appeared on his own behalf
Respondent	Ms M Saraceni (of Counsel)

Reasons for Decision.

1 The applicant was employed by the respondent from 28 June 1998 until 25 August 2000. The respondent operates a business renting computers on a short term basis which can range from daily to annually, and through an associated company, is a franchisor which provides services to Hire Intelligence franchisees of which there are a number located throughout Australia and in the United Kingdom.

2 The respondent's business in Western Australia is undertaken by Thomas Ronald Crage as Chairman and Managing Director; Mr Crage's wife, Val Crage, who also undertakes a sales role; and some 11 to 13 employees.

3 The applicant was initially engaged as a Technician. In October 1998 he was appointed Technical Manager where his responsibility was to supervise the respondent's technicians. In some three months or so after he was appointed as Technical Manager, the applicant had taken over other responsibilities within the company and, in January 1999, he was promoted to the position of Assistant to Managing Director. He indicated to Mr Crage that based on his experience in New Zealand, the title Assistant Managing Director was the equivalent of Executive Assistant or in his words "a glorified secretary". Given the importance and responsibility of the position, he thought that the title of "Manager—Special Projects" was more appropriate and put this to Mr Crage and Mr Crage agreed. His salary was substantially increased. Exhibit 3 contains a memorandum to the applicant from Mr Crage dated 8 January 1999 setting out the terms of his promotion and the relevant parts state—

> "**Re: Promotion**
>
> Congratulations on a well-deserved promotion to **Manager—Special Projects**.
>
> The promotion takes effect from 25 January 1999 however the bonus commences from 1 January 1999. Your annual base pay shall increase from $40,000 to $55,000. You will remain on the General Staff Bonus Scheme a copy of which is attached hereto.
>
> Your new duties will include—
>
> 1. Co-ordinating the workload of the technicians.
> 2. Undertaking all company purchasing.
> 3. Assist with Marketing including designing advertising and marketing materials.
> 4. Regularly updating Rental Price Lists.
> 5. Being responsible for the Perth Operations Division during periods when I work from home or are overseas.
> 6. Assisting Managing Director with a varied range of tasks as required by him.
>
> As an example of the additional tasks you will be asked to—
>
> 1. Update our Web Page including listing new Franchisees.
> 2. Create additional Web Pages to facilitate people linking to our main page.
> 3. Arrange links with suppliers and customers.
> 4. Sell Pentium 100's and older computers.
> 5. Develop a Corporate Marketing Brochure.
> 6. Prepare next newsletter.
> 7. Assist with Employment Agency Franchising.
>
> I am sure we will work well together and look forward to your assisting me in a wide range of tasks.
>
> Best regards
>
> Signed
>
> Tom R Crage
> MANAGING DIRECTOR"

4 The applicant received a number of bonuses during his employment, some relating to his personnel efforts and some relating to the team achievements.

5 Until the beginning of 2000, one of the applicant's main projects had been preparation for Y2K. In early 2000, one of his main projects was preparation in anticipation of the Goods and Services Tax. He was also working on co-ordinating the Operations Manual which was a substantial document provided to franchisees as part of the service provided to them by the franchise operation.

6 The applicant's performance reviews gave him an overall rating of excellent on the basis that he was performing above and beyond the call of the role and could be considered for promotion. He says that it was considered that he was performing exceptionally well up until February/March 2000 when Mr Crage offered him a trip to London to attend a franchise conference. He says that Mr Crage told him that it could be treated as a legitimate business expense, that the applicant could benefit from attending the conference and that it could be treated as a bonus.

7 The applicant was a cheque signatory and a key holder for the business. He says that in the months which followed February/March 2000 he was removed as a cheque signatory; his key was removed; his duties and responsibilities were narrowed considerably; in May 2000, he was directed to concentrate his efforts only on the preparation of the Operations Manual; and Mrs Crage, in particular, directed other employees to not communicate with him when they were seeking his advice or assistance which they had previously done without restriction. The applicant says that these things constituted harassment.

8 The applicant, like other employees, was required to provide regular fortnightly reports to the employer on the work that he had undertaken over the past fortnight and the work that he anticipated undertaking. The applicant included within his document a "jobs to do" list.

9 In May 2000, the applicant was offered a job with a salary of $120,000.00 per annum with CDM, a competitor of the respondent. He says that he did not accept the job however, he advised Mr Crage of the offer of the position.

10 The applicant says that about April or perhaps May 2000, after Mr Crage had returned from a trip to London, he

went to see Mr Crage on the basis that he believed that other employees were unhappy and were considering leaving. He talked to Mr Crage about that situation.

11 The applicant says that in the period after May 2000, with his work being focused purely on the Operations Manual and with the harassment he was receiving, he started sending emails to himself at home with brief comments about what had taken place so that he could keep a record of them. He says that prior to this happening, he noted on 7 April 2000 that a memo was issued stating that he was in joint control of the office. On 29 May 2000, having discussed his concerns about problems with the staff with the Managing Director, he says that his duties were reduced.

12 On 1 June 2000 Mr Crage advised that Mr Veasey, the financial accountant, would be running the office in his absence rather than the applicant. On 25 June 2000, Mr Crage attempted to change the applicant's personal contact details on the internet. The applicant had an assigned identification number on the internet to identify him when registering domain names. He says his name was listed as the contact for the domains registered by the respondent and that although he was not the owner he was listed as the contact person. He says that in registering many of those domains, undertaking the day to day maintenance and in dealing with the billing for those it was appropriate for him to be the nominated person as had been the case previously. He says that whenever anybody attempted to change the code for those domain names, an email was sent to the registered email address, in these cases to himself, to verify that the update details were correct. On 25 June 2000, he received notification that Mr Crage had attempted to change his personal internet registration details to show his own, Mr Crage's, name and address details. He says that on 26 June 2000, Mr Crage requested his keys to the building, his explanation being that Edward, the technical manager at the time, wanted to start earlier and that as he, the applicant, was starting later in the day and given that he was intending to change the locks because he was concerned about security, he did not want any more keys cut. He wanted Edward to have the applicant's keys. The applicant says that on most days he was there before Edward.

13 The applicant says that on 26 June 2000, Mr Crage also requested a copy of all proprietary software owned by Hire Intelligence for which the applicant had responsibility for development, including the source codes and all related contracts. The applicant says that also on 26 June, following Mr Crage's unsuccessful attempt to change the applicant's personal details on the domain name contact details, he advised Mr Crage that he was not able to make that change and Mr Crage requested that he make the change himself. The applicant says that Mr Crage had declined to provide his personal credit card details for the ongoing payment for those domains, all domains owned by Hire Intelligence, even though the invoices were going to the company and the applicant was paying them and being reimbursed by the respondent.

14 The applicant says that on 26 June 2000, also as normal, he spoke to Mr Haughton who was contracted to the respondent to develop the proprietary accounting software used in the business. The ongoing development of this software was one of the projects that the applicant considered he was employed to do. He said that Mr Haughton approached him and asked him what was going on because Mr Crage had asked him to take all of the Jason Business System ("JBS") development files off the file server and had started talking about protecting the source code and data. The JBS system is an integrated system which allowed management of the fleet of stock of the franchise group and could simultaneously provide financial information and other information to the franchisees and to the respondent.

15 On 27 June 2000, Mr Crage requested that the applicant take 5 days holiday during the first week that Mr Crage was to be in London. The applicant declined and says that Mr Crage asserted himself. The applicant again indicated reservations about taking that holiday and Mr Crage insisted and gave him no option. The applicant felt that if he refused to take leave then his position might be in jeopardy, that he risked being sacked. The applicant says that he wished to save up his leave. He says that he had a little less than two weeks owing to him which was not significant given that December and January were the quietest periods of the year and it was not uncommon for staff to take all of their leave at that time. He says that initially Mr Crage had asked him to attend a franchise review on the east coast for the 2 week period starting in July and the applicant said that he was busy from 2 July for a week with other commitments but he says that he offered to take the 2 week trip starting the week afterwards i.e. 9 July. Mr Crage refused and changed the trip from 2 weeks to 1 week and requested that the applicant take the first week as a holiday.

16 This two week period coincided with a period Mr Crage was going to be out of the office in London. It was the applicant's opinion that Mr Crage did not want him in the office when he was away although Mr Crage had not discussed any concerns with him. The applicant completed a leave application form but noted his objection to taking the leave on that leave application form.

17 The applicant has also given evidence of a situation where Mrs Crage used to collect the social club money which was a contribution that everyone made towards social functions. On one occasion, Mrs Crage did not ask him for his social club money.

18 The applicant has also given evidence of Mr and Mrs Crage directing other employees not to communicate with him or ask him questions.

19 The applicant says that he was becoming very concerned about what was going on and he approached a solicitor in early June 2000, and discussed the prospect of his dismissal. He says—

> "Given the fact that at all times the weekly reports that I submitted had significant tasks yet to be completed there was never any indication given to me and never any awareness that I would be made redundant and on discussing this with the solicitor I said "well could he make me redundant?" and she said "well, not if you have still got tasks to do. Not if he has not warned you of redundancy. Not if he has not discussed alternatives." The applicant says "I was aware at that stage that at no point had he mentioned that the position was going to be made redundant."

20 The applicant's employment was terminated on 25 August 2000. He was called into Mr Crage's office where he was advised that his position was to be made redundant. The applicant was provided with a letter which set out the details of the employer's position as to the duties he was performing and how they were substantially complete. Mr Crage went through with him each of the areas where he said that the functions had been completed or could be absorbed into positions of other employees.

21 The relevant parts of this letter read—

> "**Re: Redundancy**
>
> Steve this is to advise you that the position of Manager Special Projects has been made redundant with immediate effect and therefore that your employment with Hire Intelligence ceases today. The enclosed cheque covers your pay to date, annual leave entitlement and two weeks pay in lieu of notice.
>
> Over time your functions as Manager Special Projects have been completed or other employees have absorbed the functions originally allocated to that position. These functions included—
>
> a. Undertaking Franchise Outlet inspections. You went to Victoria to inspect each Franchisee's operation however two months after your return I still had not received reports on the inspections and had to move you onto other functions, so to date the reports have not been received. This function belongs more correctly with the Franchise Managers who will be undertaking the task in the future.

b. You were responsible for establishing the recruitment web site (Employonline). This was a major part of your function. The firm of programmers was unable to complete the task due to financial difficulty and the whole project has been scrapped at a cost (loss) to Hire Intelligence of about $300,000. This function no longer exists.

c. Coordinating the upgrade of the JBS in Paul's absence. With the Y2K issues now history, the integration of the JBS on an international basis accomplished and the GST upgrades completed the rate at which improvements are due to be undertaken has slowed dramatically. It is no longer a major task (the programmer comes in 1 day per week instead of 4 or 5. On occasions there were more than one programmer working on the JBS during last financial year). In any event the task belongs more correctly with our Financial Accountant and Graham Veasey has taken over this responsibility.

d. Sorting out the mess in Bob Mitchell's books. This task has been completed.

e. The bulk of the work on the Operations Manual is now complete with the remaining parts belonging more correctly with the Franchise/Training Managers who will now be responsible for completing the rest of the updates.

f. Disposing of the Unix boxes that were to be used for the recruitment website. You have attempted to dispose of them since December 1999 to no avail. I will now handle this project.

g. Negotiate the contract with Mircosoft. This has been completed.

h. Packing boxes and bar coding more correctly belong with the technical department and have been allocated to our Technical Manager.

As the main reasons for your position no longer exist (Recruitment web page, JBS for Y2K and GST, Bob Mitchell's mess, disposal of the Unix boxes and the Microsoft negotiations) you have been made redundant.

Enclosed please find—

1. Your final pay which includes—
   a. Your pay for August up until today.
   b. Two weeks pay in lieu of notice.
   c. Your annual leave entitlement for 6 days.
2. Your social Club contributions of $25 cash

Please ensure that all items belonging to Hire Intelligence, its Franchisees and associated companies are returned forthwith. Further, please delete any information relating to the aforesaid companies/people that you have placed on any computers under your control. This obviously excludes information on computers belonging to Hire Intelligence, its Franchisees and associated companies.

You are wished every success in finding a position to your liking.

Yours sincerely

Signed

Tom R Crage

Managing Director"

(Exhibit 1)

22 Mr Crage then asked the applicant to leave forthwith and he cleaned out his possessions and left. Soon after, on the same day, Mr Crage sent to franchisees an email dated that day, 25 August 2000, which stated—

"Hi Guys

This is to advise that Steve Crockett's employment with Hire Intelligence ceased today. Steve was employed as Manager Special Projects. Over time his functions have been completed or other employees have absorbed the functions originally allocated to that position. Steve's functions included—

a. Undertaking Franchise Outlet inspections. He went to Victoria to inspect each Franchisee's operation however two months after his return I still had not received reports on the inspections and had to move him onto other functions, so to date the reports have not been received. This function belongs more correctly with the Franchise Managers who will be undertaking the task in the future.

b. He was responsible for establishing the recruitment web site (Employonline). This was a major part of his function. The firm of programmers was unable to complete the task due to financial difficulty and the whole project has been scrapped at a cost (loss) to me of about $300,000.

c. Coordinating the upgrade of the JBS in Paul's absence. With the Y2K issues now history, the integration of the JBS on an international basis accomplished and the GST upgrades completed the rate at which improvements are due to be undertaken has slowed dramatically and therefore it is no longer a major task (the programmer comes in 1 day per week instead of 4 or 5. On occasions there were more than one programmer working on the JBS during the previous financial year). In any event the task belongs more correctly with our Financial Accountant and Graham Veasey has taken over this responsibility.

d. Sorting out the mess in Bob Mitchell's books. It has been discovered that he is owed over $100,000 for rental that he has never invoiced to one of his clients. This task has been completed.

e. He has proof read and updated the Operations Manual. The bulk of this work is now complete with however the remaining parts belonging more correctly with the Franchise/Training Managers who will now be responsible for completing the remaining fine tuning.

f. Disposing of the Unix boxes that were to be used for the recruitment website. He has been unsuccessfully attempting to sell these boxes since December 1999. It is not a time consuming function and I will now handle this.

g. Negotiate the contract with Microsoft. This has been completed.

h. Packing boxes and bar coding have been two tasks on Steve's "to do" list for over a year. These both more correctly belong with the technical department and are being allocated to our Technical Manager.

As the main reasons for his position no longer exist (Recruitment web page, JBS for Y2K and GST, Bob Mitchell's mess, disposal of the Unix boxes and the Microsoft negotiations) he has been made redundant.

I ask that you do not pass any company information on to Steve in the event he contacts you. There are a number of events that have occurred that suggest there could be a significant risk to head office and the group as a whole if information is passed on. They are—

1. In August 1999 Steve was asked to register domain names for us including the domain names for employonline.
   a. When registering the names employonline.net and employonline.com he listed—

   Administrative Contact and billing contact as—

   Steven Crockett (email) stevenc@crox.com <mailto:stevenc@crox.com>Crox Development

With our postal address. (Privately addressed mail is passed on to the addressee unopened). It raises the question why not register stevenc@hire-intelligence.com.au < mailto:stevenc@hire-intelligence.com.au> c/o Hire Intelligence? His answer was that he had a code from Pair.com that belonged to him for the past 5 years. When asked why he did not obtain a new code relating to Hire Intelligence his answer was "The name is registered as being owned by Hire Intelligence". When I said that it was easy for him to get a new code he admitted that this was correct. When I then again asked why he did not get a new code and have the contact and administrator as Hire Intelligence with his office email address instead of using his company's name and his private email address he said "I just did not". This still does not get over the issue that all renewal notices go to his private email address instead of his email address at Hire Intelligence. It also does not get over the issue that his company is listed as the administrator and it is only the administrator who is able to effect change. If the employonline web site had been as successful as anticipated at the time of registration the domain name would have had a multi-million dollar value.

b. The Hire Intelligence name carries a substantial value. The domain names "hire-intelligence.com.au" and "computerrentals.com.au" both had the contact as Steven Crockett and listed his home address.

c. The domain names "hire-intelligence.net", "hireintelligence.net" and hireit.com all listed his personal email address stevenc@crox.com<mailto:stevenc@crox.com > and his company, Crox Development, as all or some of Administrative contact, Technical contact, Zone contact and billing contact. This does not suggest intended wrong doing by Steve but shows that it was set up in a manner that could facilitate wrong doing whether it was intended or not. In other words a lack of corporate care was evident. His intent is unknown. This problem has now been rectified with all domains listing me as the administrator.

2. Steve Crockett has been responsible for all our security issues to date. I recently organized to have an independent security audit undertaken of our entire system. It was conducted by an outside organisation, which specializes in this type of work. Overall their report is 23 pages long however below are some of its findings and recommendations—

a. Steve had been requested by me to register 5 employonline domain names. However the consultants have advised that they discovered a further 12 employonline names were registered (not by us and not on our behalf) in key countries not covered by us. The registrations appear to have taken place during the same month that ours took place and through the same domain registration company. If our recruitment web site had been as successful as we anticipated at the time, each of those additional registrations would have had a value running into hundreds of thousands of dollars. So far we have been unable to determine who has registered the additional 12 domain names. On checking on a different domain name seller's site these 12 names are shown as being available. The security consultants say this is because they are a dormant listing with Pair.

b. Steve had been asked to register computerrentals.com.au. The report advises that the registered address is our address however his name, home address and personal email (stevenc@CROX.COM) are down as the contact details. The code he has for this registration is from Aunic and is different to the one he has from Pair.com.

c. Steve had been asked to register hire-intelligence.com.au. The report advises that we are the registered owner of the domain and the registered address is our address however his name, home address and personal email (stevenc@CROX.COM) are down as the contact details. The code he has for this registration is from Aunic and is different to the one he has from Pair.com.

d. With respect to the domain name "hire-intelligence.net" The Administrative Contact, Technical contact, Zone contact and billing contact has been listed as Steven Crockett (email) stevenc@crox.com<mailto:stevenc@crox.com of Crox Development with our postal address.

e. With respect to the domain name "hireintelligence.net" and "hireit.com" the Administrative Contact and billing contact has been listed as Steven Crockett (email) stevenc@crox.com<mailto:stevenc@crox.com>of Crox Development with our postal address.

f. The Security Consultants' **recommendation** is that "All DNS registrations should have as their contact the correct mailing contact and address. Also the email should be directed to the person within the organisation responsible for DNS changes (not a personal email address).

g. **Recommendation**: The security to the ftp site allows anonymous access to files on this server. It is not understood why this directory is available to anonymous users.

h. **Recommendation**: Several steps can be taken to prevent access in order to restrict remote access into the Hire Intelligence LAN. They have discovered that two ex-employees, namely Don Lombardi (now working for a competitor) and Chris Els have remote "Dial in Access" as does Steve Crockett. They have strongly recommended that dial in access to the Hire Intelligence LAN be revoked. Since MrPrint acts as a RAS server and a firewall they strongly recommended that it not be configured as a Windows NT Domain Controller.

i. **Recommendation**: As Hire Intelligence does not publish information on internal servers for Internet access it is imperative that the following services be stopped and configured to a manual start mode: www service; ftp service and gopher service....and anonymous access should be denied.

j. **Recommendation**: Access to the Hire Intelligence LAN could be compromised. This server should not be a BDC but a member server and have the www, ftp and gopher services stopped.

k. The above provides a summary of some of their recommendations. Full disclosure of their recommendations has not been given. The above does however assist in alerting Franchisees to areas of concern that they

may need to address, depending on the size of their operation.

3. I came into work on a Sunday during June only to find Steve working. He had brought in 2 computers that he said belong to a friend. One computer was linked to one of our computers in the tech room. The other computer was in the general office. When asked what he was doing he advised that he was transferring information from the one computer of his friend to the other and needed to bring them in to do the transfer over our network. My permission to do this had not been sought. It raises the questions "Was it really necessary to bring the computers to work to transfer data given Steve's level of technical expertise and if it was why was permission not sought?" Steve lives a significant distance from work.
4. Steve has asked directly for a promotion and pay rise on several occasions this year notwithstanding his pay having risen by more than 50% in less than two years (not counting the many bonuses he has since received which push the percentage up by an even greater amount) and notwithstanding being told previously and again on each occasion that Paul Cresp's position was being kept open for him and that performance and salary reviews take place in July/August and not on an ad hoc basis. In May, after having had his requests for promotions rejected on previous occasions, he came to me and said "I intend resigning, I am not resigning now but thought I would let you know that it is my intention to resign and virtually all the rest of the staff are about to resign." He went on to say that he had received an offer of $120,000 per annum from one of our competitors. A few days later he came into my office again and said he did not intend resigning but wanted a pay rise and promotion immediately. His willingness to work for a competitor (notwithstanding this being in breach of his employment contract) is yet another reason why information should not be provided to Steve under any circumstances.
5. On being advised that he has been made redundant he advised that he believes the redundancy does not apply, that I have breached the terms of his contract of employment and that he is therefore free to work for a competitor.

Best regards

Tom R Crage"

(Exhibit 31)

23 The applicant claims that he was harshly, oppressively and unfairly dismissed from his position. He denies his position was made redundant. He says there were tasks he had been asked to work on which were not finished, jobs included in his job description were incomplete and there was still other work to be done. He says that he was replaced in that position by another person. He also says that the proper procedure was not followed, salary increases were unfairly withheld and without proper reason, and he also claims denied contractual benefits. The applicant says that in the six months or so prior to the termination of his employment, he was subjected to harassment by his employer.

24 The respondent takes quite a different view of the situation, particularly about the work available and required to be done by the applicant. Mr Crage has given evidence that the applicant was answerable and reported directly to him. Bonuses were paid to the applicant on the basis of his performance and the performance of the team. Goodwill bonuses were made purely at his discretion. He says that bi-weekly reports were provided to him by the applicant. He says that employees want to be seen in the best light and they often include within the list of things to do, tasks which they believe might be seen by the employer as them showing initiative. That does not mean that the employer has approved of them undertaking those tasks and at all times, the applicant's priorities and work were directed by him, not by the applicant.

25 The applicant worked on a number of projects. Employonline was a world wide recruitment service to be established by the respondent. The applicant was to be instrumental in the development of the content of the website. This project was being considered in early to mid 1999 when Mr Crage asked the applicant to commence reporting on the progress of this matter. However, the company dealing with the matter got into financial difficulty so development of the project ceased in December 1999.

26 The applicant was asked to sell a number of Unix boxes which are large computer boxes associated with recruitment information. There were two of them valued at approximately $350,000.00 and the applicant commenced trying to sell them in 1999. By May/June 2000, he had not been successful in selling them. At that point Mr Crage told him to focus only on doing the Operations Manual. At the time of hearing, the Unix boxes were still on the respondent's premises and had not been sold.

27 In December 1999, the applicant negotiated contracts with Microsoft to rent particular programmes and there was very little if anything which needed doing in respect of those.

28 In respect of one of the franchisees, Norwood, its accounts required some work and the applicant reported in respect of this. However, this project was finished by around May 2000.

29 As to the Operations Manual, initially in his evidence the applicant intimated that he was responsible for the preparation of the whole document however, it is clear from the evidence that the applicant was responsible for preparing some of the Manual, albeit a significant proportion, and he was to review the work of others in preparing sections of the Manual. He was also to proof read some of the work that Mr Crage had done and Mr Crage was to proof read his work. Mr Crage says that in September 1999, it had come to his attention that there were a number of spelling and grammatical errors within the Manual and there were chapters lacking. He asked a number of people to prepare various chapters and to do corrections. The applicant was to review their work and to make sure there was a smooth flow of the whole of the Manual. Initially this was intended to be completed by the end of December 1999, ready for issuing in January 2000 and ready for a training course for new franchisees. It was not ready in January 2000.

30 Mr Crage notes that in mid January 2000, the applicant's fortnightly report indicated that it would be complete in mid February; in February, he reported that it would be complete by mid March; in March he reported that it would not be complete until 30 May. In January 2000, he had said that it would take 81 hours to complete; by March this had increased to 154 hours. By early May 2000, he forecast that a completion date of 30 July would be likely and his fortnightly report of 19 May 2000 said that it would take until 30 September. By this point, Mr Crage was becoming alarmed that the anticipated completion date had stretched monthly from December to September.

31 Mr Crage says that on 25 May 2000, he called the applicant into his office and directed him to work exclusively on the Operations Manual and to finish it by 30 June. On the basis that the applicant said that it would require 154 hours to complete, working at 40 hours per week, the period 25 May to 30 June could allow completion by that date. The respondent says that it was important that it be completed by 30 June to provide the franchisees with the documentation to allow consistent operation through the franchise operations as part of the service promised to them. It was virtually complete by the 25 August 2000.

32 The applicant had sought some relief from what he saw as the boring Operations Manual work and so at his own request, he was given the opportunity to undertake some franchise inspections in the eastern states. This was not normally a duty which would have been undertaken by him. However, these were provided as an opportunity for him to do something different.

33 Mr Cresp, the franchise controller had been working on the JBS and had been sent to the United Kingdom in August 1999 as Acting Manager Franchising. Mr Cresp had formerly owned the business which he sold to Mr Crage and Mr Cresp then became an employee. Mr Crage said that he had promised Mr Cresp that he could return in November 2000 to his position in Perth. He said that Mr Cresp had done all the development work on the JBS from June 1996 to July 1999. The JBS was "his baby", and on his return, that project would be returned to him. The applicant took over responsibility for it only in his absence.

34 Mr Crage says that with the introduction of the Goods and Services Tax imminent, and the financial controller having no computer programming knowledge, it was given to the applicant to direct how to integrate that programme. The Y2K project had to be complete by 31 December 1999 and the Goods and Services Tax project had to be complete by 30 June 2000. Beyond that time the applicant had no involvement with the JBS. Mr Veasey had responsibility for developing the depreciation schedule associated with the JBS.

35 Mr Crage says that when his wife accompanied him to the United Kingdom, which occurred for two weeks, four times a year, Mr Morgan took charge of sales. If Mr Morgan was on the phone, the applicant was to take sales calls. The applicant's involvement in that ought to have been minimal because Mr Crage was away during quiet times of the year.

36 In respect of the advertising role which the applicant performed, Mr Crage says that this was the role of the Manager, Special Projects and the applicant did a very good job in creating advertisements for the print media. These were stored on his computer and he had a significant data base of advertisements for the company to use. As time went by his involvement in updating that data base decreased because of the work already put into it.

37 Mr Crage says that website maintenance done by the applicant up to 25 May 2000, constituted 2 to 3 percent of his time.

38 As to a bar coding or "e tag" system, Mr Crage considered introducing such a system but when he obtained the details he believed the e tag system was not suitable to the company's needs and no further systems were considered at that time.

39 As to the design of boxes, he says that the applicant had reported on this on a regular basis but the original work had been done in London and the function was transferred to the Technical Manager and it would take him only two hours to obtain the details from London for any work in that regard, if and when necessary.

40 Mr Crage produced a schedule (Exhibit 57) from the regular reports provided to him by the applicant and he says that this demonstrates that the projects undertaken by the applicant were complete apart from the Operations Manual, and a few other minor matters. The applicant had no duties in purchasing advertisements.

41 Mr Crage says that as of May 2000, he had directed the applicant to work almost exclusively on the Operations Manual. In June 2000, the applicant performed 2 days on the JBS and 18 days on the Operations Manual. In July, he worked 1 day on the JBS, 6 days on franchise inspections, 9 days on the Operations Manual and took 5 days leave. He says that by August 2000, 93.3 per cent of the work previously done by the applicant over the past 12 months no longer existed, leaving 6.7 per cent of the applicant's duties. The purchasing was done by his wife for a number of years but purchasing diminished with the downturn in the business. One or two other staff members did minor purchasing.

42 Therefore, Mr Crage says that this lack of work required of the applicant constituted a genuine redundancy. As to other matters raised by the applicant he made the following comments. Mr Crage says that he saw the United Kingdom operation as being a gateway to Europe and North America and needed to find someone to replace Mr Cresp in London upon Mr Cresp's return to Perth. He says that in April 2000 he offered this position to the applicant although the applicant denies that the position was actually offered to him. Mr Crage says that the applicant indicated to him that he was not interested in the position because he had recently purchased a home in Perth. Mr Crage says that he tried to persuade the applicant that this would be a highly beneficial position but the applicant did not change his mind.

43 Mr Crage says that after the applicant came to see him when he returned from London in April 2000, the applicant told him that most of the staff was considering resigning and that he was also, but that he would not do so at that point. Mr Crage says that the applicant told him that if he could convince Mr Cresp to remain in the United Kingdom and the applicant took up Mr Cresp's position in Perth, then the applicant would manage the staff and ensure harmony. Mr Crage said that he had promised Mr Cresp the position to return to and he would not go back on his word. He says that he spoke to the staff and asked them if there was any discontent and none was reported. He did not know if the applicant was stirring the others up or if he was simply trying, through office politics, to improve his own position. In any event, he took no further action because if either of those possibilities was true, it had not benefited the applicant.

44 On 25 May 2000, Mr Crage called the applicant in to discuss the completion of the Operations Manual and he told him that he wanted him to work exclusively on that and finish it by the 30 June. He told him that he was not happy about the situation.

45 Mr Crage says that on 29 May 2000, the applicant came to him and said that he had been offered employment with CDM a direct competitor, he said that he had not taken the position because it was not what he wanted but that he was not happy to do just the Operations Manual—it was boring. He said that the applicant made another play for Mr Cresp's job. He told him that he was keeping Mr Cresp's position open for him as he promised that it would be available. The applicant told him that he was quite happy to work for the competitor if there was no advancement for him. He told Mr Crage that the job at CDM was $120,000.00 per annum and in the sales area. Mr Crage felt that the applicant was not worth $120,000.00 per annum and was surprised at such an offer being made. He felt that the applicant was using such a figure to advance his own position in respect of Mr Cresp's position but he had seen no offer made to the applicant.

46 Mr Crage was sure these two discussions occurred in the sequence described, being 25 May followed by 29 May.

47 The Operations Manual was not completed by June however, certain sections of it were issued in June and certain sections in July.

48 In June 2000, as a result of the applicant saying that he was willing to work for competitors, and as two employees had already done so, Mr Crage decided that he ought to have a security audit done on his business. Comtech was recommended to undertake this. On 23 June 2000, Mr Crage received the audit report from Comtech. It highlighted a number of significant concerns and made recommendations. One of those matters was that the applicant had registered "employonline" and "hire intelligence" domain names using his personal email address and his personal home address as contact details. The risk to the respondent was, whether or not the applicant left the respondent's employ, if a notice of renewal was sent to the applicant as the contact person either by email or in the post and the applicant did not bring those expiry notices to the respondent's attention, it could not re-register those names. The applicant could do so on their expiry and that would be perfectly legal. He said that he did not believe the applicant had any ill

intent in that regard but he believed that it was a major security issue and involved risk to the franchisees and to his own livelihood. Accordingly, on 25 June 2000 Mr Crage attempted to change the registrations himself. He said that he is nowhere near as computer literate as the applicant. He tried to change the code to his own name and was unsuccessful. A message was automatically sent to the existing nominee, the applicant, advising that someone had sought to make a change. The applicant came to him and advised him that he knew that he was trying to make the changes. He asked the applicant why the applicant had registered the names with his own contact details and the applicant said that he had had the code he had used for a number of years. When he was asked why he had not changed them for the purposes of these company details, and why he had used his own home address, the applicant said he just did. He was directed to change them. This direction was given in the presence of Mr Veasey. Mr Crage did not issue the applicant with any warning because he did not believe there was any ill intent on the applicant's part but that he believed the applicant's action had simply been cavalier.

49 In respect of the annual leave that the applicant took in June 2000, Mr Crage says this occurred when the applicant had indicated that he was interested in doing franchising inspections because the Operations Manual work was boring. When Mr Crage suggested he do them at a particular time, the applicant said he had visitors in the first week of July and it was not convenient. Mr Crage suggested that he take a week's leave to be with his visitors and then go to the eastern states to undertake the reviews, which he did. The applicant and he were absent for 2 weeks over the same period of time.

50 The company has an email policy that there are to be no personal emails of an adverse nature on their systems. Employees were warned that Mr Crage would be reviewing their emails from time to time. The policy provided that there was to be no discrimination and no pornography. He asked all employees to notify him of the passwords to access their systems and all replied with their passwords except the applicant who said that if Mr Crage had the administrator password he could access them and also that if he ever wanted to gain access to his emails, the applicant would allow him to do this.

51 When Mr Crage returned from London after his July visit he noted predictions in newspapers of a downturn and a slow down in the economy. He also noted a downturn in the company's income of some $33,000.00 in one month. He could see the trend worsening and, in August 2000, it did so. By mid August, he advised the franchisees of the downturn and encouraged them to take action to increase their turnover and reduce their costs. He says that the downturn continued through to January 2001. In any event in August 2000, he decided that it was necessary to reduce costs and tighten his belt. He examined the work being done by the applicant and noted that the projects for which the applicant was responsible were complete or substantially complete. He could not afford to continue with the applicant's employment although his skills in computers were excellent and the amount of work he had performed was satisfactory. He had hoped to retain the position but needed to reduce costs and there were no new projects that he wanted to undertake. He felt that he could not transfer other employees' duties to the applicant to keep the applicant employed, and he did not feel that that was fair. There were no other positions to consider except the United Kingdom position which the applicant had already rejected. The applicant's departure would lead to a reduction in the number of staff. There was to be no replacement of that position. A number of small duties were to be reallocated. Clayton Moulynox was to be allocated the website update, and all purchasing had been done by Mrs Crage.

52 Mr Crage said that the decision was made in mid August 2000. He did not notify the applicant straight away because of his concerns regarding security which arose from the security audit. He says that the applicant was very competent, he had boasted that he could break any password and get into any computer system and because the applicant had used his own personal email and home address for company domain names, he could not let his personal view of the applicant effect his business decision. He believed that that if he had given the applicant notice of the dismissal and allowed the applicant to continue to work, because of the applicant's level of competence and because of recent history, there was a risk to the business. Mr Crage says that with the benefit of hindsight, and based on the evidence he had heard, that the applicant had hidden certain information from him, and he had cause to be cautious about security.

53 Mr Crage says that, accordingly, at 4.00pm on 25 August 2000, he notified the applicant of his decision. He read to him those issues contained within Exhibit 1 and explained each item to him and asked for his comment. Mr Crage says that the applicant said in response "I've expected this, I have taken legal advice and you have done this unfairly. My solicitors are prepared to deal with this matter without fee", and the applicant suggested to him that he make a substantial payment to him and advised Mr Crage that he intended working for a competitor. On this basis the applicant was given a copy of the letter and asked to get his things and leave the premises. Mr Crage says that he tried to take a gentle approach with the applicant but he received a surprisingly aggressive response. He says that he tried to keep the situation under control and that there was no yelling or screaming, it was not in his nature to do so.

54 Some 10 to 15 minutes later at 5.00pm, Mr Crage met with staff to advise them of the applicant's termination of employment.

55 Mr Crage advised the staff that the applicant had been made redundant and read to them the details of the duties which had already been resolved. He then notified franchisees including alerting them to security issues which they ought to note. He said in that email that he did not believe that the applicant had ill intent but he could not ignore that risk existed.

56 Upon termination the applicant was paid 2 weeks pay in lieu of notice, 6 days leave accrual and $25.00 cash was paid to him in respect of social club money.

57 Some 6 months later, after receiving legal advice, the respondent paid to the applicant 2 weeks pay for each year of service or part thereof as a redundancy payment.

58 Mr Crage cited a number of circumstances where he believed the applicant had been treated fairly or more than fairly. He had recognised the applicant's work and his efforts. He says that when the applicant complained of working in the general office he was moved into the office with Mr Veasey albeit that Mr Veasey's salary range commenced where the applicant's salary range finished i.e. Mr Veasey was more senior in the management structure.

59 As to the allegation of harassment, Mr Crage says that the applicant's key was removed and given to another person so that a key holder would be present while the applicant was over east as Mr Veasey was away and Mr and Mrs Crage were in London. The applicant was removed as a signatory from the cheque account in similar circumstances where only one signatory was left in the office and so an additional signatory was needed.

60 In summary, Mr Crage says that the reason for termination was the economic slow down and that he could not carry a person whose position did not need to be performed.

61 Mr Crage says that from January to July 2000, the applicant was not given a performance review but if he had been, his rating would have been "satisfactory" rather than "excellent" because he had not completed the Operations Manual. His previous salary reviews had been "excellent" because he was working beyond expectations. He had ceased working the additional hours previously worked and his hours had dropped from about February or March 2000 and this was confirmed in his fortnightly reports. There were no more additional hours being worked.

62 Mr Crage referred to the applicant's "to do list" as a "wish list". He says that it is for the employer to determine what

work needs to be done. He had decided that he did not want further projects done, that the key projects which the applicant had been engaged on such as the Y2K, the Goods and Services Tax, the Operations Manual and the JBS were complete to the stage where very little work was required of the applicant. It was for Mr Crage as the employer to determine what work should be done in the future, what projects were appropriate, it was not for the employees to make those decisions.

63 Mr Crage acknowledges that the London job was not offered to the applicant after it was decided to terminate the applicant's employment.

64 Apart from the evidence of the applicant and Mr Crage, the Commission heard evidence from Mervyn Jayaseela, a Minister in the Christian Life Centre Church of which the applicant is a member. He described himself as a mentor, friend and support to the applicant whom he has known for three and a half years. He gave evidence as to the applicant's participation in and work involvement in the church. He gave evidence also of the applicant coming to him in the first half of 2000, disturbed and concerned about certain things happening in the workplace. His evidence does no more than confirm that the applicant conveyed to Mr Jayaseela his concerns and views about what was occurring in the workplace and the witness was not able to attest to the facts of those situations. However, under cross examination he said that he did not believe that the applicant would under any circumstances steal documents but was not aware that the applicant had in fact taken documents from the respondent's business.

65 There was also evidence from Andrew McKenzie, a computer technician employed by the respondent for approximately 22 months and who left that employment at the end of the financial year 2001. He said that for approximately 18 months he had been looking for work to enable him to resign. He said that once the applicant was put into a separate office and "we" were told not to seek help from him there was a marked difference in the treatment of the applicant from his perception. He had the distinct feeling, the impression, that the employees in the technical department were not trusted, things were locked up. He gave evidence that very few people had the insight or the information the applicant did of the business. He had been out of the office when the applicant had been removed from his position and found out from other employees. There was a lot of confusion about the situation. He said later in the day, Mr Crage gathered everyone together and handed out a notice to them indicating why he believed there was a valid reason to terminate the applicant's employment, and advising employees not to communicate with the applicant. He said that several reasons were given for the termination, being or including reference to the domain names, that the job no longer needed to be done and other matters. He has also given evidence that a few of his fellow employees and he were "shell shocked" and had a discussion in the car park where they speculated about the circumstances of the termination and expressed their opinions about the matter being poorly handled and that the applicant was not given a chance to say goodbye or rebut any accusations made. He says that it was not until very recently that Mr Crage discussed a down turn in the business. He gave evidence that from his observation the applicant was dedicated, trustworthy, worked long hours, was helpful and knowledgeable. He also says that Mr Crage knows how to run the business effectively and is fairly dominant. His reason for leaving was that he wanted to look for a firm that would appreciate his talents. Mr McKenzie said that he did not know if the work the applicant was doing was important, he was not in the office at the time the applicant's employment terminated, he is not privy to company financial records, and he says that Mr Crage never yelled at him.

66 The test to be applied to claims of harsh, oppressive or unfair dismissal requires consideration of whether the employer has so harshly exercised its lawful right to dismiss in such a way as to warrant the intervention of the Commission. It requires that there be a "fair go all round" *Undercliffe Nursing Home v The Federated Miscellaneous Workers Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385. Such a consideration is not to be made "only from the viewpoint of the employee". (*Sangwin v Imogen Pty Ltd t/a Carlton Custom Upholstery* (1996) 40 AILR 3—388). The applicant bears the onus of proving, on the balance of probabilities that he has been denied "a fair go all round".

67 As the applicant alleges that the dismissal was not a genuine redundancy, one needs to consider what constitutes redundancy. In *Gromark Packing v FMWU* (1993) 73 WAIG 220, His Honour Franklyn J. referred to definitions of redundancy which hold that it was "when the job is abolished". He went on to note that this described "one set of circumstances which could establish redundancy" but was not the ultimate definition. He went on to refer to a reduction in the workforce "because there was labour in excess of that reasonably required to perform the work available to the employer. That reveals a situation of redundancy, leaving for decision the selection of specific workers for termination of their employment."

68 I have considered all of the evidence and submissions in this matter. I have observed the witnesses as they gave their evidence. Having observed the applicant as he gave his evidence and as he presented his case, and noting the manner in which the applicant presented his case, I am satisfied that he is diligent in the extreme, and has a very strong sense of the rightness of his views, perceptions and conclusions. It was clear both from the way in which the applicant gave his evidence and his evidence per se as to his pursuit of opportunities for himself, that the applicant is very ambitious. He was very assertive in pursuing his own interests during his time with the respondent, was far from reticent in seeking changes to his title, to his duties, to the arrangements for his leave and all other matters including salary. I conclude that the applicant has exaggerated some of the incidents and issues to enhance his case.

69 I also note that the applicant sought to cast Mr Crage in a poor light on the basis of Mr Crage allegedly taking or threatening action against those who might cause harm to the business. He does not appear to understand that by making his claims against the respondent, he has forced the respondent into a position of defending itself. He does not appear to understand that in making his claim, he is doing no more nor less against the respondent than the respondent is purported to have done in respect of other persons or parties with whom the respondent has or may have had business dealings.

70 The applicant also does not appear to recognise that in taking the actions which he did, particularly over the last months of employment, to take from his employer documents which he was not entitled to take and in particular his decision to have domain names registered using his personal email and home addresses as contact details, shows a certain naivety, or alternatively, some ill intent towards the respondent. It would hardly be surprising that an employer might act with extreme caution upon discovering that an employee with considerable computer expertise had his personal contact details registered in respect of domain names which have a significant impact on the respondent's business and that the respondent should act in a manner to ensure that its business is not adversely affected.

71 As to Mr Crage, I found him to be a most credible witness whose recollection of detail was very impressive. I am sure that he is an astute businessman, and as an employer may be seen as somewhat firm. However, his firmness did not in any way intimidate the applicant or temper his assertiveness in pursuit of his own interests. Accordingly, where there is conflict in the evidence, I prefer the evidence of Mr Crage.

72 Having considered all of the evidence in this matter, I make the following findings. From 8 January 1999, the applicant was promoted to the position of Manager—Special Projects. The letter setting out his promotion listed duties which included examples of jobs to be done. It is clear from the analysis of Exhibit 57, which I accept to

be correct within a 10 per cent margin for error, that since September 1999 until the termination of his employment, a period of 12 months, the applicant's duties largely revolved around particular projects. Between September and December 1999, a substantial but diminishing period of time was spent on the employonline project. This ceased in December 1999. The JBS also took a significant period of time each month up until May 2000. From May 2000, it reduced from the approximately 7 days per month to 2 days, 1 day and .5 of a day during June, July and August 2000 respectively. The hiring of computers took only .5 of a day per month for each of 3 months in the preceding 12 months. The Operations Manual took 2 days in September 1999, no days in October, 1 day in November, 2 days in December 1999, 5 days in February 2000, 10 days in March, 6 days in April, 12 days in May, 16 days in June, 9 days in July and 18 days in August 2000. When Mr Crage became concerned at the increasing amount of time which this would require to complete, he was entitled to direct the applicant to direct his attentions to finalising the Operations Manual, which ought to have been completed in December 1999, to being substantially complete by 30 June 2000. By the time the applicant's employment terminated the great bulk of this work was done and there was no substantial work on the Operations Manual required.

73 As to franchise outlet inspections, these were not a significant part of the applicant's duties and were only performed on an ad hoc basis.

74 The disposal of Unix boxes was a task which was to require some time but the applicant was unsuccessful in that and the respondent no longer required that work to be given any priority at the time of termination.

75 The Microsoft contract was completed by the end of December 1999 and required very little if any further maintenance work.

76 The preparation of advertisements, price list updates and purchasing were things the applicant attended to on an ad hoc basis.

77 It is clear then, that the substantial projects undertaken by the applicant were, if not entirely complete, substantially complete by the time the applicant's employment terminated.

78 An employer is entitled to determine what work it wishes to have done. Merely because the respondent asked the applicant, and any employees for that matter, to put forward suggestions of work that might be useful, it is not for the employees to determine what work will or will not be done. That is a matter for a business decision and within the complete authority of the employer. There is no obligation on an employer to create further work for an employee when the work for which he or she is engaged is complete. Furthermore, there is no obligation on an employer to maintain an employee in employment by providing him or her with work which would otherwise have been performed by other employees. These general principles apply to the applicant particularly in a role which relied on special projects.

79 Accordingly, although the applicant says that there were many jobs left which he could have performed, as someone whose substantial work involved projects, when projects were no longer required to be done then there is no work of any substance for him. The work he performed, in addition to those projects, could easily have been reallocated to others within the organisation and this was within the discretion of the respondent. Accordingly, I am satisfied that the termination of the applicant's employment can properly be described as being a genuine redundancy as described in *Gromark v FMWU* (supra). I am satisfied, too, that the respondent was entitled to act to reduce its costs in the economic climate it faced.

80 I am satisfied that there was a slow down in the respondent's business and Mr Crage correctly and appropriately predicted it and made a necessary decision. There is no evidence that the applicant has been replaced and no evidence that the jobs which he was performing at the time of termination, apart from some minor on-going day-to-day matters which have been allocated to other persons, are still required. Although it was initially suggested by the applicant that Paul Cresp was returning from the UK to fill the applicant's position, it is clear that this was not so.

81 Having said that, though, I can understand that the applicant may have had a view that the respondent could have found other work for him if it had chosen and that there was some question about the applicant's trustworthiness. I must say that had the respondent had any concerns about the applicant's trustworthiness in the circumstances leading up to the termination of employment it would have been quite understandable given the applicant's conduct in respect of the contact details regarding domain name registrations, the applicant's conduct in taking documents from the respondent's business which he had no right to take, the respondent's concerns about the applicant's attitude towards his own ability to manipulate computer usage for his own benefit and the applicant's stated intention to work for a competitor if necessary. If those concerns had been in the back of Mr Crage's mind, although there is no evidence to demonstrate that they formed any part of the respondent's decision making as to the applicant's termination, then I could well understand why that would be so.

82 However, this goes to explain why the respondent chose to handle the termination in the manner in which it did. There was no warning given to the applicant, and given his expertise with computers and his conduct in the past, it is understandable that the respondent would not allow such an employee to remain on the premises, and have access to the company's records and computers during any notice period.

83 I am satisfied that in explaining to the applicant the basis of the termination that Mr Crage provided the applicant with genuine and good reason for the termination of employment.

84 As to whether, in the last few months of the applicant's employment, the respondent undertook harassment against him, I am satisfied that the respondent had good reason, in the circumstances of the time frames being predicted for the Operations Manual to be completed continuing to extend and increase, to direct the applicant to make it the sole focus of his work, subject to finalising a number of other matters. I do not see this as constituting any sort of harassment against him. Further, one can reasonably understand that an employee such as the applicant who in accordance with his own evidence was constantly being sought out by other employees for advice and assistance should be placed in a situation where those other employees should be discouraged from going to him and interrupting the work he was directed to focus on. Therefore, if there was any direction given to employees or any discouragement of employees from seeking the applicant's advice or assistance, then this was understandable in the circumstances of the delays and the time frames expanding for the completion of the Operations Manual.

85 In the circumstances of the respondent's security audit, taken together with issues of availability of staff, it is not surprising that changes were made to cheque signatories and to key holders. These operational considerations were significant to the respondent and cannot constitute harassment of the applicant albeit the applicant might see them as diminishing his status.

86 There are a couple of matters which might, taken in different circumstances, constitute some unfairness to the applicant. As to the communications by Mr Crage to members of staff and the franchisees after the applicant's termination of employment, I have examined in particular the email to franchisees to ascertain whether this constituted some sort of damage to the applicant, which might constitute unfairness in the dismissal. It is clear that in the circumstances of the applicant having a certain degree of contact with franchisees that Mr Crage was entitled to communicate with those franchisees the circumstances under which the applicant's employment terminated. It is possible, subject upon one's intent, to read into some of the description of functions performed

by the applicant and which were then concluded some criticism of the applicant's performance. However, read objectively, such is not the case. As to Mr Crage's request that the franchisees "not pass any company information onto Steve in the event that he contacts you," and setting out the issues regarding the domain names and other security concerns, this was quite reasonable. The franchisees should have been made aware that there were security issues which arose because of the nature of the applicant's work, because of the security audit issues, and because of the applicant's ability through the knowledge he had gained of the company, to potentially damage the respondent and the franchisees had that been his intent. Mr Crage was well within his rights to alert the franchisees to the situation. It may be that he was a little overly diligent in doing so provided more detail than was necessary, and could have been more discreet. However, this document was not for public release but was addressed to the franchisees who, of course, had some interest in the respondent's business issues.

87 It may also be that there is some question as to the respondent speaking with the applicant on his own without the applicant having any forewarning about the purpose of the discussion, and not giving the applicant an opportunity to have a witness present. However, in the circumstances of the applicant's own conduct and by that I mean not only his actions which he would portray as protecting his own position, but also in terms of the registration of the domain names, and his ability to look after and pursue his own interests, I am not satisfied that he was placed at any disadvantage or that any detriment was experienced by him in the meeting with Mr Crage. I accept Mr Crage's evidence that the applicant told him in a forthright manner that he believed the dismissal was unfair, that he had sought legal advice and that he intended to pursue the respondent in that regard. There is no indication that the applicant felt less than equal to the task of dealing with Mr Crage on any occasion. On the contrary, my observations of the applicant lead me to believe that he felt more than equal to dealing with Mr Crage. In any event, if those are matters of some unfairness to the applicant, then taken in context, they do not constitute such an unfairness to the applicant as to warrant a finding that the termination of employment was unfair (*see Shire of Esperance v Mouritz* FB (1991) 71 WAIG 89). In all of the circumstances of this redundancy, and of the nature of the applicant's work and skills, he has received "a fair go all round".

88 As to the applicant's claims to contractual entitlements, I am satisfied that claims to a share of the loyalty bonus are quite inappropriate and misguided. The loyalty bonus required that he continue in employment for a period of time, being 5 years, which he did not. The termination of his employment is not in circumstances which would warrant a finding that the termination was unfair and accordingly he ought be paid something on account of the loss he would suffer of an accrual. I also note in respect of the loyalty bonus that it is not simply an amount of money but in March 1999 related to an entitlement to "half of the Franchise Fee being A$60,000 received by the Hire Intelligence Franchisor with respect to a franchise for an area nominated by the company when that Franchise Area is sold and the appointed Franchisee commences trading." (Exhibit 52) This does not simply convert to an annual amount, even if it provides for some accrual arrangement.

89 As to the claim that the applicant is entitled to back pay for a pay rise which he says was due to him but not paid because there was no salary review for him, I have read the applicant's contract of employment, and the conditions set out in the respondent's policy. I am not satisfied that the applicant's contract of employment provided guaranteed salary reviews which would result in a pay increase such that he has been denied a pay increase. Those performance reviews were clearly at the respondent's complete discretion.

90 As to the applicant's claim that annual leave taken by him be re-credited on the basis that it was taken in circumstances which were not his choosing, I am not satisfied that the applicant was in any way entitled to have that leave reimbursed to him. There is nothing within his contract of employment to provide such an entitlement, and he took the leave albeit under protest.

91 As to the lost bonus which the applicant describes as relating to the trip to London including accommodation, this would have been a normal business trip and would have provided the applicant with some benefit. However, it was within the respondent's complete discretion to provide that "bonus", or in the circumstances of business requirements, to cancel the bonus, if it were a bonus at all.

92 As to the issue of time in lieu not paid, as I understand it this relates to time spent by the applicant during trips to the eastern states. The applicant was a person in a middle management position engaged on a salary. An examination of his contract of employment demonstrates that there is nothing which would entitle him to make such a claim. Further, it is quite normal as part as a salaried person's position in the private sector to undertake business travel which will, of course, be subject to airline timetables and the like. This involves such a person in travel which commences earlier or extends beyond normal business hours. This is not something for which normal private sector business travellers expect compensation. Nor is it a contractual entitlement which the applicant is able to claim.

93 The applicant claims that the dismissal was unfair because a redundancy payment was not made at the time of termination. I am not satisfied that the failure to pay the redundancy payment constituted ill intent on the part of the respondent. The payment was made, albeit some 6 months after the termination, but it was paid after the respondent had received appropriate advice. The applicant has given evidence of the consequences for him of the respondent's tardiness in this regard. I am satisfied that the failure to pay the redundancy pay within a reasonable time after the termination of employment constitutes an unfairness to the applicant. Six months is not a reasonable time, particularly given that the respondent claimed from the outset to have genuinely made the applicant redundant. The application was lodged with the Commission on 13 September 2000, and the respondent had its solicitors prepare and file a Notice of Answer and Counter Proposal as early as 10 October 2000.

94 The remedy for unfair dismissal is reinstatement, or, where the Commission finds that reinstatement is impracticable, then compensation for loss or injury is payable. Clearly, reinstatement is not practicable and the applicant's position no longer exists, and the relationship necessary for the parties to work together is not redeemable.

95 The loss suffered by the applicant in this case is the loss he suffered on account of not receiving redundancy pay within a reasonable time. A reasonable means of compensating him for that loss would be payment of interest on the amount of redundancy pay for the period of delay. The parties are invited to put written submissions to the Commission on this point, the applicant within 7 days of today's date, and the respondent within 14 days.

96 In all of the circumstances, other than in respect of the delay in the payment of the redundancy pay, I am not satisfied that the applicant has been treated unfairly, harshly or oppressively. I am not satisfied that he is owed any of the amounts that he claims as contractual benefits. Accordingly, except in respect of these issues of compensation for the failure to be paid redundancy pay within a reasonable period of the termination of employment, the application will be dismissed.

97 Having said that, I note that the application as filed by the applicant and originally through his solicitors, made no reference to the contractual entitlements claim. The applicant sought to add those at a later time. The application was never formally amended and accordingly the claims in respect of contractual benefits have no standing albeit that I have addressed them in these reasons.

2001 WAIRC 04047

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	STEVEN CROCKETT, APPLICANT *v.* HIRE INTELLIGENCE PTY LTD, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DELIVERED	TUESDAY, 30 OCTOBER 2001
FILE NO	APPLICATION 1441 OF 2000
CITATION NO.	2001 WAIRC 04047

Result Return of Documents

Order.

HAVING heard from the applicant on his own behalf and Ms M Saraceni (of Counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

1. THAT the applicant return to the respondent all documents (including all hard copies and visual images of the documents) tendered by the applicant as exhibits in the hearing of this matter and which are and have at all times been he property of the respondent.
2. THAT the applicant return to the respondent all documents (including all hard copies and visual images of the documents) which he discovered in the course of the claim (albeit they were not tendered into evidence), but which are and have been at all times the property of the respondent.
3. THAT the applicant shall comply with the orders (1) and (2) referred to above within 14 days of the date of this Order.

(Sgd.) P.E. SCOTT,
[L.S.] Commissioner.

2001 WAIRC 04050

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	STEVEN CROCKETT, APPLICANT *v.* HIRE INTELLIGENCE PTY LTD, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DELIVERED	TUESDAY, 30 OCTOBER 2001
FILE NO	APPLICATION 1441 OF 2000
CITATION NO.	2001 WAIRC 04050

Result Order for compensation for loss

Order.

HAVING heard from the applicant on his own behalf and Ms M Saraceni (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 the respondent has unfairly dismissed the applicant from his employment in that it failed to pay redundancy pay within a reasonable time.
2. ORDERS—
   (a) THAT the respondent shall pay to the applicant the amount of $150.76, such payment to be made within 28 days of the date of this Order.
   (b) THAT the application be and is otherwise dismissed.

(Sgd.) P.E. SCOTT,
[L.S.] Commissioner.

2001 WAIRC 03961

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	PETER JOHN JOHNSTON, APPLICANT *v.* FERNCROFT NOMINEES PTY LTD T/AS TYRE POWER ESPERANCE, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	TUESDAY, 16 OCTOBER 2001
FILE NO	APPLICATION 895 OF 2001
CITATION NO.	2001 WAIRC 03961

Result Applicant dismissed unfairly; compensation awarded Contractual benefits claim dismissed

Representation

Applicant Mr P J Johnston

Respondent Mr E Gorrett

Reasons for Decision.

1 This is an application pursuant to section 29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979*. The applicant, Mr Peter John Johnston lodged an application in the Commission on 25 May 2001 alleging that he had been unfairly dismissed by Mr Earnest Gorrett, the owner of the business on 12 May 2001. The applicant sought $10,000 in compensation for, he says, the financial pressures he faced arising from the suddenness of the termination.

2 The matter came on for conference on 13 July 2001 at which time the applicant raised a claim for denied contractual benefits being 5% of the net profits of the business. The matter was not settled in conference and Mr Johnston was given leave to file an amended application. The matter was referred for hearing.

3 An amended application was lodged in the Commission on 16 July 2001 and claimed instead $850 being 5% of $17,000 which the applicant says is the gross profit of the business. The applicant also claimed 2 weeks redundancy pay for he says the harsh and unreasonable way in which he was terminated. The respondent opposed the claims.

4 The matter came on for hearing at the Albany Courthouse on 2 October 2001. At hearing the applicant claimed the alleged denied contractual benefit of $850 and four weeks pay for compensation for unfair termination. The respondent's name was correctly identified and amended as Ferncroft Nominees Pty Ltd (ACN 21 062 155 140) trading as Tyrepower Esperance.

5 Mr Johnston worked for the respondent from 1 April 2000 to 11 May 2001 as the manager of the business. He was responsible for selling, ordering and fitting tyres and had earlier worked in the business under a previous owner.

6 It is common ground that the applicant approached the respondent with a view to the respondent starting up the business once Boral, the previous operator, wound up their business. The respondent entered an arrangement [Exhibit ECG1] to sell the business on 11 May 2001 to a Mr Doug Christian. Mr Christian took over operating the business in August 2001, the sale having been delayed, on Mr Gorrett's evidence, from 30 June 2001. Mr Johnston was handed a letter on 12 May 2001 advising him that his services were terminated due to the sale of the business. The letter was dated 11 May 2001 and was to take immediate effect. The applicant had commenced 4 weeks leave on 12 May 2001 and was taken by surprise that the business was to be sold. The applicant was not paid any notice as the respondent, on his evidence, believed that the notice payment was incorporated into the leave period. Mr Gorrett's evidence is that he wanted to give Mr Johnston as much notice as possible and hence he advised Mr Johnston of the sale at the commencement of his leave.

7 Mr Johnston says that he was also underpaid his annual leave entitlement. It is conceded by Mr Gorrett that notice was not paid and only paid later after he had received professional advice. He does not concede that he underpaid Mr Johnston his annual leave but he did later make an additional payment for annual leave. The point of contention is not that there are now monies owing for annual leave and for notice, but that Mr Johnston was originally underpaid and had some difficulty obtaining the correct payment. It is clear from the evidence of both the applicant and the respondent that this is the case, and I so find.

8 There is one other matter that needs to be covered in reaching that finding. Mr Johnston contends that his weekly wage was $581 net ($750 gross). He exhibited a letter of 9 October 2000 (attached to the application), under the signature of Mr Gorrett to prove his point. Mr Gorrett says that he paid Mr Johnston on his base rate of pay which was $482.33 gross plus overtime. I accept the evidence of Mr Johnston over Mr Gorrett in general, having heard both parties. His evidence is more consistent, plausible and credible. In particular I note that the respondent's answer and counterproposal lodged in the Commission on 25 June 2001 agreed to the salary listed in the application of $750 gross. It was only at hearing when the matter came to argument that the respondent challenged the wage paid.

9 Mr Johnston's claim for 5% of the net profit was made in his amended application and not in his original application. He says that this was part of the original contract agreed verbally with Mr Gorrett. Mr Gorrett says that there was no such agreement but then took some time in evidence before the Commission to suggest that the business was not profitable. Whilst I accept Mr Johnston's evidence over that of Mr Gorrett, I do not consider that Mr Johnston has in anyway made out his claim for this denied contractual benefit. His evidence is that Mr Christian, the new owner, told him at some stage that the business had made a $17,000 profit. He bases his amended claim on the passing statement by Mr Christian. Mr Gorrett says that he has spoken to Mr Christian who indicated that he had not made any such statement. Whilst I accept Mr Johnston's evidence that the verbal contract contained a provision for the payment of 5% of the net profit, and there is no dispute that he was never paid any monies relating to profits, I do not find that Mr Johnston has made out his claim. He bought forward no real evidence to suggest that a profit was in fact made, and even though he managed the business and would have had a good understanding of the level of sales and profit, he bases his claim solely on a comment made to him by Mr Christian. There is no direct evidence from Mr Christian or in terms of the respondent's records. The claim was not made in the original application or even referred to as being part of the contract. I can only assume that Mr Johnston accepted at that stage that the business was not profitable and was being sold. For those reasons the contractual benefits claim is dismissed.

10 Mr Johnston complains that Mr Gorrett knew of his financial position and did not forewarn him of the sale or his termination, hence leaving him in a precarious financial position. He says that he proceeded on 4 weeks leave on 12 May 2001 and went to the respondent's premises that day to return a company vehicle. He was handed his letter of termination which came as a shock. He submitted that there was no reason for the respondent to terminate his services at that point in time as the sale would have taken some time to complete. He contends that the respondent was attempting to save money and that this is also evidenced by the underpayment of his termination monies.

11 Mr Gorrett's evidence is that he gave the applicant the maximum amount of notice that he could have, ie at the commencement of his leave. He says that he could have waited until after his leave to terminate his services, but was considerate in giving him time during his leave to find another job. He says that he could not have advised Mr Johnston earlier due to the sensitivities and confidentiality of the sale arrangements.

12 Mr Johnston says that he has been on unemployment benefits. This money has been supplemented by $500 which he earned as a casual wall presser. He evidenced a range of positions which he has unsuccessfully applied for since his termination.

13 The evidence in my view is clear and displays a lack of concern and effort on the part of Mr Gorrett to consider the consequences of his actions in swiftly terminating Mr Johnston's services. The financial position of the applicant is his own concern. Mr Gorrett may have had good reason to believe that the sale should have been kept confidential, even from Mr Johnston, as he may have reacted badly. I can accept this as plausible and a matter where the Commission should not interfere. However, Mr Gorrett's approach to the termination was absent any notice, absent any redundancy payment and absent any thought as to keeping Mr Johnston in employment whilst the sale was being finalised. Mr Gorrett in part pleads that the business was losing money and had always lost money. That does not then present a reason to terminate the manager of the business instantly, after 13 months service, in a business they had effectively established together and without any warning. For these reasons I do not believe that Mr Johnston received a fair go (see *Undercliffe Nursing Home—v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385). I am prepared to accept as convincing the evidence that the sale was necessary as the business was losing money. This does not excuse the absence of payment for notice or for redundancy. The notice payment has been rectified, albeit reluctantly. The redundancy payment has not, and in the circumstances I find the absence of the redundancy payment to be unfair.

14 Mr Gorrett seeks to distinguish this matter from the circumstances in the matter of *Frederick John Rogers v Leighton Contractors* (1999) 79 WAIG 3551. He says that Mr Johnston is 42 years old, was employed for one year, in a business that was losing money, the employer was a small business (1.5 employees) and the business had to be sold. Weighed against this is the fact that Mr Johnston started the business, there were limited employment prospects in the locality (on Mr Johnston's evidence which I accept) and Mr Gorrett evidenced a reluctance to pay Mr Johnston his basic termination payments. In the circumstances I would award Mr Johnston a redundancy payment of two weeks, ie a payment of $1,062 net.

2001 WAIRC 04012

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	PETER JOHN JOHNSTON, APPLICANT
	v.
	TYRE POWER ESPERANCE, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	THURSDAY, 25 OCTOBER 2001
FILE NO	APPLICATION 895 OF 2001
CITATION NO.	2001 WAIRC 04012

Result	Applicant dismissed unfairly; compensation awarded Contractual benefits claim dismissed
Representation	
Applicant	Mr P J Johnston
Respondent	Mr E Gorrett

Supplementary Reasons for Decision.

15 Reasons for decision were handed down by the Commission as currently constituted on 16 October 2001. The parties were provided with a copy of the reasons, a minute of proposed order and a covering letter advising them to check that the minute accurately reflected the express intention of the Commission's reasons for decision.

16 The applicant, Mr Peter John Johnston, in a facsimile to the Commission on 22 October 2001 stated—

> "In reading the decision and reasons by Commissioner Wood I would like to point out that this net amount total for 2 weeks should be $1,162 and not $1,062 and I would also query whether tax is paid on a redundancy payment."

17 The Commission then contacted the respondent, Mr Ernie Gorrett, to advise him of Mr Johnston's letter to the Commission. Mr Gorrett had identified the calculation error of $1,062 and had nothing to add in respect of the order.

18 I have considered the submissions of both parties and clearly there is a calculation error. Two weeks net pay would be $1,162, not $1,062. However one of the essential elements of the decision is that two weeks redundancy should be paid. The gross weekly figure is in fact $750 and hence I would consider the appropriate order should be for $1,500 as a redundancy payment. I would so order.

2001 WAIRC 04013

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	PETER JOHN JOHNSTON, APPLICANT
	v.
	FERNCROFT NOMINEES PTY LTD T/AS TYRE POWER ESPERANCE, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	THURSDAY, 25 OCTOBER 2001
FILE NO	APPLICATION 895 OF 2001
CITATION NO.	2001 WAIRC 04013

Result	Applicant dismissed unfairly; compensation awarded Contractual benefits claim dismissed
Representation	
Applicant	Mr P J Johnston
Respondent	Mr E Gorrett

Order.

HAVING heard Mr P J Johnston on his own behalf and Mr E Gorrett for the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

(1) DECLARES that the applicant, Peter John Johnston, was unf-airly dismissed by the respondent on the 12th day of May 2001.

(2) ORDERS that the respondent shall pay the applicant the sum of $1,500.00 as a redundancy payment.

(3) ORDERS that the claim for outstanding contractual benefits be and is hereby dismissed.

(Sgd.) S. WOOD,
[L.S.] Commissioner.

2001 WAIRC 04044

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JOE PARIS LEE, APPLICANT
	v.
	HANSON PUBLISHING PTY LTD t/a JAM DESIGN, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	MONDAY, 29 OCTOBER 2001
FILE NO	APPLICATION 1081 OF 2001
CITATION NO.	2001 WAIRC 04044

Result	Order issued.
Representation	
Applicant	Mr J. Lee
Respondent	No appearance.

Order.

WHEREAS an application was lodged in the Commission pursuant to section 29 of the *Industrial Relations Act 1979*;

AND WHEREAS this matter was listed for hearing on 17 October 2001;

AND WHEREAS the hearing was adjourned with the consent of the parties to allow them to discuss the issues between them;

AND WHEREAS the parties agreed that the respondent would pay Mr Lee the sum of $1,744.00 within 7 days of the date of the hearing in full and final settlement of the application before the Commission;

AND WHERAS Mr Lee now informs the Commission that the respondent has not paid any sum as agreed and he requests that the agreement be reflected in an order of the Commission;

AND WHEREAS the Commission listed this application to enable the respondent to show cause why an order should not now issue as requested;

AND WHEREAS the Commission is of the opinion that an order should now issue as requested;

AND HAVING HEARD Mr J. Lee on his own behalf as the applicant and there being no appearance on behalf of the respondent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order—

(1) THAT Hanson Publishing Pty Ltd forthwith pay Joe Paris Lee the sum of $1,744.00 in full and final settlement of this matter.

(2) THAT the application otherwise be discontinued.

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

2001 WAIRC 03979

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	SHARON MARIE LEIPOLD, APPLICANT
	v.
	ALESSIA BECCEGATO t/a SALON EXPRESS, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	FRIDAY, 19 OCTOBER 2001
FILE NO	APPLICATION 1124 OF 2001
CITATION NO.	2001 WAIRC 03979

Result	Application alleging unfair dismissal dismissed for want of jurisdiction.
Representation	
Applicant	Mr B. Stokes (as agent) by way of written submissions
Respondent	Mr A. Di Lallo (as agent) by way of written submissions

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Reasons for Decision.

1 On 15 June 2001 Sharon Marie Leipold lodged an application in the Commission claiming that she had been unfairly dismissed on 25 May 2001. She is an apprentice hairdresser. The Commission convened a conference of the parties and although there were some discussions of a settlement on a "without prejudice" basis no agreement was reached. The Commission raised the *Industrial Training Act 1975* with both parties and queried whether the application was a matter for the Commission. The conference was adjourned to allow Ms Leipold to consider her position.

2 Ms Leipold's agent subsequently filed a submission claiming that the Commission had jurisdiction to deal with the claim of unfair dismissal and requesting that the issue of jurisdiction be determined. The respondent has been given an opportunity to respond to that submission. The Commission now deals with the issue of jurisdiction on the basis of the written submissions.

3 I find the agreed facts to be as follows—

(1) Ms Leipold is an apprentice within the meaning of the *Industrial Training Act 1975*.

(2) Between 19 March and 25 May 2001 Ms Leipold had a registered apprenticeship agreement with the respondent.

(3) On 25 May 2001 Ms Leipold's apprenticeship agreement was suspended pursuant to section 37(2) of the Industrial Training Act 1975.

4 The jurisdiction of the Commission to enquire into and deal with industrial matters in respect of apprentices is limited by the *Industrial Relations Act 1979*. In s.7 the Act defines an "employee" as including an apprentice. However, the Act also defines an "industrial matter" as including in respect of apprentices—

"(f) …

(i) their wage rates; and

(ii) subject to the *Industrial Training Act 1975*—

(I) their other conditions of employment; and

(II) the rights, duties, and liabilities of the parties to any agreement of apprenticeship or industrial training agreement."

5 Therefore, there is no limit on the jurisdiction of the Commission to enquire into and deal with an apprentice's wage rates. However, the jurisdiction of the Commission to enquire into and deal with an apprentice's other conditions of employment and, in this case, the liabilities of the parties to any agreement of apprenticeship is subject to the *Industrial Training Act 1975.*

6 The *Industrial Training Act 1975* provides for the employment and training of apprentices in Part V of that Act. Relevantly, it provides power to the Director of Industrial Training to decide differences over apprenticeship agreements. Thus, by section 37(1) of that Act, no apprentice may be discharged from employment by an employer for alleged misconduct unless the parties to the relevant apprenticeship agreement consent to the dismissal or the agreement is cancelled by order of the Director on the application of the employer.

7 By section 37(2), an employer may suspend an apprentice for alleged misconduct but shall, within 7 days of the date of suspension, apply to the Director for suspension or cancellation of the relevant apprenticeship agreement.

8 By section 37(3) upon application by an employer under subsections (1) or (2), the Director has the power to suspend the operation of the apprenticeship agreement for such period and on such conditions as he thinks fit, or cancel the agreement or order the employer to reinstate the apprentice and make such order as to the payment of wages to the apprentice during any period of suspension as he thinks fit.

9 On the agreed facts, Ms Leipold's apprenticeship agreement has been suspended. The suspension of the apprenticeship agreement is a matter solely within the prerogative of the Director of Industrial Training and is not an industrial matter for the purpose of this Commission. Further, the period of the suspension and any conditions to be attached to it are a matter for the Director of Industrial Training and not this Commission. Therefore, the suspension of Ms Leipold's apprenticeship agreement is not a matter for this Commission. An apprentice aggrieved by a decision of the Director of Industrial Training may appeal to the Commission. However, that is not the case here.

10 Ms Leipold claims that she has been dismissed. She states in her application to the Commission that at a meeting between her and her employer she was told that her employment was terminated because her future employment with the respondent "wasn't going to work". The respondent disagrees with Ms Leipold's statement and in turn says that, ultimately Ms Leipold wanted "to leave immediately". Even if I accept for present purposes that Ms Leipold's statement is correct, she has not been dismissed in the way that an employee may have been dismissed. What has occurred is that Ms Leipold's apprenticeship agreement has been suspended. The relationship between Ms Leipold and the respondent was one of apprenticeship. The suspension of the apprenticeship agreement means that the contract of apprenticeship between them has been suspended. I am not aware of any authority to suggest that there is a contract of employment between an apprentice and an employer independently of the contract of apprenticeship. There is no provision for that in the *Industrial Training Act 1975*. In the common law a contract of apprenticeship has its own peculiar niche in the industrial scheme and strictly speaking a contract of apprenticeship is not one of hiring and service and the relationship is not that of employer and employee but rather that of master and apprentice (*Boilermakers Society of Australia v. Saunders and Stuart and Others* (1946) 26 WAIG 343 at 344 per Dunphy J.). It is a relationship which arises out of a contract whereby one person, called the employer, becomes bound to teach another person who is called the apprentice, a profession or trade and the apprentice becomes bound to learn it and serve the employer as an apprentice (re *Painters and Paperhangers Award*, (1924) 4 WAIG 102 at 103 per Burnside J.).

11 That position is reflected in section 30 of the *Industrial Training Act 1975* which provides that the parties to an apprenticeship agreement shall be the employer, the apprentice and the parent or guardian of the apprentice. It is for that reason that it is necessary for an apprentice to be specifically included within the definition of "employee" in the *Industrial Relations Act 1979* because history suggests that an apprentice may not otherwise be an employee as that term is commonly used (re *Frieze* (1909) 8 WAAR 5).

12 It follows that Ms Leipold has not been dismissed for the purposes of the *Industrial Relations Act 1979*. The contract of apprenticeship which exist between Ms Leipold and the respondent has been suspended in accordance with the *Industrial Training Act 1975* and that circumstance can not give rise to an industrial matter for the purposes of this Commission's jurisdiction.

13 Accordingly, an Order will now issue dismissing this application for want of jurisdiction.

2001 WAIRC 03980

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	SHARON MARIE LEIPOLD, APPLICANT
	v.
	ALESSIA BECCEGATO T/A SALON EXPRESS, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	FRIDAY, 19 OCTOBER 2001
FILE NO	APPLICATION 1124 OF 2001
CITATION NO.	2001 WAIRC 03980

Result	Application alleging unfair dismissal dismissed for want of jurisdiction.
Representation	
Applicant	Mr B. Stokes (as agent) by way of written submissions
Respondent	Mr A. Di Lallo (as agent) by way of written submissions

Order.

HAVING HEARD Mr B. Stokes (as agent) on behalf of the applicant, by way of written submissions and Mr A. Di Lallo on behalf of the respondent, by way of written submissions, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders—

THAT the application be dismissed for want of jurisdiction.

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

2001 WAIRC 04018

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	DAVID MAIN, APPLICANT
	v.
	BBC HARDWARE LIMITED, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	FRIDAY, 26 OCTOBER 2001
FILE NO	APPLICATION 2003 OF 2000
CITATION NO.	2001 WAIRC 04018

Result	Application dismissed
Representation	
Applicant	Mr G McCorry appeared on behalf of the Applicant
Respondent	Mr J Brits (of Counsel) appeared on behalf of the Respondent

Reasons for Decision.

1 This application concerns a claim by Mr David Main (the Applicant) that he was unfairly dismissed from employment with BBC Hardware Limited (the Respondent) on 15th November 2000.

2 The Applicant says he was a Retail Manager for the Respondent and his dismissal came about for a so-called breach of company policy. The dismissal was harsh, oppressive and unfair because the alleged breach of company policy took place on 7th August 2000 whereas the dismissal was effective on 15th November 2000. He was given a signed letter of termination before he had any opportunity to respond to the allegation against him. There was no prior counselling in any form, in any event the alleged breach of company policy, which was in the form of removing a sum of money from the safe, was not contrary to custom and practice at the Respondent's business and was a regular event sanctioned by members of management.

3 The Applicant became a Retail Manager of the Respondent's Morley Hardware House, on 22nd September 1999. It was a permanent position with a salary of $46,000 per annum. The salary level was reviewed against performance annually on 1st July. The letter of appointment details the terms and conditions (Exhibit B1). One of those terms required that the Applicant read the BBC Handbook and acknowledge that he had done so by signing the acceptance.

4 The Handbook (Exhibit B2) contains a section entitled "Employee Rules" these rules draw to the attention of an employee that violation of any of the policies could result in disciplinary action including termination.

5 The document sets out a series of categories of failure to perform or misconduct which would fall within conduct that could lead to termination. Included in those and relevant to these proceedings is "failure to follow cash register and cash handling procedures" and under the heading "Theft" giving away merchandise, unauthorised removal of company property including stationery, theft of money or cash or property of others. There is also head of conduct entitled "Failure to achieve standards set out for key result areas of your position description".

6 The Applicant gave evidence before the Commission and related his version of events. He told the Commission on or about 7th October 2000 he realised that he had not brought his wallet to work and as he required some fuel to get home, he wrote out a note and took $40.00 from the safe. A bank clerk, Roma Ierace, witnessed him sign a document, date it and according to the Applicant, Ms Ierace then signed the document. He says that he put the note back in the safe and took the money.

7 The money in question was not part of the normal earnings of the store, there was a significant float of the Respondent's money in the safe but there was also money that accumulated from amounts left by customers, credit cards and other items. There was a substantial amount of money in a bag and it was from this bag that the Applicant took the $40.00.

8 The purchase of fuel was the primary use of the money. He admits that he did not return the money until 16th November 2000 approximately seven weeks after. He said that soon after he took the money he returned to work but it slipped his mind that he should return the money to the safe.

9 On Friday 10th November 2000, Mr Wayne Mundy the Store Manager approached the Applicant and asked him about the $40.00 enquiring whether it had been used to buy beer for the Manager's fridge, the Applicant had replied in the negative saying that he had borrowed the money. He told Mr Mundy that he had forgotten to put the money back. However, he did not return to work until 15th November 2000 and it was then he intended to replace the money.

10 Before he did so he was asked into Mr Mundy's office to discuss the $40.00 he had taken from the safe. During the discussion he was asked why he had not put it back and he responded that he had forgotten. Mr Mundy then said that in light of his failure to return the money it could only be assumed that he had stolen it and the Respondent had no choice but to terminate his contract of service.

11 The Applicant said that he appealed to Mr Mundy emphasising to him that Mr Mundy must have known that the IOU was in the safe and that he intended to return the money. It was clear that he had that intention because he had the IOU witnessed, how then could it be said the money was stolen.

12 The Applicant also says that he was the Duty Manager at the time and there was no one other than himself who could authorise removal of money. He asserted both in examination in chief and cross- examination that the writing of IOU's was a common practice and he cited a number of examples. It was his understanding that the use of IOU's was an acceptable practice in the store from

time to time and that even though the practice was a breach of company policy it was done without reference to Head Office. The Applicant said that he had never, prior to his termination seen any documentation about company policy in that respect.

13 The Applicant also gave evidence about an incident involving a cheque for $38,000 that was removed from the store by him. The usual practice was the cheque to be rung up in a till and to be banked the following Monday morning. The Applicant said that he put the cheque in his pocket, took it downstairs forgot to put it in the till, he realised he had it and returned it the following day. To him it was a non-issue.

14 The Applicant called two witnesses in support; the first was Mr Brent Lyndon Connolly who was a Store Manager for the Respondent and who had employed the Applicant. He told the Commission there was no common practice of staff borrowing money from the safe, the only occasions when that would happen was when wages were not paid and money would be taken to pay the employee concerned. This occurred from time to time with a new employee when their pay details were incorrect.

15 The practice was to give those people a small loan to tide them over until an electronic transfer went direct to their bank and then they would refund the advance. There were no formal documents to do this, there were not any IOU's. The practice catered for instances of hardship caused by failure of the Respondent to pay wages.

16 Mr Connolly had approved money being paid in such circumstances and was aware of the policy in that respect. Technically it was a breach of the policy but authorisation was obtained every time from Head Office before it was done.

17 Mr Connolly could not remember authorising any loans for Ms Ierace, he could remember no more than four or five loans of that nature in the six months he was at the store.

18 During cross-examination Mr Connolly related that there had been incidents when employees of the Respondent on the East Coast lost their job for putting IOU's in safes, it was something that was not encouraged and there was an absolute ban on it. The only time it was done was in circumstances concerning failure of payroll. In effect the money really belonged to the worker involved because it was pay and it was not a loan.

19 Evidence was also called from Ms Rosemary Gina Pitch, Ms Pitch is a clerk at the Respondent's Morley business, she worked in the banking room and the office.

20 Her evidence concerning IOU's was that they were only used for wages when a person had not been paid. Once the money was put into the bank account the employee would pay the money back.

21 Ms Pitch knew of no incident involving payment of money to Ms Ierace when her husband lost her wallet. Nor did she know of money being given on IOU to another person named Chris Persian, she knew of no persons asking for loans from the safe because they knew that they would be refused in any event. Her clear evidence was that only wages could be supplemented from money out of the safe for people who were desperate for cash and then only on authority.

22 On the completion of the Applicant's evidence the Respondent moved that the evidence of the Applicant substantiates the defence of the Respondent, that an investigation took place, that he was interviewed and that the Applicant admitted he was given the opportunity to respond. The reason that he says the dismissal was unfair was because the removal of money from the safe was common practice. His own witnesses had established that was not the case, it was therefore submitted there is no case to answer.

23 The Commission rejected the no case to answer submission on the basis that it was appropriate and necessary that the Commission hear evidence from the Respondent in order that the Respondent may discharge the first evidentiary onus which rested with its case because the dismissal was summary. That would also give the Applicant the opportunity to cross-examine those witnesses.

24 The Commission then heard evidence from Mr Wayne Austin Mundy who was the Store Manager at the Respondent's Morley branch during the time the incidents the subject of this application took place.

25 Relating his knowledge of the incident concerning the cheque that was taken home by the Applicant after close of trade. Mr Mundy said that the banking clerk and the office supervisor came in to finalise the paperwork and reconcile the banking and they could not find the cheque. After searching the office they assumed the Applicant had it because he was the last person to have it in his possession. He was contacted at his home and asked whether he had the cheque and he said "no". He was asked to search his clothing and he did so and found the cheque. He was told that the cheque was needed, it is an accountable document and could he bring it back on that day which was a Saturday. His response was that he could not and he would send it in the next day, which he did, by way of a junior employee. For these events the Applicant was counselled.

26 In October 2000 Mr Mundy was on leave, this apparently was during the time in which the cash was removed from the safe, on his return he was not aware of the event, it was brought to his attention on the afternoon of 9th November 2000 that the Applicant had taken $40.00 out of the safe and had not returned it. This was the first knowledge Mr Mundy had of the matter. The first opportunity to speak to the Applicant was on Friday 10th November 2000, when he asked the Applicant about the $40.00, why he had taken it and why he had not returned it after five weeks.

27 The Applicant was told that he needed to replace the money and that the matter would be investigated the following week when he returned from two days off after working the weekend.

28 Mr Mundy said that during his investigations Ms Ierace told him that the Applicant had used words to the effect that he was "taking [the]$40.00 it wont affect the float". Mr Mundy also interviewed Ms Carol McGhie, Ms Ierace's supervisor, to confirm what Ms Ierace had said. He asked Ms McGhie why she did not report the matter earlier to the Acting Manager; her response was that as the Applicant was a Manager she was afraid to challenge his authority.

29 On 15th November 2000 Mr Mundy conducted a formal interview with the Applicant to discuss the removal of the cash without authorisation, the non return of the money for five weeks and its use for personal reasons.

30 Mr Mundy had prepared a list of questions to put to the Applicant (Exhibit B3) his responses were recorded and a report was prepared. Before the interview Mr Mundy had checked the safe to see if the money had been returned or if there was any evidence of any documents supporting the removal of the cash as the Applicant claimed, there were none.

31 The interview lasted upwards of an hour, at the end of the interview Mr Mundy told the Applicant that he did not accept his explanation why he had taken the money and had not returned it, given that he had the opportunity to repay it and he had not done so. In those circumstances he was dismissed. Mr Mundy's evidence was that the Applicant did not return the $40.00 until a fortnight after his services were terminated.

32 Mr Mundy was certain that IOU's are only used for payment to employees of entitlements if wages had been delayed. The Respondent accepts that it makes a mistake if entitlements are not paid and if an employee expresses extreme hardship the funds are made available to them. The process followed is an envelope with the caption "employee wages unpaid" it is signed by both the employee and the Manager and when the entitlement is banked the money is recouped from the employee. There is no practice at all that IOU's are used for general loans.

33 Evidence was received on behalf of the Respondent from Ms Caroline Denise McGhie who is an office supervisor;

the Respondent had employed her for 10½ years. Ms McGhie related that she knew that the Applicant had taken a cheque from the premises, phone calls had been made to him, he was asked to return the cheque to the store, he said that he could not and it eventually came back through another staff member. Ms McGhie reported this to the Store Manager.

34 As for the $40.00 taken from the safe by the Applicant Ms McGhie said Ms Ierace had come to her concerned that the Applicant had come into the office and taken $40.00 for fuel and had not put any record in the safe. She was concerned because she thought she might be held to be responsible. According to Ms McGhie IOU's in the safe are used solely for the purpose of wages that had not been paid or when there had been mistakes in pay. The accounting procedure was to use a banking envelope, the employee signs for the amount of money and the Manager counter-signs to say he has given the money and details of the amount of the loan are recorded.

35 Ms McGhie said that she wanted to give the Applicant a chance to put back the money, she left it four or five weeks hoping that he would, she checked every day to see if it had been returned, but she did not speak to the Applicant about it before she reported the incident to Mr Mundy when he returned from leave.

36 During cross-examination by Mr McCorry, Ms McGhie confirmed that during a telephone conversation Ms Ierace had said that the Applicant had not put an IOU in the safe. When asked why she did not speak to the Applicant about it she said that the day the Applicant had taken the money he had left his car at work and taken Mr Mundy's car home. So she presumed that he did not need the money for fuel as he said that he did, on the contrary he had taken it for some other purpose. She did not feel comfortable in those circumstances with asking a Manager to put the money back into the safe; she thought that it was appropriate to leave it to another senior Manager to ask him to do so.

37 When pressed further under cross-examination she said that the question of whether the Applicant really needed the money for fuel or not was raised with her by Ms Ierace when she said that the Applicant did not need fuel money because he had the Manager's car some time and that a fuel card comes with the car.

38 Evidence was also taken from Mr Neil William Timms, a Trade Manager, employed by the Respondent at the Morley store, he was asked by Mr Mundy to be a witness to the interview with the Applicant on 15th November 2000, he was shown the letter of termination and extracts from diaries Exhibits B5 and B6 and confirmed the information in them. He said they were a fair summary of what occurred and that the interview took an hour. The Applicant was not given the letter of termination nor was he dismissed until the end of the meeting.

39 The Commission also heard evidence from banking clerk, Mr Roma Ierace, she said that she observed the Applicant remove $40.00 from the safe, she did not sign any document as a witness, the Applicant merely said that he was taking the money for petrol. She was quite concerned that she might be implicated in some way with the removal of money from the safe when she knew that to be wrong, she therefore told her supervisor as soon as she could.

40 Ms Ierace also confirmed that it was not the practice in the store for IOU's to be issued to employees for money to be used for personal matters. Money was only taken out of the company float when there was a problem with pays and then only on authorisation.

41 The preceding is a sufficient scan of the evidence in this matter for the purpose of these Reasons.

42 The Commission is to rule on witness credibility, it had the opportunity of observing the Applicant give his evidence. It must be said that there are differences between the Applicant's evidence in chief and cross-examination such as whether an IOU was signed or not and Ms Ierace's role as an example. His story had the marks of being constructed to suit the outcome that the Applicant seeks, in other words it had the appearance of being self-serving. Worse for the Applicant none of his fundamental contentions were supported by either of the persons called to give evidence for him. In fact the evidence of Mr Connolly is directly at odds with that given by the Applicant. He relied on Mr Connolly and Ms Pitch to corroborate his fundamental contentions about the use of IOU's in the business and they did not, in fact their evidence clearly and emphatically supported the contentions of the Respondent.

43 There is no such question with the evidence of Mr Mundy, Ms McGhie, Mr Timms or Ms Ierace who gave evidence for the Respondent. The Applicant through his agent Mr McCorry embarked on vigorous cross-examination of Mr Mundy but his story remained strong and unshaken. The cross-examination did not disturb any of the evidence in chief of any of the witnesses for the Respondent.

44 This is a clear case where the evidence of the Respondent is to be accepted in preference to that given by the Applicant. In fact it should be said that the evidence that has been presented by the Respondent supported as it is by the evidence from the Applicant's own witnesses leads to a finding that the Applicant cannot be regarded as a credible witness.

45 The Commission is to apply the test that is set out in *Federated Miscellaneous Workers Union v Undercliffe Nursing Home(1985) 65 WAIG 385* the parties to the dispute are to be given a fair go all round. In this case the Applicant's conduct as a Manager dealing with money raises fundamental questions about his fiduciary duty. The Applicant was dismissed summarily for failure to satisfactorily answer the questions that had been posed to him by Mr Mundy about his conduct. In such circumstances the questions that have to be asked are as follows: Was his conduct a deliberate flouting of his contract of employment? Was the punishment inflicted upon him fitted to his conduct? And did his conduct constitute a wilful disregard of his responsibilities to the Respondent therefore attracting the employer's ultimate sanction of dismissal?

46 These matters have been examined recently by the Full Bench in *BGC Australia Pty Ltd v Ian Phippard*, 22nd October 2001 [unreported]

"[84]This was a dismissal for breach of fiduciary duty, it was submitted, and the proper principle was that laid down by Kirby J in Concut Pty Ltd v Worrell [2000] 75 ALJR 313 at 321 and 322. His Honour said—

> *"The ordinary relationship of employer and employee at common law is one importing implied duties of loyalty, honesty, confidentiality and mutual trust. At common law:*
>
> > *"[c]onduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal. ... [T]he conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found. It is not enough that ground for uneasiness as to its future conduct arises."*
>
> *and*
>
> > *"It is, however, only in exceptional circumstances that an ordinary employer is entitled at common law to dismiss an employee summarily. Whatever the position may be in relation to isolated acts of negligence, incompetence or unsuitability, it cannot be disputed (statute or express contractual provision aside) that acts of dishonesty or similar conduct destructive of the mutual trust between the employer and employee, once discovered, ordinarily fall within the class of conduct which, without more, authorises summary dismissal. Exceptions to this general position may*

exist for trivial breaches of the express or implied terms of the contract of employment. Other exceptions may arise where the breaches are ancient in time and where they may have been waived in the past, although known to the employer. Some breaches may be judged irrelevant to the duties of the particular employee and an ongoing relationship with the employer. But these exceptional cases apart, the establishment of important, relevant instances of misconduct, such as dishonesty on the part of an employee like Mr Wells, will normally afford legal justification for summary dismissal. Such a case will be classified as amounting to a relevant repudiation or renunciation by the employee of the employment contract, thus warranting summary dismissal."

[85]The test is as laid out, too, in Sargant v Lowndes Lambert Australia Pty Ltd 81 WAIG 1149 (FB) at 1156-1157, where the Full Bench said—

"As to the question of summary dismissal, the Commission, constituted by Full Benches, has applied the well known principles expressed in North v Television Corporation Ltd (1976) 11 ALR 599 at 609 (FCFC) per Smithers and Evatt JJ, as follows—

"For purposes of the application of the common law principles to the facts of this case, the remarks of the Master of the Rolls in Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 2 All ER 285 at 287 and 289 are in point. He said—

'... since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service ... I ... think ... that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and ... therefore ... the disobedience must at least have the quality that it is "wilful"; it does (in other words) connote a deliberate flouting of the essential contractual conditions.'

... Until the terms of the contract are known and identified it is impossible to say whether or not any particular conduct is in breach thereof or is a breach of such gravity or importance as to indicate a rejection or repudiation of the contract.

One cannot begin the inquiry without ascertaining what work ... the employee was employed and had undertaken to perform. It is also necessary to ascertain what particular obligations the parties had agreed upon as important or even vital."

This approach is also expressed by Dixon and McTiernan JJ in the well known passage from their joint judgment in Blyth Chemicals Ltd v Bushnell (1933) 49 CLR 66 at 81-82.

.....

The Commissioner found (see pages 31-32(AB)), and found correctly, that the relationship of employer and employee is ordinarily recognised as fiduciary (see Hospital Products Ltd v United States Surgical Corporation (HC)(op cit) per Gibbs CJ at 68, per Mason J at 96 and per Dawson J at 141). In Concut Pty Ltd v Worrell (HC)(op cit) at page 315, per Gleeson CJ, Gaudron and Gummow JJ, it was said to be one of the accepted fiduciary relationships. Their Honours observed, too, at pages 315-316, as follows—

"Their critical feature is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion that will affect the interests of that other person in a legal or practical sense"

[86](See the discussion of repudiation and summary dismissal in Sargant v Lowndes Lambert Australia Pty Ltd (op cit) at pages 1156-1157.)

[87]In Blyth Chemicals Ltd v Bushnell (1933) 49 CLR 66 at 81-82, Dixon and McTiernan JJ said—

"Once he was enabled to supply the customers' requirements, he might easily divert the greater part of its business to his own company. In these circumstances, it is said, the appellant was not bound to wait until its reasonable apprehensions were realized, but might avert the danger by dismissing the respondent. Conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal (Boston Deep Sea Fishing and Ice Co. v. Ansell (1888) 39 Ch D 339 at pp 357-8 and 362-4; English and Australian Copper Co. v. Johnson (1911) 13 CLR 490; Shepherd v. Felt and Textiles of Australia Ltd. (1931) 45 CLR 359). But the conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found. It is not enough that ground for uneasiness as to its future conduct arises. In the present case, many circumstances were given in evidence from which it might have been inferred that in all that he did the respondent was actuated by one design, namely, to prepare a position to which he could retreat with a considerable part of his employer's business, if it should become necessary or desirable to vacate the managership of Jaques Proprietary Limited. If any such finding had been made, the learned Judge would clearly have been entitled, if not bound, to hold that the respondent had been guilty of misconduct. But, although there was evidence from which such an inference might have been drawn, the respondent's conduct was capable of an innocent construction."

[89]An act or acts of misconduct can justify summary dismissal only if it is of a nature to show that the employee is repudiating the contract or one of its essential conditions. …

[90]It is trite to observe that, like all employees, Mr Phippard had a fiduciary duty to his employer. Further, as I have expressed above, as a managerial employee, he was, by virtue of his position, closely identified and identifiable with his employer's interests. This, of course, puts a manager in a different class from other and subordinate employees and this is very much more the case for a General Manager, as Mr Phippard was.

[91]As Concut Pty Ltd v Worrell (HC)(op cit) and Sargant v Lowndes Lambert Australia Pty Ltd (op cit), and a number of the cases cited in both say, it is an inflexible rule of equity that a person in a fiduciary position is not, unless otherwise expressly provided, entitled to make a profit or not allowed to put himself in a position where his interest and duty conflict (see Sargant v Lowndes Lambert Australia Pty Ltd (op cit) at page 1157). I adopt again, too, what was said in Canadian Aero Service Ltd v O'Malley [1994] SCR 592 and applied in Sargant v Lowndes Lambert Australia Pty Ltd (op cit) at page 1157 by Laskin J (as he then was)—

"The general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively. Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specific ness and the director's or managerial officer's relation to it,

the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or by resignation or discharge."

[92]Whilst those dicta related to the use of confidential information and preparations made by a senior officer to leave his employment and compete against his employer, they are sufficiently general to identify the duty and to characterise the breaches of duty of a senior officer or manager.

[93]As the General Manager and a senior officer, Mr Phippard was required, to a great extent, to stand in the shoes of his employer and to conduct his duties of management entirely according to his duty. This included the responsible and prudent management of the employer's assets, property and money."

47 I now apply the facts of the case to the law, I find that the Applicant when engaged was given a copy of the Respondent's Employee Handbook, he acknowledged that he had read it. One would be entitled to expect that having so acknowledged a person in a managerial position did in fact understand the company's policies particularly as they relate to cash handling.

48 The Applicant's conduct must be found to be in breach of those policies. Even if he had an incomplete understanding of the policies, commonsense should have told him that to take the money in the way he did was wrong. The evidence in the case reveals his contentions that IOU's were used in the way in which he said they were in Respondent's business was nothing more than fiction. Not one witness gave any corroboration to those contentions at all; in fact the evidence is powerfully to the contrary. It is must be concluded therefore that the Applicant should have known that what he was doing was wrong.

49 There is doubt too that he took the money for an emergency situation as he claimed, he said that it was for petrol but more likely than not because he had use of Mr Mundy's car and a fuel card for it, that was not the true reason. If he had another use for the money it has not been revealed to this Commission. This removes the Applicant's so called justification for needing the money for emergency purposes. He certainly did not need it to buy fuel because he had the firm's motor vehicle. His contentions to the contrary and his continued assertions that the money was for fuel further damaged his credibility in the matter.

50 The incident with the cheque demonstrates in my opinion the Applicant's laze faire attitude to the Respondent's cash procedures. It must have been clear that to remove a cheque in the sum of $38,000 from the employer's business by being forgetful and then being too busy to return it as a matter of urgency, is an attitude to financial management which is incompatible with the position of Retail Manager occupied by the Applicant.

51 This Applicant had a duty to closely identify and be identifiable with the employer's interests. It was not in the employer's interest for him to engage in the conduct in which he indulged.

52 The only question that remains to be answered is whether there was such a flaw in the investigatory procedures that the balance of the matter as it is weighted towards the Respondent's position ought to change.

53 I accept the evidence of Ms McGhie that she did not raise the matter with the Applicant because she had doubts about the real reasons for him taking the money combined with the reticence to confront a senior person with his conduct. Mr Mundy, the person ultimately responsible, cannot be held responsible for failure to act by Ms McGhie's reticence to advise more senior management about the situation in his absence. On any analysis of the way Mr Mundy acted he did so with proper expedition in the circumstances, he did it thoroughly enough so that the Respondent could develop a reasonable position concerning the Applicant's conduct. He sought advice about what he should do from the Respondent's senior management, he then conducted an interview with the Applicant, who at that time still had not paid the money back and continued to have the money in his possession for two weeks after he was dismissed. It is not unreasonable at that stage for Mr Mundy to be suggesting to the Applicant that it was open for him to conclude that the money had been stolen.

54 The Applicant was given every opportunity in the discussion held on 15th November 2000, at which Mr Timms was a witness, to present his side of the story. The questions and answers contained in Exhibit B3 are anything but a chronicle of satisfactory conduct on behalf of the Applicant. That Mr Mundy had already had a letter of termination prepared is not fatal to the efficacy of the decision to terminate. The fact is that the termination was not effected until the Applicant was given every chance to explain himself, he was unable to do so and the termination was effected summarily. This Applicant's conduct was incompatible with fulfilment of his duty. What he did was in conflict with his interest and his duty to his employer and was not a faithful performance of his obligations at all. It gave grounds to conclude that the confidence between employer and employee was destroyed, it was a repudiation of an essential condition of an employee's contract and his conduct was wilful.

55 This is not a case where there is a mere ground for uneasiness about future conduct, this Applicant has been involved in two incidents involving the financial dealings of his employer. There is every reason to think that if his employment had not been terminated he would continue with that same approach to similar dealings. The Respondent is entitled to expect, particularly with the Applicant being a Manager, and in that position identified with his employer's interests, that he will act responsibly in the interests of the Respondent, but he did not. His conduct did not include reasonable and prudent management of the employer's assets, property or money. For all of those reasons the decision to dismiss him summarily was not unfair. This application will be dismissed.

2001 WAIRC 04017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION.

PARTIES	DAVID MAIN, APPLICANT *v.* BBC HARDWARE LIMITED, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	FRIDAY, 26 OCTOBER 2001
FILE NO	APPLICATION 2003 OF 2000
CITATION NO.	2001 WAIRC 04017

Result Application Dismissed

Order.

HAVING heard Mr G. McCorry on behalf of the Applicant and Mr J. Brits (of Counsel) on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders—

THAT the Application be and is hereby dismissed.

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

2001 WAIRC 03950

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	MOHAMMAD HASSAN MANTEGHI , APPLICANT
	v.
	PETER FAEGHI GROUP PTY LTD (ACN 068 434 168) T/A PERSIAN CARPET GALLERY, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	THURSDAY, 11 OCTOBER 2001
FILE NOS	APPLICATION 107 OF 2001, APPLICATION 448 OF 2001
CITATION NO.	

Result	Applicant unfairly dismissed, compensation awarded
Representation	
Applicant	Mr T Mijatovic, of Counsel, appeared on behalf of the Applicant
Respondent	No appearance on behalf of the Respondent

Reasons for Decision.

1 Mohammad Hassan Manteghi (the "Applicant") has applied to the Commission for orders pursuant to section 23A of the *Industrial Relations Act 1979* (the "Act") on the grounds that he had been the subject of a harsh, oppressive or unfair dismissal by the Peter Faeghi Group Pty Ltd t/as Persian Carpet Gallery (the "Respondent") and that at the conclusion of the engagement he was entitled to benefits under the contract of employment which had not been paid.

2 The Applicant asserts that he commenced work on 17 March 2000 to manage sales staff in the Respondent's business which retails persian carpets. He claims he was appointed as Store Administrative Officer on 17 April 2000, and on or about 26 June 2000 was offered, and accepted, the position as Manager of the Respondent's carpet gallery in Perth. The Applicant claims he was unfairly dismissed from his position of Manager when he was reduced to the classification of a Gate Keeper. The Applicant claims that the diminution of the classification without notice was oppressive and unfair and was based upon conduct by the Respondent, which amounts to political and religious discrimination.

3 By Application No 107 of 2001 the Applicant sought reinstatement to either the position of Manager of the Respondent's Perth business or to the position of Store Administrative Officer. In the alternative he claimed compensation and contractual benefits in the form of $1,760.00 for termination pay and annual leave, $6,000 compensation for unfair dismissal and $3,465.00 as outstanding commissions due under his contract of employment.

4 On 12 March 2001 Application No 448 of 2001 was filed. It sought orders from the Commission on the same grounds as in Application No 107 of 2001.

5 It was asserted by the Applicant that he was appointed to be a Gate Keeper or Store Assistant of the Respondent on 18 December 2000 after being unfairly dismissed from the previous position of Manager and/or Store Administrative Officer by demotion. On 12 February 2001 in writing and by physical expulsion from the Respondents premises, he was dismissed for political and religious reasons without warning or any notice. The Applicant sought reinstatement to his previous position or in the alternative, termination pay in the sum of $550.00, damages for unfair dismissal by way of compensation for loss or injury in the sum of $14,300.00 and a letter of apology from the Respondent.

6 Both these matters were listed for hearing in Perth on 8 August 2001. There was no appearance on behalf of the Respondent. At the hearing Mr Mijatovic, of Counsel, who appeared for the Applicant, submitted that there had been three occasions on which the Respondent has been required to appear and has not appeared at proceedings listed by the Commission including two conciliation conferences and the hearing. The Applicant had travelled from the Eastern States to attend personally, witnesses who had been summoned were present in the court, the Respondents were aware of the case, there was no excuse for them not to be present and the prejudice to the Applicant was substantial if the matter did not proceed. He had been unemployed for six months since his dismissal on 12 February 2001 when he was removed from the premises under police escort at the directions of the management of the Respondent. In those circumstances the detriment and prejudice to him by the matter not proceeding was substantial.

7 The Commission considered the submissions of Mr Mijatovic and concluded that the exercise of the power vested in the Commission to proceed to hear a matter in the absence of the Respondent should not be embarked upon lightly. It is fundamental for the system of justice that persons be allowed to answer claims made against them but that did not mean that a party having received proper notice is excused from attending upon the necessity to defend an action taken out against them without good and proper reason.

8 The recording of the Commission showed that a notice of hearing was issued on 18 May 2001. The Commission had conducted a series of correspondence with the Respondent. On 30 April 2001 for instance the Respondent was advised that a teleconference would take place on 17 May 2001 this was arranged for the convenience of the Respondent whose head office is located in Sydney. That conference occurred and there can be no doubt that the Commission was in possession of the correct address of the Respondent in Sydney upon which to serve it notices of hearing.

9 There was a further letter on 5 April 2001 which also appeared to reach its destination. The Respondent had filed a Notice of Answer and Counter Proposal in each of the applications so it had knowledge of the original claim.

10 During the hearing on 8 August 2001, the Commission directed its Associate to contact the Respondent by telephone. The Associate reported that a conversation took place with Mr Allen Calderon the Financial Controller of the Respondent. Initially, he disclaimed all knowledge of the proceeding. In response to questions he then admitted that he knew that an employee of the company, Mr Healy, had received a summons to attend upon the Commission at this hearing in relation to an action by the Applicant. If the Respondent had not received service of the notice of hearing, one would have thought that as a result of the knowledge that Mr Healy had been summoned it would have concluded a proceeding was taking place, and caused enquiries to be made as to the nature of the proceeding.

11 Regulation 89 of the *Industrial Relations Commission Regulations 1985* provides as follows—

"*89. Service*

(1) The party by or on behalf of whom any notice or document is filed or issued in a proceeding before the Commission shall forthwith thereafter, effect service upon other parties entitled to be served unless the Commission otherwise directs.

(2) Where any notice or document is required to be served under the Act or these regulations such service may be effected

(a) in the case of an organization in the manner prescribed by section 60 (3) of the Act;

(b) in the case of a corporation (other than an organization), by leaving it at, or sending it by prepaid post to, its principal place of business or principal office in the State or the registered office of the corporation;

(c) in the case of a partnership, firm or unincorporated company or body, by leaving it at, or sending it by prepaid post to the

principal place of business thereof in Western Australia; or

(d) in the case of any other person, by delivering it to him personally, or by leaving it for him at his usual or last known place of abode, or if he is a principal of a business at his usual or last known place of business; or by sending it by prepaid post to his usual or last known place of abode, or if he is a principal of a business, to his usual or last known place of business."

12 The requirements on the Commission to effect service upon the principal place of business of the Respondent by pre-paid post had been met. That action constitutes good service for the purposes of Regulation 89.

13 The Commission having concluded that the prejudice to the Applicant in not proceeding outweighs the prejudice that may be occasioned to the Respondent by their non-appearance ruled that it would hear the matter in the absence of the Respondent, but that it intended to cause a transcript of the proceedings to be sent to the Respondent and the Respondent be given 20 days to file such written submission as it thought appropriate in the circumstances. The Commission in exercising the power vested in it to deal with the matter in such a way as it thinks just, applied the rules in section 26 of the Act.

14 On Tuesday 14 August 2001 the record reveals that the Associate to the Commission had a conversation with Mr Calderon and advised him of the Commission's directions in the matter. That conversation was confirmed in an email which had the transcript electronically attached (see: *File 107 of 2001)* and also by facsimile forwarded to the attention of Mr Calderon to fax number (02) 9884 9997. The facsimile included the transcript of proceedings.

15 The Respondent was required to file whatever submissions it felt necessary by close of business on Monday 3 September 2001. The Respondent was told that those submissions could be received by email. Also forwarded to the Respondent was the Applicant's schedule of loss or injury which was submitted by the Applicant's Counsel by leave of the Commission after the conclusion of the hearing. The total sum claimed in the schedule is $40,513.03.

16 By the close of business on 3 September 2001 no response had been received from the Respondent. Further conversations occurred with a person purporting to act for the Respondent on 18 September 2001. This conversation is recorded in an email on file No 107 of 2001. On 19 September 2001, upon considering reasons for an extension of the 20 day period to file submissions, Commission granted a further 14 days for the Respondent to file submissions in response to the Applicant's case. Those submissions were to be received by 4 October 2001.

17 A brief submission was received on 4 October 2001 and is summarised later in these Reasons for Decision.

18 The Commission heard evidence from the Applicant. He is a man 37 years of age who has been resident in Australia for five years having been granted political asylum by the Government of Australia. The Applicant is a cleric in the Muslim faith and continues his religious studies.

19 According to the Applicant his background and vocation were known to the Respondent when he commenced work with them in March 2000.

20 About a month after he started work with the Respondent, he wrote to the principal of the Respondent, Mr Peter Faeghi, and asked for a job description to be sent to him (Exhibit M1). In due course he received a document which described him as a Store Manager. His duties included to conduct a stock take and accept responsibility for all stock. The Applicant was responsible for making sure that the carpets were tagged and none were sold unless the tag was attached. He had to ensure that there was proper invoicing, control lay-by's, keep an accurate record of stock, do the banking daily and to clean and keep the store tidy at all times. For this work he was to be paid $550.00 per week, to be reviewed after three months which, coincidently, was at the completion of a trial period (Exhibit M2).

21 On 26 June 2000 the Applicant received a letter which confirmed his understanding that he was the Manager of the Perth operation. The letter, over the signature of Mr Allen Calderon the Financial Controller of the Respondent, was addressed to "All Store Managers" and gave instructions as to the control of finance and other matters. In a document headed "Company Directory" attached to the memo the Applicant is described as the "Manager" of the Perth operations (Exhibit M3).

22 During his evidence the Applicant said that he had responsibility to do "just what managers usually do". He described that as managing the business and making sales when he could.

23 After the receipt of the letter of 26 June 2000 and between then and 18 December 2000 it appears a dispute arose between the Applicant and Mr Faeghi concerning the terms of employment. This dispute was given shape in a letter dated 18 December 2000 written by the financial controller, Mr Allen Calderon, in which he wrote that it was Mr Faeghi's understanding that the Applicant was to open and close the store each day and in return for those duties the Respondent would allow him to continue his studies in the Islamic faith and would pay him a salary of $28,000.00 per annum. There was never any commission structure discussed, nor did the Respondent expect him to perform any other duties. Concurrently, it offered the Applicant the opportunity to take up a career in selling, and if he did, the Respondent was happy to discuss a salary and commission package (Exhibit M4).

24 The Applicant says that he was shocked by this letter because it was inconsistent with previous discussions with the Respondent. Although his salary remained the same he took it to be a dismissal from the position of Manager or Store Administrative Officer. He thought that the intent of the letter was to change his position from that of Manager to a Gate Keeper.

25 By way of background, the Commission was told by the Applicant that the Respondent company obtains its rugs and carpets from Iran. In his opinion, the Respondent trades in cooperation with the "*fundamental Irani regime*" which, in the Applicant's view, is a "*fanatic regime*". He was against the fanaticism and hence his entry into Australia by grant of political asylum. The Applicant had tried to keep his views from the Respondent, but in particular Mr Faeghi, because he thought that if he did not he would be dismissed. However, he made a protest before Parliament House in Perth, this protest was reported in Australia and overseas and in this way Mr Faeghi became possessed of knowledge that the Applicant was against the Irani regime. These matters were very emotional and distressing for the Applicant who says his wife and daughters are hostage in Iran. In trying to remedy this situation he commenced a hunger strike in front of the New South Wales Parliament House. The Applicant admits that around the time that he conducted this protest he was absent from work for two weeks.

26 The Applicant says that he was given approved leave from the Respondent for these absences. Each time that he had leave, he received permission of Mr Faeghi but none of these authorities granted were in writing, they were all as result of phone calls. It is his opinion, though, that his work regime more than made up for the absences. He worked seven days per week, but he was only paid from Monday to Friday, not the weekend. But he accepted that arrangement as reasonable in the circumstances. About this time the Applicant gave notice to Mr Faeghi, through a solicitor's letter, of an intention to commence proceedings in the Supreme Court for damages and other relief for alleged defamatory statements made about him by Mr Faeghi to a number of people in the Iranian community. Also on 18 December 2000 the Applicant wrote to Mr Calderon drawing to his attention that he had certain wage entitlements which had been denied him. About that time he had also spoken to Mr Faeghi and Mr Calderon on the phone during which time he complained that he had not received any commission for sales made during the time he was Manager.

27 During the period of his demotion the Applicant continued to come to work as he thought that he was still employed. He continued to be paid. He said nothing was changed except his title. This state of affairs continued until 12 February 2001. Around that time a person presented to the store describing himself the new Manager. In response, the Applicant had told him that he was the Manager. The new Manager, Mr Hurley, disputed this. The Applicant asked advice from Mr Hurley as to what he should do and Mr Hurly confirmed that he was the new Manager and the Applicant should leave and that if he did not Mr Hurly would arrange for the police to remove him.

28 The Applicant was given a letter by Mr Hurly which appears to be a catalyst for his dismissal. The letter is as follows—

"MEMO TO: Mr Tony Hurly
FROM: Peter Faeghi
DATE: 12-2-01
SUBJECT: Mohammand Mantegani
Dear Tony,

Peter has ask me to write to you on his behalf concerning Mr Mantegani being on the premises.

MR Mantegani and Peter are currently involved in a legal battle concerning Mr Mantegani's pervious employment with the company.

Mr Mantegani is no longer employed by The Peter Faeghi Group and therefore has no business being on the premises.

You as Manager of the Perth operation have Peter's total authority and support to ask Mr Mantegani to vacate the premises and if he refuses to you have Peter's full support in having the Police if necessary remove him from the premises.

Allen Calderon. (signed)"

29 The Applicant explained his version of political differences between him and Mr Faeghi. It is not relevant to summarise those in detail, but the thrust is that there was a fundamental ideological difference between the men, the difference resulted in the Applicant forming the view that his life was in danger to the extent that he now lives in hiding.

30 As for payments the Applicant says that on 11 January and 9 February 2001 he received payments which, he says, were for commission. His contentions are supported by a letter signed by Mr James Healy, a person authorised by the Respondent to do so, that the Applicant was offered a commission of 1% of overall sales and 8% on his specific sales at a conference held at the Persian Carpet Gallery held on Good Friday 21 April 2000 in front of several staff members. Commission was to be paid from the commencement of employment. The document before the Commission is signed by Mr Healy and contains another, unidentifiable signature, but said by the Applicant to be that of Matthew Ogori (Exhibit M9).

31 Of the events on 12 February 2001 the Applicant says that when he was told to leave the premises by Mr Hurley he contacted his solicitor to seek advice. He was advised to ask whether he was to get notice and he was told that he would not. He also requested some documentation to establish that his services had been terminated. He was further advised by his solicitors to stay until the Police came to remove him. In due course the Police arrived and told him he would have to leave, he did so out of respect for the law and because he needed a witness to prove that he had been forced to leave.

32 Insofar as mitigation of loss is concerned the Applicant said that he had been searching for work but he had been unsuccessful.

33 The Commission also heard evidence from First Class Constable Stuart John Barter who confirmed that he had been called to an incident on 5 February 2001 at the Persian Carpet Gallery on Stirling Highway on the complaint of one Tony Hurley. The Police Officer said that it had been explained to him that there was a sacked employee who did not want to leave the premises and he was directed to a person who he identified in Court as the Applicant. He had a discussion with the Applicant then, in the presence of the Constable Barter, Mr Hurly asked the Applicant to leave. Constable Barter explained to the Applicant that if he remained on the premises he could be committing an offence and would probably be arrested. With that the Applicant agreed to leave. He asked for the Police Officers names, which were supplied.

34 Evidence was also taken from Mr James Trevor Healy, who described himself as a bookkeeper and salesman at the Respondent's premises in Nedlands Western Australia where he had been employed since 1985. He recalled that the Applicant came into the store in March 2000 with Mr Faeghi. The Applicant was given the keys to open and shut the premises and various other functions. Mr Healy had seen a fax which said those functions included control of stocks, bookkeeping and so on. He recalled this because he was surprised it appeared to be the job that he was doing and he was never consulted about any changes.

35 Mr Healy was shown various correspondence before the Commission (Exhibits M2 and M3). He said that to his knowledge the Applicant was not the Store Administrative Officer, but he recalled that he later became Manager. Even though he was Manager, Mr Healy felt that he lacked experience because he was a cleric rather than having managerial experience, but it was not his decision as to whether the Applicant should be the manager or not, that was for Mr Faeghi. Mr Healy confirmed that he signed a statement that the Applicant was appointed manager of the Respondent's premises in Perth (Exhibit M11). He also confirmed that the Applicant was offered commission on the basis of 1% of overall sales and 8% on specific sales (Exhibit M9). Mr Healy confirmed that the Applicant was entitled to $3,474.00 for commission and that the sales were seasonal and generated between $800,000.00 to $1,000,000.00 per annum.

36 Mr Healy confirmed the evidence of Constable Barter, who had been asked by Mr Tony Hurly, as appointed Manager of the store, in the middle of January 2001 to remove the Applicant.

37 That is sufficient summary of the evidence given on behalf of the Respondent.

38 Mr Mijatovic says in his closing submission that there is proof that the Applicant was Store Administrative Officer of the Respondent on 18 April 2000 and was appointed Manager on or at least about 26 June 2000. There is credible evidence, corroborated by Mr Healy, that he was the Manager notwithstanding that in writing he was only referred to as the Store Administrative Officer. Regardless of his designation, the reality was that after 18 January 2001 he was sent a facsimile which referred him to as literally a gate keeper. This according to Mr Mijatovic was effectively a dismissal, but in practice the Applicant carried out and continued to carry out the same role as he did before and received the same wages with the same commission. When he returned to the premises from an approved leave which had been authorised by Mr Faeghi his service would have entitled him to such leave.

39 Soon after this on 12 February 2001 the Applicant was confronted with a situation where another Manager was appointed. This Manager asked him to leave the premises, the police attended, and he was removed in circumstances which amount to nothing other than a summary dismissal. There was no evidence of resignation, there was no termination pay, there were no warnings, there is no dismissal letter, he was never given any opportunity to respond to any complaints about his work. It is the submission of the Applicant that on two separate occasions he was summarily dismissed without termination pay and without consideration for his interests. There has been no fair go all round and the Respondent should be found not to have given the Applicant a fair go.

40 The submission on behalf of the Respondent paints a different picture of events. It is argued that in March 2000, it was discovered that there was a shortfall in stock. This arose from a stocktake done by Mr Faeghi and the Respondent's Accountant, Mr Calderon. There were

suspicions that staff were stealing carpets and Mr Faeghi decided a watch should be kept on the shop.

41 Through an associate Mr Faeghi knew of the Applicant, understood that he was a theologist and a preacher and he could therefore be trusted to watch the shop. The Applicant was engaged for that purpose. He was offered the position of Store Administration Officer. His duties were to open and close the doors, not to leave the premises and if he did the shop was to be locked. He knew that this was the purpose of his engagement. At first the Applicant declined to accept the appointment because it would interfere with his theology studies and it was agreed that if he opened and closed the store, in any free time in the store he could continue his study. He was to supervise all stock movements, control lay-by's and receipts and payments of monies which the Respondent describes as an administrative role. A job description was supplied for him to show the then Manager, Mr Ogori, and not arouse suspicion as to the real reason for his being at the store. This had arose after a clash between the Applicant and Mr Ogori about whose conduct the Respondent had some suspicions. The Applicant, though, was never given a commission structure, nor was he in a managerial or sales position. His rate of pay remained the same through the whole of the time he was employed because he had the same job of opening and closing the store and watching over the movement of the stock.

42 The Respondent denies that the Applicant was ever authorised leave for either two days in Perth or the two week trip to Sydney for his demonstration. It was the contention of the Respondent that during that time the Applicant abandoned his job.

43 As far as Mr Faeghi was concerned he was under no misapprehension as to the political or religious beliefs of the Applicant. The submission asserts that Mr Faeghi understands the political views of those who seek political asylum from Iran. According to the written submission, there are staff from many religious backgrounds employed in the business, all Mr Faeghi seeks is the business be run well and profit made. The staff are a mixture of Christian, Jewish, Bahia and Muslim.

44 As to the claim in Application No 107 of 2001, the Respondent asserts that the Applicant was always employed to open and close the store, he was never employed to sell carpets. The manager at the time was Mr Ogori.

45 As to the second claim, the Applicant went to Sydney without authority and in doing so, abandoned his job. A replacement was found and that was the reason he was not accepted back in the store on 12 February 2001. The first the Respondent, through Mr Faeghi, new about his whereabouts was on a news program.

46 As for the claim for loss of damage, the Respondent asserts the Applicant has been paid all entitlements. As to injury and loss of reputation, it should be remembered that the Applicant drew media attention to himself.

47 The Respondent also submits that over 700 carpets went missing from the Perth store. The loss is estimated at around $4 million. The then manager, Mr Ogori, was confronted during 2001 regarding this loss and according to the Respondent disappeared overnight and left Australia.

48 The Commission had the opportunity of hearing and seeing the Applicant give his evidence in chief. He was not subject to cross examination and therefore the Commission has none of the usual measures against which to formulate its opinions as to the credibility. I therefore must rely upon what I saw and heard from the witness on the day of hearing. Nothing that I did see or hear on that day detracts from the general impression that the Applicant is a sincere and honest man. His evidence was careful and measured and was not extravagant in any way although the allegations he makes concerning the Respondent are serious. There was nothing from his demeanour or the form of his answers that ought lead the Commission to conclude he told anything other than the truth and I so find.

49 As set out earlier in these Reasons, the Respondent has chosen to take little part in these proceedings. It filed a Notice of Answer and Counter Proposal to Application No 107 of 2001 on 16 February 2001 and Mr Calderon did take part in a conference held to discuss the matter on 17 May 2001. However, those two events were the only involvement from the Respondent in this matter until it submitted its written submission on 4 October 2001.

50 If the Respondent did not appreciate the gravity of the applications insofar as the necessity to defend them is concerned, prior to the date of hearing it should have after when the Commission forwarded to it the transcript of proceedings. It appears that the receipt of those transcripts did not promote the Respondent into any greater activity than to write a one and a half page response to the application and then only after an extension of time to do so was granted. There were a number of options to it. It could have sought leave that the matter be reopened so it could present its case and call evidence in rebuttal of the information the Applicant had put before the Commission. At the very least the Respondent could have supported the contentions advanced in its written submission by affidavits sworn by Mr Faeghi or any other relevant person. However, it has not chosen to take either of those options. This leaves the Commission with the sworn evidence of the Applicant, supported by documents which have the appearance of being acceptable corroboration of what he said, with almost nothing to consider on behalf of the Respondent.

51 The best that can be said about the Respondent's submission is that it continues, at least in general, the thrust of the Answer and Counter Proposal. That is, the Applicant terminated his own services when he left Perth to hold a protest. There was a denial that he had been discriminated against on religious grounds. The Applicant had not supplied the Respondent with any information about what he was going to do, it was assumed therefore he had left his employment and a replacement was employed. There was nothing, though, about the Respondent's reason described in the submission of 4 October 2001, why the Applicant was appointed, that is he was to watch over the stock because it was thought that it was being pilfered.

52 The Commission also has to take into account that, in preparing the short written reply, the Respondent had before it all of the information that was before the Commission, that is it had all of the Applicant's case. It is hard to escape the conclusion that a number of the contentions in the submission are potentially self serving.

53 Having considered the submissions against the background of how the Respondent has treated this matter in the past, the superficial plausibility of the submission is overwhelmed by the lack of evidence needed to support the contentions contained in it.

54 As I understand the law, the Commission is obliged, having found that the Applicant was a truthful person, to find that, where the evidence of the Applicant differs from the unsupported contentions of the Respondent, that the evidence of the Applicant should be preferred.

55 There are two applications to decided. The first alleges that there has been a dismissal by way of a demotion.

56 The law in this jurisdiction is that ordinarily the unilateral transfer of an employee from one job to another is, notionally at least, a dismissal and re-employment in the new classification. These principles were established in *Midland Junction Abattoir Board v Western Australian Branch, Australasian Meat Industry Employees Industrial Union of Workers WA* (1963) 43 WAIG 1082 and see also *O'Connor v The Argus and Australasian Limited* (1957) VR 374. The same principles have been applied in succeeding cases, one of the most notable being *Transport Workers' Union of Australia Industrial Union of Workers—Western Australia Branch v Mt Newman Mining Company Pty Ltd* (1989) 69 WAIG 1036 (*Savic's Case*).

57 Discussion has developed in the case law about the severity of an action by the employer which would constitute a unilateral transfer. The concept has been examined in *Russian v Woolworths SA Pty Limited* 64 IR

169 where there are two relevant observations. These are—

> "*In the instant matter the employer sought to change the terms pursuant to which the Applicant worked … the changes proposed by the employer were no small matter of detail but were fundamental and went to the very heart of the parties relationship, involving as they did a fundamental change to the position held by the Applicant, and a significant reduction in the rate of remuneration*"

58 There are two propositions here. Fundamental change and significant reduction. These are conjunctive and are questions which need to be posed in this case. The reality is the Respondent did not ask the Applicant to make a fundamental change to the relationship at all, in effect they are asking him to do the same job, at the same pay, but they changed the title of the job. This was not a fundamental change to the position held by him as occurred in *Savic's case ibid* where Savic was a truck driver and was transferred to a non driving position. Savic did not accept the change and the Full Bench eventually found that the type of treatment he received amounted to a fundamental change and therefore entitled him to say that he had been dismissed even though he had been offered a job within the operations of the Respondent.

59 It seems that the test to what constitutes conduct is whether that conduct is likely to destroy or seriously damage the relationship of trust between the employer and the employee. If either of those things happen the employee would be entitled to treat himself as being discharged from further performance of the contract. If he did he would terminate the contract by reason of the employer's conduct and would be constructively dismissed.

60 That did not happen in this case. The Applicant did not treat himself as discharged from any further performance of the contract, he continued to work and the employment relationship continued until the second event which is termed a "summary dismissal" occurred. This event is the subject of Application No 448 of 2001 which I now need to consider. It follows that the Commission finds that there was no dismissal, constructive or otherwise, in the issues raised in Application 107 of 2001 because relatively speaking, there was no significant variation to the contract, the name change postulated by Mr Mijatovic, of Counsel, from Manager to Gate Keeper does not give rise to significant change, in fact, it is doubtful that label was ever given by the Respondent to the classification that continued to be occupied by the Applicant.

61 The relationship subject to the first application needs to be further examined because there are claims for contractual benefits. There is evidence from the Applicant, supported by the documentary evidence, which gives force to his contention that he was and would be entitled to be regarded as a Manager (Exhibit M3). His claims concerning commission were rejected by the Respondent in the letter dated 18 December 2000 (Exhibit M4). This letter could well be the source of contention that the Applicant was to open and close the store and do only those things, however, that proposition is inconsistent with the letter of engagement (Exhibit M2) and the nomination of the Applicant as a manager in Exhibit M3 as it is with parts of the 4 October 2001 submission by the Respondent.

62 The Applicant has, in my view, established that he was to be paid a commission. Exhibit M9 signed by Mr Healy and supported by Mr Healy's viva voce evidence makes it clear that there was to be commission to be paid from the commencement of the employment relationship. The analysis for the period of 1 September 2000 to 30 November 2000 indicates that the Applicant, for that period, was entitled to the sum of $3,474.00 for commission. Mr Healy certifies that to be a true understanding of the contract between the parties and the Applicant will be awarded a balance of commission owing on that basis.

63 It is clear on the evidence that the Applicant was dismissed when Mr Hurley came to the store on 12 February 2001. The Applicant was asked to leave the premises, he did so under police escort. He could not be anything other than summarily dismissed. He received no pay, there was no precursor to the action by way of warnings or expressions of dissatisfaction with his work. The Applicant says that this is because the reason for his dismissal is based upon political difference between him and Mr Faeghi.

64 The Applicant attests that these differences were not immediately obvious between the two men. When he was employed by Mr Faeghi, Mr Faeghi knew that his family was in Iran, but did not know that they were hostages. Because they were hostages the Applicant did not explain to Mr Faeghi that he was against the Iranian regime, nor did he say that he was in the country by way of entry by political asylum.

65 That Mr Faeghi would accept that has much to do with the Applicant's vocation as a priest. In the Applicant's opinion, because he was a cleric, Mr Faeghi reached the conclusion that he was like other priests in Iran who were not against the Iranian regime.

66 The reason Mr Faeghi did not want to be involved with people who were against the Iranian regime is that, for trading purposes, every few months he needed to go to Iran to buy carpets. For this purpose he needs the cooperation of Iranian officials both in Australia and Iran. The Applicant says against this reality that if he had explained that he was against the Irani regime, he would be dismissed.

67 Mr Faeghi became aware of his political position because after a period of four years, the Applicant decided that he needed to protest in front of the Parliament in this State. He received media coverage and was interviewed by various radio stations. The Applicant says that he had information that Mr Faeghi had approached the Iranian Embassy and sought to have him removed from the country. After that, the Applicant thought that he was in danger and has lived in hiding since.

68 It is the Applicant's contention that it should not be regarded as strange that the Respondent would pay him to study the Islamic faith. This is a custom and not unusual.

69 The Applicant's public protests occurred during December 2000. It was after that, that the Applicant found that things were being said about him in the Iranian community and he had instructed solicitors to initiate action in the Supreme Court for defamation against Mr Faeghi. These actions commenced in late December 2000.

70 With the lack of evidence from the Respondent in this matter, the Commission needs to be cautious about making findings about such serious matters as political and religious differences as alleged by the Applicant. What can be found is, though, that there is a circumstantial stream of evidence which suggests that the Applicant's story should be given some weight. However, ultimately it is unnecessary to make a finding whether the Applicant was dismissed for political or religious reasons because what is clear is that the tests the Commission is required to apply are set out in *Undercliff Nursing Home v Federated Miscellaneous Workers Union of Australia* (1985) 65 WAIG 315. The question to be answered is whether the right of the employer to terminate the employment has been exercised so harshly, oppressively or unfairly against the Applicant to amount to an abuse of the right but more particularly whether there has been a fair go all round (*Lottie and Halloway v AWU* (1971) NSWAR 195).

71 There is no evidence at all that on 12 February 2001 the Applicant was given a fair go in any shape or form whatsoever. A person he did not know appeared at the store and told the Applicant that he was the new manager and that the Applicant had no longer a job. In addition, a dismissal was exercised in a summary fashion by the calling of the police to remove the Applicant from the property. The police were not required to physically remove the Applicant, he went under his own volition. But it is clear from the evidence of Constable Barter that the sole purpose of the police attendance upon the property in Stirling Highway was to ensure that an ex-employee was removed from the premises.

72 In those circumstances the Applicant was unfairly dismissed. His dismissal was harsh, unfair and oppressive and the Commission finds accordingly.

73 The Applicant was invited, through Counsel, to submit a schedule of loss and injury. This document was received by the Commission on or about 10 August 2001.

74 In assessing the claim the Commission is required to apply the principles for the assessment of loss or injury which have been clearly stated by the Full Bench in *Boganovich v Bayside Western Australia Pty Ltd* (1999) 79 WAIG 8. I apply those. Concerning loss the Applicant submits that he suffered actual damages for six months unemployment. He was not employed for any period during that time. His income prior to dismissal was $28,000.00 per annum, this was reduced to nil from 12 February 2001. His loss was therefore $14,250.00 and is ongoing.

75 As for outstanding commission entitlements, he was entitled to $3,474.00. He has been paid $3,310.91 leaving a balance $163.10.

76 There is a claim for termination pay pursuant to the *Minimum Conditions of Employment Act* of $1,100.00. This is outside the jurisdiction of this Commission and therefore cannot be awarded.

77 As for injury and loss of reputation, Counsel for the Applicant says that the Applicant was shocked and stressed by the treatment meted out to him and suffered humiliation and injury of a type that is contemplated by the Act and for which compensation ought be awarded. He has not been able to find any work and his name and reputation has been irreparably damaged. The Iranian community of Australia was aware of his dismissal and there has been publicity about it. For all of these reasons the Applicant has been unable to obtain work in Perth or Australia for that matter, with the Iranian community due to the political issues involved and is unemployable and tainted by the matter. This means that his injury is personal and its effect on him and his reputation is profound. He has been labelled as a person of notoriety. There has been impact on his ability to work as both a salesman and a manager and that impact continues.

78 Counsel made statements concerning the physical and particular health problems by the Applicant including fears for his life. However, apart from this last, there is no evidence before the Commission from the Applicant about these matters. Finally it is submitted that the Applicant lives in fear, changes his address and his telephone numbers constantly, he is being treated like a person without honour and without rights which is contrary to his religious beliefs and his personal character. The Applicant claims the sum of $25,000.00 for injury for both dismissals.

79 I have carefully considered these claims of loss and injury. As for loss, I accept that the loss earnings is at least in the sum of $ 14,250.00. Insofar as injury is concerned, I have found that there is not two dismissals there in fact is one dismissal. It is clear to me that the effects upon the Applicant, at least on his evidence, are severe and ongoing particularly his ability to obtain work or to follow his religious vocation. In the circumstances, and applying the established criteria, bearing in mind that the Full Bench has observed that the sum to be awarded for injury is still is an open matter, I award the applicant $10,000.00 for injury. This means a total amount for loss and injury for $34,250.00 to this the Commission is required to apply the cap of equivalent to six months salary as set out in section 23A of the Act. On that basis the applicant will be awarded the sum of $14,250.00 for loss and injury he will receive a further sum of $163.03 for outstanding commission and entitlements.

80 It needs to be observed that in reaching these conclusions, the Commission has decided that because of the passage of time and the reasons for the dismissal in this case, reinstatement would be unavailing. It would issue orders that the Applicant was unfairly dismissed on 12 February 2001, that reinstatement is unavailing and the Applicant will be awarded compensation in the sum of $14,250 for loss and injury and $163.03 for contractual benefits.

81 Minutes of Proposed Order will now issue and the Commission will accept submissions on behalf of the Applicant as to whether any specific orders should be made about where the compensation that has been awarded to the Applicant should be paid.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	MOHAMMAD HASSAN MANTEGHI, APPLICANT
	v.
	PETER FAEGHI GROUP PTY LTD (ACN 068 434 168) T/A PERSIAN CARPET GALLERY, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	TUESDAY, 16 OCTOBER 2001
FILE NOS	APPLICATION 107 OF 2001, APPLICATION 448 OF 2001
CITATION NO.	

Result	Unfairly Dismissed that reinstatement is unavailing and that he be paid compensation in the sum of $14,413.73

Order.

HAVING heard Mr T. Mijatovic (of Counsel) 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 declares and orders—

1. THAT the Applicant was unfairly dismissed and reinstatement is unavailing.
2. THAT the Respondent pay to the Applicant compensation in the sum of $14,250.70 for loss and injury.
3. THAT the Respondent pay the Applicant the sum of $163.03 as a contractual entitlement for commissions.
4. THAT the payments specified in orders 2 and 3 herein of $14,413.73 be paid within 14 days of today's date to the Applicant's solicitors, TRM Legal Services, Level 4 Irwin Chambers, 16 Irwin Street, Perth WA 6000.

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

2001 WAIRC 04094

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	SHELLEY-LEE MCKEATING, APPLICANT
	v.
	CORPORATE PHYSICIANS INTERNATIONAL (AUSTRALIA) PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	MONDAY, 22 OCTOBER 2001
FILE NO/S	APPLICATION 508 OF 2001
CITATION NO.	2001 WAIRC 04094

Result	Application upheld. Order issued.
Representation	
Applicant	Ms S L McKeating 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)(ii) of the Industrial Relations Act, 1979 ("the Act") by which Ms Shelley-Lee McKeating ("the applicant") claims that she was denied contractual benefits from the respondent as named in the notice of application as the Corporate Physicians International (Australia) Pty Ltd ("the respondent"). The applicant's claim is that in her employment as an administrative secretary and accounts clerk she was denied wages in the sum of $1,838.00 net for the month of December 2000 and, secondly, wages in the same sum for the month of January 2001, and finally, wages and salary in respect of a period of annual leave taken for one month in the same sum leading to a total of $5,514.00 net.

2 The respondent has not appeared on the calling on of this matter and nor has it filed a notice of answer and counter-proposal. Additionally the Commission notes that at a meeting held by Deputy Registrar Lovegrove under direction from the Commission the respondent failed to appear at that proceeding and has apparently made no contact with the Commission since that time.

The Facts

3 The applicant has given evidence that she was employed by the respondent company as named, in the capacity to which I have referred, pursuant to a letter of appointment dated 10 February 2000, tendered as exhibit A2. That letter specifies that the applicant would be employed commencing 28 February 2000 in Perth on an annual salary of $27,000 per annum. The applicant testified that she regularly received, in accordance with her contract of employment, a monthly salary as a net payment of $1,838.00 which was the practice apparently at least up until December 2000. For that month, the applicant tells me that she was given a cash cheque dated 15 December 2000, tendered as exhibit A3, in the sum of $1,838.00 from Corporate Physicians International (Australia) Pty Ltd which cheque, upon its presentation, was not honoured and has not been so since on the evidence.

4 Furthermore, the applicant testified that at about this time she communicated with representatives of the respondent, in particular a Mr Bertogna, in relation to the financial position of the respondent as creditors were due to be paid and it appears on the evidence that insufficient funds were available to meet those commitments. The applicant also testified that similarly with her monthly salary due for December 2000 her salary entitlement due for January 2001, again in the amount of $1,838.00 net, was not paid to her and has never been received by her since she left the employment of the respondent.

5 Furthermore the applicant testified that she arranged with the agreement of the respondent to take a period of annual leave to go on holidays for a period of two weeks in the early New Year in 2001. However, the applicant testified that upon reflection, she tendered her resignation as an employee of the respondent which resignation letter was dated 12 February 2001 and tendered as exhibit A5. Exhibit A5 bears out the applicant's evidence that at the time of tendering her resignation she had not been paid her salary for December 2000 nor for January 2001. Additionally, she was owed a period of annual leave commencing 12 February 2001 and ending on 2 March 2001 in respect of, in effect, her wages for February, again in the sum of $1,838.00, giving rise to a total amount of $5,514.00 net. In that letter of resignation the applicant records her disappointment with the respondent in relation to its treatment of staff and particularly the non-payment of wages.

6 Also on the evidence before me by exhibit A6, is a document entitled "Employee Leaving Check List" which the applicant testified was completed in conjunction with a Mr Roland Rosario, who the Commission is informed, was the then acting manager of the respondent and also occupied the position, I am told, of quality assistant/quality assurance manager for the respondent. That document, which is co-signed by both the applicant and apparently Mr Rosario and dated 9 February 2001, records that the applicant has not received outstanding "pays", as it is described, in the amount of $5,514.00 which represents salary for the months of December 2000, January 2001 and February 2001. Other matters there set out on that document are not relevant to the applicant' claim in these proceedings.

7 The Commission is satisfied in the absence of any evidence from the respondent of the matters to which the applicant has given evidence, and is satisfied that it should accept that evidence in the absence of any evidence from the respondent to the contrary. That evidence is entirely consistent with the documentary evidence before the Commission and in all respects I find it credible evidence and I find accordingly.

Conclusions

8 On the basis of that evidence I am entirely satisfied that the respondent has failed to pay to the applicant, by way of contractual entitlements, her salary entitlements for December 2000 in the sum of $1,838.00 net, for the period January 2001 in the sum of $1,838.00 net and in respect of a period of annual leave for one month, again in the sum of $1,838.00 net, leading to a total of $5,514.00 net outstanding to the applicant which has not been paid by the respondent and, therefore, is a contractual benefit denied to the applicant on termination of her employment and I conclude accordingly.

9 On that basis then, the Commission intends to order on the basis of my findings and conclusions that the respondent pay to the applicant the sum of $5,514.00 net as a benefit under the applicant's contract of employment with the respondent due but not paid to her, and my order will be that that amount of money be paid forthwith.

2001 WAIRC 04095

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	SHELLEY-LEE MCKEATING, APPLICANT *v.* CORPORATE PHYSICIANS INTERNATIONAL (AUSTRALIA) PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	TUESDAY, 6 NOVEMBER 2001
FILE NO/S	APPLICATION 508 OF 2001
CITATION NO.	2001 WAIRC 04095

Result	Application upheld. Order issued.
Representation	
Applicant	Ms S L McKeating in person
Respondent	No appearance by the respondent

Order.

HAVING heard Ms S L McKeating 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 the respondent denied the applicant a benefit under her contract of employment in respect of three months salary.
2. ORDERS that the respondent pay to the applicant forthwith the sum of $5,514.00 net.

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

2001 WAIRC 03981

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	DAVID LEITH MOYLAN, APPLICANT
	v.
	CHAIRMAN OF COMMISSIONERS CITY OF SOUTH PERTH COUNCIL, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	FRIDAY, 19 OCTOBER 2001
FILE NO	APPLICATION 622 OF 2001
CITATION NO.	

Result	Applicant unfairly dismissed
Representation	
Applicant	Mr G Stubbs, (of Counsel) appeared on behalf of the Applicant
Respondent	Mr J Sher, (of Counsel) appeared on behalf of the Respondent

Reasons for Decision.

1 David Leith Moylan (the Applicant) applied on 5 April 2001 to the Commission for orders pursuant to section 29 of the *Industrial Relations Act 1979* (the Act) on the grounds that on 3 April 2001 he had been dismissed by the Commissioners of the City of South Perth Council (the City) in a harsh, oppressive or unfair manner. He seeks reinstatement to the position of Chief Executive Officer (CEO) of the City, a position he says he occupied at the date of dismissal.

2 It is common ground that there are matters relating to the employment relationship between the Applicant and the City which have not been or are not capable of being examined in these proceedings. Those are the subject of an enquiry constituted under the provisions of section 8.13 of the *Local Government Act 1995* (the *LG Act*) into matters concerning the City of South Perth and later by a Panel Enquiry, which enquiries are ongoing. The enquiries by this Commission relating to this application are limited to events commencing *circa* 10 April 2000 up until the date of termination on 3 April 2001.

3 It is events during this period which establish the chronology to be examined in these proceedings. There is no substantial difference between the parties as to the sequence of events which I now relate.

4 The Applicant commenced his employment relationship with the City in the classification of Executive Manager Business Services on 1 December 1994. He worked in that classification until he was appointed by the City's Council to a newly created position of General Manager. This occurred on 10 April 2000. The appointment was of a short duration because on 31 May 2000, approximately one month after the Applicant was appointed, the position was made redundant. Three days before, the then Chief Executive Officer, Mr Len Metcalf, was made redundant and retrenched.

5 The Council agreed to appoint the Applicant to a recreated position of Chief Executive Officer (CEO) to take effect from 1 June 2000 subject to the formalities set out in the *LG Act.*

6 The Applicant says, around the time of his appointment as CEO, there were numerous allegations and concerns about the administration of the City and he became aware that these had been communicated to the Department of Local Government which department oversees the operations of local government in Western Australia. He says that he had discussions with the Mayor and in order to protect the City they agreed that the most prudent way for the City to handle the matter would be for him to be suspended. It is claimed by the Applicant that the suspension would be for a period of 35 days during which time legal advice could be obtained to provide the Minister for Local Government with written advice, setting out what action the City has taken or proposed to take to give effect to the findings and recommendations contained in a report in accordance with Section 8.14(3) of the *LG Act*.

7 Consequent upon that alleged discussion, there was a special Council meeting held on Friday 24 November 2000 to discuss remedial action consequential to the enquiry. At the meeting, Council having considered the matter, passed a resolution (Exhibit M4) a copy of which was served upon the Applicant together with minutes of the meeting. According to the Applicant his apprehension of what would happen thereafter was that advice would be given to the Minister within the 35 day period and that he would thereafter be reinstated as CEO.

8 It is relevant to note that the report upon which the City acted, flowed from an authorisation given by the Department of Local Government on 6 July 2000 to Mr Gary Martin to enquire into and produce a report on aspects of the City's operations pursuant to section 8.14 of the *LG Act*. His report titled "A Report to the Executive Director, Department of Local Government under the provisions of section 8.13 of the Local Government Act 1995 into matters concerning the City of South Perth" was published by him as an authorised person on 22 November 2000 (Exhibit S2).

9 I have mentioned earlier that there are matters relating to the employment relationship which are not before the Commission even though the Report by Mr Martin (Martin Report) has been produced for information (Exhibit S2). The parties advise the Commission that the only purpose of producing the Martin Report was to highlight to the Commission the recommendation contained in Paragraph 14.2 Recommendations (c) "*the Commissioners appointed take immediate action to dismiss Mr Moylan for misconduct*". The terms of reference of the Martin Report relate *inter alia* to allegations of unethical conduct. Findings about this and other issues led to the conclusion set out in the recommendation. However, it is unnecessary for me, because of the limited scope of the issue before this Commission, to comment further in the chronology about those matters.

10 Soon after the Council passed the resolution referred to in Exhibit M4, the Department of Local Government suspended it and Commissioners were appointed. For the purpose of these reasons it must be noted that the Commissioners, in accordance with the *LG Act* effectively are the Council and exercise all its powers during their appointment.

11 The suspension of Mr Moylan previously advised to him was confirmed on 20 December 2000. The effect was that he was relieved of duties but remained on full pay and benefits, pending the outcome of the Panel Enquiry. His status was again confirmed to him on 21 February 2001. This was done because Mr Moylan, by letter on 20 February 2001, had sought an explanation as to the City's intended course of action regarding his suspension. He was of the belief that clarification would be given well before 20 December 2000 as had been advised to him on 8 December 2000 by the City's solicitors. He complained that he had not received any information that qualified or explained the Council's actions and intentions, he reminded the Council that he had been on suspension for four months, he thought that unreasonable particularly in the absence of any communication about what was to happen to him.

12 The next relevant event is that on 27 March 2001 the Applicant attended a Council meeting. He says he did so after becoming aware of recommendations made by the Acting Chief Executive of Council to pay a tax liability incurred by former CEO Mr Len Metcalf. He had views about the efficacy of such payment and thought that he had responsibilities under the *LG Act* to bring them to the attention of relevant persons. He says that he tried to do so through the Acting CEO. Because he was unsuccessful in doing so he attended the Council meeting.

13 At the meeting he made an intervention from the public gallery. This intervention was ruled out of order. The

following day he wrote a long letter to Mr J Donaldson, the Chairman of the Commissioners of the City, outlining his concerns. This letter is marked also to have been sent to the Minister for Local Government (Exhibit M8).

14 On the same day, he sent a facsimile letter addressed to the Principal Policy Advisor of the Minister for Local Government. The letter was marked as being released to a number of print media outlets, specifically, The West Australian Newspaper, The Sunday Times and the Community News. In it the Applicant outlined complaints about the running of the City, and gave notice that he intended to resume his role as CEO, allegedly in accordance with what he saw as his contractual rights and obligations. He gave notice that he would be seeking a full enquiry including an investigation into what he believed constituted official corruption by various office holders.

15 The Applicant also claimed in the correspondence that he had talked with a series of officers of the City who had shared his concerns about how the City was operating.

16 The Applicant's actions prompted the City, through its solicitors, to have him reminded that he had been relieved of all duties and he was on full pay and benefits pending the outcome of the Panel Enquiry. He was instructed that he should not in any way attempt to resume his duties as CEO. Notwithstanding these communications, the Applicant continued with his stated intention. On 2 April 2001 he wrote to the Chairman of the City and outlined his intentions along those lines (Exhibit M10). His letter outlines various complaints and intentions upon his return to duty.

17 On the same day he wrote to Mr Roger Burrows, the acting CEO, advising Mr Burrows that he intended to resume duties on 4 April 2001 and directed Mr Burrows to make various arrangements to facilitate this (Exhibit S26).

18 It is common ground that on 3 April 2001 the Applicant telephoned Mr Nicholas Ellery, Solicitor of Corrs Chambers Westgarth, the solicitor for the City, when during the conversation he repeated his intentions. There is controversy between the Applicant and Mr Ellery about what was said during that conversation. The file note made by Mr Ellery of the discussion (Exhibit S27) support the City's contention that the Applicant said he would attend with a security officer as necessary. The Applicant's contention is that he only mentioned such an intention because he was told by Mr Ellery that the police or another authority would be called to stop him securing his so-called right to enter the premises. This last comment is recorded in the file note dated 3 April 2001 (Exhibit S28).

19 Apparently on this day there was another telephone conversation between Mr Moylan and Mr Ellery, wherein the Applicant repeated his intention to resume his duties (Exhibit S28).

20 Around this period there was correspondence between the lawyers for the City and the Applicant (see Exhibit S21). There were responses from the Applicant (see Exhibits S22 and S25). This caused the Commissioners of the City to convene a Special Meeting on 3 April 2001. At the meeting they heard reports on the stated intentions of the Applicant. They say they took legal advice and in all of the circumstances decided that the Applicant had committed gross misconduct and for that reason his termination of employment should be effected summarily. They resolved accordingly and the Applicant received forthwith a letter by hand delivery in the following terms—

> *"Dear Mr Moylan*
>
> *TERMINATION OF EMPLOYMENT*
>
> *I advise that following a Special Council Meeting held on 3 April 2001, Council has resolved to terminate your employment with the City with effect from 4 April 2001 for gross misconduct.*
>
> *The reasons for the terminations are—*
>
> 1. *Your wilful refusal to obey lawful directions of the City.*
> 2. *Various repeated breaches of the City of South Perth Code of Conduct. These breaches of the Code relate to recent public communications to the media, the Office of the Minister for Local Government, the Premier, the Chairman of Commissioners, and to officers of the City.*
> 3. *Your actions since the meeting of Council of 27 March 2001 have led to an irreparable breakdown of a sustainable employer-employee relationship leaving the City with no other available alternative action.*
>
> *As you are being terminated summarily for gross misconduct, you will not be paid salary or other remuneration benefits beyond Wednesday, 4 April 2001.*
>
> *You should make arrangements immediately to return all assets of the City that are in your possession. This would include the motor vehicle and mobile phone. You should contact Mr Cliff Frewing for this purpose.*
>
> *Yours faithfully*
>
> *Julian Donaldson (signed)*
>
> *JULIAN DONALDSON*
>
> *CHAIRMAN OF COMMISSIONERS*
>
> *3 April 2001"*

(Exhibit M12)

21 The Applicant says all of these events caused him personal distress and have harmed his health to the extent that he was admitted to hospital on or around 24 December 2000 where he remained for the next three weeks. A clinical psychologist's report said to have been produced for the purposes of a workers compensation claim is before the Commission (Exhibit M6).

22 The City says that the action of the Applicant over this period breach provisions of the Code of Conduct which was adopted by the City in September 1999. A copy of the Code had been communicated to the Applicant as it had to all employees of the City. It is binding on him as a Senior Manager as it is on an elected Member of the Council. The Code sets forth modes of behaviour and conduct which, in the contention of the City, the Applicant breached.

23 It is argued in any event, his actions constitute serious and gross misconduct in that he demonstrated an intention to repudiate his contract. This conduct seriously damaged the relationship of trust and confidence between the employer and employee and led the Commissioners of the City to terminate the employment contract for gross misconduct.

24 The City makes it clear that for the reasons which were at the heart of his termination, the Applicant's claim for reinstatement would be totally impracticable and submits that the application should be dismissed.

25 For the purposes of these Reasons for Decision the proceeding summary is sufficient scan of the relevant events.

26 The Commission is required to make findings about the credibility of witnesses. The only evidence for the Applicant was presented by him in person. It was obvious to the Commission that he was agitated, tense and very anxious. However, there is nothing in what he said which would lead me to conclude that he did not tell the truth about the sequence of events. I will make some later comments about his conduct as a response to those events but I am unable to find that his evidence should be disbelieved, on the contrary he was a credible witness.

27 The Commission heard evidence from the three Commissioners of the City, Ms S Smith, Mr E Lumsden and Mr J Donaldson. Each of those persons gave their evidence in a careful measured and in an impressive manner. They each gave the impression of being thoroughly competent in the office they have been appointed to discharge. Mr Donaldson's answers while superficially may give the impression of being evasive, were not that in my finding, they were precise answers to the particular questions put. That he was careful in the way he gave his answers did not detract from my view of

his credibility as a witness. I find the evidence given by the three Commissioners who constitute the employing body of the Applicant to be acceptable as truthful record of events.

28 As for Mr Nicholas Ellery he was questioned closely about the file notes Exhibits S27 and S28. He was, unfortunately, unable to recall much of the detail of the surrounding conversation, whereas the Applicant was sure about what happened. In that narrow area of evidence, because the Applicant could recall strongly what occurred and I have found him to be a witness of truth, then I am obliged to find, because of Mr Ellery's lack of detailed recall about what happened, honestly admitted I must say, that in respect of the two telephone conversations between the Applicant and Mr Ellery that more likely than not the evidence of the Applicant is the correct version and in that area of the evidence I favour the evidence of the Applicant over that of Mr Ellery.

29 The determination of matters such as this depend upon whether there has been a fair go all round (see: *Undercliff Nursing Home v Federated Miscellaneous Workers Union of Australia* (1985) 65 WAIG 305) events have to be considered from both points of view upon the test set out in *Loty and Holloway v Australian workers Union [1971]* AR 91 at 99.

30 Ordinarily an employee claiming to have been unfairly dismissed bears the onus of establishing that his or her case for the Commission's intervention (see: *Western Suburbs District Ambulance Committee v Tipping* [1957] AR (NSW) 273 at 279). The burden lies with the employee to provide evidence to prove to the Commission that the dismissal was harsh, unjust or unreasonable. However, where the dismissal is justified on the basis of an allegation of misconduct or incompetence, it would be for the employer to establish that the alleged misconduct or incompetence in fact warranted summary dismissal. A well known case dealing with these issues is *Pastrycooks Employees, Biscuit Makers Employees & Flour and Sugar Goods Workers Union (NSW) v Gartrell White* (No 3) (1990) 35 IR 70 where an employee was summarily dismissed for alleged failure to follow what the employer believed to be a lawful order. There are parallels in this case. In the course of dealing with the question of onus Hungerford J stated—

> *"It is undoubted, in my view, and as Mr Walton conceded, that the onus for making out a case to warrant the intervention of the Commission in ordering reinstatement is on the claimant union: see Re Barrett and Women's Hospital, Crown Street [1947] AR (NSW) 565; RE Municipal Employees, Greater Newcastle (Wages Division) Award (Re Wallace) [1949] AR (NSW) 868; Western Suburbs District Ambulance Committee v Tipping [1957] AR (NSW) 273 at 279 and Homebush Abbattoir [1966] AR (NSW) at 386. However, it is also undoubted, in my view, that where an allegation of misconduct is raised as a defence or as justification of a particular course of action by an employer, such as in summarily dismissing an employee, then the legal burden, in an evidentiary sense to establish that fact, shifts from the union to the employer: see WD & HO Wills (Australia) Ltd v Jamieson [1957] AR (NSW) 547 at 552, 553; North Television Corporation Ltd [1976] 11 ALR 599 at 602; Flynn v JC Hutton Pty Ltd (1982) 3 IR 413 at 414; Williams v Printers Trad Services (1984) 7 IR 82 at 84; and Wallace v Deering Auto Electrics (1985) 12 IR 34 at 35. To the extent that Mr Newall submitted to the contrary, his submission cannot stand. The approach as to this shifting of the burden of proof received conceptual support in the judgement of Dixon J, as he then was, in Darling Island Stevedoring & Lighterage Co Ltd v Jacobsen (1975) 70 CLR 635 at 643, and in that passage from his Honour's judgement which said at 644—*
>
> > "Again, it is a general principle that absence of default or wrongdoing is presumed and proof is required when its absence is made a qualification of a right. It is in accordance with principles to regard fault as a particular exception defeating the right only when alleged and proved."
>
> *The right of an employer to summarily dismiss an employee without notice is qualified by the employee inter alia having committed an act of misconduct; thus, to be able to rely upon the right, and to pay the employee up to the time of dismissal only rather than terminate by notice or payment in lieu of notice, the employer must not only allege misconduct but must also prove it. In support of his judgment of Dey J in Re Wentworthville Leagues Club Ltd (1976) 18 AILR 355 in which his Honour clearly held that the necessity for proving misconduct lay upon the party setting it up, namely the employer, and even though the union had the responsibility for establishing a proper case for reinstatement. I respectfully agree with his Honour's conclusion, it being entirely consistent with well established authority."*

31 The relevant standard to be satisfied in relation to allegations of gross misconduct against employees is on the balance of probabilities. However, that standard must be satisfied to a degree which is appropriate for the gravity of facts to be proved. In *New South Wales Bar Association v Liversee* (1982) 2 NSWLR 231 it was considered a finding which may put a career in jeopardy must be made with regard to such considerations of the gravity of facts in issue (see the principles *Briginshaw v Briginshaw* (1938) 60 CLR 336). Even though the principle *Briginshaw v Briginshaw* is applicable to findings of criminal conduct or fraud, the statements of principle have been applied to allegations of a broader nature in unfair dismissal proceedings. It is necessary for a tribunal therefore to consider the nature and seriousness of the allegation made before finding it proved at the requisite level. If an employer cannot prove to the requisite standard the acts to justify the summary dismissal then such dismissal should be found to be harsh unjust and unfair. The relief to be granted in a particular matter would depend upon the various discretionary considerations.

32 I intend to deal with the facts and to apply the law to them. It is common ground that the Applicant had been a General Manager for a short period, that position became redundant, he became CEO. These events gave rise to a range of difficulties between the parties which had been the subject of proceedings first by an enquiry by Mr Gary Martin and then by way of a Panel Enquiry appointed pursuant to the *LG Act*.

33 The Commission has only superficial knowledge of the events which were subject of enquiry before Mr Martin and now by the Panel Enquiry. The Commission understands from the submissions of Mr Sher, of Counsel, who appeared for the City that the Panel Enquiry has been reconstituted, is continuing its work and in due course one can anticipate that it will report its findings.

34 If that Panel Enquiry is dealing with the recommendations of the Martin Report, it will make findings concerning what action ought to be taken concerning the Applicant arising from his conduct in the matters which are subject to the enquiry.

35 I agree with the submission of Mr Stubbs that the issue for this Commission is a narrow window into the employment relationship between these two parties and it canvasses only those events between the parties post the suspension leading up to the termination on 3 April 2001.

36 I find that the Applicant had it in his mind, as a result of a discussion with the then Mayor, that when he was first suspended it would be for a short period, 35 days. Events overtook that arrangement, if there was such an arrangement, about which I can make no dispositive conclusion because I have not heard sufficient evidence to do so. I merely say that I accept the Applicant's evidence that a suspension of 35 days was in his mind.

37 The Applicant, after the period expired, then commenced, in various ways, to pursue a return to work. He was disabused from doing so by the City and a chain of correspondence took place between them about him returning to work. It was always the intention of the City

that he remain away from the workplace because on 7 December 2000 when he did return to his job there was disruption which was resolved in a conversation between Mr Donaldson and the Applicant, which lead to the Applicant removing himself from the office.

38 The Commissioners of the City had formed the view that the Applicant's presence in the office did not, in their view, help with the proper governance of the City. They, therefore, wanted him to stay away.

39 The Applicant would have it that, following his attendance, he became sick, suffering stress and associated health problems which led to his hospitalisation by a psychiatrist in a private hospital for three weeks commencing late in December 2000.

40 There is no need for me to comment further on that event or upon the psychologists report which was introduced into evidence (Exhibit M6) other than to say that on my lay reading of the report, it refers more to difficulties with his private life than it does to work. However, be that as it may, I have no need to make a finding about that at the moment. What it does show is that the three weeks in January 2000 when there was no communication the reason was that the Applicant was unable to do so.

41 Apparently after the Applicant left hospital, he became possessed of information which he thought he had a duty to bring to the attention of the Commissioners of the City he gave notice of his intention to do so to the Acting Chief Executive and he attended a Council meeting as a private citizen in the public gallery. He took the opportunity to attempt to raise issues. His attempts were ruled to be out of order by the Chairman of Commissioners, Mr Donaldson.

42 It is relevant to note that apart from the telephone conversation between Mr Donaldson and the Applicant on 7 December 2000 and the contact with the Applicant at the Council meeting on 27 March 2001 was the only in person contact the Commissioners had with him, notwithstanding his numerous attempts to seek meetings.

43 The Applicant continued to seek meetings through the City's solicitors. He was told by Mr Ellery that the City Commissioners did not wish to take up his request to meet with them. It is fair to say that Mr Ellery, on their behalf, most likely told the Applicant he should desist with his attempts to see them in fact his note contains the following words *"I said the Council has told him their position numerous times nothing has changed. They have the authority to take this action"* (Exhibit S28).

44 Mr Ellery's view is that as a result of being told this the Applicant then said that there would be a confrontation. He admits that the Applicant said this in the context that it would be ridiculous. The Applicant's view is that the conversation should have been recorded the other way around, he thought the situation had reached the ridiculous stage which could lead to confrontation. The Applicant had told Mr Ellery that he would appear at the City to enforce what he said were his rights.

45 As I have found earlier, I think it more likely than not during that conversation when the Applicant talked about attending the premises that his version of events is correct. When he expressed his intention to bring a licensed security agent with him it was in response to being told by Mr Ellery that he would be disallowed entry by the police.

46 This is important in the general context of events because if it were reported to the City in the way that the note indicates, it would no doubt cause concern.

47 Soon after that conversation there was a special meeting of Council that resolved to issue a letter of termination. The letter is included in full earlier in these Reasons. It erects the contention that the Applicant had committed gross misconduct because of a refusal to abide lawful directions. These directions were not specified in the letter though. It also alleges breaches of the City of South Perth Code of Conduct relating to recent public communications with the media, the Office of the Minister for Local Government, the Premier and the Chairman of the Commissioners and thirdly, actions by the Applicant since the Council meeting of 27 March 2001. These are said to lead to an irreparable breakdown of the employee-employer relationship leaving the City with no alternative but to dismiss summarily.

48 That termination has all the ingredients of a response to conduct by the Applicant which is said to go to the root of the contract of service. (*see discussion on Summary Termination in The Law of Employment, Macken, McCorry and Supperdine 3rd Edition*). Also relevant is the discussion of the differences to be drawn between a dismissal and a summary dismissal in the Reasons for Decision of the Full Bench in *Transport Workers Union v Eastern Goldfields Transport Board* (1989) 69 WAIG 1895—in particular the writing of His Honour the President where he observed—

> "*Clearly, for example, a dismissal which is a summary dismissal might be quite unfair, whereas a dismissal by notice under a contract of service carrying with it benefits and being a different remedy might not. One therefore must consider the act of dismissal complained about, not the effect of an act, because the contract of employment is terminated by that precise act, not by an alternative act which might have occurred but did not.*"
>
> Emphasis added

This concept is relevant in these proceedings as I will now discuss.

49 The summary termination ignores that the Applicant had tried on numerous occasions to commence a dialogue with his employer. It is the law, as I have described earlier in these Reasons, that the employer has responsibilities to deal with issues of this nature and the way that it deals with those issues are reflective of the severity of them in terms of the contractual situation. It is relevant that even though the Applicant had expressed an intention to perform an act contrary to instructions passed to him through a solicitor, he had not performed the act.

50 I think of significance as to whether or not a summary dismissal or not was justified is in page 219 of the transcript of proceedings in the cross-examination of Mr Donaldson by Mr Stubbs. The thrust of the cross-examination is that up until the meeting of 3 April 2001, no mention had been made to the Applicant that there was any consideration by the Council or any view of the Council that he had breached the City's Code of Conduct. Mr Donaldson confirmed this. Then; there was no suggestion that the City would summarily terminate the contract of employment, again the answer was "No". Finally there was no request to address any of the issues prior to a decision being made in relation of his employment. Again the answer was in the negative as was the answer to the question that there was no request for him to attend the meeting. Mr Donaldson agreed that there was no opportunity given to the Applicant to influence the decision of the City prior to its decision being taken.

51 Clearly the City denied the Applicant what is at common law his fundamental right to ascertain the reasons for his pending dismissal and to address those and provide explanation or answers, or to explain to the City that he is prepared to change his conduct in some way to meet their requirements. He was not given the opportunity to any of those things. This failure taints the decision because it calls into question the efficacy of reaching a conclusion that there had been gross misconduct without the Applicant having the opportunity to address the issues upon which such contentions were based. For instance, he had no idea of the alleged breaches of the Code of Conduct that he was said to have committed. In fact the answer filed by the Respondent sets out nine alleged separate breaches of the Code. It is clear that if those allegations were made, the Applicant should have been given the opportunity to address them. The claim that he wilfully refused to obey lawful directions of the City contains no detail at all, he could not possibly know what lawful directions it was said that he refused to obey.

52 This sequence of events leads inexorably to the conclusion that to dismiss the Applicant in those circumstances for

gross misconduct was unfair. However, that is not to say that the Applicant's conduct might not have justified the City in bringing the relationship to termination in the normal manner which, as I mention in paragraph 48, the authorities permit. But that is not what is before this Commission. The Commission has to deal with an application alleging gross misconduct and summary dismissal. The nature of the dismissal and its reasons are not challenged by the City. It has the onus of proof to establish the evidentiary basis for the dismissal and I find it has failed to do so mainly because in important areas it has confused the intention to act with an act. And where on the evidence it might be reasonable to conclude that the Applicant may be in breach of the contract of employment the City did not confront him with its concerns and give him a chance to answer or change his conduct.

53 The conclusion that the Applicant has been unfairly dismissed raises another set of issues for the Commission. The Applicant seeks reinstatement and only reinstatement. There have been no submissions put to the Commission on behalf of the Applicant seeking compensation.

54 In the Answer filed, the City makes it clear that they do not think a viable relationship can be recreated, though there was little, if any, evidence of that given to the Commission in the proceedings. What is clear, though, is that there is a continuing investigation into the matters of the Applicant's conduct as an employee which are beyond the knowledge of this Commission and which may, in due course, affect the employment relationship. There is a clear dilemma created by that situation in the Commission's mind as to the viability of reinstatement as a remedy in this matter.

55 It could well be that the appropriate remedy is reinstatement but the Applicant continues on suspension until the Panel Enquiry is completed and the City has had the opportunity to consider and apply whatever findings that the Panel makes. However, neither of the parties have addressed the potential outcome nor have they addressed any alternative remedy.

56 In the circumstance I have decided to issue orders that the Applicant was unfairly dismissed and further list the matter to hear from the parties on the question of remedy.

2001 WAIRC 03994

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	DRAGOMIR PETKOVIC, APPLICANT *v.* KROKO NOMINEES P/L, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DELIVERED	TUESDAY, 23 OCTOBER 2001
FILE NO	APPLICATION 1692 OF 2000
CITATION NO.	2001 WAIRC 03994

Result	Application for unfair dismissal and contractual benefits dismissed
Representation	
Applicant	Mr K Trainer (Agent)
Respondent	Mr G Barrow (of Counsel)

Reasons for Decision.

1 The applicant claims that he has been harshly, oppressively and unfairly dismissed from his employment and he claims a number of contractual benefits have been denied to him.

2 The Commission has heard evidence from the applicant; from Nicholas Paul Breheny, a mechanical engineer employed by the respondent from 1 August 2000; Hansen Fernandez, a first class welder employed by the respondent; Raymond Leslie Watt who was employed by the respondent from early January 2000 until the end of June 2000; Brendan David O'Brian, who worked as a sales representative for the respondent from February 1987 to May 2000; Shane David Gilmore a sales representative with Statewide Bearings who visited the respondent's premises on a number of occasions; Alan Charles Winduss, the principal of the accountancy firm Winduss and Associates, accountant and financial adviser to Mr Kostecki and his related companies; Maria Kostecki, a co-director and shareholder of the respondent and the person who undertakes the day to day accounts and the administration of the respondent, and Gene Kostecki who I take to be the managing director of the respondent.

3 The applicant describes himself as a professional mechanical engineer. Kroko Nominees Pty Ltd in its capacity as trustee of the Collier Unit Trust trades under the business names of Minesite Spares and Arcoplate. The business manufactures steel plate with a hard surface attached. The process involved in this requires the mixing of alloys, which when mixed is spread over steel plate. The alloy is then arc welded to the plate. A mill is used to feed the steel plate, via rollers, to apply the mixture and to arc weld it to the plate. The respondent operated one mill in its day to day work. The applicant was engaged on a project to computerise the process and enable its remote operation. Mr Kostecki had been instrumental in the development of the process, and the company intended to grow and develop internationally. The intention was that a company, Arcoplate Inc, was to be incorporated and listed on the London Stock Exchange. This company would raise share capital to develop its work. The evidence of Mr Winduss, the respondent's accountant, is that the process of capital raising through listing Arcoplate Inc was a complete failure, and another company, Arcoplate UK took over from it.

4 There was also evidence that in the month preceding the termination of the applicant's employment, Alloy Steel International, another trading entity of the respondent was to take over the mill project. This involved a restructure of the company and involvement of an American company. The employees of the respondent were to become employees of the new business. The American interests required that employees sign a confidentiality agreement. This agreement became significant in the applicant's case and will be dealt with later in these reasons.

5 The applicant says that he applied for a position of mechanical engineer with the respondent advertised in the "West Australian" or the "Sunday Times". He made enquires about the position and was interviewed by Mr Gene Kostecki at the respondent's premises at 48 Clavering Road Bayswater. He says that it was agreed at the end of the interview that in about 4 week's time, on 23 February 1998, he would commence employment. He says that during the interview he requested a salary of $136,000 per annum working hours of 7½ per day, 5 days per week; 8 days sick leave; and 3 months notice from the company and 1 month from him. A car was to be available to him in the future. He says that this was all agreed except that Mr Kostecki indicated that the company could not afford it at that time. Mr Kostecki offered him $55,000 per annum and the applicant says that Mr Kostecki wanted him to work a probationary or trial period, and originally 3 months was agreed but then Mr Kostecki begged him twice to make the probationary period 6 months and he agreed. The applicant says that after the probationary period of 6 months, he was to receive $136,000 per annum. He says that Mr Kostecki discussed with him an opportunity for him to obtain a share in the company in the future.

6 The applicant commenced work. In around the third week of May 1998, when the applicant was working 7½ to 8 hours a day, he says that Mr Kostecki requested that he work an additional 2½ hours per day commencing an hour earlier and finishing an hour later, and working during his lunch break. He says that it was agreed that he would do this provided that he was paid for this additional

work at a 30 per cent loading on the $136,000 per annum that he was soon to receive.

7 The applicant says that 6 months and 1 day after commencement he had noted in his diary that the 6 months had lapsed and he went to talk to Mr Kostecki about increasing his salary. However, no increase was provided. Neither was there any payment made for the additional hours worked each day.

8 The applicant says that at a meeting on 11 June 1999, he put to Mr Kostecki and Mr Kostecki agreed to a salary package of $300,000 per annum. However, according to the applicant, Mr Kostecki said he would have difficulty paying that salary but preferred to offer $100,000 salary, the use of a vehicle being a benefit equal to $10,000, and 50,000 shares per annum at $2.99 per share. The applicant says he responded that that equalled $260,000, so Mr Kostecki said he would pay for the shares from the commencement of employment, easily making up $300,000.

9 The applicant says that from 30 June, 1999 through to termination, his salary package was that set out in a document prepared by the applicant and signed by Mr Kostecki (Exhibit 2) which was said to reflect the agreement between them including the benefit of shares in the company. These benefits were not provided to him.

10 The applicant says that he raised with Mr Kostecki on a number of occasions that he was not being paid in accordance with their agreement and that Mr Kostecki told him on those occasions why the payments could not be met at that time but that he promised that payments would be made of all outstanding amounts at some future date.

11 In addition, the applicant says that there was an arrangement with the respondent for work to be directed to a business, DIV Engineering, which the applicant conducted with his wife. This was to be design work for which the respondent would be invoiced a total of around $50,000 per annum divided into 12 equal monthly instalments but the applicant says that that was separate to the arrangement which he had with the respondent as an employee.

12 The applicant also says that there were an additional 150 hours he worked at home at the direction of the respondent on particular projects and he commenced working those hours in the year 2000.

13 The applicant claims that he is entitled to a salary of $136,000 per annum from 23 August 1998 being 6 months from the commencement date rather than the $55,000 per annum he was paid; he claims payment for the additional 2½ hours per day at a loading of 30 per cent of the $136,000 per annum salary; he seeks a benefit of shares in the company of 50,000 shares per annum valued at $2.99 per share. He also seeks payment of $10,000 for the work done out of hours at home.

14 The applicant also claims that his dismissal was unfair and he says that if there were no grounds for the termination of his employment or, alternatively, if there were no grounds for summary termination then the applicant has an entitlement to notice being three months as agreed at his commencement of employment. If the Commission found that there was no entitlement to notice in that agreement then the applicant says that a reasonable term of notice ought be implied and that that would be 6 months notice.

15 The respondent denies that it owes the applicant the amounts claimed, and says that there were no agreements in the terms described by the applicant. The respondent also denies that the applicant was harshly, oppressively or unfairly dismissed, and says that the applicant's conduct justified summary dismissal for misconduct.

16 Mr Kostecki gave evidence that he had been involved in Alloy Steel for some 10 years and before that with Kroko Nominees trading as Minesite Spares selling locomotive spare parts to the iron ore industry in Western Australia. The company currently has approximately 15 employees. When the applicant departed employment with the respondent, a junior engineer was already employed on the rate of approximately $35,000 per annum. No other engineer was employed in the place of the applicant.

17 Mr Kostecki gave evidence that the company had a turnover of less than a million dollars per annum. He denies that he applicant's employment was ever to have been on the basis $130,000—$136,000 per annum. He says that if the applicant had raised that with him in the February 1998 interview, then he would have "showed him the door". He says that the subject was never raised. He says that no probationary period was ever discussed and the company has no policy regarding probationary periods. He says the company did not need anybody of the calibre who would attract a salary of $136,000 per annum. He denies that there was an agreement to pay the applicant an additional 2½ hours of work per day at a 30 per cent loading.

18 Mr Kostecki says that in June 1999, it was made very clear to the applicant that the company was still operating with a very small mill, a prototype, and that the company did not have sufficient turnover to warrant increasing anyone's salary and he says that he reminded the applicant that Maria Kostecki, who was also a full-time employee, was not drawing a salary at that stage. He says that there was a discussion with the applicant about pay in June 1999 and during the course of that discussion he says that he told the applicant that he could not increase his salary. The applicant said to him that if he wanted the mill finished, then the applicant was involved in a business called DIV Engineering with his wife who was also a qualified engineer, and he said that he could take work home and could speed up the process of completing the project to meet the company's deadlines. He says that he told the applicant that until they arranged the float of the new company and the capital was raised for that company that he could not guarantee that they could afford to pay him any further increases. He thought that the suggestion of utilising DIV Engineering was a useful one in that it would be helpful in minimising payroll tax, minimising superannuation and would also help the applicant with his taxation.

19 At that time the question of shares was raised by the applicant asking whether when the company was publicly listed would there be shares available. He told the applicant that there would be some and that they could be made available to the applicant at par. The applicant said to him that this had been coming on for two years and asked whether it would be possible to get 50,000 shares and he agreed that that was appropriate although no price for the shares was mentioned. The applicant then approached Mr Kostecki with a document (Exhibit 2) saying that he wanted to show it to his wife to demonstrate what his package would be. Mr Kostecki says that he glanced at it and signed it but that he did not examine the document. Mr Kostecki denies that there was ever a proposition by the applicant for a salary package of $300,000.

20 This document reads—

> "11.6.99
>
> Perth,
>
> Re: Salary package for George Petkovic
>
> Arcoplate agree to pay salary package to (George) Petkovic Dragomir as follow—
>
> - $100,000.00 per annum
> - car
> - 50,000.00 shares per annum paid back for whole period from 21.2.1998. (when Arcoplate Inc listed)
>
> Payment should be done weekly.
>
> Director—
>
> Signed
>
> Gene Kostecki."
>
> (Exhibit 2)

21 That part of the document that refers to "50,000 shares per annum paid back for the whole period from 21.2.1998" meant a total of 50,000 shares which would be made available for the applicant to purchase. He says

that he told the applicant that to finance his share purchase, the applicant could sell half and keep the other half and that he would be offered those shares at par. This was subject to the company taking off, hence the reference to "when Arcoplate Inc listed". The shares were not a gift, but were to be offered to him for his purchase at par. In any event, the share availability was shares in Arcoplate Inc and was subject to Arcoplate Inc being listed and this was never satisfactorily finalised.

22 He says that the figure of $100,000 per annum referred to in Exhibit 2 was on the basis that the applicant would receive $55,000 per annum as a salary and $45,000 per annum would be paid via invoices from DIV Engineering. This would bring the total package to $100,000. However, Mr Kostecki says that it was not his intention at that time to put work in the way of DIV Engineering until the company was in a better financial position, when Arcoplate Inc. was listed, but the applicant commenced issuing invoices and always came up with a story as to why he needed the money then. He decided to pay those invoices even though, in accordance with the agreement reached, they were not appropriate for payment, believing that the successful float of Arcoplate Inc was imminent.

23 He says that he discussed the payment of the invoices with his wife upon presentation of the invoices and decided that as they were building a new factory and were going to have bigger machines that they would pay the invoices even though they were not due to begin until after Arcoplate Inc was floated.

24 The respondent says that letters (Exhibits 7 and 8) written by Mrs Kostecki saying that the applicant was receiving a salary of $100,000 resulted from Mr Kostecki being approached by the applicant saying that he needed a loan for a bigger house because he had his mother-in-law and mother and the whole family living with him and he needed to show the bank that he was on a quarter of a million dollars a year, so that he could obtain a loan. Mr Kostecki says that he told the applicant that he was unable to provide such a letter as it would be fraudulent and that the applicant walked out of his office. However, letters were prepared which reflected the applicant's salary of approximately $100,000 which was the total of the $55,000 per annum and the $45,000 payments through DIV Engineering.

25 As to the claim by the applicant for $10,000 for additional work allegedly performed at home, Mr Kostecki says that the only work to be done at home was through DIV Engineering. He denies that there was an agreement that work to be done at home was anything other than through DIV Engineering.

26 There was considerable evidence about an issue of whether or not the applicant was responsible for pornography found on the respondent's computer system. I note that both the applicant and Mr Kostecki blame each other for the presence of the material on the computer. I note too that this was not a matter particularly associated with the manner in which the termination of employment arose. It appears, as Mr Barrow says, that this is merely a matter of credibility and it is apparent that a good deal of time and effort was wasted on a matter which did not relate to either the claim or the issues primarily before the Commission.

27 As to the termination of employment, the applicant and Mr Kostecki have given quite divergent evidence as to what occurred between them where there were no witnesses.

28 The applicant says that his dismissal is unfair. This occurred on 28 September 2000 following a meeting addressed by Mr Winduss about the restructure of the business. The applicant says that he was in his office when Mr Kostecki came into the office. He says he asked Mr Kostecki if they could discuss the amounts of money allegedly owed to him and asked when the respondent planned to pay him, particularly as there was to be the restructure Mr Winduss had talked about. He says that when he mentioned the shares he was to receive, Mr Kostecki exploded, lost control, and struck out with his hand towards the applicant's throat. The applicant says he moved back and on Mr Kostecki's second attempt, he grabbed at the right side of the applicant's face, leaving a small cut. The applicant says he immediately stood up, and asked what Mr Kostecki was doing attacking him. He says Mr Kostecki left the room, saying he would be back. The applicant was frightened he may come back with a gun or a knife because Mr Kostecki had previously told the applicant he owned a gun. The applicant says he looked around the room for a means of escape. However, as the windows did not open, he sat back down and pretended to work at his computer. He says Mr Kostecki came back in less than a minute with a paper in his hand which the applicant says was the confidentiality agreement, which up until this point the applicant had not signed. Mr Kostecki came close to him and, in the applicant's words, smashed the paper at the applicant's face, then smashed his hand on the edge of the desk a couple of times, demanding that the applicant sign the document. The applicant says that because he feared that he had to sign the document "to survive", he agreed to sign it then although it appears that he did not sign it. He says that he had thought that the noise in his office would have attracted attention but no one came into his office, so he shouted out to Mr Kostecki "Don't attack me. You don't have the right to attack me in my office. I only ask you how do you plan to pay me" (what was owed). Still no one came.

29 Mr Kostecki is then said to have responded that "I will tell you what I am going to do. Pick up your things," and pointed for the applicant to leave.

30 The applicant says he then said that he would go if he was paid notice. Mr Kostecki then repeated that the applicant was to pick up his things and go. The applicant says he picked up his briefcase and 3 or 4 notebooks and started to pack up. He picked up the car key and Mr Kostecki told him to leave the car key, the car belonged to him. The applicant told him the car was part of his package, unless he was given notice, he would not give him the car key. The applicant says Mr Kostecki tried to grab the car key which was in his hand, so the applicant put the key in his pocket. The applicant started to scream out "Gene, don't attack me more," in the hope some one would come. He reached for the diary and Mr Kostecki told him to leave it, it was a work diary. The applicant says he told Mr Kostecki that it was his private diary and he would need it as evidence of his working times, and he was going to the Industrial Relations Commission.

31 The applicant gave further evidence of attempting to convince Mr Kostecki that he was owed 3 months notice, and was going to go to the Industrial Relations Commission. Mr Kostecki prevented his exit saying "You will not pass here. You will not go with my car to the Commission."

32 The applicant says Mr Kostecki then called the other engineer, Nick Breheny, to come and witness his sacking the applicant, and then Ken Peters, another employee, came into the office also. There is further evidence as to the applicant leaving the premises with the company car and returning in the company of the police, at which time he returned the car keys only when Mr Kostecki gave him a letter of termination.

33 Mr Kostecki's evidence of his and the applicant's altercation is quite different in a number of important aspects. He says he went in to the applicant's office to ascertain when the mill project would be completed; he did not leave the office and later return; he did not have the confidentiality agreement with him. He wanted the spreadsheet which the applicant was to have drawn up to set out time frames for completion of the project. He sat on the corner of the applicant's desk. When the applicant did not provide the spreadsheet, he sought to look in the work diary which he believed contained information to enable him to ascertain the completion date. The applicant held the diary to his body and when Mr Kostecki reached for it, the applicant punched his arm away, and started shouting out. He says he did not attempt to strike or grab the applicant. He told the applicant "George, you're out of here." As the applicant was departing, he told him not to take the keys or the diaries—they were company

property. He instructed the receptionist to organise a cab for the applicant, and told the applicant that if he took the car keys or any company property, he would report them stolen.

34 Having observed the witnesses as they gave their evidence, and having considered the evidence on the balance of probabilities, I find that the applicant's evidence was lacking in credibility, as was that of Mr Fernandez who was very clearly motivated to give evidence from the perspective of his own unhappy dealings with Mr Kostecki. A number of the applicant's assertions, with which I shall deal later, are quite incredible, particularly in respect of the benefits he says were agreed to by Mr Kostecki, especially in the context of a relatively small business. I also note later in these reasons concerns about the plausibility of the applicant's account of the events immediately surrounding the termination of his employment. The applicant seems very naïve in business matters and he has a very poor understanding of the consequences for the conditions of his employment. The applicant would have the Commission believe that he had a contract of employment with a business employing 15 employees and with a turnover of approximately $1,000,000 per annum, which entitled him to, firstly a salary of $136,000, and later a package equal to $300,000 per annum; that he was to be paid a 30 per cent loading for work performed in the office beyond 7½ hours per day, in addition to his salary; that he was also to be paid for hours of work performed at home, and that quite separately approximately $45—50,000 worth of work was to be put his way by the respondent through his and his wife's private business. Further, if he was ill, the respondent would provide him with 3 months sick leave each year.

35 I note too that in his Notice of Application the applicant made no mention of having been assaulted by Mr Kostecki, but rather said that "Mr Kostecki became angry and abusive". The respondent's Notice of Answer and Counter Proposal alleged that the applicant had assaulted Mr Kostecki. The respondent also alleged that subsequent to termination, it had discovered pornographic material on the computer terminal at the applicant's work station. Only after these allegations were made did the applicant allege in his Further and Better Particulars of Claim that it was Mr Kostecki who attempted to grab him and in his evidence blamed Mr Kostecki for the pornographic material being on the computer.

36 I also find that the applicant's interpretation of what Mr Winduss told the staff is deliberately constructed to create an impression that there was uncertainty about the employment of the respondent's staff by the new business, when such an interpretation is not consistent with other evidence.

37 The applicant also gave evidence about being requested to sign the confidentiality agreement to which I referred earlier and his delaying doing so to get advice. Yet, he conceded that having taken time off work to get that advice he merely consulted a friend over the telephone and did not seek the legal advice he lead his employer to believe he was seeking.

38 The applicant would also have the Commission believe that having been promised a salary of $136,000 after 6 months employment, and not receiving it, and continuing to be paid only $55,000, he continued in employment for a further year, and still was paid only $100,000 through salary and DIV Engineering invoices until termination in September 2000, 2½ years after commencement. He says agreement to the payment of hours in excess of 37.5 occurred in May 1998, but he continued on without such payment. Although he may have protested at not being paid what he wanted, he took no action to bring the matter to a head.

39 Mr Kostecki's evidence was not undermined in any significant way, and I accept Mr Winduss's evidence. In these circumstances, where Mr Kostecki's and Mr Winduss's evidence conflicts with the applicant's evidence, I have no hesitation in accepting the former evidence and rejecting the latter.

40 Part of my consideration of the credibility of the applicant and Mr Kostecki relates to what the applicant said occurred during the final hours of the applicant's employment. As with the other evidence I prefer that of Mr Kostecki to that of the applicant on the manner of the termination of employment. The applicant says that at one stage Mr Kostecki assaulted him but it seems that if Mr Kostecki made physical contact with the applicant that it would have been in accidental contact in an attempt to obtain a diary. It was the applicant who punched Mr Kostecki's arm to prevent him seeing the diary. What is most implausible about the applicant's evidence on this matter is that Mr Kostecki hit the applicant or attempted to hit him with a document which Mr Kostecki denies having with him at the time and that when Mr Kostecki left the room the applicant said that he feared for his own safety allegedly concerned that Mr Kostecki would return with a gun or a knife. Yet having examined the room and found that there was no means of escape other than through the door, the applicant chose to sit down at his desk. He said that part of his fear was because Mr Kostecki had told him of firearms he possessed and he was fearful that Mr Kostecki would come back with a firearm. If this is the case, it is quite surprising that the applicant would simply sit down in his office where he would be unable to escape, and not find a safer place or advise somebody of the danger in which he found himself. It is also notable that there was no other evidence to support the applicant's assertion that Mr Kostecki had told him he had a gun, and Mr Kostecki was not questioned on that matter. The applicant's description of the situation is not credible.

41 It is also strange that notwithstanding his alleged fear of Mr Kostecki, the applicant continued with his demands for payment and for notice.

42 The test to be applied in a claim of harsh, oppressive and unfair dismissal is whether the employer so abused its lawful right to terminate in such a way as to warrant the Commission's intervention in that decision. There is to be a "fair go all round" (*Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385). A common sense and practical approach is to be used. (*Byrne v Australian Airlines Ltd* (1994) 52 IR 10).

43 Where the dismissal is summary and for misconduct, as in this case, the employer bears an onus of demonstrating that aspect. However, the applicant bears the onus of proving that the dismissal is harsh, oppressive or unfair. The process applied to the termination is not an overriding consideration but is a consideration to be weighed with all of the circumstances (*Shire of Esperance v Mouritz* (1991) 71 WAIG 891).

44 I find that what occurred during the course of the termination was that Mr Kostecki was attempting to ascertain from the applicant, as he had on a number of other occasions, when the applicant would complete the project allocated to him. It may be that Mr Kostecki left the office and came back—Mr Breheny's evidence was that he did. The applicant was unprepared to provide him with any definite information and Mr Kostecki, in frustration, attempted to grab the diary in which he believed there was notation which would allow him to ascertain the completion date. I am satisfied that the applicant struck Mr Kostecki by way of punching his arm out of the way as Mr Kostecki reached for the diary. The applicant then called out to Mr Kostecki in a loud voice to stop assaulting him, so as to attract attention from others in the office supposedly so that they might come to his rescue. However, it is more likely that he wanted to create an impression that he was under assault when he was not. Other people did eventually enter the office. There is dispute at to where people were standing at particular points. Mr Kostecki told the applicant that "George, you're out of here". The applicant demanded that he be given notice. The applicant walked ahead of Mr Kostecki out of the office and towards the reception area to leave the premises. Mr Kostecki told the applicant that he was required to leave his keys and diaries. He directed Denise, the receptionist, to organise a taxi to take the applicant

home. Mr Kostecki told him that if he walked out with the car keys and any property, he would report them stolen. The applicant left the premises with the car which was the property of the respondent, contrary to Mr Kostecki's instructions.

45 There is dispute between the parties as to whether the applicant went to a local police station to complain about Mr Kostecki and to seek assistance in going back to the office to retrieve his property and to leave the car, or whether Mr Kostecki directed the receptionist to notify the police that the vehicle was stolen and that the police escorted the applicant back to the premises for the purpose of him returning the car. Neither side produced sufficient evidence to substantiate their respective claims as to the involvement of the police.

46 Although the tests in respect of misconduct terminations require an investigation process, in this case the conduct of the applicant was directed at his employer and Mr Kostecki could see and was aware of what had occurred. There was no need for him to investigate. The nature of the conduct of the applicant in refusing a lawful direction being to advise Mr Kostecki of when the project would be finished, denying the respondent access to work records, and particularly in his punching Mr Kostecki's arm away in the manner which he did was misconduct justifying instant dismissal. I am satisfied that as a consequence of the applicant's conduct, the relationship between the parties broke down so completely as to destroy any trust that there might have been and that the applicant's conduct is also sufficient to justify termination of employment. It was wilful and deliberate conduct going to the heart of the contract.

47 Further, the applicant departed the scene with the vehicle and other company property notwithstanding direction from Mr Kostecki.

48 In the circumstances, I am satisfied that the termination of employment was not harsh, oppressive or unfair, and was justifiably one for misconduct going to the root of the contract.

49 However, if I am wrong in that and that there was not sufficient to justify summary dismissal without notice, then it may be that a notice period would have remedied any defect in that regard. I am not satisfied that the discussions between the parties upon commencement or at any other time establish that the applicant was entitled to receive from the respondent 3 months notice and he would provide only 1 month in return. Therefore, it is necessary to imply a term of reasonable notice. The tests applicable in *Tarozzi v W.A. Italian Club (Inc)* 74 WAIG 2499 would be appropriate. The applicant's situation was that he was a professional engineer, relatively senior within a very small business, he had been employed by the respondent for 2½ years, his salary was $55,000 per annum albeit that through a private business he was paid an additional $45,000 per annum or a similar amount and in those circumstances a period of notice of approximately 3 months might be appropriate.

50 As to the claims of denied contractual benefits, I am not satisfied that the applicant was ever engaged for more than $55,000 per annum until an agreement was reached that a further $45,000 would be available to him through his private business for work to be allocated to the business and invoices rendered. Payment of those invoices was made, notwithstanding that their payment did not comply with the terms of the agreement between the parties that this was to occur after the successful float of Arcoplate Inc, which did not eventuate. These payments were made in anticipation of the imminent float of Arcoplate Inc, its success capital raising, and imminent increased production. Therefore in terms of the claim of outstanding salary, I conclude that no amounts are owed to the applicant as he was paid according to the terms of the agreement reached.

51 As to the claim for payment for additional hours of work, this seems quite extraordinary that a person claiming to be on a salary of $136,000, as claimed by the applicant, would claim and his employer would agree to pay him for 2 to 2½ hours overtime per day for 5 days per week. I am not satisfied that agreement was ever reached that these additional hours would be paid for and certainly not paid for at a 30 per cent loading.

52 If there were any claim for additional work at home, then I am satisfied that this corresponds, if not exactly, then certainly within a reasonable range, to the amounts of money paid to the applicant through DIV Engineering. Accordingly, there is no amount owed to the applicant in respect of any additional hours purported to have been worked at home.

53 As to the value of shares, I note that Exhibit 2 and the evidence of the respondent require that two things occur, one is that Arcoplate Inc be listed. This listing was not successful. The applicant clearly has little understanding of the way in which the share allocation system would operate and appears not to have any real understanding that what was being discussed was the listing of a new company on the UK stock exchange.

54 Secondly, I am not satisfied that the parties ever agreed that the respondent would provide the applicant with 50,000 shares per annum for each year that he had worked, at no cost to the applicant. Such an arrangement would be quite incredible in an organisation the size of the respondent albeit that the respondent's intention was that the business would grow substantially. I find that shares were to be made available for him to purchase at par.

55 In all of the circumstances, I find that the applicant was not harshly, oppressively or unfairly dismissed from his employment with the respondent. I conclude that there were no outstanding contractual benefits owed to the applicant. If I am wrong in respect of the unfair dismissal claim then it would be that the respondent may have dismissed the applicant in circumstances which warranted the termination on notice and that a period of notice of three months at the salary of $55,000 per annum would be the appropriate remedy.

2001 WAIRC 03995

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	DRAGOMIR PETKOVIC, APPLICANT
	v.
	KROKO NOMINEES P/L, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DELIVERED	TUESDAY, 23 OCTOBER 2001
FILE NO	APPLICATION 1692 OF 2000
CITATION NO.	2001 WAIRC 03995

Result	Application for unfair dismissal and contractual benefits dismissed

Order.

HAVING heard Mr K Trainer on behalf of the applicant and Mr G Barrow (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 03965

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	MICHAEL STARK, APPLICANT
	v.
	C.O.C. PTY LTD, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	WEDNESDAY, 17 OCTOBER 2001
FILE NO	APPLICATION 893 OF 2001
CITATION NO.	2001 WAIRC 03965

Result	Application alleging unfair dismissal granted.
Representation	
Applicant	Mr D.A. Lenhoff (of counsel)
Respondent	Mr L.A. Margaretic (of counsel)

Reasons for Decision.

1 Mr Stark was employed by the respondent from the end of March 2000 as its State Manager for Western Australia. He was given notice of dismissal on 7 May 2001 by Mr Matthews, the then National Manager. Mr Stark claims that his dismissal was unfair. Mr Stark claims that the only reason given to him for his dismissal by Mr Matthews was that his style of management was not nasty enough. The respondent replies that Mr Stark was dismissed by reason of redundancy.

2 I find the relevant facts to be as follows. Mr Stark's employment was subject to the terms and conditions set out in the letter of appointment which became exhibit 1. It provided for a base salary of $55,000 per annum, a sum which subsequently increased to $65,000 per annum, and an incentive bonus of 0.5% of the total dollar amount installed in both the Insulation and Roof Restoration divisions. A provision was to be put in place where the total dollar amount of all bad debts disposed of by the respondent that bear a date post Mr Stark's employment would be deducted from the gross amount set for the calculation of the incentive bonus. He was also entitled to standard sales commissions from his own personal sales, the provision of a personal company vehicle and a mobile telephone. The letter provided that the termination of employment required the giving of three weeks' notice on either side. There was no provision for payment in lieu of notice. The letter also indicated that termination by the respondent would follow at least two written warnings other than for instant dismissal in cases of misconduct or a breach of the terms and conditions of employment.

3 On 13 February 2001 Mr Stark tendered his resignation by way of an e-mail to Mr Matthews (exhibit 4). Following the receipt of that e-mail, Mr Matthews and Mr Stark met. As a result of that discussion, Mr Stark remained in employment. That is, the resignation was effectively overtaken by the parties' agreement that Mr Stark's employment would nevertheless continue.

4 On 7 May 2001 at approximately 2:00 pm a meeting took place between Mr Stark and Mr Matthews. Mr Stark gave evidence of the meeting and was cross-examined on his evidence. Mr Matthews was not called to give evidence. The Commission has before it, therefore, only the evidence of Mr Stark regarding the content of the meeting. In the context of the evidence presented to the Commission overall, I accept Mr Stark's evidence of the meeting. I therefore find that Mr Matthews stated to Mr Stark that the company would have to let him go and that his style of management was not nasty enough.

5 Later that day after 4:00 pm, Mr Stark spoke to the members of staff with whom he worked and informed them that by mutual agreement with the respondent he had decided to leave its employ.

6 In find as a matter of fact that Mr Stark was given three weeks' notice of termination. It is not entirely clear at what point his employment actually ended. However, that is not a point of significance in this matter. It is agreed from the evidence that Mr Stark was paid for all of the work he performed up to the time of the dismissal by Mr Matthews. He was then subsequently, for each of the next three weeks, paid one week's wages, together with his outstanding annual leave entitlement.

7 I find also that by virtue of the company policy referred to by Mr Bowe, the current Human Resource Manager of the respondent but who was not employed by the respondent at the time of Mr Stark's dismissal, that Mr Stark is entitled as benefit under his contract to a further two weeks' payment, being the redundancy payment payable under the respondent's policy to an employee with more than one year's service, but less than two, and which was not paid. I find also, that as Mr Stark is over the age of 45, by virtue of s.170CM of the *Workplace Relations Act 1996* his notice of termination ought to have been increased by a further one week's notice, or payment in lieu thereof.

8 The respondent called evidence from Mr Di-Lallo, the Managing Director of the respondent. His evidence, as relevant to my findings, was that he decided that the financial position of the respondent, due in part to effect of the Goods and Services Tax and the economic conditions of the time, to restructure the company. The restructure involved the abolition of the WA State Manager's position in part because the National Manager was resident in Western Australia, and that this was the reason for Mr Stark's dismissal.

9 I have considered Mr Di-Lallo's evidence in the light of the submission by Mr Lenhoff that it is open to find that Mr Di-Lallo's evidence was made up after the event. However, I have been persuaded by the fact that the WA State Manager's position was abolished and not filled after Mr Stark's dismissal, together with the evidence which I accept that shortly afterwards the National Manager's position also was made redundant, that as a matter of fact Mr Stark was dismissed by reason of redundancy.

10 However, in the implementation of that redundancy by Mr Matthews, I find on the evidence that Mr Matthews did not mention "redundancy" and that the reason he gave to Mr Stark for his dismissal was that his style of management was not nasty enough.

11 Mr Di-Lallo's evidence is that he considered Mr Stark's suitability for alternative employment in the respondent's builders' division or as Marketing Manager. His assessment was that Mr Stark did not possess the skills to perform either of those positions. Mr Di-Lallo's evidence is that these two positions were never offered to Mr Stark, nor discussed with him.

12 Mr Di-Lallo did say that Mr Stark would have had no warning of his impending dismissal, although he referred to a conversation with Mr Stark he states occurred three months prior to Mr Stark's redundancy. Mr Di-Lallo's evidence is that in that conversation he discussed with Mr Stark the worsening economic conditions and that the respondent may be forced to make changes which might affect him. I am not prepared to accept Mr Di-Lallo's evidence that the conversation occurred, in part because it was not put to Mr Stark for him to comment on when he gave evidence. The failure to do so remains unexplained. However, in any event, I am not satisfied that such a discussion, even if it had occurred as Mr Di-Lallo states, could be relevant when the decision to make Mr Stark redundant was not made until some three months later. As I find subsequently, the term implied into Mr Stark's contract of employment by virtue of the *Minimum Conditions of Employment Act 1993* requires discussions to be held as soon as practicable after the decision to make the employee redundant has been taken. For the conversation to be relevant therefore it would have to have occurred subsequent to the decision to make Mr Stark's position redundant.

Was Mr Stark's dismissal unfair?

13 Mr Stark's submission, as put by Mr Lenhoff, is that the dismissal of Mr Stark was unfair because redundancy is not the real reason for the dismissal. In that regard, reliance is strongly placed upon the meeting with Mr Matthews when he stated to Mr Stark that his management style

was not nasty enough. Similarly, reliance is placed upon the procedural failings of the respondent in implementing the dismissal in that there was no discussion about or offer of alternative employment. There was no consultation with Mr Stark, notwithstanding that he was the WA State Manager regarding his circumstances. His dismissal came without any warning.

14 For the respondent, Mr Margaretic argues that the events surrounding Mr Stark's earlier decision to resign show that the Commission should place no reliance upon his evidence that he could not think of leaving the respondent and that he suffered a sense of shock at the dismissal which occurred. Further, the respondent submits that Mr Stark lied to the staff regarding the reasons for the termination of his employment when there was simply no need for him to have done so. It is argued that Mr Stark's conduct in doing so shows that far from considering that his dismissal was unfair at the time, Mr Stark accepted the reasons for his dismissal. The respondent relies upon Mr Di-Lallo's evidence regarding the reasons for the redundancy and that the position held by Mr Stark has not been filled.

Conclusion

15 I have found little difficulty in reaching the conclusion that the respondent's reason to dismiss Mr Stark was by reason of redundancy. That is not the end of the matter, of course, because even an employee genuinely made redundant may nevertheless be dismissed unfairly (*Cannon v LEP International* (1998) 83 IR 415). In this case, the dismissal of Mr Stark was unfair for three reasons—

(1) The failure to have discussions with Mr Stark after the decision to make his position redundant had been made about measures which may be taken as an alternative to redundancy constitute a breach of his contract of employment by virtue of sections 5 and 41 of the *Minimum Conditions of Employment Act 1993*. While the Commission is not a court for the purposes of enforcing that Act, it is quite well settled that the breach of the *Minimum Conditions of Employment Act 1993* means that Mr Stark was dismissed in breach of his contract of employment and that is a relevant consideration in assessing unfairness (*Gilmore v. Cecil Bros* (1998) 78 WAIG 1099 per Kennedy J. at 1100). In this case, given that there were two positions which were potentially available for Mr Stark, the failure of the respondent to at least give Mr Stark an opportunity to state why he should be considered for one of those positions was unfair to him. I add that the evidence does not suggest that had the discussions between the respondent and Mr Stark occurred which were required by virtue of the implied term in his contract of employment, Mr Stark would have persuaded the respondent to have offered him either of the two alternate positions considered by Mr Di-Lallo. In this regard, Mr Stark in his own evidence in the Commission, did not state that had one of the positions been offered to him, he would have accepted it. Nevertheless, Mr Stark was dismissed in breach of his contract of employment.

(2) Mr Stark was told at the time an incorrect reason for his dismissal. On the evidence, Mr Matthews' comment was without foundation. It has not been part of the respondent's case in this Commission that Mr Stark's style of management was ever in issue.

(3) He was not even paid the proper termination payments to which he was entitled. He was not paid the redundancy payment he ought to have been paid and his age was not taken into account in the length of notice given to him. The respondent also concedes that Mr Stark was not paid for 8 hours work he had performed. I suspect, from the evidence of Ms Brown, that this was in large part due to the information supplied to her by Mr Matthews. It is for that reason that the termination advice slip given to Mr Stark (exhibit 5) is headed "Termination Payment" rather than "Redundancy Payment".

16 For those reasons, I find that the respondent's right to dismiss Mr Stark was exercised so oppressively towards him as to an amount to an abuse of that right.

Remedy

17 It is common ground that it would be impracticable to attempt to reinstate the contract of employment between Mr Stark and the respondent. The Commission therefore considers the issue of compensation. The Commission has the power to order Mr Stark to be paid compensation for the loss or injury arising from the dismissal. While I have had regard to the submissions of Mr Lenhoff in this regard, the loss suffered by an employee who is dismissed by reason of redundancy but whose dismissal was unfair by reason of the manner of dismissal is not the loss measured by the wages Mr Stark would have earned had the dismissal not occurred. On the evidence, even had the discussions occurred between Mr Stark and the respondent and the dismissal handled fairly, on the balance of probabilities, it is unlikely that Mr Stark would have remained in employment beyond the period of time which he in fact remained in employment.

18 Rather, Mr Stark's loss includes the opportunity denied him to discuss alternatives to redundancy and thus the chance of retaining employment, the truth denied him regarding the reason for his dismissal and the payments which ought properly to have been made by the respondent at the time. In assessing compensation for that loss, I do not overlook the comments made by Mr Margaretic at the conclusion of the proceedings about the respondent's good intentions throughout this matter. I accept his submission that the respondent has intended no malice towards Mr Stark but that rather, through administrative failures, the respondent did not handle the issue as well as it possibly may have done. I also take into account that the respondent has apparently sought to address these issues in the future by the employment of Mr Bowe. Nevertheless, the compensation to be ordered by the Commission is not assessed in a manner similar to a penalty, where the employer's good intentions or conduct may result in the awarding of a different amount. Mr Stark occupied a relatively senior position and the manner of his dismissal by Mr Matthews and the failure even to pay him correctly at the time he was going to lose his income without warning is significant.

19 The compensation to be paid to Mr Stark will therefore include the payments he should have received together with a sum as compensation for the loss arising from the manner of his dismissal. Taking into account these factors I assess Mr Stark's loss as the equivalent of a further two months' salary.

20 I am not persuaded that Mr Stark has demonstrated that he has suffered an injury arising from the dismissal for which compensation should separately be awarded. Although Mr Stark may have been shocked by his dismissal, dismissal in virtually every case will cause the employee disappointment, distress and a host of unpleasant personal feelings (*Manuel v Pasminco Cockle Creek Smelter* (1998) 83 IR 135 at 162). The evidence of Mr Stark, including his statement later on the day of his dismissal to the staff does not persuade me that he suffered an injury as that word may be defined in s.23A.

21 A minute of a proposed order now issues.

2001 WAIRC 03983

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	MICHAEL STARK, APPLICANT
	v.
	C.O.C. PTY LTD, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	FRIDAY, 19 OCTOBER 2001
FILE NO	APPLICATION 893 OF 2001
CITATION NO.	

Result	Application alleging unfair dismissal granted.
Representation	
Applicant	Mr D.A. Lenhoff (of counsel)
Respondent	Mr L.A. Margaretic (of counsel)

Supplementary Reasons for Decision.

1 The applicant has questioned whether the "salary" to be used for the basis of calculation of the compensation ordered by the Commission should be the annual salary of $65,000 per annum or the amount of $90,000 which includes the base salary, "bonuses and commissions and so on". The respondent is of the view that the base salary should be used because bonuses and commissions would not be payable over and above the base salary if these were not in fact earned.

2 I would have thought that the answer to the query lies in the nature of the payments ordered. Paragraph (2)(a) of the Minute of Proposed Order orders derives from the redundancy payment acknowledged as due, but not paid, under the respondent's own policy. The "salary" for the purposes of that paragraph will therefore be the salary as it may be defined in that policy.

3 The "salary" for the purposes of paragraph (2)(b) will be the salary Mr Stark was usually paid for work performed by him. Whether or not it included bonuses or commissions is a question of fact to be determined by examination of the pay records. If it did, and the gross figure in exhibit 3 appears to include them, then the salary for the purposes of paragraph (2)(b) will similarly include them. If it did not, then the salary for the purposes of paragraph (2)(b) will not do so.

4 Paragraph (2)(c) relates to payment in lieu of notice. Payment in lieu of notice carries with it "an obligation to pay to the employee everything to which the employee would have been entitled to be paid if the required period of notice had been worked: *Furey v CSA* (1999) 93 IR 349 at 361, 362 per Carr J. Accordingly, the "salary" for the purposes of paragraph (2)(c) is to be the salary which would have been paid to Mr Stark if he had performed work for the period of the notice. The "salary" for the purposes of paragraph (2)(d) is likewise the salary which would have been paid to Mr Stark for a period of two months if he had performed work otherwise the compensation will not achieve the purpose for which it is ordered.

5 The order to issue will issue in the terms of the Minute on Tuesday 23 October 2001 to allow the parties an opportunity to raise any issue arising from these Supplementary Reasons.

2001 WAIRC 04057

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	MICHAEL STARK, APPLICANT
	v.
	C.O.C. PTY LTD, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 1 NOVEMBER 2001
FILE NO	APPLICATION 893 OF 2001
CITATION NO.	2001 WAIRC 04057

Result	Application alleging unfair dismissal granted.
Representation	
Applicant	Mr D.A. Lenhoff (of counsel)
Respondent	Mr L.A. Margaretic (of counsel)

Order.

WHEREAS an application was lodged in the Commission pursuant to section 29 of the *Industrial Relations Act 1979*;

AND WHEREAS the matter was heard on 11 October 2001;

AND WHEREAS Reasons for Decision issued on 17 October 2001 together with the Minutes of Proposed Order;

AND WHEREAS Supplementary Reasons for Decision issued on 19 October 2001;

AND WHEREAS the applicant advised the Commission that the parties had reached an agreement in relation to the implementation of the Commission's decision and the Minutes of Proposed Order;

AND WHEREAS the applicant subsequently filed a Notice of Discontinuance in the Commission;

HAVING HEARD Mr D.A. Lenhoff (of counsel) on behalf of the applicant and Mr L.A. Margaretic (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby—

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order—

THAT the application be discontinued.

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

2001 WAIRC 04002

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	KEVIN BARRY TYRRELL, APPLICANT
	v.
	MUNGERABAR HOLDINGS, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	MONDAY, 22 OCTOBER 2001
FILE NO	APPLICATION 102 OF 2001
CITATION NO.	2001 WAIRC 04002

Result	Application alleging unfair dismissal and denied contractual entitlements dismissed.
Representation	
Applicant	Mr D. Cooling (as agent)
Respondent	Mr D. Zadow

Reasons for Decision.
(Extemporaneous)

1 I am satisfied from the evidence that Mr Kevin Barry Tyrrell was employed as a water-truck driver commencing on 5 December 2000. His evidence is that he thought his position was permanent, that he had no problems at work and that he had adhered to the rules and he also said that he was to adhere to the safety regulations.

2 I am satisfied from all of the evidence, however, as follows: Mr Tyrrell's employment was initially for a trial period of one month. In his cross-examination he conceded that he was engaged on a trial period, but he was not sure what the period was and that others were one month. As against that there is the evidence of both of the respondent's witnesses that the trial period was one month and I therefore find accordingly.

3 Further, and notwithstanding Mr Tyrrell's evidence I find that there were problems at work and that he did not adhere to the rules of the safety regulations on two occasions. Firstly, in relation to driving underground on 14 December 2000. In his cross-examination Mr Tyrrell originally said that he had been certified fit to drive by Bernie Hill and that he was under the impression that he had passed his driving test. Nevertheless, he later conceded that he had not been accredited on the water-truck, but rather only on the PC, until 18 December 2000. I find as a fact, therefore, that Mr Tyrrell did drive when he had not been the water-truck underground when he had not been accredited and that of itself is a breach of the safety regulations.

4 The fact that Mr Tyrrell believed that he had been accredited when he was not is not a point in his favour. If he did not know whether he was accredited, he should not have driven before he found out. I found Mr Tyrrell's evidence, with due respect to him, that the company, not the respondent, but the mine site company, had lost the paperwork, and that that was the reason he had to do the test again, unconvincing. The fact that Mr Tyrrell assumed that he had been accredited is not good enough. In this case, there was no accident when he drove underground but that was merely fortuitous and if there had been, the legal issues involved or the legal issues arising from him not having been accredited would have caused complications both for himself and indeed for his employer.

5 The second occasion is on 22 December 2000 when he bent the rear bumper of the water-truck when he reversed into a wall. That was an accident and Mr Tyrrell's evidence is that he understood that he was supposed to report it if anything had happened. Mr Tyrrell did not do so. He failed to make an incident report to the mine owner and he also failed to report it to his own employer. Mr Tyrrell did report it to a fellow employee, however, that is neither of those two obligations. Neither is recording the incident in the pre-start log book. I find as a matter of fact that he did do that, it is written in there, but that is not an accident report and neither is it a report to his employer.

6 Truck damage caused by poor driving is important in the context of a mine site because it has the potential to reflect upon the competence of the driver and for that reason an accident of that nature, even if the damage was fixed during the course of the shift and even if it did not render the water-truck unserviceable, is to my way of thinking beside the point. The failure to report it is of itself a serious matter. It is therefore open to me to conclude, and I do so, that Mr Tyrrell's attitude towards or the understanding of the seriousness or his obligations in those incidents is not good.

7 The other matters that have been referred to, the alleged incident regarding failing to give way to an ambulance, I find that even if the incident occurred, there is no evidence before me that that incident related to Mr Tyrrell or that he was the driver of the water-truck at the time.

8 In relation to any allegation of swearing on the two-way radio, it has not been established on the evidence that Mr Tyrrell swore on the two-way. Indeed, I understood Mr Zadow had heard it himself, yet when he gave evidence under oath he did not give evidence of having heard Mr Tyrell swearing on the two-way and for that reason there is no evidence before me that Mr Tyrrell swore on the two-way.

9 Neither is there evidence that it was Mr Tyrrell who stood the water-truck down for 36 hours. The most that can be said is that the water-truck was stood down, and when it was stood down it was during Mr Tyrrell's shift and I therefore conclude that he did know about it. The complaint made by the respondent is that Mr Tyrrell did not do everything he could to notify his employer between then and the employer receiving contact from the mine site some 36 hours later. To some extent, I find that that complaint is made out. I accept that Mr Tyrrell may have tried to contact the respondent and I also accept as Mr Cooling observed, that mobile telephones can drop in and drop out and that there can be delays. However, given that there are three telephone numbers in the book that was exhibit F, that no money is required to contact those numbers, or at least one of those numbers and that there are telephones on site that Mr Tyrrell could have used without charge to him, I am not satisfied that he did everything that he could to contact his employer over a 36 hour period.

10 I turn then to Mr Tyrrell's claim and what I will refer to now is what is set out in paragraph 20 of his Notice of Application.

11 Mr Tyrrell's first reason why he says his dismissal was unfair, in the first sentence, is that he received a letter of a first and final warning and not any verbal warning. As to that, it is true that he received a letter of first and final warning. He received it on 19 December 2000. He complains about it and in my view with some justification. The letter of first and final warning is unsatisfactory because it does not say just what it was that was the cause of the warning being given, what is was that he had done wrong and what it was that he had to do to improve. Nevertheless, he received it on 19 December 2000 and on the evidence as I have evaluated it so far, there is certainly room in Mr Tyrrell's conduct before that date to be told not to have driven while he was not accredited on 14 December 2000. That had occurred some five days earlier and could of itself have provided justification for a warning.

12 Even if Mr Tyrrell disagreed with the letter, there is sufficient in it for Mr Tyrrell to be sure that he did follow procedures from then on past 19 December 2000 and yet the incident with the bumper bar occurred on 22 December 2000. Therefore, in conclusion on that point, even though Mr Tyrrell might be correct in saying that he queried the letter of warning, and in my view, he did so with good reason for the reasons I have given, nevertheless, he did receive a warning and yet his conduct in relation to the bumper bar showed that his attitude had not improved.

13 The second sentence is that he says there was verbal abuse in the room at the camp on the telephone. There is no evidence regarding any verbal abuse. He has not referred to any in his evidence and that claim is not made out.

14 The third point is that he had received no warning that he was going to be sacked. In fact, the letter of warning, that is the first warning, does contain some reference to termination and I find that that claim is not made.

15 The fourth point is that he was dismissed on 10 January 2001 by a letter from his employer which was backdated to 26 December 2000. The letter of dismissal still has the same problem as the letter of warning in that it does not say why Mr Tyrrell was dismissed. However, that is the issue of the circumstances why we were here and as I find there were issues which had occurred during Mr Tyrrell's employment. In other words, if the letter of dismissal had stated these issues as the reasons for dismissal then it would have made no difference because in fact those incidents did occur. So to my mind although Mr Tyrrell is correct in saying that he was dismissed on 10 January 2001 in a letter from his employer which was backdated to 26 December 2000 it is not, as I find, a reason why his dismissal was unfair.

16 The next point that he makes is that he believes he was unfairly dismissed because he did not know what he had done wrong. To some extent this point is made out because the letter of dismissal did not say why he had been dismissed. Nevertheless, the fact that there were incidents which occurred in his employment and which have been covered in the evidence this morning, means that even though Mr Tyrrell had not been told at the time why he had been dismissed, as I find that does not make the dismissal overall unfair, merely that one aspect of it may have been.

17 The next point is that he feels he was dismissed because he did not fit in with his employer's wishes. In my view, there is no evidence before me to show that Mr Tyrrell's conduct was in any way contrary to the wishes of his employer or that there was a problem in not having "kept his mouth shut". That was not an issue that was put to him by Mr Cooling in his examination in-chief and it is not a point that has been made out.

18 Furthermore, Mr Tyrrell's application says that he believed he had "made waves", or that he had been "rocking the boat". His case was not presented on that basis and there was nothing in the evidence to show that the employer dismissed him because of those particular issues.

19 It must be said that when a claim of unfair dismissal is brought in a matter such as this, it is up to Mr Tyrrell to prove that his dismissal was unfair. It is not for the employer to prove that it was fair. Notwithstanding what I have found, however, it must be said that Mr Tyrrell was employed in a trial period and that a trial period is a purpose of evaluation of both the employer and the employee and an assessment as to whether the working relationship is going to work. I find as a matter of fact that within the three week period of Mr Tyrrell's employment the issue of driving while not accredited, the non-reporting of the accident to the bumper bar at least, even without what efforts he may or may have not made during the 36-hour stand down of the truck, in my view provide reasons why his employment would not have continued beyond the trial period in any event.

20 While, as I find, the employer's procedures, its written communications, are poor in communicating just what it is the employer wants to say, I am not of the opinion that Mr Tyrrell has shown that his dismissal was unfair.

21 I pass the comment also, seeing as it came up in the course of the case, that there is no difficulty with an employer having a handwritten payslip provided it is not in pencil and provided it contains all of the details such as the identity of the employer—this one does not—that provided it contains the details of the employee's entitlements, the date, the hours worked, the gross wage, the net wage and any deductions. The fact that it is handwritten and if it is provided within 14 days of the payment that is made, is sufficient for the purposes of the *Minimum Conditions of Employment Act 1993*.

22 The final two matters are first that Mr Tyrrell complained that he had not been paid for 25 December 2000. I find on the evidence that he has been and that claim is not been made out and will be dismissed. And, secondly that the superannuation payments that were a part of this matter were paid once Mr Tyrrell himself provided details of the relevant fund and that claim is also dismissed.

23 In summary, therefore, I propose to issue an Order which dismisses all of Mr Tyrrell's application.

24 Order accordingly.

2001 WAIRC 04003

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	KEVIN BARRY TYRRELL, APPLICANT
	v.
	MUNGERABAR HOLDINGS, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	WEDNESDAY, 24 OCTOBER 2001
FILE NO	APPLICATION 102 OF 2001
CITATION NO.	2001 WAIRC 04003

Result	Application alleging unfair dismissal and denied contractual entitlements dismissed.
Representation	
Applicant	Mr D. Cooling (as agent)
Respondent	Mr D. Zadow

Order.

HAVING HEARD Mr D. Cooling (as agent) on behalf of the applicant and Mr D. Zadow 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.

SECTION 29 (1)(b)—Notation of—

Applicant	Respondent	Number	Commissioner	Result
Ace MR	Carpet Call	554/2001	GREGOR C	Discontinued
Allison LJ	Nationwide Termite and Pest Management Pty Ltd	780/2001	SCOTT C.	Discontinued
Anning MR	Godfrey Virtue & Co Barristers & Solicitors	1538/2001	SMITH, C	Discontinued
Ardagh KA	Cork International Pty Ltd	1180/2001	GREGOR C	Discontinued
Ashton S	Dryandra Timber Product	555/2001	COLEMAN CC	Dismissed
Aston KM	Tynedale Farm	840/2001	KENNER C	Discontinued
Baldwin V	Unit Shelf Co No 94 Pty Ltd T/a RB & A Kinnear Transport Services	1028/2000	KENNER C	Discontinued
Ballantyne JM	Topaz Promotions	1312/2000	COLEMAN CC	Dismissed
Betterridge NN	Subway (Store Manager Warnbro) Wendy	1294/2001	WOOD,C	Dismissed
Bishop DG	G.M.A. Garnett Pty Ltd	1595/2001	SMITH, C	Dismissed
Blay L	Cadarga Pty Ltd t/a Boutique Warehouse Naughty by Nature & Rebel	818/2001	KENNER C	Discontinued
Blythman DG	Broadwater Beach Resort	1487/2001	SCOTT C.	Discontinued
Bonniface AL	Ocean Gardens Retirement Village Inc	1086/2001	SMITH, C	Discontinued
Braithwaite P	"Advantage Air"—comprising Advantage Air Australia Pty Ltd/Advantage Air manufacturing Pty Ltd / Plastic Injection Co Pty Ltd	338/2001	SMITH, C	Discontinued
Broad ML	Ellenbrook Supermarket Pty Ltd	1878/2000	SMITH, C	Discontinued
Bruss R	Perth Office Systems Pty Ltd t/a Ricoh Business Centre	719/2001	SCOTT C.	Discontinued
Burress AC	Scotch College	1369/2001	KENNER C	Discontinued
Burrett NS	RLS Management Pty Ltd ACN 009267949 t/a Butlers Barristers & Solicitors	1075/2001	GREGOR C	Order Issued

Applicant	Respondent	Number	Commissioner	Result
Bylund GL	SRS Engineering PTy Ltd (ACN 090 935 309)	287/2001	BEECH C	Discontinued
Cameron MJ	Action Food Barns Pty Ltd	1135/2001	SCOTT C.	Discontinued
Cannon IW	Startrack Communications Ltd.	814/2001	SCOTT C.	Discontinued
Carew DV	Aquan Pty Ltd t/a Laurie Kelly Real Estate	535/2001	SMITH, C	Discontinued
Carmichael KW	Simcraft Products/Grovenor	296/2001	SMITH, C	Discontinued
Chandler J	Unit Shelf Co No 94 Pty Ltd T/a RB & A Kinnear Transport Services	1027/2000	KENNER C	Discontinued
Chen D	Scarboro Toyota Pty Ltd	1105/2001	SCOTT C.	Discontinued
Chew KKC	Icon Recruitment Pty Ltd ACN 007 145 637	1146/2001	BEECH C	Discontinued
Chipper C	City of Melville	537/2001	SMITH, C	Discontinued
Clark AJ	Golden Hay Co Pty Ltd	1761/2000	GREGOR C	Discontinued
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union	Inter Security Systems a division of Instalarm Security Pty Ltd	894/2001	SMITH, C	Discontinued
Coppin BP	Swick Drilling Pty Ltd	243/2001	BEECH C	Discontinued
Councillor L	Yamatji Barna Baba Maaja Aboriginal Corporation	1244/2001	GREGOR C	Order Issued
Cowan IJ	Brambles Australia Limited t/a Cockburn Wrekair	1588/2001	BEECH C	Discontinued
D'Mello JF	Managing Director, Challenger TAFE, Fremantle Campus	1363/2001	KENNER C	Discontinued
Dallie CJ	Q Multimedium Ltd ACN 083 160 909	224/2001	SCOTT C.	Discontinued
De Alwis S	Ausclad Industries Pty Ltd	656/2001	BEECH C	Discontinued
Dillenger SJ	Formfix Pty Ltd	466/2001	SMITH, C	Dismissed
Drummond-Hay R	Western Fabrication Pty Ltd	1377/2001	GREGOR C	Order Issued
Dumbell C	Internetcard Technologies Pty Ltd	1063/2001	SMITH, C	Order Issued
Dykstra MJ	Chariot Internet Limited	1554/2001	BEECH C	Discontinued
Dyson PF	Underground Services Australia & Others	890/2001	GREGOR C	Discontinued
Eastcott-Layton MT	Shire of Augusta-Margaret River	506/2001	SMITH, C	Discontinued
Esteban RG	Pieman Australia Pty Ltd ACN 085 783 571 Trading as Bovell's Bakery	1176/2001	BEECH C	Discontinued
Fabiano A	Aroma Cafe	1319/2001	GREGOR C	Dismissed
Farano N	Metro Fresh WA P/L	1411/2001	KENNER C	Discontinued
Fernandes P	Manuel Painting Contractors Pty Ltd	2107/2000	KENNER C	Discontinued
Fernando JD	Mr Jim Laurie (Big Busters Pty Ltd)	1438/2000	SMITH, C	Discontinued
Fletcher N	Crown Mushrooms	1290/2001	BEECH C	Discontinued
Fordyce SC	Hugall & Hoile (ACN 082 341 197)	1122/2001	WOOD,C	Discontinued
Francis M	Proactive Investments Pty Ltd	497/2001	SCOTT C.	Discontinued
Franklin B	Health Foods	1515/2001	BEECH C	Discontinued
Franklin JP	Brookleigh Equestrian Estate	1639/2001	KENNER C	Discontinued
Gerhard F	Gosnells Golf Club (Inc)	109/2001	SCOTT C.	Discontinued
Gibbings NA	Gel Group Pty Ltd T/a Accountancy People	221/2001	GREGOR C	Discontinued
Gilbert BW	Fly by Night Musicians Club Limited	176/2001	KENNER C	Discontinued
Ginbey GK	Auto Trade Auctions	1501/2001	WOOD,C	Discontinued
Gray SP	Birch Family Trust t/a Dewsons Donnybrook	637/2001	KENNER C	Discontinued
Green A	Golden Hay Co Pty Ltd	39/2001	GREGOR C	Discontinued
Green DV	iNature Australia Pty Ltd	808/2001	KENNER C	Discontinued
Hanley G	BGC (Australia) Pty Ltd T/A BGC Quarries	1392/2000	KENNER C	Discontinued
Harman K	Djooraminda	1213/2001	WOOD,C	Dismissed
Harvey RJ	Westcan Group	1436/2001	KENNER C	Discontinued
Heart NL	Cash City Cannington	1238/2001	SCOTT C.	Discontinued
Heinrich S	Mitchell & Brown Communications	920/2001	SCOTT C.	Discontinued
Henderson A	Email Metals Pty Ltd ACN 004574681	2094/2000	SMITH, C	Discontinued
Henry JM	Drilling Equipment (Aust) Pty Ltd	1452/2001	BEECH C	Dismissed
Hill P	North West Barging of Derby Export Facility	1909/2000	SMITH, C	Discontinued
Hong YL	Hot Gossip Restaraunt	1855/2000	KENNER C	Discontinued
Howard G	Brushwood Australia/Darlex Pty Ltd	232/2001	SMITH, C	Discontinued
Hunt JM	The Salvation Army	1082/2001	WOOD,C	Discontinued
Hutchison KJ	Fencejumper Holdings Pty Ltd trading as Steelstruct Engineering	1110/2001	SMITH, C	Discontinued
Illidge PG	Council of Grain Grower Organisations Limited	838/2001	SMITH, C	Discontinued
Ingram W	Amnet Internet Services Pty Ltd	665/2001	SMITH, C	Discontinued

Applicant	Respondent	Number	Commissioner	Result
Isles SJ	Office Comforts	148/2001	COLEMAN CC	Dismissed
James H	Gina Noblett of Westate Realty	1379/2001	KENNER C	Discontinued
Jeffrey PJ	Easyrent Pty Ltd (Administrator Appointed) ACN 009 409 689	1211/2001	BEECH C	Discontinued
Kickett JP	Noongar Alcohol & Substance Abuse Service	2128/2000	SCOTT C.	Discontinued
Kickett LG	Moorditch Gurlongga Association Inc	704/2001	GREGOR C	Discontinued
Kimber JM	Stellar Call Centre Pty Ltd	940/2001	BEECH C	Discontinued
Korda C	Astro-Foil Australia Pty Ltd	957/2001	BEECH C	Discontinued
Kovaceski LM	Carpet Call (WA) Pty Ltd	1134/2001	KENNER C	Discontinued
Laczko LA	Davmin Nominees Pty Ltd	244/2001	KENNER C	Discontinued
Lamp GK	Aaron Lee Pest Control	767/2001	SCOTT C.	Discontinued
Lanigan MA	Fieceda Accessories Pty Ltd	1391/2001	BEECH C	Discontinued
Lattimore A	Industrial Galvanizers Corporation Pty Ltd trading as Ingal Civil Products	1130/2001	SCOTT C.	Discontinued
Leet J	Boat Torque Cruises	1209/2001	BEECH C	Discontinued
Lippe SS	Kapinkoff Nominee's Pty Ltd	1313/2001	BEECH C	Discontinued
Looby RG	Howard Porter Pty Ltd ACN 076 745 214	1108/2001	KENNER C	Discontinued
Lothian J	BC The Body Club	805/2001	KENNER C	Discontinued
Luskan G	Corrpro Companies of Australia	811/2001	SCOTT C.	Discontinued
Mallet MH	Solution 6 Pty Ltd	416/2001	KENNER C	Discontinued
Martin SC	Hutchinson's Telecommunications (Australia) Ltd t/a Orange Australia	1491/2001	WOOD,C	Discontinued
Matthews LJ	Hedland Business Company	1078/2001	COLEMAN CC	Dismissed
Mazzatelli P	Antrim Panel and Paint	1693/2001	BEECH C	Discontinued
McEncroe GM	Satterley Property Group	1235/2001	GREGOR C	Order Issued
McGuire WA	Bega Garnbirringu Health Services Aboriginal Corp.	515/2001	GREGOR C	Discontinued
McShane J	HP JDV Limited	1419/2001	BEECH C	Discontinued
Millard AD	Gecko Management Pty Ltd	1458/2001	BEECH C	Discontinued
Mulder TL	W.A. Salvage Pty Ltd	1297/2001	BEECH C	Discontinued
Naylor WJ	Simcraft Products/Grovenor	396/2001	SMITH, C	Discontinued
Ng K	Ambassador Golf and Hotel Services Pty Ltd	749/2001	SCOTT C.	Discontinued
Nosworthy DS	Key Largo Cafe Restaurant	1650/2000	SCOTT C.	Dismissed
O'Brien G	West Australian Newspapers Ltd	912/2001	SCOTT C.	Discontinued
O'Leary TM	Henry Walker Eltin Contracting Pty ltd (ACN 009 625 138)	171/2001	BEECH C	Discontinued
Obremski HL	The Gym Pty Ltd ACN 087 977 704	1302/2001	KENNER C	Discontinued
Outred TM	Victorian Healthcare Association	1206/2001	SMITH, C	Discontinued
Parker KD	Abacus Calculators (WA) Pty Ltd	2101/2000	SCOTT C.	Discontinued
Patton B	Dot Com Meat Processors	325/2001	BEECH C	Discontinued
Paull T	Suzanne & Neil McGrechan—trading as Modal Pty Ltd	1330/2001	BEECH C	Discontinued
Pearson LP	Kelly Services (Aust) Ltd & Others	1216/2001	KENNER C	Discontinued
Peatman LG	VR Williams & Co	118/2000	SCOTT C.	Discontinued
Perry LA	Karen Doust @ Echo's Cafe	381/2001	COLEMAN CC	Dismissed
Pettigrew NA	Digitek Office Solutions	813/2001	BEECH C	Discontinued
Pitts DW	Action Food Barns Pty Ltd	1137/2001	SCOTT C.	Discontinued
Poole JD	Mayne Health western Diagnostic Pathology	1293/2001	SCOTT C.	Discontinued
Powell JA	Flexiglass Challenge Industries	1668/2000	COLEMAN CC	Dismissed
Pryce MJ	Macmahon Underground Pty Ltd	433/2001	KENNER C	Discontinued
Read V	Management—Boogurlarr Community House Inc	1202/2001	SMITH, C	Discontinued
Richards U	Integrated Tree Cropping Limited	1395/2001	SCOTT C.	Discontinued
Riini I	Harvey Norman Joondalup	1504/2001	SMITH, C	Dismissed
Roast EJ	Forx Pty Ltd (ACN 008 972 076)	1678/1999	GREGOR C	Discontinued
Roberts WS	Teravin Group Pty Ltd ACN 009 445 121	1565/2001	BEECH C	Discontinued
Ruhen ML	Pindan Pty Ltd T/a Pindan Constructions	1107/2001	KENNER C	Discontinued
Sadowska Z	Metropolitan Health Service	1733/2000	SCOTT C.	Dismissed
Seeber MD	Dynamic Digital Depth Australia Pty (ACN 060 154 949)	763/2001	WOOD,C	Discontinued
Shimmin J	Hermann's Thermo King	1184/2001	GREGOR C	Discontinued
Sinclair DC	The Blue Army Co-Operative Limited (ABN 696 167 438 44)	947/2001	BEECH C	Discontinued
Smith BA	Mr John Ireland (Director) Marine Pty Ltd T/A Vogue Garage Doors	1527/2001	SCOTT C.	Discontinued
Smith BE	VR Williams & Co	1359/1999	SCOTT C.	Discontinued
Smith JA	The Birch Family Trust Trading As Dewsons Donnybrook	1239/2001	KENNER C	Discontinued

Applicant	Respondent	Number	Commissioner	Result
Smith SJ	Select Refrigeration Services Pty Ltd t/a Select Mechanical Services ABN 99 068 551 379	1221/2001	BEECH C	Discontinued
Snedden JK	Beaurepaires For Tyres	1263/2001	KENNER C	Discontinued
Solin I	The Sunseekers Incorporated	293/2001	SMITH, C	Discontinued
Stone V	Gypsy Jade	294/2001	COLEMAN CC	Dismissed
Sum A	Saro Vinzi Carbone	1374/2001	KENNER C	Discontinued
Sumpton JR	Bulkwest Pty Ltd	675/2001	KENNER C	Discontinued
Taylor NJ	Dr Robert Will, Perth Bone Densitometry (t/as Bone Densitometry Australia)	1435/2001	KENNER C	Discontinued
Thomas DL	Novacross Pty Ltd	907/2001	SCOTT C.	Dismissed
Thompson B	Midway Marine Pty Ltd	1168/2001	BEECH C	Discontinued
Thornton TM	Retire Invest Pty Limited	1157/2001	SCOTT C.	Discontinued
Thuyasithu -	Men's Meeting Place Inc	1484/2001	BEECH C	Discontinued
Troung VT	Webforge (WA)	263/2001	SCOTT C.	Discontinued
Tutill M	B.T. & K.R. Ryan Fashion Agencies	1410/2001	KENNER C	Discontinued
Tweddle JA	The Wood & Gunn Family Trust t/a Supreme Kitchens	1234/2001	KENNER C	Discontinued
Uduste H	Melville Mitsubishi	1560/2001	BEECH C	Discontinued
Vance J	Bank of Western Australia Limited ACN 050 494 454	729/2001	KENNER C	Discontinued
Vassallo PJ	Shabala Engineering	1193/2001	KENNER C	Discontinued
Ward DR	Pine Sales Pty Ltd	1217/2001	KENNER C	Discontinued
Wearne DJ	Williams District Club Inc	830/2001	WOOD,C	Dismissed
Welsh WA	Regus Centres Pty Limited—ABN 54 085 537 266	1165/2001	KENNER C	Discontinued
West MP	General & Civil Pty Ltd	1375/2001	KENNER C	Discontinued
Weston L	Post Cafe Leederville	623/2001	SCOTT C	Discontinued
Williamson WG	W.P Crowhurst Pty Ltd	781/2001	SCOTT C.	Discontinued
Wilson CE	Hungry Jack's T/A Hungry Jack's DogSwamp	1300/2001	KENNER C	Discontinued
Wilson RD	Montegos on the Bay (Talliman Pty Ltd)	1090/2001	BEECH C	Discontinued
Woolley C	Supa-Stik Labels	1500/2001	KENNER C	Discontinued
Woolon LLS	Nangoy Pty Ltd Trading as Muffin Break Morley	1404/2001	GREGOR C	Order Issued
Wormer GM	Anthony Hayes, Chereeba Pty Ltd and Maxicoast Holdings Pty Ltd all t/as " The Sapphire Bar "	1287/2001	KENNER C	Discontinued

CONFERENCES—
Matters arising out of—

2001 WAIRC 03935

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	THE HONOURABLE ATTORNEY GENERAL, APPLICANT
	v.
	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	TUESDAY, 9 OCTOBER 2001
FILE NO	C 177 OF 2001
CITATION NO.	2001 WAIRC 03935
Result	Interim Order varied
Representation	
Applicant	Mr R. Andretich (of counsel) and with him Mr D. Matthews (of counsel)
Respondent	Mr P. Momber (of counsel) and with him Mr S. Smith

Order.

WHEREAS on 27 July 2001 the Commission issued an Order which, amongst other things required the Department of Justice to provide to the Commission daily for the duration of the Order a report showing the number of positions vacant filled and the number of positions remaining vacant on the daily sheets at Hakea Prison;

AND WHEREAS the Commission is of the opinion that that requirement should now cease;

NOW THEREFORE I, Commissioner of the Western Australian Industrial Relations Commission, pursuant to the powers vested in me pursuant to s.44(6) of that Act hereby order—

(1) THAT the Order in this matter dated 27 July 2001 be hereby amended by deleting the requirement that the Department of Justice provide to the Commission daily a report showing the number of positions vacant filled and the number of positions remaining vacant on the daily sheets at Hakea Prison;

(2) THAT this Order shall take effect from 9 October 2001.

(Sgd.) A.R. BEECH,
Commissioner.

[L.S.]

CONFERENCES—
Matters referred—

2001 WAIRC 04091

EMPLOYMENT CONDITIONS

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	PRESTIGE PROPERTY SERVICES, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	MONDAY, 5 NOVEMBER 2001
FILE NO	CR 24 OF 2001
CITATION NO.	2001 WAIRC 04091

Result	Application dismissed
Representation	
Applicant	Mr J Ridley
Respondent	Mr D Clarke as agent

Reasons for Decision.

1 This is an application pursuant to section 44 of the *Industrial Relations Act, 1979* (the Act). The Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch (the applicant) contends that the respondent's refusal to employ its members is harsh oppressive and unfair. The matter came on for conferences on 2 February 2001 and 1 March 2001 at the conclusion of which the matter remained in dispute and was referred for hearing and determination.

2 The terms of the memorandum of matters for hearing and determination are as follows—

> "The applicant contends that in all the circumstances, including the requirement to sign a workplace agreement, the respondent's refusal to employ Mr Andrew Greeuw, Mr Craig Pattenden, Mr Michael Stubbs-Mills and Mr Terry Fitzgerald as Security Officers on the Education Department contract, which commenced on 5 February 2001, is harsh, oppressive and/or unfair. The Union seeks employment of the abovenamed four members or compensation.
>
> The respondent denies the allegations and opposes the relief sought."

3 The matter was listed for hearing on 15 and 16 May 2001. On 10 April 2001 the respondent lodged in the Commission an application claiming that the Commission was without jurisdiction to hear the matter. The respondent submitted that there was no industrial matter as there had never been an employer-employee relationship between the respondent and the applicant's members. The respondent sought that this matter be determined at a preliminary hearing. On 18 April 2001 the applicant union requested that the hearing dates of 15 and 16 May 2001 be adjourned pending the outcome of the decision of the Commission in Court Session in the *Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch V Airlite Cleaning Pty Ltd and Others* 81 WAIG 1162. By response dated 19 April 2001 the applicant also submitted that the respondent was estopped from raising the jurisdictional challenge. The hearing dates of 15 and 16 May 2001 were vacated and the respondent's application concerning jurisdiction was heard on 15 May 2001.

4 It was submitted by Mr Clarke for the respondent that if there had been a refusal to employ a class of persons then the Commission would have jurisdiction, but that there had been no refusal to employ a class of persons. He referred to the definition of industrial matter in s 7 of the Act which, in part, includes any matter relating to—

> "the employment of children or young persons, or of any person or class of persons, in any industry, or the dismissal of or refusal to employ any person or class of persons therein."

5 Mr Clarke sought to lead evidence to the effect that no employment relationship existed. The relevance being that as there was no employment relationship there was no industrial matter. Additionally, he submitted that there had been no refusal to employ a class of persons or any person.

6 The applicant agreed that there had been no employment relationship, but that there had been a refusal to employ on two grounds. Firstly, there had been discrimination in the selection. Secondly, there had been a lack of "choice" in that a workplace agreement was the only form of contract offered.

7 The Commission decided that all the evidence would have to be heard before determining the jurisdictional point and could not be dealt with in a preliminary fashion. The applicant would have been disadvantaged at that time in proceeding to hear evidence and the matter was again listed for 16 and 17 August 2001. The Commission considered that, on the basis of the submissions to that time, the Commission was within jurisdiction in dealing with the dispute as a matter concerning a refusal to employ within the terms of the definition of "industrial matter" in the Act. Leave was granted for the respondent to again raise their jurisdictional arguments at the substantive hearing of the merits of the claim. A claim for costs by the respondent was denied and in the Commission's view should not have been contemplated in the circumstances.

8 Mr Clarke on behalf of the respondent argued at commencement of the substantive hearing that the application was not within the jurisdiction of the Commission as, pursuant to s 96C, D, E and L and s 83A of the Act, a matter of discrimination in employment based on union membership is a matter for the Industrial Magistrate. The applicant concurred with this but submitted that they did not seek to argue discrimination on the grounds of union membership. That ground having dropped away, the Commission dealt with the merits of the matter and whether there was a refusal to employ.

9 The claim was therefore as follows. Mr Ridley in his opening submission at Transcript pg 21 stated—

> "The basis of the union's application was that the respondent in its actions of engaging employees to carry out the work of security officers on the EDWA school security contract, refused to employ Mr Andrew Greeuw, Mr Michael Stubbs-Mills, Mr Terry Fitzgerald and Mr Craig Pattenden."

Further at Transcript pg 24-25—

> "To ensure our members were given a reasonable opportunity to achieve employment with Prestige doing the same work they had collectively done for 15 years, there should have been a fair, objective and transparent selection process and criteria. When employers are faced with circumstances of selecting those to be made redundant, or before terminating employees for disciplinary reasons, the Commission, both Federal and State, have consistently referred to the need for some form of procedural fairness."

10 The respondent says that the matter is not an "industrial matter", namely a refusal to employ within the meaning under the Act, as there was never any offer to employ. The circumstances were that the applicant's members were simply not selected for jobs after a selection process conducted by Mr Bowen, State Manager for the respondent.

11 The four members concerned were all employed as Security Officers with Falcon Investigations and Security Pty Ltd (FAL). They were all deployed to work predominantly, if not exclusively, on the Education Department Schools Security Contract (the "Education Contract"). Their duties involved patrolling the schools and, in some cases, work in the control room which

monitored operations. Each member had worked on the Education Contract for FAL for several years.

12 The respondent was successful in securing the contract and commenced operation on about 9 February 2001. In the weeks leading up to the change of companies operating the Education Contract the employees of FAL were alerted to the possibility of employment with Prestige. Application forms were left for them to complete should they wish to be employed by Prestige. These forms were then forwarded to the respondent either directly or via Mr Jeff Brooks. I will deal later with the evidence of Mr Brooks, however, suffice to say that he had a role in the changeover of the operations of the contract between the two companies and was taken on as an employee of Prestige, as Manager, Security.

13 The four members, as with other staff of FAL, attended individual interviews with Mr Bowen. The evidence concerning these interviews is different for each of the members, however, the common theme is that they were advised soon thereafter that they had been unsuccessful in obtaining employment with Prestige. In some cases they were shown a workplace agreement, though not asked to sign it and in no instance did they have an offer of a position. Their expectations of a position derived from the circumstances of the Education Contract being awarded to Prestige, Prestige's desire to employ staff, the applications they made, their attendance at interview and most importantly their view of their superior skill and experience as Security Officers working on the Education Contract.

14 Their prospective employment was subject to an application, an interview and then an offer if they were successful in that process. Although the evidence for each member is different in relation to their experience with the process, the process was essentially the same. Likewise each member complains that given their years of experience, especially with the Education Contract, that they would have expected to be employed over less experienced officers. As the patrols were typically performed in pairs, and the pairings were rotated frequently, they each believe that they have a good knowledge of the capacities of their fellow employees at FAL.

15 Mr Greeuw said that at the conclusion of the interview with Mr Bowen he was told by Mr Bowen that he would let him know whether he had been successful or otherwise in obtaining a job (Transcript p38-40). Mr Pattenden said that Mr Bowen told him that if he was successful in obtaining a job he would receive a workplace agreement to look over and to sign (Transcript p75-76). He also thought initially that he would have a good chance of getting a job, but not so after the interview (Transcript p77 & 80). Mr Stubbs-Mills says he was presented with a workplace agreement and told that it did not guarantee him employment (Transcript p95 & 104), and that Mr Bowen was to consider all applicants and then make a decision (Transcript p96-97). Mr Fitzgerald said that he was happy with the interview process and that he rang Mr Bowen after the interview to ask him if he had been successful (Transcript p117). He was told to await advice. On the basis of this evidence, which I accept it is clear and I find that no offers of employment were made to the four members. Each of them, following their interview, understood that they were being assessed for a position and would be advised if successful or not by Mr Bowen.

16 Each applicant received a letter telling them that they had been unsuccessful. They followed up with Mr Bowen to ascertain why they were not successful and were told that they were unsuited or less experienced than other people employed. They understood that a workplace agreement was to be signed if they had been successful and considered this to comprise less favourable conditions than their previous job. Again I accept their evidence regarding the workplace agreement. I will deal later with their evidence concerning their relative claims of merit for the jobs. I find that they each were not asked to sign or accept a workplace agreement.

17 The only exception to what I have just outlined appears, at least on the evidence of Mr Michael Stubbs-Mills, to be that a decision was taken by Mr Bowen, prior to the interview, not to engage him. Mr Stubbs-Mills says that a recommendation not to employ him was made four days prior to his interview (Transcript p100-101). This, in the applicant's submission, supports the view that the selection process was not a fair one and that Mr Jeff Brooks had reported adversely on the four members to Mr Bowen. I will return to this point.

18 In terms of whether the Commission has jurisdiction to deal with this matter, both parties agree that the decision of the Industrial Appeal Court in *RGC Mineral Sands & Anor v Construction, Mining, Energy, Timberyards, Sawmills, Woodworkers Union of Australia WA Branch & Ors* [2000] 80 WAIG 2437 is determinative. Mr Clarke for the respondent argues that as there was no offer of employment then there was no refusal to employ and hence no jurisdiction. Mr Ridley for the applicant argues that in considering the definition of an "industrial matter" the reference to "refusal to employ" should be read in conjunction with s 7(d) which refers to—

> "any established custom or usage of any industry, either generally or in the particular locality affected".

He says that Prestige should have provided the employees of FAL who worked on the Education Contract with a reasonable opportunity to gain employment. A reasonable opportunity should have included an assessment against objective criteria, which is fairly and consistently applied to all applicants. The applicant union says that there was bias against these members, they were denied the principles of natural justice and that given their skills and experience they had the right to a reasonable opportunity to ongoing employment at the contract site.

19 The reasoning of Parker J, with whom Kennedy J concurs, for the purposes of this matter is best expressed in the following statement @ page 2446 (para 79)—

> "The distinct statement in par (c) that a refusal to employ is within the scope of an industrial matter also requires the conclusion that there can be an industrial matter within the defined meaning even though there is no existing contract of employment."

20 He refers earlier in his reasoning to the notion of management prerogative and says as follows @ page 2444 (para 65)—

> "The reasons in *Re Cram* also deal with and reject the submission that decisions as to the mode of recruitment of an employer, or as to whom should be preferred for employment by an employer, cannot be industrial matters as they are within what has been called the management prerogative of the employer. While decisions as to employment may be critical to management, as is said in *Re Cram* at 136—137, that is a reason for caution by an Industrial Tribunal in the exercise of its jurisdiction (perhaps even extreme caution) but it is *not a justification for construing the words of the definition to exclude such matters*. Thus, for reasons examined in *Re Cram* at 133—137, in some situations at least, decisions by an employer as to whom to employ or not to employ in an industry relate to the mutual roles of employers and employees as such in the industry."

21 I do not need to go further to conclude that the matter before me, which concerns a refusal to employ, is within jurisdiction. The refusal in this case is simply the non-selection of the applicant's members. I note also in this sense the common meaning of "refusal" as expressed in the Concise Oxford Dictionary (New Edition) which is "the right or privilege of deciding to take or leave a thing before it is offered to others". Clearly the employment relationship does not need to have been formed for the matter to be within jurisdiction.

22 My concern is that in the exercise of my jurisdiction, in a matter such as this, I should tread with considerable caution. I consider that the circumstance of a refusal to employ which would warrant the intervention of the Commission would be where a firm or legitimate expectation of employment could justifiably be said to

exist. The most typical circumstance being where an offer or promise of employment has been made but not honoured (*Board of Management, Princess Margaret Hospital for Children v The Hospital Salaried Officers Association of Western Australia (Union of Workers)* (1975) 55 WAIG 543). Another circumstance may be where a contract passes to a new employer and the custom and practice is for the employees to follow the contract (*The Australian Liquor, Hospitality and Miscellaneous Workers Union v Cleandustrial Services* 80 WAIG 4517); albeit the balance of equity did not fall to the applicant in that matter. It may be that there has not been a formalisation of offer and acceptance, or in some cases where there has but the date of commencement is yet to arrive. I do not pretend to cover all possible eventualities, except to say that typically either the employer has expressed an intention to employ the individual by offering employment or at least that offer could be considered to have been normally made to the individual. Even in these circumstances I would be cautious as to the relative fairness involved in not proceeding with the offer. I express this caution as I do not consider that the mere non-selection of an individual in a selection process is one that should justify the intervention of the Commission. This would place the Commission in the defacto position of having to conduct the selection process to ascertain the relative merits of candidates. This is neither warranted nor practicable and would trammel the rights of the employer to decide who to employ.

23 The applicant union has submitted that the Commission should adopt various precedents relating to unfair dismissal in exercising its discretion, *Undercliffe Nursing Home—v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385, *Shire of Esperance—v- Peter Maxwell Mouritz* 71 WAIG 891 and *Loty and Holloway v Australian Workers Union* (1971) 71 AR (NSW) 95. Their view is that the interview process was inadequate, it lacked consistency, was interrupted and rushed and impliedly carried a bias. It is clear from the evidence of Mr Greeuw and Mr Fitzgerald that their unhappiness was not as a result of the interview, but as a result of the letter advising them that they were unsuccessful and more particularly the reasons given by Mr Bowen for their non selection. Mr Pattenden and Mr Stubbs-Mills were otherwise unhappy with the interview, but equally unhappy about the reasons given for their non selection. The applicant union says effectively that because the four members in their view were more experienced and skilled than others who were offered jobs then they should have been given employment. The other ground of unfairness, namely an alleged bias by the respondent, is not argued as discrimination on the grounds of union membership, but "a strong suspicion that the FAL/FPS Industrial Relations problems coloured Craig Bowen's perception about them." The applicant says that the four members had a high profile in union discussions in industrial issues with FAL.

24 The evidence of Mr Bowen is that he was very busy in late January and early February 2001 arranging all matters for the commencement of the new contract, the education contract. He was heavily engaged in interviewing applicants over a period of about two and a half weeks. He interviewed about 50 people and employed 31 full-time and 4 part-time security staff. A good many FAL employees were engaged as were several Prestige employees on the Education Contract.

25 The selection assessment he says that he used was to take into consideration experience, background, history, work history, ability to work as a team, work in a team environment, work alone, persons able to take instructions, training, qualifications, skills (Transcript p.126). He says that some of the references were checked and that he alone made the decision as to who to employ. He was not given any information from Mr Brooks except a list of names and contact details of FAL employees. In respect of [Exhibit MGS2], which relates to the employment of Mr Stubbs-Mills, he says the wrong date was put on that document and that was a mistake (Transcript p.128). He says also that perhaps he signed the applications, in the recommendation box, when they arrived.

26 Mr Brooks, the Security Manager for Prestige gave evidence that he was not involved in the selection of personnel for Prestige other than supplying a list of names and contact details and that he did not discuss employees of FAL with Mr Bowen.

27 I must say that I had considerable difficulty with the evidence of Mr Bowen. Apart from the considerable reluctance with which he addressed questions under cross-examination, I was left with the impression that he embellished his answers as to how thorough he was in relation to the assessment of personnel under all the criteria he mentioned. More specifically in answer to my questioning he relied heavily on the demeanour of the applicants and referred to an original set of documents, they being the applications, which he had circled in terms of recommendations. These documents were not brought forward to the Commission, yet supposedly the applications in an earlier form, ie uncrossed or circled as to a recommendation for employment, were copied and marked as exhibits. His explanation was at best improbable.

28 I do not have the same difficulty with the evidence given by each of the applicant's members and as such I would prefer their evidence over that of Mr Bowen.

29 Having said that, my consideration of the application forms leads me to the view that it is probable that Mr Bowen signed the forms, in the recommendation box, on the day he received them. Each of the forms appear consistent in that regard, including that of Mr Stubbs-Mills, and there are no other markings made by Mr Bowen as to whether an applicant was recommended or otherwise.

30 I consider that it is improbable that Mr Brooks, having managed the security operation for FAL, having been engaged as the security manager for Prestige (although this is suggested as occurring in February), having assisted with the contact details of FAL employees and Prestige having employed many FAL staff, that Mr Brooks did not express any opinions on their capacities to Mr Bowen. There is no suggestion or evidence that he was involved directly in the selection process and I find that to be so. However, I do not accept as plausible the evidence of Mr Bowen or Mr Brooks that he made no contribution other than passing across a list.

31 This does not lead me to a conclusion of bias against the four members due to their union activities. That aspect of the application, I find, has simply not been made out. Mr Brooks was listed as a referee for Mr Pattenden. Mr Greeuw gave some evidence by witness statement, and unchallenged, of difficulties he experienced with a Mr Borg and Mr Brooks at FAL. Apart from that, the only evidence that I can resort to is that the applicant's members say they were asked about who they did not get along with. This is inconclusive to the point almost of being irrelevant. It does not amount, in its totality, to a "strong suspicion" as Mr Ridley for the applicant would have it. It certainly does not amount in my view to evidence justifying a finding of bias in selection based on the union activities of the four members in the past.

32 The other matter to consider in this light is the use of workplace agreements by the respondent. These were made apparent at interview, but no applicant, as far as the evidence goes, was offered one or quizzed about their attitude to them. Again this evidence is at best inconclusive.

33 I turn to the evidence given by each of the four members concerning their experience and skills relative to other employees of FAL who it is assumed obtained positions with the respondent. The evidence of the four members is clear. They all submitted application forms, were granted interviews and were advised by letter that they had been unsuccessful in obtaining employment. It is also common amongst the four members that after learning

of being unsuccessful in obtaining employment they contacted Mr Bowen to ascertain why they were not chosen. They say the response from the respondent was that due to their lack of experience, compared to that of other guards, they were not successful or they were not suited for the job. Having made the findings as to the credibility of the witnesses, and that I would prefer the evidence of the four members, I accept their view that they expected to get a job as they had had more experience than some other FAL employees. In doing so, it stands to reason that I reject as authentic the explanations given to each of them by Mr Bowen when they queried their non-selection. I should add that the explanations they say were given to them vary, however, each explanation challenges in effect their skills and experience. The explanation does not in each case compare them unfavourably to other FAL employees who secured a job with Prestige, but this can be implied by the reason together with their non-selection.

34 This leads me to conclude that Mr Bowen has been less than honest with the four members as to the reasons for their non-selection. I do not endorse this as a proper or fair manner of dealing with applicants who apply for employment with the respondent. The applicant union would have the Commission, pursuant to s26 of the Act, intervene to award compensation to its members. However, in all the circumstances and for the reasons which I have stated above, I do not consider this alone warrants the intervention of the Commission. I do not consider that the Commission should be supervising the selection process in the manner sought by the applicant. I find that the circumstances that were made out by the applicant were simply the non-selection of these four former employees of FAL, with a greater level of skill and experience to that of the other FAL employees who were successful, following interviews of all FAL employees who applied and that the reasons given for their non-selection were not authentic.

35 The applicant union also complains that the respondent failed to offer a choice in the terms and conditions of employment, namely that the respondent did not offer employment under the Security Officers Award No. 25 of 1981. The respondent instead only offered employment under a workplace agreement which the four members say was less than their existing terms and conditions. I do not address this point further for the simple reason that the four members did not reach that stage. They were not offered employment at all, let alone under particular conditions.

36 The applicant union in closing submissions says that—

> "Ordering employment in the circumstances is probably no longer sustainable, but this does not obviate the need for there to be an award of compensation to ensure protection of the four or remedy the unfair, harsh and/or oppressive exercise of the employers rights".

37 There is a clear distinction between a matter involving a refusal to employ and a matter concerning a dismissal. The applicant union would have the Commission, in the exercise of its judgement pursuant to s 26 of the Act, to deal with the matter of a refusal to employ in similar fashion. I do not consider that this is appropriate. More specifically though the applicant union claims that engagement of its members by the respondent is no longer appropriate and that compensation is warranted. The submission appears to seek resort to exercise of the Commission's powers under s 23A which relate only to matters of unfair dismissal. I say "appears to seek" as this is not directly stated, however, the argument taken would lead the Commission to that approach. I do not consider that this is appropriate either, even if it were to be within power, and I take that no further, other than the appropriate remedy in a matter such as this would be employment, not compensation.

38 For all of the above reasons the application must fail. An order dismissing the application will issue.

2001 WAIRC 04090

EMPLOYMENT CONDITIONS

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	PRESTIGE PROPERTY SERVICES, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	MONDAY, 5 NOVEMBER 2001
FILE NO	CR 24 OF 2001
CITATION NO.	2001 WAIRC 04090

Result	Application dismissed
Representation	
Applicant	Mr J Ridley
Respondent	Mr D Clarke as agent

Order.

HAVING heard Mr J Ridley on behalf of the applicant and Mr D Clarke on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed.

(Sgd.) S. WOOD,
[L.S.] Commissioner.

2001 WAIRC 04045

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS, APPLICANT
	v.
	THE HONOURABLE ATTORNEY GENERAL, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	TUESDAY, 30 OCTOBER 2001
FILE NO	CR 26 OF 2001
CITATION NO.	2001 WAIRC 04045

Result	Application granted in part.
Representation	
Applicant	Mr P. Momber (of counsel)
Respondent	Mr R. Andretich (of counsel) and Mr D. Matthews (of counsel)

Reasons for Decision.

The claim of the union

1 The issues brought to the Commission by the union concern Hakea Prison. The union's claim is for an additional officer to be rostered in Units 1, 3, 5 & 6. The union also seeks an Order that an additional officer be employed on nightshift in the Crisis Care Unit (CCU). It is inherent in the union's claim that these are positions additional to those positions already on the roster and that all vacant positions on the roster be filled daily. The union's claims are based upon the presumption that even when all positions on the roster are filled, there is insufficient staff to run the prison effectively.

2 The Honourable Attorney General opposes the claim in its entirety. The respondent states that the current staffing

of the prison is appropriate and that it is normal for staff to be re-allocated to other duties to accommodate absences on the roster on a daily basis.

Background

3 Hakea Prison resulted from the amalgamation of the Canning Vale Prison and the CW Campbell Remand Centre in July 2000. The first roster for the amalgamated prison commenced on 13 January 2001. On 29 January 2001 the union applied for a conference in the Commission to address what it saw as the need to determine safe working and rostering practices at Hakea.

4 The Commission issued a Recommendation from the conference on 28 February 2001 that an additional 12 hour shift position be allocated to Unit 6 for a period of one month and made recommendations regarding notification to contractors and future FTE reductions. Meetings between the union's branch at Hakea and the prison management occurred on a regular basis and from a period of time following the Recommendation the Commission was provided with minutes of those meetings.

5 It is a matter of record that the prison staff at Hakea took industrial action on 20 and 21 July 2001. The Honourable Attorney General made an application for an urgent conference which became application C177 of 2001. The conference resulted in a Recommendation by the Commission that if on any day there are vacant positions on the roster due to staff absences that the Department of Justice fill up to eight vacant positions. This Recommendation was rejected and the Commission subsequently issued an Order on 21 July 2001 which, amongst other things, required the filling of all vacant positions on the roster for a period of five days pending a further review by the Commission.

6 On 26 July 2001 the Commission was provided with reports by both parties on the operation of the Order and on 27 July 2001 the Commission amended the Order by providing that up to six vacant positions on the roster be filled and that the Department of Justice provide the Commission with daily reports showing the number of positions vacant on the roster which were filled and the number of positions remaining vacant. These are the Daily Roster Absence Sheets referred to subsequently. The Order which obliges the Department to fill up to six vacant positions remains in force pending the determination of this application.

7 The Commission then programmed the arbitration of the union's claim to allow a pattern to be revealed by the daily roster absence sheets over a longer period of time. As at the final days of hearing of this matter on 10 October 2001, the Commission has received reports for 69 days.

8 The Commission formally records that in addition to the oral evidence and exhibits tendered during the proceedings, the parties have agreed that the Commission is to take into consideration the contents of the daily roster absence sheets and the reports made by both parties on the operation of the Order in C177 of 2001.

Commission's Conclusions of the Daily Roster Absence Sheets

9 Each daily roster absence sheet lists the total number of vacancies occurring on the roster each day and identifies whether the absences were due to sick leave, workers' compensation or "other". It indicates the number of overtime positions used to fill those vacancies and then indicates the number of vacancies still remaining. It contains a brief outline of the operational impact on the running of the prison on that day of the number of vacancies which had occurred.

10 Some tentative conclusions reached by the Commission from its analysis of the daily roster absence sheets were put to the parties on 14 September 2001 (transcript p. 25) and they were provided with an opportunity to comment on them. The conclusions which follow take into account the submission of the respondent that the period covered by the daily roster absence sheets may be unrepresentative. The conclusion also takes into account the fact that the union disputes the accuracy of some of the figures on a number of days.

11 The Commission's conclusions are as follows—

(1) On only 23 of the 69 days did the daily roster absence sheets show the prison operated according to normal routine. Normal routine is when there is no disruption to the routine of the day (transcript p. 29). That is, for the period covered by the reports, the prison ran normally only 33% of the time. Conversely, 67% of the time there was a disruption to routine caused by the level of staff absences.

(2) On 9 occasions the absences due to sick leave were the highest for the preceding 12 month period. The respondent states that there has been a trend in sick leave to increase from the start of the Commission's Interim Order. That information was not challenged and I accept it. Nevertheless, the evidence before the Commission is that the budget provides funds for overtime to cover 5 absences on sick leave. The evidence from the Superintendent of the prison is that when sick leave absences exceed 8 per day difficulties ensue (exhibit DOJ 5 (33)). The absences due to sick leave exceeded 8 on 24 of the 69 days for the period covered by the reports.

(3) The budget allocation of 5 overtimes to cover absences due to sick leave was exceeded on 51 of the 69 days. That suggests that the present budget allocation is inadequate. (I appreciate the later evidence that there is usually a capacity for the 5 overtimes to be exceeded where required.)

12 The above conclusions show that the routine of the prison does not run normally most of the time. Rather, it is normal for there to be disruption to the routine due to staff absences. The management of the prison is usually obliged to call officers in on overtime and to progressively close non-essential areas to release staff for redeployment in order to ensure full staffing in the units because that is where the prisoners will be. The performance of routine prison functions after that has occurred therefore comes at some cost, both in overtime and in the frequent closure of areas such as the workshops or the schools. It has resulted in delays in unlocking cells in the morning and on one occasion a refusal to do so at all. That Hakea functions as well as it does in those circumstances is a tribute to the professionalism of the Superintendent, management and staff of the prison.

13 However, the frequency with which there is such disruption and closures provides a compelling illustration of the evidence from the union that there is a build up of frustration in the staff at the situation.

14 The above conclusions are reached on the Department of Justice's own figures. The comparable figures supplied by the union according to its analysis of the human resource daily record from the prison shows in some cases a greater shortfall of positions on the roster (exhibit POU 1). I have had regard for those figures and their potential to show that the daily disruption to the routine is in fact greater than shown by the Department's figures. The evidence before the Commission does not provide an explanation for all of the discrepancies between the union's and the Department's figures. The union suggests that it is really the first two columns of the union's figures which are critical and it is to these the Commission has paid particular attention.

15 The above conclusions are to be seen as forming part of the background against which the evidence before the Commission is to be assessed.

The award

16 The union relies upon subclauses (9) and (10) of Clause 11.—Out of Hours Work contained in Order C121 of 2000 of 27 June 2000 which purports to amend the award (80 WAIG 3110) as follows—

"(9) If the Superintendent determines that the number of staff on duty or available for duty has fallen below a staffing level which will ensure the maintenance of routine prison functions including the

security and welfare of prisoners and the safety of staff at the prison, he/she shall—

(a) determine the number of officers required to return to duty, and/or

(b) what changes are required to be made to routine prison functions.

(10) If the Union Branch of the prison believes that the number of staff available for duty has fallen below a staffing level which will ensure the maintenance of routine prison functions including the security and welfare of prisoners and the safety of staff at the prison, they shall advise the Superintendent, who may then take action in accordance with subclause (9)—

(a) If the Superintendent does not agree that any action is necessary in accordance with subclause (9), he/she shall advise the Union Branch of his/her decision and the reasons for that decision.

(b) If the Union Branch does not agree with the Superintendent's decision, any dispute that arises shall be resolved in accordance with Clause 38.—Dispute Settlement Procedure."

17 These clauses were agreed by the parties. The procedure set out in Clause 38.—Dispute Settlement Procedure culminates in the matter being referred to the Commission.

18 The Commission also records that pursuant to s.36(1) of the *Prisons Act 1981* the Superintendent is responsible for the good government, good order and security in the prison. That responsibility includes the determination of appropriate staffing levels. The agreed clauses referred to above, however, acknowledge that the staffing level may nevertheless be a matter referred to the Commission.

19 However, as I have stated on a previous occasion it is not for the Commission to substitute its own views of the appropriate staffing level: *WAPOU v Hon Attorney General* [2000 WAIRC 00875] 80 WAIG 5216 (re the Senior Officer positions in Units 9 and 10 at Hakea). That is, and must remain, the prerogative of the Superintendent of the prison. I will not repeat in this decision the authorities listed in that decision (at page 5218), but I adopt them here. I merely repeat the conclusion that—

> It is not inaccurate to say that the Commission will only become involved in a decision regarding staffing levels with the greatest reluctance. Nevertheless, the prerogative of management to run the prison … does not mean that the Commission is not able to become involved where the evidence shows that a particular decision regarding the staff level imposes an unfair or unacceptable burden upon those staff.

The evidence before the Commission

20 What follows is a summary only of the evidence which was received.

21 The union called evidence from Mr K. Brown who has been a prison officer at Hakea for six years. He has been a Vigilance Officer with the union since November 2000. He is currently Wing Officer in Unit 4. Mr Brown's evidence was that the staffing level in the roster for the amalgamated prison had not been agreed with the union. He stated that the industrial action which had occurred was the result of a build-up of frustration at being generally short staffed and that staff were not fulfilling their normal duties. He gave evidence of the impact upon his work when prisoners became disgruntled due to short staffing.

22 Mr Brown addressed the claim for a block support officer in unit 1 to assist in the escorting of punishment and close supervision prisoners to the medical centre, interviews and visitors. The block support officer would also facilitate proper meal relief for unit staff and is considered necessary in order to allow the staff to function efficiently in this labour intensive unit. In Mr Brown's evidence the actual work needs to be done by the wing officers only. If an escort is required for a prisoner, two officers are needed which means that there would be no wing officers in one side of the wing. With a block support officer, escorts would be able to be filled leaving one officer back in the unit to perform the work which needs to be done.

23 The union also seeks a block support officer in unit 3 because that unit, on Mr Brown's evidence, constantly loses an officer to internal escorts in the prison, for contractor escorts or for maintenance repairs escort. Indeed, his evidence is that in recent times two officers have been removed for those purposes. The unit itself does not function in the absence of two officers such that the normal daily duties are not performed and it impacts on the meal break time for the unit staff.

24 In unit 5, the union asks for a control officer. The claim is brought because when a wing officer goes for a meal break it leaves the senior officer and one officer in the unit and if there is a problem in the wings, one officer cannot respond and cannot leave the control area. In Mr Brown's opinion there is more pressure on the officers in that unit than anywhere else in the prison.

25 Mr Brown's evidence is that unit 6 requires a block support officer. The union states that the function of this position is currently being performed by the temporary appointment made in accordance with the Commission's Recommendation mentioned earlier in these Reasons.

26 Mr Brown also gave evidence of the union's claim for a second officer on the nightshift in the CCU. His evidence is that the officer on nightshift carries keys to the cells but is not allowed to open a cell without a second officer being present. He related an incident which occurred on 4 September 2001 where there was an attempted self-harm by a prisoner. The single officer was not able to open the cell door alone. The prison's recovery team was able to, and did, respond in time. The union is concerned that the length of time for the recovery team to respond may be too long depending where in the prison the recovery team is at the time.

27 Mr Brown was cross-examined on his evidence. He agreed that in the past the staffing levels in units 1, 3 and 5 were "pretty much" what it is currently. Mr Brown made the point that prior to the amalgamation roster, the roster had positions which are not included in the amalgamation roster. Escort officers could be used to facilitate shortfalls in manning levels. Mr Brown accepted that, in part, the union's claim is about the reinstitution of the peak muster positions which were removed when the muster fell below the peak muster level. Mr Brown agreed that whilst he had been a prison officer it had never been the practice to fill each line in the roster.

28 Mr Brown also conceded that the impact in unit 1 is the same now as in the pre-amalgamation days in that if an escort is needed, a miscellaneous officer or an officer from another unit is called up. Some of the prisoners who had been in unit 1 prior to amalgamation now go to the CCU and there is no longer a receival function in unit 1. Some of the workload in unit 1 has therefore reduced. In relation to unit 3, Mr Brown conceded that the workload in this unit has decreased as a result of fewer prisoners compared to the pre-amalgamation period and the two officers who were previously required to go to visits are no longer required to do so. Mr Brown maintained, however, that the need for the additional officer claimed is because the C & D officer and the control officer are used for escorts inside the prison which had not occurred previously. Mr Brown maintained that 30% of the prisoners in unit 3 are remand and that this mix increases the workload on staff. Mr Brown stated that if unit staff are not taken out to do escort duties then the staffing within the unit is appropriate.

29 In relation to unit 5, Mr Brown agreed that the staffing level in that unit has not changed since the 1980's. However, remand prisoners present in unit 5 increase the workload and there is no replacement if an officer is absent to take a meal break. Mr Brown once again conceded that the union's claim concerns the removal of peak muster staffing but maintained that the dynamic within the wing has changed because of the presence of remand prisoners.

30 In relation to unit 6, Mr Brown conceded that the CCU had decreased the workload in unit 6 unless CCU is full. The staffing level in unit 6 is the same as

pre-amalgamation other than for the additional temporary officer ordered by the Commission.

31 In relation to the CCU, Mr Brown accepted that in relation to the incident which had occurred on 4 September 2001, even the granting of the union's claim would not have made any difference because there were two prisoners in the cell and a third prison officer would need to have been present when the door was opened.

32 The union called evidence from Mr R. Hunter who has been a prison officer for 11 years, and for the last three of those has been a Senior Officer. He has also been a Senior Officer Operations for two consecutive three-week periods. Mr Hunter's evidence was that staff were unable to take their meal breaks if, for example the lobby officer of unit 10 (who relieved five others for their meal breaks) was seconded elsewhere. Mr Hunter outlined his duties in the Senior Officer Operation's position. Those duties included co-ordinating escorts for the emergency transportation of prisoners other than those on the transfer and discharge lists which becomes difficult when the prison operates with non-replacement staff. In his last three years, there has been a fairly consistent significant staff shortage. The shortage of staff creates problems when workshops are closed or restricted and prisoners are returned to their units where there may be decreased numbers of staff, or when there is a late unlock and this may cause aggravation amongst the prisoners. It was his evidence that probably in a six-week period there may be at least 12 different staff that go without meal breaks for the entire day because of the shortages of relief staff.

33 In cross-examination, Mr Hunter maintained his view that there were occasional closures of workshops pre-amalgamation, but that closures did not occur as commonly as they presently do.

34 The union then called evidence from Mr Verner who has been a prison officer for 24 years and a Senior Officer for the last 12 of those years. Mr Verner's evidence was that he was involved in assisting the preparation of the amalgamation roster. The first draft of the roster had 305 positions. Mr Verner was told this was too many and after some negotiation the roster was re-worked so that there were either 290 or 291 FTE's. His evidence is that at that level, the roster would have to be maintained with full staffing in order to facilitate meal relief and other matters. In cross-examination, Mr Verner conceded that the ultimate figure may have been 295, it rather depended on how the figures were looked at. He maintained, however, that the preparation of the roster did not anticipate the need for controlled closures and that in order for the roster to function, all positions needed to be covered.

35 The union's final witness was Mr Cleland who has been a prison officer for 6½ years and has been at Hakea and its predecessors for that time. Mr Cleland is also a union representative. Mr Cleland prepared the union's record of roster shortfalls (exhibit POU 1) extracted from the human resource daily analysis which contrasts with the figures in the Department's daily roster absence sheets. Mr Cleland was cross-examined on his evidence.

36 All of the respondent's witnesses tendered statements of evidence which became their evidence-in-chief, subject to some additional questions put to them.

37 Evidence was called from Mr Corcoran who is the Managing Director of a private company specialising in operational risk, crisis management, security and investigation services. Mr Corcoran gave evidence via his witness statement that in December 2000 he commenced a review of Hakea's emergency and security procedures which entailed examining all areas of the prison operations. In his view, the current levels of staffing in the accommodation areas at Hakea are more than sufficient for the nature of the tasks undertaken by the custodial officers. In some areas of both the accommodation and security operations, in comparison to prisons in other jurisdictions, the level of staffing would be regarded as excessive.

38 Mr Corcoran was cross-examined on his evidence. At the time Mr Corcoran attended the prison the amalgamated roster was not in operation. He has not re-assessed Hakea since it commenced operation. He made the point nevertheless that in December 2000 the prison was operating as one unit and many of its procedures were in place. He also revisited Hakea on the Sunday immediately prior to him giving evidence in this Commission and his view was that the prison seemed to be operating in much the same way as when he had visited the prison in December 2000.

39 The respondent then called evidence from Mr T.B. Bibby who is the Assistant Superintendent Manager Operations of Zone 1 at Hakea and who has 18 years' experience working in prisons in Western Australia. Mr Bibby has worked as a prison officer, First Class Prison Officer, Senior Officer, Assistant Superintendent of Standards, Assistant Superintendent Prisoner Management and Deputy Superintendent of Hakea and acted as Superintendent of Hakea and Wooroloo prison farms intermittently. Mr Bibby is the Zone 1 manager responsible for units 1-4 and the CCU. Mr Bibby had been the Senior Officer in unit 1 for 4 years, 1991 to 1995. His evidence is that there is no longer a protection wing in unit 1 and unit 1 no longer performs receivals and orientation. In his view and experience, the workload in unit 1 has decreased, not increased. He is also of the view, that the officer located in the CCU at night is no different from any other officer located in a unit by himself or herself at night. There is no requirement for the nightshift officer to unlock the cells because that is the responsibility of the recovery team. Staff in unit 1 do not leave the unit to assist in other areas unless they are responding to an emergency. Mr Bibby's evidence is also that when pre-paid hours operated under the award, staff were quite prepared to allow areas to run with less staff by avoiding working pre-paid hours. Since the removal of pre-paid hours it is administratively easier to manage staffing in the units, however, since overtime penalty rates increased to time and one half there has been an increasing push by staff to cover everything with overtime.

40 Mr Bibby supplemented his evidence as follows. He stated that unit 1 monitored at-risk prisoners only if the CCU is full. Prior to amalgamation, and prior to the CCU, unit 1 was used extensively for that purpose. He maintained that the officer on nightshift in the CCU is purely to monitor the cameras and to provide human interaction to assist in maintaining a therapeutic atmosphere. He is quite satisfied that the mechanism of the recovery team is adequate.

41 Mr Bibby was cross-examined on his evidence. He maintained that there is no increased workload, and neither is there a decreased workload, in unit 1 although he acknowledged that his perception of the workload in unit 1 is different from that of the staff.

42 Mr Bibby agreed with the suggestion that the roster currently operating at Hakea was a roster without any "fat" on it (which is, perhaps, the capacity to have some spare staff should you need them: transcript page 180) but he strongly disagreed with the proposition that if there is no "fat" on a roster each line must be filled for it to operate correctly. Since 1983 he has never known a roster to have each line filled on a daily basis and this is accepted by the staff of the prison. Filling each line on the roster is simply an ideal situation to be worked towards. While Mr Bibby regarded Mr Verner as a very responsible prison officer, he disagreed with Mr Verner's evidence that if the roster lines are not filled the roster will not work effectively; rather, the roster may not work effectively but it can still be managed.

43 Mr Bibby stated that staff under his control in the CCU had never raised the issue of the recovery team's response time. If the nightshift officer in the CCU did have a key to the cells, the key should be removed because the function of the nightshift officer is to notify for assistance if it is required and for that reason the cameras in the CCU are also monitored from the gatehouse.

44 In re-examination, Mr Bibby stated that during the pre-paid hours days the prison ran short of staff "every day" but there was no demand that every line on the roster must be filled. In fact staff by their own actions and by agreement with management at the time sought to

minimise the problems and not cover positions. There was an agreement for the rotation or close down of areas and only 3 staff plus a Senior Officer were to be called in to fill vacancies. The workload in unit 1 has definitely decreased.

45 The respondent's next witness was Mr G. Rayner who is the designated Manager of Operations Zone 3 at Hakea Prison and who has worked in the prison system in Western Australia since 1985 in the positions of prison officer, Senior Officer, Co-ordinator Prisoner Assessment, Assistant Superintendent Security, Assistant Superintendent Incident Management, Assistant Superintendent Prisoner Management at the Eastern Goldfields and Bandyup Prisons and has acted as Superintendent of both those prisons. He has done operational reviews of four institutions and has acted as Superintendent of Hakea from 25 August until 7 October 2001. Mr Rayner is responsible for units 6 and 7, Reception and Movements. On a busy day up to 120 separate movements can occur through the Reception room, down to a figure of between 20 to 30 separate movements in a day.

46 The amount of movement through the Reception area can have ramifications for the amount of work that occurs in unit 6. Nevertheless, unit 6 is staffed to cater for the busy periods. Mr Rayner sees the orientation officer position as a crucial position. If there are staff absences the unit may get a replacement through overtime shifts. If there are no overtime shifts available then the unit operates with one officer down. The effect of this on a busy day is that prisoners cannot be moved on or moved as quickly because orientation must take priority. However, on those occasions, Mr Rayner would not describe the workload as intolerable. If staff numbers are down due to sick leave absences, work in unit 6 can be difficult; for example the orientation officer's job is quite specific and needs to be replaced with someone who has the same skills. However, if a control officer is absent then he or she is easier to replace because that person is the same in every unit. If the orientation officer is absent only the basic orientation is done and it means that there is an extra workload for the person coming in to work the next day. Although there are times when the unit is short staffed and it creates a difficult environment on occasions, it did not create an intolerable workload.

47 Mr Rayner supplemented his written statement with evidence that he was satisfied with the current level of staffing in unit 6. The unit assist officer position is essential when the muster is above 45 to 50 and there is no requirement for it when the muster drops below 40. The roster is a plan for the prison and it is it is not the norm to fill every line on the roster.

48 Mr Rayner was not cross-examined on his evidence.

49 The respondent then called evidence from Mr R. Jennings, the Superintendent of Hakea Prison. Mr Jennings has worked in the correctional industry in both the United Kingdom and Australia since 1974 and has held the positions of Superintendent of Casuarina, Wooroloo and Bandyup. Mr Jennings' evidence is that the unit 1 staffing complement is the same as that which existed prior to muster increases. It no longer has the role of receiving new prisoners and is not the primary location for prisoners at risk. This, together with its low muster, does not support a staff increase for unit 1. Since the amalgamation, officers in unit 3 no longer have to supply officers to attend visits. There have always been times when staff are required to leave the unit to facilitate escorts and so on. However, there are documented procedures to reduce and restrict prisoner movement within the unit until the required number of staff are available and the routine of the prison is changed to accommodate this. Mr Jennings' evidence is that the staffing level for unit 3 is sufficient and nothing has changed so significantly in this unit to warrant additional staff. Further, the current muster in the unit is due to reduce to a standard level in a short period of time and the current staffing level will stay the same when the muster reduces.

50 Mr Jennings states that prior to the amalgamation, unit 6 was a multifunctional-purpose unit and its role changed to that of being receival unit for the whole complex. As an interim measure, a unit assist officer is placed in unit 6 to deal with the increased workload that needed to be addressed because of the current muster and the number of new receivals into the unit and the urgency to move them on. When the muster drops, the need for the unit assist officer will be reviewed. With that position, the ratio of staff to prisoners would be regarded as a high staffing level in any jurisdiction.

51 In the CCU, Mr Jennings' evidence is that there have been no issues arising which would warrant consideration of an extra officer, and neither has that formed part of the local union branch's staffing discussions with management since the new roster came into operation. The role of the officer on night shift is to provide extra checks for prisoners considered vulnerable and to monitor cameras. Officers are not expected to monitor cameras continuously and an officer can leave the control panel at various times during the nightshift. The recovery team is in place to respond immediately should an emergency occur and there is no justification to place a second officer in the CCU during the nightshift. The operating procedures for the CCU were compiled in close co-operation with the staff. Prior to the amalgamation, when CCU prisoners were located in unit 1 at no time were there ever two officers located there during the nightshift.

52 Mr Jennings' evidence generally is that the current number of staff allocated to the units is sufficient to do the work and although the prison may have peak times where officers are busy, this does not automatically mean that there are safety issues or an intolerable workload for officers. There are many variables and demands that can occur within the prison on any given day which result in peaks and troughs requiring appropriate staff deployment. Forward planning for the Acacia prison will see the Hakea muster dropping by March 2002. Previous experience suggests that when the muster drops a reduction in workload is experienced in all work areas of the prison. The union's opposition to the roster can to a large extent be traced back to the removal of the peak muster positions that were previously in place. However, these positions were always temporary and it was envisaged that when the prison muster decreased the positions would be removed.

53 Mr Jennings' evidence is that absences on the roster are generally covered by a combination of overtime and re-deploying staff and there is a restricted regimen when abnormal absenteeism occurs. The amalgamation, and in particular the change in function to a remand and receival prison, has altered workloads. The majority of areas have adapted well but pressure on internal escorts has been a constant source of concern. A number of strategies have been suggested to rectify this by changes in work practices. However, the local union branch has rejected these and seeks an increase in staff. Absences within a reasonable band can be managed by using redeployment of resources and overtime, however when sick leave goes beyond eight a day difficulties ensue. Nevertheless, it has never been the position in the past that every position on the roster is covered everyday. Generally, prisoner management ensures that all essential positions on the roster are filled.

54 Mr Jennings does not have the impression that staff at the prison are stressed out all the time. When there are extreme absences the pressures are increased and require managing, however, in general, staff at Hakea continue to operate in a competent and professional manner. He is confident that the smooth running of the prison is met by appropriate staff deployment without jeopardising the good order and security of the prison and the safety and security of staff and prisoners. Further improvement would be achieved by staff flexibility and a move away from the somewhat rigid approach to solutions to staff deployment that have occurred in recent months.

55 Mr Jennings' written evidence was supplemented. Mr Jennings stated that currently budget provision is made to allow for five overtimes of 12 hour shifts to be used to fill positions on the roster which may be vacant on a daily basis. This arose from the funds returned to the prison

from the change away from pre-paid hours. He explained the removal of the peak muster positions. Miscellaneous officers, being officers without a designated function, occur as a matter of the construction of the roster. Miscellaneous officers are counted as part of the 295 in the roster but are not replaced if they are absent because they did not have a set function for that day. If an officer in a miscellaneous position does attend, then that person is used as needed, for example to cover training or to relieve in a position to cover sick leave. A miscellaneous position is part of the "fat" of the roster.

56 Mr Jennings was cross-examined on his evidence. Mr Jennings maintained that the roster would still do the job it was designed to do even without "fat" in the roster. Mr Jennings stated that some of the union's evidence may be accurate relating to the increase in sick leave and an increase in the number of complaints, however Mr Jennings maintains that sick leave of its own is not an indication of the health of the prison. The rate of staff leaving the prison is the lowest in the industry. Mr Jennings stated that the fact the parties were before the Commission was because there was a perceived problem. However, that is because the issues raised by the union have not been able to be resolved and the matter has been referred to the Commission.

57 Mr Jennings indicated he was unaware that the officer on nightshift in the CCU had a key to the cells. Now that it had been drawn to his attention that is an issue which will be addressed. Mr Jennings maintained that prior to the recovery team, it was standard procedure for one officer to be in a unit on his or her own on nightshift. In re-examination, Mr Jennings conceded that there have been peaks of sick leave since July 2001, and while he is not judgemental about the reasons, it has exceeded the average sick leave absences of between six and seven absences.

58 The respondent's final witness was Mr A. Leech, the General Manager Public Prisons of the Department of Justice and who has been employed in the correctional services industry since 1986 working in both Western Australia and South Australia at every level of the service including Correctional Officer, Superintendent of Prisons and at Director and General Manager level. Mr Leech stated that approximately 70% of the total budget allocation for Hakea is allocated for staffing costs. The union's claim for additional staff equates to an increase of approximately 13 FTE's and the increased cost will be approximately $625,000 per annum. The increased costs would have a dramatic effect on the operation of Hakea because it would be required that those funds be found from other areas of the prison system, including other prisons. Further, should there then be a flow-on effect from the decision to other prisons there will be a requirement to further cut services to prisoners to meet the shortfall.

59 In comparison to other jurisdictions within Australia, the cost of secure prisons in this State is higher than all other states except for the ACT which contracts NSW to manage and supervise their offenders. There are currently approximately 300 FTE's at Hakea including the temporary positions in unit 6 and the escort position on the Canning Vale side. The reduced muster at Hakea which will occur when Acacia prison is full will have a dramatic effect on Hakea. It is planned to shut a unit or units and redeploy staff within the prison to other activities or to other prisons in the metropolitan area where there may be a need for staff. Changes which may occur in terms of staffing on a daily basis do not necessarily have any effect on the security and good order of the prison and it is common practice for staff to be deployed in different areas of the prison given the needs of the day. Mr Leech's evidence is that there are a number of positions on the Hakea roster that do not impact on the good order or security of the prison but may have some effect on the delivery of a service on that particular day and the delivery of that service is determined by the prison's Superintendent on an as-needs basis. Therefore, all lines on a roster are not essential but are there to provide a level of service should the circumstances allow.

60 In relation to the CCU, Mr Leech's evidence is that the Department has determined that it is not up to the officer on nightshift to open cells. The officer is in the location only for monitoring purposes and it is not plausible to have to employ two staff to carry out monitoring. At Hakea, the medical centre is located directly next door to the CCU and nursing staff would also be available at night when requested. There are many circumstances throughout the Department where officers, especially at night, work on their own in units or areas of various prisons. It is Mr Leech's strongly held view that the staffing level at Hakea as it currently stands is more than adequate and as the prisoner population decreases it will be necessary for those staffing levels to be reduced.

61 Mr Leech added to his written evidence. He stated that if each line on the roster in every prison in this State was required to be filled it will cost approximately $3-5,000 000. Any cost increase is matched by a consideration of where services can be reduced to prisoners. For the financial year 2000/2001 Hakea was averaging nine 12 hour shifts per day to be covered on overtime for sick leave, workers compensation and filling other vacancies. His budget analysis shows that 8 or 9 vacancies are filled on average. Mr Leech was firm in his evidence that the history regarding vacant positions on the roster since the abolition of pre-paid hours shows that there is a greater willingness on the part of staff to attend on overtime than there was to attend to perform the work for which hours had been pre-paid.

62 Mr Leech was not cross-examined on his evidence.

Submissions

63 Mr Andretich, on behalf of the respondent, urged the Commission to record respect to the right of management to run the prison, although he conceded this issue is not entirely a question of management's prerogative. Rather, the Commission should become involved only if there is some undue or unfair burden on employees and there is no evidence of that in this case. On a day-to-day basis, whether a service is to be provided in Hakea on any day is a matter for the Superintendent. The evidence shows that the staffing levels in the units in question were the same prior to the amalgamation as they currently are and the units functioned effectively without complaint. The respondent characterises the union's claim as being resentment regarding the removal of peak muster positions when the new roster came into effect and that Mr Brown conceded that point. Effectively, there has been a diminution in the workload of units 1, 3 & 6. In unit 5, at worst for the respondent's point of view, there has been no change to the workload.

64 Mr Andretich pointed to the absence of direct evidence from officers working within these units. In contrast, the evidence of Mr Rayner was not questioned by the union and should stand unchallenged. Mr Bibby's evidence is to be preferred because of his direct knowledge of working within unit 1 and the CCU. The evidence of Mr Jennings should be accepted especially that any problems that exist will not be cured by the provision of extra persons on the roster. The respondent recognises there is an issue of removing officers for escort purposes.

65 In relation to CCU, Mr Andretich indicated that there was nothing more than a strong moral case in the union's argument; there was certainly not an industrial case. The evidence of Mr Corcoran is that staffing ratios in the prison are more than adequate. Not every line in the roster is filled and when the prison ran short during the pre-paid hours' time, it ran short without complaint from the union. Mr Andretich finally drew attention to the cost to the prison system of filling each line in the roster and the inevitable rationalisation or pruning of services to prisoners if the claim is granted.

66 Mr Momber, for the union, emphasised the continuing quarrel on a day-to-day basis regarding the operation of positions on the roster. He urges the Commission to accept Mr Verner's evidence that the roster figure of 295 was a real and genuine figure. Mr Cleland's figures support the union's claim regarding the issues arising on a day-to-day basis.

67 Mr Momber strongly urged the view that the roster is currently not working effectively and that funds must be provided for the minimum number of positions on the roster on a daily basis. The union acknowledged that if there was a significant future reduction in the prison muster then the union's position would change. The union recognises that there will be a shortfall in the roster and it co-operates, and will continue to co-operate, in the issues that arise. However, the shortfall is seen by the union to be so great that it does not even meet a minimum necessary standard and the filling of the gaps creates an enormous anxiety amongst staff. This is especially the case in relation to the remaining officer on nightshift in the CCU, although Mr Momber acknowledged that the issue in crisis care is both difficult and complex. The union had not realised that the Department did not know that the officer carried a key to the cells and it is possible that the issue may be addressed by the removal of the key. Mr Momber particularly mentioned the miscellaneous positions on the roster which are not filled if the officers allocated to those positions are absent and submitted that the evidence is that the roster cannot work without them. He concluded by stating that it cannot be accepted that the evidence shows that there is no problem at Hakea in the operation of the current roster.

CONCLUSIONS

68 I turn to consider the union's claims.

Filling all positions on the roster

69 The evidence from the union that there is a problem with the operation of the current roster is, in my view, made out. This conclusion is supported by the evidence that there are disruptions to the routine 67% of the time. While I accept the evidence that the management takes appropriate steps to prioritise the services of the prison for the day each day, and that the skill and dedication of all the staff makes the prison function, there is a distinction to be drawn between being able to manage when the routine of the prison is disrupted on a small number of occasions and where the routine of the prison is disrupted 67% of the time. I therefore attach some weight to the evidence of Mr Brown that the problem which led to the arbitration of this matter in the Commission resulted from an accumulation of frustration at the continual disruption to normal routine. In the conclusion I reach the continual disruption with little firm prospect that the situation will improve at current muster levels imposes an unfair burden upon the staff.

70 However, it does not follow that all vacant positions on the roster must be filled. I take into account the evidence that during the pre-paid hours time prior to July 2000, the shortage of staff occurred regularly and it did not result in a claim that all vacant positions on the roster be filled. Mr Bibby's evidence in particular was that when pre-paid hours operated under the award, staff were quite prepared to allow areas to run with less staff by avoiding working pre-paid hours. Since the removal of pre-paid hours it is administratively easier to manage staffing in the units, however since overtime penalty rates increased to time and one half there has been an increasing push by staff to cover everything with overtime.

71 It is important to note that the current roster did not operate at that time. I accept Mr Brown's evidence that although the prison ran short of staff on occasions prior to the amalgamated roster being introduced, the effect was not as significant as currently. This evidence was supported by the evidence of Mr Verner, and also from the evidence of Mr Bibby, regarding the lack of flexibility, or "fat", in the roster. This conclusion is supported by the evidence from Mr Hunter, which I accept, that there were occasional closures of facilities in the pre-amalgamation period but the closures were not as common then as they are now. This evidence in turn supports the evidence from Mr Brown that there was greater capacity in previous rosters to move positions within the roster.

72 It is integral to the union's claim that on a daily basis all vacancies on the roster should be filled. However, the evidence shows that in the past, there has not been a practice of filling all vacancies in the roster on a daily basis and I so find. I find on the evidence that filling each line on the roster is a target to be worked towards. I accept the evidence of Mr Jennings that generally all lines on a roster would have a name against them when the roster is posted. However, shortfalls can occur due to unexpected resignations or secondment. On a daily basis staff sign on upon their arrival at the prison and it is at that time that there may be shortfalls caused by illness, unexpected urgent leave or workers' compensation. Accommodating these short term shortfalls on the roster is dependent on a number of variables and absences are generally covered by a combination of the use of overtime and redeploying staff where necessary.

73 Therefore, the evidence does not show that the answer to the problem with the operation of the current roster is to require the filling of all vacant positions on the roster on a daily basis. Rather I am quite persuaded that the present difficulty is heightened because of the need to reduce staff in units to provide escort functions. The evidence from witnesses called by the union and the respondent is consistent on this point: the pressure on internal escort needs is a constant source of concern. It is a point recognised by the respondent as common to both parties. It is also a point which has arisen since the introduction of the amalgamated roster at Hakea.

74 In summary therefore, while the union has not been successful in persuading the Commission that every vacant position on the roster be filled, the union has established the issue of removing officers from the units for the internal escort function. While I appreciate the evidence of Mr Jennings (exhibit DOJ 5 (32)) that a number of strategies have been suggested to rectify the issue by a change in work practices, the Department of Justice in its opposition to this matter has not itself sought an Order that the issue be addressed in an alternate way to that suggested by the union.

75 In my view, the evidence establishes a need to ensure that internal escort requirements do not regularly result in the removal of officers from units.

76 I otherwise accept the evidence, particularly from Mr Corcoran and Mr Leech that the staffing level of the prison is adequate for the purpose when compared to the staffing ratios of other prisons both within this State and in other States. I take their evidence in the context that the staffing level is the number of staff in the roster. On the evidence, however, problems arise when the rostered number of staff are not in attendance.

77 Finally, the current practice as revealed in the later Daily Roster Absence Sheets has shown a trend towards using a greater number of overtimes than the 5 in the budget allocation and of the 6 required by the Interim Order to reduce the impact of staff absences. That is, to the Commission, a most appropriate trend. While it is a matter for the discretion of the Superintendent on a daily basis, I place on the record the Commission's endorsement of that trend.

78 I turn now to consider the claim of the union in relation to individual units. In doing so I do not ignore the evidence that the union's position is substantially influenced by its view that the peak muster positions previously in the roster should not have been removed. However, once the peak muster numbers have been reduced, the need for peak muster positions is also removed.

Unit 1

79 I am persuaded particularly by the evidence of Mr Bibby that the workload in unit 1 has decreased. That evidence is not inconsistent with the evidence of Mr Brown. Its workload was higher when it had a protection wing and performed a receival and orientation function. In the conclusion I have reached, the evidence from the union is that its concern regarding the staffing level also depends upon, for example, the availability of escort officers so that wing officers remain in the wing itself. Given the conclusion I have reached in relation to additional provision for escort, I do not consider the evidence supports any change to the staffing of unit 1.

Unit 3

80 The union's claim in unit 3 similarly refers to the issue which arises when an officer is required for internal escort, contractor escorts or for maintenance repairs. In my view, the evidence before the Commission shows that the union has not made out its case for an additional person to be allocated to unit 3 provided the issue of internal escorts is addressed. In all other respects, I accept the evidence of Mr Jennings that the staffing level for unit 3 is sufficient and nothing has changed so significantly in the unit as to warrant additional staff.

Unit 5

81 The emphasis in Mr Brown's evidence is the remand prisoners create an additional workload when an officer is absent due to being on a meal break. The evidence is that the staffing level in unit 5 has been the same since the unit first opened in the 1980's and the union's claim is that the workload has increased because of the mix in the muster now including remand prisoners. Nevertheless, I am not persuaded that the evidence shows that a control officer should be rostered for unit 5 in order to merely cover meal break relief. The evidence shows that the matrix for meal break relief is a separate issue from the roster and in my view, this issue has the capacity to be addressed by the parties separately.

Unit 6

82 The extra unit assist officer currently placed in unit 6 as an interim measure is seen in the union's evidence as being the additional person sought by the union. I accept the evidence of Mr Rayner that the unit assist position is essential at certain muster levels. As I understand the position put by the Department, the unit assist officer in unit 6 will remain until the muster drops and the need for the position will be reviewed. Accordingly, it is appropriate that I observe that on the evidence both the Department and the union agree that at the current muster the additional position is required. To the extent necessary therefore, the Commission would require the extra officer to remain until the muster drops as per Mr Rayner's evidence at which time the need for the additional temporary position is able to be reviewed.

CCU

83 The principal concern raised by the union is the stress felt by the single officer on nightshift. The actual working conditions do not themselves seem to be of issue. The evidence before the Commission has emphasised that it is the function of the officer merely to observe and where appropriate to provide voice contact with a prisoner in the cells. As I understand the evidence, the Department will ensure that the officer does not have a key to the cells and that this will remove any problem which may have arisen whereby the officer may feel an obligation to enter the cell without having a second officer present if the circumstances apparently warrant it. There is some recognition by the union that this may assist in the issue. In this regard, the evidence of senior prison management with many years experience is that the response time for the recovery team when required is appropriate. In my view, the issue of the function of the recovery team and its response time is not a matter for this Commission.

84 I am not at all persuaded that having regard to the monitoring duties to be performed by the officer that it is at all appropriate for two persons to be rostered on nightshift. An additional officer will not address all of the issues referred to by the union particularly when there are two prisoners in a cell in the CCU. It is recognised by the Department that the officer on duty is not required to monitor the screens at all times. The screens are also able to be monitored by the control room officers. On the evidence before the Commission, there is little point in rostering a second officer on nightshift particularly as it would not of itself have made any difference to the circumstances of the incident which was relayed by Mr Brown. Accordingly, the union's claim in this regard is not made out.

85 I add the comment that this conclusion does not mean that the Commission dismisses the concern raised in the union's evidence. It is just that the evidence does not show that the concern is shared by all staff and that the solution is simply to roster an additional officer on night shift. Additionally, there is some force in the submission of the respondent that the issue raised is not entirely an industrial issue.

Summary

86 The Commission is to decide the issue according to equity, good conscience and the substantial merits of the case. I find that the union's claim is made out to the extent that provision be made for additional internal escort functions to reduce the need for officers to be taken from units for that purpose. The nature of the positions is to be the subject of discussions between the parties with recourse to the Commission.

87 I have had regard to the submissions properly made regarding the effects of increased costs upon the running of the prison. I regard seriously the evidence of the budget position. The cost of providing additional escort functions will be considerably less than the figures referred to by Mr Leech relating otherwise to the union's claims if they had been granted. The potential cost will also be reduced by the fact that any Order to issue necessarily will have a limited life. Acacia Prison will be filled by February 2002 and Hakea's prison population which is currently approximately 680 will come down to about 500 to 520 with a likely reduction in workload in all areas of the prison. The union recognises that the reduction in muster will involve a reduction in staffing. The Order to issue is based upon the evidence of the current staffing and muster level and the necessity for it necessarily reduces with the changes to those levels.

88 The Commission endorses in principle the discussions between the parties referred to by Mr Jennings which are aimed at achieving further improvements by staff flexibility and those discussions ought still to occur.

89 The deployment of the escort positions will be a matter for the discretion of the Superintendent. To the extent necessary, the Order to issue may oblige the respondent to ensure that the Superintendent of the prison has sufficient funds to adequately provide internal escort functions.

90 In all other respects, the union's application is dismissed. The Minute of a Proposed Order now issues.

2001 WAIRC 04084

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS, APPLICANT *v.* THE HONOURABLE ATTORNEY GENERAL, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	MONDAY, 5 NOVEMBER 2001
FILE NO	CR 26 OF 2001
CITATION NO.	2001 WAIRC 04084

Result	Application granted in part
Representation	
Applicant	Mr P. Momber (of counsel)
Respondent	Mr R. Andretich (of counsel) and Mr D. Matthews (of counsel)

Order.

HAVING HEARD Mr P. Momber (of counsel) on behalf of the applicant union and Mr R. Andretich (of counsel) 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—

1. That provision be made for additional internal escort functions within Hakea Prison.

2. That the respondent ensure that the Superintendent of the Hakea Prison has sufficient funds for the purpose of Order 1 hereof.
3. That either party may apply for the cancellation of this Order upon a significant reduction occurring in the staffing level and prison muster at Hakea Prison.
4. That the application otherwise be dismissed.

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

CONFERENCES—Notation of—

Union Name	Other Party	Commissioner Number	Dates	Matter	Result
Australian Workers' Union	BHP Iron Ore Ltd	KENNER C C38/2001	16/03/2001 17/08/2001	Dispute over the issuance of desciplinary notes	Concluded
Australian Workers' Union	Iluka Resources Limited & Others	BEECH C C131/2001	17/07/2001	Alleged refusal to grant employees a pay increase	Concluded
Australian Workers' Union	Proscape	BEECH C C265/2000	8/11/2000	Termination of employee	Referred
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	BHP Iron Ore Ltd	KENNER C C36/2001	16/02/2001 16/03/2001 18/06/2001 17/08/2001	Use of contractors	Concluded
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	BHP Iron Ore Pty Ltd	KENNER C C217/2001	7/09/2001	Respondent allegedly refuses to recognise 4 Union representatives at MUA/ Company meetings.	Concluded
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	BHP Iron Ore Pty Ltd A.C.N. 008 700 981	KENNER C C86/2001	4/05/2001 18/06/2001	Use of contractors	Concluded
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Eagle Aircraft Pty Ltd	GREGOR C C206/2001	N/A	Dispute involving a log of claims	Concluded
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Kitenga Pty Ltd	GREGOR C C167/2001	1/08/2001	Termination of Union member, Mr Ludwik Kowalski.	Concluded
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Kokan Kogyo (Australia) Pty Ltd	GREGOR C C292/2000	28/11/2000 10/05/2001	Alleged contractual entitlements	Concluded
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Law Castings	GREGOR C C146/2001	20/07/2001	Termination	Referred
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Midland Brick Pty Ltd	KENNER C C217/2000	30/08/2000 12/10/2000 18/09/2001	Applicant union disputes pay decrease for the unions member	Concluded
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Transfield Maintenance	KENNER C C184/2001	N/A	Proposed termination of 15 AFMEPKIU members.	Concluded
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Wynai Pty Ltd t/a George Day Caravans	BEECH C C194/2001	27/08/2001 8/11/2001	Alleged inadequate redundancy	Concluded
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union & Others	Transfield Services (Australia) Pty Ltd	KENNER C C171/2001	17/07/2001 18/07/2001	Dispute regarding payment of meal breaks	Concluded
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union & Others	Transfield Services (Australia) Pty Ltd	KENNER C C178/2001	N/A	Industrial action at BHP HBI plant	Concluded
Builders' Labourers, Painters & Plasterers Union	Independent Glass Service Pty Ltd	GREGOR C C209/2001	3/09/2001 24/09/2001 3/09/2001 24/09/2001	Alleged forcing of employees to resign with new employer without redundancy or notice payment	Concluded
Civil Service Association	Chief Executive Officer Water Corporation	SCOTT C. PSAC7/2001	29/06/2001 13/09/2001	Proper classification of Development Officer positions	Referred

Union Name	Other Party	Commissioner Number	Dates	Matter	Result
Civil Service Association	Chief Executive Officer, Ministry for Culture and the Arts	SCOTT C. PSAC15/2001	N/A	Continuation of contract of employment	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union	Bakewell Foods Pty. Ltd	GREGOR C C231/2001	9/10/2001	Alleged unfair termination and loss of entitlements and pay.	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union	Boral Window Systems Ltd	GREGOR C C186/2001	30/08/2001	Loss of pay/entitlements	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union	Dawsons—AOC Water Services Pty Ltd	GREGOR C C277/2000	27/10/2000 13/08/2001	Conditions for use of Company Vehicles	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union & Others	O'Donnell Griffen	KENNER C C179/2001	N/A	Industrial action at HBI site	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union & Others	Stork ICM Australia Pty Ltd	KENNER C C179/2001	N/A	Industrial action at HBI site	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union & Others	SWG Operations Pty Ltd	KENNER C C179/2001	N/A	Industrial action at HBI site	Concluded
Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union	Independent Glass Service Pty Ltd	GREGOR C C209/2001	3/09/2001 24/09/2001 3/09/2001 24/09/2001	Alleged forcing of employees to resign with new employer without redundancy or notice payment	Concluded
Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union	Lostock Pty Ltd T/A Ceiling and Associated Contracting	GREGOR C C13/2001	19/01/2001	Dismissal of an employee	Referred
Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union	Southdown Construction Co. Pty Ltd	GREGOR C C207/2001	N/A	Industrial action	Concluded
Forest Products, Furnishing and Allied Industries Industrial Union	Wesfi Manufacturing Pty Ltd, Kewdale	GREGOR C C242/2001	N/A	Threatened industrial action	Concluded
Independent Schools Salaried Officers' Association	The Roman Catholic Archbishop of Perth & Others	KENNER C C16/2001	8/02/2001	Variation to contract of employment	Concluded
Independent Schools Salaried Officers' Association	The Roman Catholic Archbishop of Perth (Inc) & Others	KENNER C C297/2000	5/12/2000 2/08/2001	Restructure in Art Classes	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Activ Foundation Inc	SCOTT C. C211/2001	3/10/2001	Termination of employment	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Activ Foundation Inc.	SCOTT C. C227/2001	N/A	Dismissal of union member	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	AHS Hospitality Group Pty Ltd	WOOD,C C152/2000	6/07/2000	Unfair dismissal	Referred
Liquor, Hospitality and Miscellaneous Workers Union	Airlite Cleaning Pty Limited	KENNER C C132/2001	29/06/2001	Alleged unfair dismissal	Concluded

Union Name	Other Party	Commissioner Number	Dates	Matter	Result
Liquor, Hospitality and Miscellaneous Workers Union	Heaton Enterprises Pty Ltd (Cleaning Division)	WOOD,C C180/2001	1/08/2001	Unnecessary reduction of hours	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Peters and Brownes Group	WOOD,C C212/2001	7/09/2001	Alleged harsh, unfair or oppressive dismissal of a member of the applicant union	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Peters Brown Group	SCOTT C. C122/2001	5/07/2001	Alleged unfair dismissal	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Plasmo Pty Ltd	WOOD,C C201/2001	7/09/2001	Alleged harsh, unfair or oppressive dismissal	Referred
Prison Officers' Union	Ministry of Justice	BEECH C C26/2001	31/01/2001 28/02/2001 26/07/2001 2/08/2001	Safe working and rostering practises at Hakea Prison Complex	Referred

PROCEDURAL DIRECTIONS AND ORDERS—

2001 WAIRC 03982

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	ROBERT DEDMAN, APPLICANT *v.* SONS OF GWALIA LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	TUESDAY, 16 OCTOBER 2001
FILE NO/S	APPLICATION 2114 OF 2000
CITATION NO.	2001 WAIRC 03982

Result	Direction issued.
Representation	
Applicant	Mr S Sirett of counsel
Respondent	Mr B Di Girolami of counsel

Direction.

HAVING heard Mr S Sirett of counsel for the applicant and Mr B Di Girolami of counsel for the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

1. THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.
2. THAT the parties file and serve upon one another any signed witness statements upon which they intend to rely no later than 21 days prior to the date of hearing.
3. THAT the applicant and the respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than 3 days prior to the date of hearing.
4. THAT the matter be listed for hearing for 2 days.
5. THAT the parties have liberty to apply on short notice

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

2001 WAIRC 04004

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CATHERINE JOAN BYRNE, APPLICANT *v.* MOUNT HOSPITAL PHARMACY, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	WEDNESDAY, 24 OCTOBER 2001
FILE NO	APPLICATION 345 OF 2001
CITATION NO.	2001 WAIRC 04004

Result	Application for Further and Better Particulars and Further Discovery granted.
Representation	
Applicant	Mr G. Hancy (of counsel) and with him Mr A. van Noort (of counsel)
Respondent	Mr B. Jackson (of counsel)

Order.

WHEREAS an application was lodged in the Commission pursuant to regulation 80 and 81 of the *Industrial Relations Commission Regulations 1985*;

AND WHEREAS the parties were heard in chambers on 24 October 2001;

AND HAVING HEARD Mr G. Hancy (of counsel) and with him Mr A. van Noort (of counsel) on behalf of the applicant and Mr B. Jackson (of counsel) on behalf of the respondent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order—

(1) THAT to the extent that the following particulars are not able to be answered by the discovery of documents the subject of Order 2 of this Order, that by 4pm on Friday, the 26th day October 2001 the respondent do file and serve on the applicant Further and Better Particulars of paragraph 5 of its Notice of Answer filed in the Commission on 14 March 2001 as follows—

(a) As to paragraph 5(a)—

(i) When and by whom was the applicant advised that "more commitment would be required to her full time position"

(ii) What "commitment" was the applicant advised was required.

(b) As to paragraph 5(b)—
  (i) What were the incidents of unsatisfactory performance and/or conduct;
  (ii) When did the performance or conduct occur; and
  (iii) In what respect or respects was it unsatisfactory.

(c) As to paragraph 5(b)—
  (i) When was the applicant late or absent from work without proper cause;
  (ii) When did the applicant "not apply herself to her duties"; and
  (iii) What aspect or aspects of her conduct constituted failing to apply herself to her duties.

(d) As to paragraph 5(c) as to each relevant alleged warning—
  (i) When and by who was it given; and
  (ii) What was the substance of the warning.

(e) As to paragraph 5(d)—
  (i) When and by whom was the applicant given instructions about the alleged written protocol; and
  (ii) What was the alleged "detriment" to the clinical trial and in what respect or respects was a patient placed "at risk".

(f) As to paragraph 5(e), in what respect or respects did the applicant—
  (i) Fail to improve her attitude; and
  (ii) Fail to improve her performance or conduct.

(2) THAT by 4pm on Friday, the 26th day October 2001 the respondent do provide to the applicant discovery of the following documents in its possession, custody or power—
  (a) The respondent's written procedures for warnings for employees whose performance or conduct was viewed by the respondent as unsatisfactory;
  (b) The written protocol alleged in paragraph 5(d) of the schedule to the respondent's Notice of Answer and Counterproposal;
  (c) Documents showing the occasions when prior to 6 February 2001 the respondent or his manager sought legal advice concerning the applicant;
  (d) Documents evidencing communications between the respondent and his manager that occurred in January and February 2001 and concerned the applicant;
  (e) Records of the applicant's performance and conduct prior to 6 February 2001; and
  (f) Documents verifying counselling and/or warnings allegedly given to the applicant by the respondent or his manager.

(3) THAT by 4pm on Friday, the 26th day October 2001 the applicant do file and serve on the respondent Further and Better Particulars of her application, as follows—
  (a) In relation to paragraph 20 of the Application—
    (i) When and by whom was the applicant asked to sign a contract when she returned to work;
    (ii) Full particulars as to conversations whereby the applicant was "reduced with less pay from full-time to part-time work";
    (iii) Full particulars as to who dismissed the applicant;
    (iv) Who assured the applicant previously that her work was satisfactory and when did these conversations occur;
    (v) Full particulars as to what benefits were denied.
  (b) In relation to paragraph 23 of the Application, full particulars as to what contractual benefits have been denied since 29 January 2001.
  (c) In relation to paragraph 24 of the Application, particulars as to the basis upon which the applicant is able to claim an entitlement to the following accrued benefits—
    (i) Holiday;
    (ii) Sick leave;
    (iii) Long service

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

2001 WAIRC 04033

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	GEOFFREY WILLIAM BYRNES, APPLICANT *v.* SHIRE OF MT MARSHALL, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DELIVERED	MONDAY, 29 OCTOBER 2001
FILE NO	APPLICATION 527 OF 2001
CITATION NO.	2001 WAIRC 04033

Result	Interlocutory application granted
Representation	
Applicant	Ms P Giles (of Counsel)
Respondent	Mr S White

Order.

HAVING heard Ms P Giles (of Counsel) on behalf of the Applicant and Mr S White on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT within 28 days of the date of this Order, the Respondent shall provide to the Applicant or his legal representatives further and better particulars of paragraph 2 of the Respondent's Notice of Answer and Counter Proposal as follows—

1. A statement setting out all material facts upon which the Respondent relies to support the allegation that the Applicant had been having performance problems prior to his alleged resignation;
2. A statement setting out all material facts upon which the Respondent relies to support the allegation that the Applicant had been having behavioural problems prior to his alleged resignation; and
3. A statement setting out all material facts upon which the Respondent relies to support the allegation that the Applicant was likely to have been in breach of his employment contract.

(Sgd.) P.E. SCOTT,
[L.S.] Commissioner.

2001 WAIRC 03984

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	ROBERT JAMES COLEMAN JNR & HENRY THOMAS COLEMAN, APPLICANT
	v.
	R.J. COLEMAN HOLDINGS PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	WEDNESDAY, 17 OCTOBER 2001
FILE NO/S	APPLICATION 950 OF 2001 & APPLICATION 951 OF 2001
CITATION NO.	2001 WAIRC 03984

Result	Direction issued.
Representation	
Applicant	Mr S Lemonis of counsel
Respondent	Mr R Harrison of counsel

Direction.

HAVING heard Mr S Lemonis of counsel for the applicant and Mr R Harrison of counsel for the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

1. THAT the applicants shall file and serve amended notices of application in the terms of the applicant's contracts of employment with the respondent by 30 October 2001.
2. THAT the respondent produce for inspection by the applicants by 6 November 2001 the following documents—
   (a) All documents relating to the terms of employment of the applicants.
   (b) All documents relating to the wages paid by the respondent to the applicants for the period 13 September 2000 to the present date.
   (c) All documents relating to the wages paid to Irene Margaret Coleman Jnr and Phillipa Mary Coleman during the period 13 September 2000 to 22 August 2001.
   (d) All documents relating to the allegations that the applicants were absent from the workplace.
3. THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.
4. THAT the respondent file and serve any signed witness statements upon which it intends to rely by 28 December 2001.
5. THAT the applicants file and serve any signed witness statements upon which they intend to rely by 11 January 2002.
6. THAT the matters be heard and determined together and be listed together for hearing for 1 day.
7. THAT the parties have liberty to apply on short notice.

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

PUBLIC SERVICE APPEAL BOARD—

2001 WAIRC 04042

AGAINST THE DECISION TO TERMINATE MADE ON 5/1/2001

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	MARGARET SUSAN THOMAS, APPELLANT
	v.
	CHIEF EXECUTIVE OFFICER, MINISTRY OF FAIR TRADING, RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER P E SCOTT—CHAIRPERSON
	MS D ROBERTSON—BOARD MEMBER
	MR B APPLEBY—board member
DELIVERED	MONDAY, 29 OCTOBER 2001
FILE NO	PSAB 1 OF 2001
CITATION NO.	2001 WAIRC 04042

Result	Application dismissed for want of jurisdiction
Representation	
Appellant	Mr B Cusack
Respondent	Ms L Coleman

Reasons for Decision.

COMMISSIONER P E SCOTT AND MR B APPLEBY

1 This is an appeal to the Public Service Appeal Board ("PSAB") filed on 16 January 2001 against what the appellant says was a decision to terminate her employment made on 5 January 2001. She occupied a position which carried a salary lower than the "prescribed salary" as defined within the Public Sector Management Act 1994 ("PSM Act"). The appellant was at all material times a Government officer. There is no dispute that the appellant's employment was subject to a probationary period and was also subject to a workplace agreement registered pursuant to the Workplace Agreements Act 1993 ("WA Act"). The Workplace Agreement made no specific provision for any claims regarding termination of employment to be referred to any particular body or to apply any particular procedure. The appellant's letter of appointment dated 25 May 2000 says, amongst other things—

> "I am pleased to advise that your appointment to the above office has been approved …
>
> A six-month probationary period will apply to this appointment and an assessment will be made at that time." (Exhibit 1)

2 The probationary period was extended beyond that six months probation period.

3 A memorandum dated 5 January 2001 addressed to the appellant from Patrick Walker, Chief Executive, on the subject of "Termination of Probation", deals with issues of work performance such as the time taken to finalise particular files, says that the appellant's "capacity to analyse issues succinctly and bring issues to closure has been the primary problem", and concludes by noting that—

> "Overall I do not believe the information you have provided gives me sufficient reason to extend your employment with the Ministry beyond today. Accordingly, I have asked Anne Driscoll to arrange the necessary administrative arrangements to conclude your probationary employment effective at 5.00pm today."
>
> (Exhibit 5)

4 The PSAB has convened to hear the parties' submissions regarding preliminary matters of jurisdiction. Set out below is an examination, paragraph by paragraph, of the terms of the Industrial Relations Act 1979 ("IR Act") relating to the PSAB's jurisdiction and an examination of the PSM Act and the WA Act as they relate to the PSAB's jurisdiction.

5 Prior to examining the parties' submissions, we feel compelled to comment on the scheme of the legislation as it affects the public sector. We have found the issues before the PSAB extremely difficult to resolve. Part, if not all, of that difficulty has arisen because of the maze created by the various pieces of legislation. The intentions of the legislature in making legislation dealing with the public sector employment, and the impact on the rights and protection of public sector personnel of being parties to workplace agreements is far from clear. Given the interconnectedness of the various pieces of legislation it is highly unlikely that a Government officer or public service officer could, on reading the legislation, have a reasonable grasp of his or her rights.

6 The jurisdiction of the PSAB is set out in s.80I of the IR Act and is subject to subsection (3) of that section and to s.52 of the PSM Act. Subsection (3) of s.80I of the IR Act says that the PSAB "does not have jurisdiction to hear and determine an appeal by a Government officer from a decision made under regulations referred to in section 94" of the PSM Act. It is not suggested that the Board's jurisdiction is ousted by any regulations referred to in s.94. Section 52 of the PSM Act deals with "Industrial arbitration or legal proceedings not available for chief executive officers". As the appellant was not a chief executive officer that section is not relevant to this matter.

7 It is clear that this is not an appeal against any decision of the employing authority in relation to an interpretation referred to in s.80I(1)(a).

8 Subsection (1)(b) of s. 80I(1) deals with appeals by Government officers who hold offices included in the Special Division of the Public Service, and this paragraph has no application to the appellant.

9 Subsection (1)(c) provides for an appeal other than under s.78(1) of the PSM Act by any Government officer who occupies a position that carries a salary not lower than the prescribed salary, from a decision to dismiss that officer. The appellant does not occupy such a position so this paragraph has no application to this matter.

10 Subsection (1)(d) provides for an appeal by a Government officer under s.78 of the PSM Act against the decision of subsection (1)(b) of that section. Subsection (1)(b) of s.78 of the PSM Act provides that subject to subsection (3) and to s.52, an employee who is a Government officer and who is aggrieved by the decision made in the exercise of power under s.79(3)(b) or (c) or (4), 82, 86(3)(b), (8)(a), 9(b)(ii) or (10)(a), 87(3)(a), 88(1)(b)(ii) or 92(1) may appeal to the Industrial Commission constituted by the PSAB, and that the PSAB has jurisdiction to hear such an appeal.

11 There is no suggestion by the appellant that this appeal is at all related to any decision made under any section other than s.78 of the PSM Act. The respondent denies that the decision to bring the employment to a conclusion is based on s.78 of the PSM Act, and says that it is simply based on the terms of the Contact of Service clause of the workplace agreement which covered the appellant's employment and under Approved Proceedure 3.

12 Section 80I(1)(e) provides for the PSAB to have jurisdiction to hear and determine an appeal, other than an appeal under s.78(1) of the PSM Act, by any Government officer who occupies a position that carries a salary lower than the prescribed salary from a decision, determination or recommendation of the employer that the Government officer be dismissed.

13 Section 80I(2) defines "prescribed salary" and it is clear that the appellant had a salary lower than the prescribed salary.

14 Section 80I(3) provides that the PSAB does not have jurisdiction to hear and determine an appeal from a decision made under regulations referred to in s.94 of the PSM Act. There is no suggestion that this subsection applies.

15 Section 79 of the PSM Act deals with employees whose performance is said to be substandard. Subsection (3) provides that an employee whose performance is substandard may;

(a) have his or her salary increment withheld, or

(b) be reduced in level of classification, or

(c) have his or her employment in the Public Sector terminated.

16 For the purposes of this matter, the jurisdiction of the PSAB appears to arise in s.80I(1)(d) or (e). The issues of jurisdiction raised by the respondent are whether—

(1) The appellant was dismissed or her appointment terminated by the effluxion of time, or was annulled.

(2) If there was a dismissal, whether the right of appeal provided by s.80I of the IR Act is ousted because of the workplace agreement between the parties.

17 The respondent argues that s.18(1) of the WA Act implies into the workplace agreement a provision that the employer shall not unfairly, harshly or oppressively dismiss the appellant, and that the right not to be so dismissed is enforceable via s.51 of the WA Act, or s.7G of the IR Act if provision is made within the workplace agreement for such enforcement under s.7G, and not otherwise. The respondent says that there is an inconsistency between the terms of s.80I of the IR Act and the agreement. This inconsistency is said to be resolved by s.46 of the WA Act. Section 46 of the WA Act says—

46. Agreement to prevail over certain written laws

(1) Subject to section 45, this Part and any workplace agreement have effect despite any relevant enactment that would otherwise apply.

(2) In subsection (1) **"relevant enactment"** means an enactment that —

(a) makes provision for or in relation to the way in which human resources are to be managed or administered in any part of the public sector;

(b) confers a right of appeal against a decision or recommendation of an official performing any function of public sector management;

(c) empowers a person or body to determine the remuneration or other terms and conditions of employment of officers or employees;

(d) requires any determination of the kind referred to in paragraph (c) to be made subject to any order, award or industrial agreement under the *Industrial Relations Act 1979,*

but does not include any provision of the *Equal Opportunity Act 1984.*"

18 Accordingly, the respondent says that the effect of the agreement has primacy.

19 The appellant argues that she was dismissed in circumstances which should attract the provisions of s.78 of the PSM Act relating to substandard performance. She also says that s.45 and s.46 of the WA Act, taken together with s.99 of the PSM Act and Regulation 24(1) of the Public Service Management (General) Regulations 1994 mean that s.78 and s.79 of the PSM Act are mandatory and prevail over the WA Act and the effect of the WA Act. Accordingly, the PSAB has jurisdiction pursuant to 80I(1)(d).

20 The respondent in reply says that the respondent's decision did not arise pursuant to s.78 or s.79 of the PSM Act but was pursuant to the terms of the contract of service provisions contained in the agreement. The appellant's

appointment was made according to an approved procedure referred to in s.64(1) of the PSM Act. An approved procedure, being Approved Procedure 3 has issued. This states—

> "Every officer appointed as a permanent officer to the public service shall normally be on probation for a period not exceeding six months."

21 The respondent says that the appellant was not permanently appointed, or if permanently appointed, was subject to probation, and permanency was not confirmed. Accordingly, the decision to terminate was not one which was made pursuant to s.78 and s.79 of the PSM Act.

22 We have considered all of the submissions and documents put to the PSAB and would like to deal with the first issue as to whether or not the appellant's employment was permanent, subject to a probationary period and required an action on the part of one of the parties to bring it to an end, such an action is termination by the employer. According to the documents before the PSAB, there is nothing to indicate that the appellant was employed for a fixed term. Rather, as Appointment Proceedure 3 contained in Approved Proceedure 3 notes—

> "Every officer appointed as permanent officer to the public service shall normally be on probation for a period not exceeding six months."

23 Prior to the expiry of the period of probation, the chief executive officer is required to do a number of things, including undertaking a performance assessment and confirming the officer's appointment; or extending the period of probation; or terminating the services of the officer. It is clear that the respondent did not confirm the appellant's permanent appointment. However, the proceedure required that he either confirm, extend the period of probation or terminate. The appointment was nonetheless a permanent appointment but was subject to a satisfactory completion of a probationary period. It required that the employer terminate the services of the officer if there was to be no extension or confirmation of the permanent appointment. The appointment was not limited to the probationary period but was permanent subject to satisfactory completion of probation. There are two types of probationary employment. The first is a permanent appointment which is subject to the satisfactory completion of a probationary period. The second is for a period of probation only, after which the employer is to consider whether or not to offer a permanent position. There is nothing before the PSAB to demonstrate that the appellant's appointment was only for a probationary period. We note the letter of 25 May 2000, being attachment A to the respondent's documents forwarded to the PSAB on 16 March 2001. The letter of appointment says, in its relevant parts—

> "I am pleased to advise that your appointment to the above office has been approved. … A six month probationary period will apply to this appointment and an assessment will be made at that time."

24 Accordingly, we would characterise the employment as being a permanent appointment subject to satisfactory completion of a six month probationary period. This required the employing authority to take some action to bring that employment to an end, such as terminating the services of the appellant, which is what occurred.

25 Accordingly, we find that the appellant has been dismissed. Her appointment did not come to an end by the effluxion of time as it might had there been a fixed term appointment.

26 As to the effect of the WA Act on the PSAB's jurisdiction, we note the terms of s.45 and s.46 of the WA Act. They provide—

> **45. Matters that cannot be the subject of a workplace agreement**
>
> (1) Any matter that is excluded from the operation of this Part by the Public Service Act (including regulations under that Act) cannot be varied or affected by agreement between the parties to a workplace agreement referred to in section 43 (1).
>
> (2) To the extent that a provision of a workplace agreement is inconsistent with subsection (1) it is of no effect.
>
> **46. Agreement to prevail over certain written laws**
>
> (1) Subject to section 45, this Part and any workplace agreement have effect despite any relevant enactment that would otherwise apply.
>
> (2) In subsection (1) **"relevant enactment"** means an enactment that —
>
> (a) makes provision for or in relation to the way in which human resources are to be managed or administered in any part of the public sector;
>
> (b) confers a right of appeal against a decision or recommendation of an official performing any function of public sector management;
>
> (c) empowers a person or body to determine the remuneration or other terms and conditions of employment of officers or employees;
>
> (d) requires any determination of the kind referred to in paragraph (c) to be made subject to any order, award or industrial agreement under the *Industrial Relations Act 1979*,
>
> but does not include any provision of the *Equal Opportunity Act 1984*."

27 We note that the heading to s.45 is "Matters that cannot be the subject of a workplace agreement". The section then goes on to provide in subsection (1) that any matter that is excluded from the operation of that Part, being Part 3 of the WA Act, which deals with its application to the public sector, cannot be varied or effected by agreement between the parties to a workplace agreement. We note that is it not suggested that the parties to the workplace agreement, the subject of this matter, have varied or affected by agreement any matter that is excluded from the operation of Part 3.

28 However, s.45 and s.46 of the WA Act taken together with s.99 of the PSM Act and Regulation 24(1) of the PSM (General) Regulations 1994 have the effect of providing that matters concerning the management or structure of the public sector dealt with by Part 5 of the PSM Act (which include matters dealing with substandard performance and appeals from any decisions relating thereto) are excluded from the operation of Part 3 of the WA Act i.e. that part of the Act dealing with the public sector.

29 Therefore, excluded from the application to the public sector of the WA Act are matters concerning the management or structure of the public sector dealt with by Part 5 of the PSM Act. Section 99 of the PSM Act and Regulation 24 of the Public Sector Management (General) Regulations 1994 set out what those matters are i.e. the prescribed matters. Those prescribed matters are matters concerning the management or structure of the public sector dealt with by Parts 5, 6 or 7 of the PSM Act. Section 78 and 79 of the PSM Act are contained within Part 5. Section 45 of the WA Act says that any matter that is excluded from the operation of that Part, i.e. the Part dealing with its application to the public sector by the PSM Act and its regulations, cannot be varied or affected by agreement between the parties to the workplace agreement. To the extent that any workplace agreements contains a provision which is inconsistent with subsection (1) of s.45 then it is of no effect. It may be that the legislatures intended that the provisions should mean that the mere existence of a workplace agreement would mean that any matter that would be excluded from the operation of that part of the WA Act, that is its application to the public sector, is not affected, but does not say so. It refers to variation or effect by agreement between the parties. It is not agreement between the parties to vary or effect any matter excluded from the operation of that Part by the PSM Act, but it is the existence of the provisions of the

WA Act and in particular s.18 and s.51 of the WA Act, which purport to vary or affect the operation to the public sector by the PSM Act. For this reason we are of the view that s.45 does not purport to exclude from the operation of Part 3 matters which are covered by the PSM Act but deals with matters which are not to be the subject of a workplace agreement.

30 Section 46, which is subject to s.45, says that that Part of the Act, i.e. its application to the public sector, and any workplace agreement have effect despite any relevant enactment that would otherwise apply. Subsection (2) defines the relevant enactment as including an enactment which confers a right of appeal against a decision or recommendation of an official performing a function of public sector management. It also refers to any enactment that requires any determination of the kind referred to in paragraph (c) to be made subject to any order, award or industrial agreement under the IR Act.

31 Accordingly, we would conclude that s.45 and s.46 of the WA Act make provision for the primacy of that Act and of the terms of the workplace agreement over any other enactment. The workplace agreement cannot purport to vary or affect any matter that is excluded from the operation of Part 3 of the WA Act by the PSM Act. Section 99 of the PSM Act is headed "Matters that cannot be the subject of industrial agreements or workplace agreements". This heading is clear and refers to what cannot be contained within a workplace agreement. There appears to be an inconsistency between the heading and the terms of s. 99 in that the terms say that—

> "There are excluded from the operation of … Part 3 of the WA Act (being that part which relates to the public sector)
>
> (c) such other matters concerning the management or structure of the Public Sector as are prescribed for the purposes of this paragraph."

32 Those matters are defined by Regulation 24 as being matters concerning the management of the public sector and are dealt with by, amongst other things, Part 5 of the PSM Act. If one were to exclude the terms of the headings contained within the headings of the PSM Act in respect of s.99 and s.45 of the WA Act, one might come up with a quite different interpretation than if one includes the headings of those sections in the consideration of their meanings. The heading of those two sections make it clear that they make reference to what cannot be the subject of a workplace agreement, rather than what might be the effect of the WA Act.

33 For this reason we are of the view that s.45 does not purport to exclude matters which are covered by the WA Act, but specifies matters which cannot be the subject of a workplace agreement. Section 99 of the PSM Act ought to be interpreted in the same manner. Accordingly, we are not satisfied that s.99 of the PSM Act taken together with Regulation 24 have the effect on s.45 of the WA Act which is suggested by the appellant. As s.46 makes clear, the workplace agreement is to prevail over certain written laws including enactments which confer a right of appeal against a decision or recommendation of an official performing any function of public sector management. If it were otherwise, that is, that parties to a workplace agreement are not to apply those conditions, then one would assume that the legislation would say so. Rather it says that those provisions cannot be affected or varied by agreement between the parties.

34 What remains is that s.18 of the WA Act provides that in every workplace agreement there is implied a provision that the employer must not unfairly, harshly or oppressively dismiss from employment any employee who is party to a workplace agreement, and that such implication is enforceable under s.51, that is via the Industrial Magistrate's court or under s.7G of the IR Act as the case may be. Section 78 of the PSM Act deals with rights of appeal and reference of certain matters. It may be that the intention of the legislature was that a Government officer bound by a workplace agreement may take a claim in relation to his or her dismissal to the Industrial Magistrate's court or under s.7G of the IR Act, to the Commission, but where substandard performance results in the withholding of an increment of remuneration or a reduction of level of classification, such a Government officer is entitled to take those matters to the Industrial Commission constituted by the PSAB in accordance with s.78. We note that there is no right of appeal from decisions of the PSAB, yet such a right exists in respect of decisions of the Industrial Magistrate and the Commission.

35 Accordingly, it would appear that if the appellant's employment was terminated, which we have found that it was, on account of substandard performance, or in accordance with Approved Proceedure 3, which is provided for in s.64 of the PSM Act, that her recourse in respect of her dismissal is dealt with in accordance with the terms of s.18 of the WA Act, and that PSAB has no jurisdiction to deal with her appeal.

36 We note too, the reasons for decision of Fielding SC, then the Public Service Arbitrator, in *Dragicevich v Department of Resources Development* (PSA 2 of 1999). Although the learned Arbitrator was dealing with a reclassification matter, the circumstances were similar in that the officer concerned was party to a workplace agreement. He says that "public servants are not simply officers of the Crown but also employees (see: *Oceanic Crest Shipping Company v Pilbara Harbour Services Proprietary Limited* (1986) 160 CLR 626). Indeed, consistent with this idea the PSM Act contains extensive provisions to identify the employer of persons including public service officers, "employed" in departments of State (cf:ss.5 and 64). Although s.80C, which is relevantly dedicated to the jurisdiction of the Public Service Arbitrator, contains only a definition of "Government officer" and no mention of an "employee", there is no reason why a person cannot be both a Government officer and employee for the purpose of the Act". The learned Arbitrator goes on to note the lack of jurisdiction to deal with that matter because no "industrial matter" arose in accordance with s.7C of the IR Act due to the parties being parties to a workplace agreement. The learned Arbitrator then examines the terms of s.45 and s.46 of the WA Act as they related to the PSM Act and in particular s.99.

37 The PSAB deals with an even more limited range of matters than the Arbitrator, and all of those matters relate to the industrial relationship between the parties. In the circumstances, it would seem strange that the legislation could provide that a Government officer or Public Service Officer a party to a workplace agreement is not an employee for the purposes of the IR Act, and therefore, cannot bring certain matters to the Public Service Arbitrator, and yet can bring a matter relating to dismissal to the PSAB when the WA Act and the IR Act provide specific methods of redress for alleged unfair dismissals by s.18(1), and s.51 of the WA Act and 7G of the IR Act, and as s.18(1) says "not otherwise".

38 We would dismiss the appeal on the basis that the PSAB lacks jurisdiction to deal with it.

MS D ROBERTSON

39 By a letter dated 25 May 2000 the appellant was offered an appointment as a Senior Compliance Officer Level 5 with the Ministry of Fair Trading (Ministry).

40 The letter stated that a six month probationary period would apply to the appointment, and that an assessment would be made at that time.

41 The appellant accepted the offer, and entered into a formal Workplace Agreement, ("WPA") signed it seems by her on 7 June 2000, and on behalf of the Ministry on 19 June 2000.

42 By letter dated 5 January 2001 the Ministry advised the appellant that her services were terminated on the grounds of work performance.

43 That termination led to this appeal, lodged by the appellant on the grounds that the decision was harsh, oppressive and unfair because—

- the assessment of her work performance was unfair in that it was based on flawed comparisons

of output with other officers whose type of work was qualitatively different from the appellant.

- that the assessment of her work was invalid in that she was not assessed against the published policy and guidelines for how the work should be undertaken, but rather against an arbitrary standard.
- That a proper assessment of the appellant's performance would lead to her performance being judged as at least satisfactory.
- Such other grounds as may be advanced at the hearing.

44 This is a decision made on the threshold issues raised by the respondent and the Commissioner in this appeal, namely that there is no jurisdiction for this Board to hear the matter.

45 After submissions from both parties, and a preliminary hearing some agreement was reached on the facts of the case.

Agreed Facts

1. The appellant was at the relevant time a Government Officer within the meaning of Section 80C of the Industrial Relations Act 1979 ("IRA").
2. The jurisdiction of the Public Service Appeal Board does not require that an industrial matter in the terms of Section 7C of the IRA arise.

Applicable Law

46 In this instance the applicable law is the common law of employment as it applies in Western Australia, and as modified by the IRA and the Workplace Agreements Act 1993 ("WPAA").

47 The common law itself is expressed by past judicial decisions of varying weight accorded by an examination of the judicial hierarchy of the decision making body. While decisions of the Privy Council before the advent of the various *Australia Acts* in the last decade or so, and of the High Court are almost compulsory in application, decisions of other courts become more persuasive than definitive.

48 In the State jurisdiction, previous decisions of the Public Service Appeal Board ("PSAB") are at best persuasive only, and each Board can make its own decision on the facts before it, and after giving its own weight to the evidence of the parties before it as to what those facts may be.

49 The decision in appeal PSAB 7 of 1997 (*Oliver v CEO Goldfields Esperance Development Commission* 77 WAIG 2819) is at the lowest end of the scale of persuasiveness, and I am not convinced, for reasons that I have set out in this decision, that it was a decision based on the correct statutory interpretation of section 46 of the WPAA.

50 I do not consider it an authoritative precedent to be followed in this case.

Employment and termination

51 By their letter dated 25 May 2000 the appellant was clearly appointed by the Ministry on an ongoing (permanent) basis, not for a period of six months.

52 The position offered was that of an officer in the State Public Service, and was, by classification and duties, one of the routine offices created and at all times subject to the provisions of the Public Sector Management Act 1994 ("PSMA") but as that Act is varied by both the WPAA and the IRA.

53 The letter also created a condition of probation that required the Ministry to make an assessment of her performance within that period. Following that assessment, the Ministry could either confirm the appointment, extend the period of probation, or terminate the employment.

54 In this case there was an assessment followed by a termination in the form of the letter from the Ministry to the appellant dated 5 January, 2001 which has previously been referred to.

55 The termination of an officer of the State Public Service is both authorised and regulated by the PSMA, and in this case particularly by Section 79(3).

56 In summary, I find that the appellant was employed as a permanent officer under the PSMA, and terminated under that same Act. She has the right to appeal that decision in the manner authorised by the PSMA for officers of her classification and duties unless that right is removed by agreement or statute.

Work Place Agreement

57 Clause 13.6 of the WPA signed by the appellant confirms the operation of the PSMA in relation to disciplinary matters, and I find that termination for any reason must be considered a disciplinary matter.

58 The dispute resolution procedures contained in the agreement are designed to resolve disputes on *the meaning and effect of this agreement, including any provision implied into this agreement by the Minimum Conditions of Employment Act 1993* (my emphasis).

59 I find that the termination of the appellant's employment is neither a dispute on the meaning or effect of this agreement, nor a dispute on an implied condition emanating from the Minimum Conditions of Employment Act.

60 Clause 62.2 of that same agreement requires the use of the agreed dispute settlement procedures *before any external action is taken* (my emphasis again) so I find that the WPA does not purport to preclude an appeal to an external body such as this Appeal Board.

61 By the manner of construction of the WPA, the appointment of an arbitrator in the terms of Clause 62.6 is limited to the resolution of the disputes that I have previously referred to, namely disputes on the meaning and effect of the agreement, and provisions implied by the Minimum Conditions of Employment Act.

62 In conclusion I find that the WPA did not prevent her from making this appeal to this Board.

Workplace Agreements Act.

63 Section 46 of the WPA gives Workplace Agreements paramountcy over the Public Service Act (since replaced by the PSMA) in those matters listed in that section, but subjects that paramountcy to the limitations set out in Section 45.

64 The sections read as follows—

"45. Matters that cannot be the subject of a workplace agreement

(1) Any matter that is excluded from the operation of this Part by the Public Service Act (including regulations under that Act) cannot be varied or affected by agreement between the parties to a workplace agreement referred to in section 43 (1).

(2) To the extent that a provision of a workplace agreement is inconsistent with subsection (1) it is of no effect.

46. Agreement to prevail over certain written laws

(1) Subject to section 45, this Part and any workplace agreement have effect despite any relevant enactment that would otherwise apply.

(2) In subsection (1) "relevant enactment" means an enactment that —

(a) makes provision for or in relation to the way in which human resources are to be managed or administered in any part of the public sector;

(b) confers a right of appeal against a decision or recommendation of an official performing any function of public sector management;

(c) empowers a person or body to determine the remuneration or other terms and conditions of employment of officers or employees;

(d) requires any determination of the kind referred to in paragraph (c) to be made subject to any order, award or industrial agreement under the *Industrial Relations Act 1979,*

but does not include any provision of the *Equal Opportunity Act 1984*."

65 Section 99 of the PSMA sets out the limitations to the matters listed in section 46 of the WPA, and that section reads—

"99. Matters that cannot be the subject of industrial agreements or workplace agreements

There are excluded from the operation of sections 41, 41A and 43 of the *Industrial Relations Act 1979* and of Part 3 of the *Workplace Agreements Act 1993* —

(a) any matters dealt with by a public sector standard or code of ethics, except—
(i) rates of remuneration;
(ii) leave;
(iii) hours of duty; and
(iv) such other matters as are prescribed for the purposes of this subparagraph;

(b) any matters dealt with by a provision of this Act relating to —
(i) employment tenure in the Public Service; or
(ii) approved classification systems or procedures in the Public Sector;

and

(c) such other matters concerning the management or structure of the Public Sector as are prescribed for the purposes of this paragraph."

66 The regulation that expands on section 99(c) reads—

"Prescribed matters for purposes of section 99(c) of Act

24. (1) Matters concerning the management or structure of the Public Sector that are dealt with by— (a)Parts 5, 6 or 7 of the Act; or

(b) the Occupational Health, Safety and Welfare Act 1984, are prescribed matters for the purposes of section 99 (c) of the Act.

(2) For the purpose of the management of the Public Sector, compensatory loadings or allowances payable for loss or absence of indefinite tenure of offices, posts or other employment in the Public Sector (other than offices referred to in section 6 (1) (d) and (e) of the Salaries and Allowances Act 1975) are prescribed matters for the purposes of section 99 (c) of the Act."

67 In interpreting the effect of those exclusions I do not reach the conclusions reached by Commissioner Scott and Mr B Appleby, which have been provided to me in draft form.

68 I do not believe that the appellant's rights to appeal the decision to terminate have been removed by the combined operation of both statutes.

69 The matters listed in both Acts are matters of general management, applicable to the provision of human resources as that term is applied to the collective allocation and management of a workforce.

70 My view is supported as the general terms of the sections are given direction by the more particular terms such as the determination of remuneration, conditions of employment, change of tenure, loadings and allowances and similar matters.

71 One of the rules rule of statutory interpretation limits the identification of general matters in a statute to the same nature of the specific matters listed with the general matters.

72 The nature of the Public Sector Management decisions that may not be appealed (WPA section 46(b)), on my interpretation, then become those decisions applicable to the collective workforce.

73 The management decisions referred to in section 46(b) are then limited to those collective decisions, leaving decisions on the termination of the employment of individuals appealable.

74 The WPAA does not operate to oust the appellant from the jurisdiction of the PSAB.

75 My interpretation makes sense as management decisions affecting the collective workforce should not be appealable by an individual under a WPA, but justice and equity demand that every individual be granted her day in court to appeal a decision made in relation to her as an individual, that is harsh, oppressive and or unfair.

76 I consider that this Board does have jurisdiction to hear on its merits the appeal made by the appellant.

77 I am also of the opinion that the delay caused by the raising of jurisdictional issues by the respondent has in itself created an injustice, if not more injustice, for the appellant.

78 I believe that in future cases, issues of jurisdiction should be argued with the hearing on merit. This issue is so serious that it strikes at the heart of the objects of the IRA (section 6) and of the manner in which the Commission's power is to be exercised (sections 26 and 27). I propose to pursue this issue further.

79 The Supreme Court of Western Australia Court of Appeal is of the same view as it has expressed in the case of *Swan Television and Radio Broadcasters Ltd. Trading as STW Channel Nine Perth v Satie* (1999) WASCA 79 (23 June 1999). In this instance this precedent has the force of law in Western Australia.

2001 WAIRC 04040

AGAINST THE DECISION TO TERMINATE MADE ON 5/1/2001

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	MARGARET SUSAN THOMAS, APPELLANT
	v.
	CHIEF EXECUTIVE OFFICER, MINISTRY OF FAIR TRADING, RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER P E SCOTT—CHAIRPERSON
	MS D ROBERTSON—BOARD MEMBER
	MR B APPLEBY—board member
DELIVERED	MONDAY, 29 OCTOBER 2001
FILE NO/S	PSAB 1 OF 2001
CITATION NO.	2001 WAIRC 04040

Result	Application dismissed for want of jurisdiction
Representation	
Appellant	Mr B Cusack
Respondent	Ms L Coleman

Order.

HAVING heard Mr B Cusack on behalf of the Appellant and Ms L Coleman on behalf of the Respondent, the Public Service Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be, and is hereby, dismissed for want of jurisdiction.

(Sgd.) P.E. SCOTT,
[L.S.] Commissioner,
on behalf of the Public Service Appeal Board.