Western Australian

Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 1 WEDNESDAY, 23 JANUARY, 2002 Vol. 82—Part 1

THE mode of citation of this volume of the Western Australian Industrial Gazette will be as follows:—
82 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

LONG SERVICE LEAVE—Standard Provisions—

(As Consolidated at a Hearing before the Commission in Court Session on 15 December 1977)*

1.—Right to Leave.

A worker shall, as herein provided, be entitled to leave with pay in respect of long service.

2.—Long Service.

(1) The long service which shall entitle a worker to such leave shall, subject as herein provided, be continuous service with one and the same employer.

(2) Such service shall include service prior to the 1st day of April 1958, if it continued until such time but only to the extent of the last 20 completed years of continuous service.

(3) (a) Where a business has, whether before or after the coming into operation hereof, been transmitted from an employer (herein called "the transmittor") to another employer (herein called "the transmittee") and a worker who at the time of such transmission was an employee of the transmittor in that business becomes an employee of the transmittee the period of the continuous service which the worker has had with the transmittor, (including any such service with any prior transmittor shall be deemed to be service of the worker with the transmittee.

(b) In this subclause "transmission" includes transfer, conveyance, assignment or succession whether voluntary or by agreement or by operation of law and "transmitted" has a corresponding meaning.

(4) Where, over a continuous period, a worker has been employed by two or more companies each of which is a related company within the meaning of section 6 of the Companies Act 1961 the period of the continuous service which the worker has had with each of those companies shall be deemed to be service of the worker with the company by whom he is last employed.

Section 6 reads—

(1) For the purposes of this Act, a corporation shall, subject to the provisions of subsection (3) of this section, be deemed to be a subsidiary of another corporation, if,

(a) that other corporation—

(i) controls the composition of the board of directors of the first mentioned corporation;

(ii) controls more than half of the voting power in the first mentioned corporation; or

(iii) holds more than half of the issued share capital of the first mentioned corporation excluding any part thereof which carries no right to participate beyond a specified amount in a distribution of either profits or capital; or

(b) the first mentioned corporation is a subsidiary of any corporation which is that other corporation's subsidiary.

(2) For the purpose of subsection (1) of this section, the composition of a corporation's board of directors shall be deemed to be controlled by another corporation if that other corporation by the exercise of some power exercisable by it without the consent or concurrence of any other person can appoint or remove all or a majority of the directors; and for the purposes of this provision that other corporation shall be deemed to have power to make such an appointment if—

(a) a person cannot be appointed as a director without the exercise in his favour by that other corporation of such power; or

(b) a person's appointment as a director follows necessarily from his being a director or other officer of that other corporation.

(3) In determining whether one corporation is subsidiary of another corporation—

(a) any shares held or power exercisable by that other corporation in a fiduciary capacity shall be treated as not held or exercisable by it;

(b) subject to paragraphs (c) and (d) of this subsection, any shares held or power exercisable—

(i) by any person as a nominee for that other corporation (except where that other corporation is concerned only in a fiduciary capacity); or

(ii) by, or by a nominee for, a subsidiary of that other corporation, not being a subsidiary which is concerned only in a fiduciary capacity,

shall be treated as held or exercisable by that other corporation;

(c) any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first mentioned corporation or of a trust deed for securing any issue of such debentures shall be disregarded; and

(d) any shares held or power exercisable by, or by a nominee for, that other corporation or its subsidiary (not being held or exercisable as mentioned in paragraph (c) of this subsection) shall be treated as not held or exercisable by that other corporation if the ordinary business of that other corporation or its subsidiary, as the case may be, includes the lending of money and the shares are held or power is so exercisable by way of security only for the purposes of a transaction entered into in the ordinary course of that business.

(4) A reference in this Act to the holding company of a company or other corporation shall be read as a reference to a corporation of which that last mentioned company or corporation is a subsidiary.

(5) Where a corporation—

(a) is the holding company of another corporation;

(b) is a subsidiary of another corporation;

(c) is a subsidiary of the holding company of another corporation,

that first mentioned corporation and that other corporation shall for the purposes of this Act be deemed to be related to each other.

(5) Such service shall include—

(a) any period of absence from duty on any annual leave or long service leave;

(b) any period of absence from duty necessitated by sickness of or injury to the worker but only to the extent of 15 working days in any year of his employment;

(c) any period following any termination of the employment by the employer if such termination has been made merely with the intention of avoiding obligations hereunder in respect of long service leave or obligations under any award in respect of annual leave;

(d) any period during which the service of the worker was or is interrupted by service—

(i) as a member of the Naval, Military or Air Forces of the Commonwealth of Australia other than as a member of the British Commonwealth Occupation Forces in Japan and other than as a member of the Permanent Forces of the Commonwealth of Australia except in the circumstances referred to in section 31 (2) of the Defence Act 1903-1956, and except in Korea or Malaya after 26 June 1950;

(ii) as a member of the Civil Construction Corps established under the National Security Act 1939-1946;

(iii) in any of the Armed Forces under the National Service Act 1951 (as amended).

Provided that the worker as soon as reasonably practicable on the completion of any such service resumed or resumes employment with the employer by whom he was employed immediately before the commencement of such service.

(6) Service shall be deemed to be continuous notwithstanding—

(a) the transmission of a business as referred to in paragraph (3) of this subclause;

(b) the employment with related companies as referred to in paragraph (4) of this subclause;

(c) any interruption of a class referred to in paragraph (5) of this subclause;

(d) any absence from duty authorised by the employer;

(e) any standing down of a worker in accordance with the provisions of an award, industrial agreement, order or determination under either Commonwealth or State law;

(f) any absence from duty arising directly or indirectly from an industrial dispute if the worker returns to work in accordance with the terms of settlement of the dispute;

(g) any termination of the employment by the employer on any ground other than slackness of trade if the worker be re-employed by the same employer within a period not exceeding two months from the date of such termination;

(h) any termination of the employment by the employer on the ground of slackness of trade if the worker is re-employed by the same employer within a period not exceeding six months from the date of such termination;

(i) any reasonable absence of the worker on legitimate union business in respect of which he has requested and been refused leave;

(j) any absence from duty after the coming into operation of this clause by reason of any cause not specified in this clause unless the employer, during the absence or within 14 days of the termination of the absence notifies the worker in writing that such absence will be regarded as having broken the continuity of service, which notice may be given by delivery to the worker personally or by posting it by registered mail to his last recorded address, in which case it shall be deemed to have reached him in due course of post.

Provided that the period of absence from duty or the period of any interruption referred to in placita (d) to (j) inclusive of this paragraph shall not (except as set out in paragraph (5) of this subclause) count as service.

3.—Period of Leave.

(1) The leave to which a worker shall be entitled or deemed to be entitled shall be as provided in this subclause.

(2) Subject to the provisions of paragraphs (5) and (6) of this subclause—

Where a worker has completed at least 15 years' service the amount of leave shall be—

(a) in respect of 15 years' service so completed—13 weeks' leave;

(b) in respect of each 10 years' service completed after such 15 years—eight and two-thirds weeks' leave;

(c) on the termination of the worker's employment—

(i) by his death;

(ii) in any circumstances otherwise than by his employer for serious misconduct;

in respect of the number of years' service with the employer completed since he last became entitled to an amount of long service leave, a proportionate amount on the basis of 13 weeks for 15 years' service.

(3) Subject to the provisions of paragraph (6) of this subclause, where a worker has completed at least 10 years' service but less than 15 years' service since its commencement and his employment is terminated—

(i) by his death; or

(ii) in any circumstances, otherwise than by his employer for serious misconduct;

the amount of leave shall be such proportion of 13 weeks' leave as the number of completed years of such service bears to 15 years.

(4) In the cases to which paragraphs (2) (c) and (3) of this subclause apply the worker shall be deemed to have been entitled to and to have commenced leave immediately prior to such termination.

(5) A worker whose service with an employer commenced before 1 October 1964, and whose service would entitle him to long service leave under this clause shall be entitled to leave calculated on the following basis:—

(a) For each completed year of service commencing before 1 October 1964, an amount of leave calculated on the basis of 13 weeks' leave for 20 years' service and

(b) for each completed year of service commencing on or after 1 October 1964, an amount of leave calculated on the basis of 13 weeks' leave for 15 years' service.

Provided that such worker shall not be entitled to long service leave until his completed years of service entitle him to the amount of long service leave prescribed in either paragraph (2) (a) or paragraph (2) (b) of this subclause as the case may be.

(6) A worker to whom paragraphs (2) (c) and (3) of this subclause apply whose service with an employer commenced before 1 October 1964, shall be entitled to an amount of long service leave calculated on the following basis—

(a) For each completed year of service commencing before 1 October 1964, an amount of leave calculated on the basis of 13 weeks' leave for 20 years' service; and

(b) for each completed year of service commencing on or after 1 October 1964, an amount of leave calculated on the basis of 13 weeks' leave for 15 years' service.

4.—Payment for Period of Leave.

(1) A worker shall, subject to paragraph (3) of this subclause, be entitled to be paid or each week of leave to which he has become entitled or is deemed to have become entitled the rate of pay applicable to him at the date he commences such leave.

(2) Such rate of pay shall be the rate applicable to him for the standard weekly hours which are prescribed by this award (or agreement), but in the case of casuals and part-time workers shall be the rate for the number of hours usually worked up to but not exceeding the prescribed standard.

(3) Where by agreement between the employer and the worker the commencement of the leave to which the worker is entitled or any portion thereof is postponed to meet the convenience of the worker, the rate of payment for such leave shall be at the rate of pay applicable to him at the date of accrual, or, if so agreed, at the rate of pay applicable at the date he commences such leave.

(4) The rate of pay—

(a) shall include any deductions from wages for board and/or lodging or the like which is not provided and taken during the period of leave;

(b) shall not include shift premiums, overtime, penalty rates, special rates, disability allowances, fares and travelling allowances or the like.

(5) In the case of workers employed on piece or bonus work or any other system of payment by results the rate of pay shall be calculated by averaging the workers' rate of pay for each week over the previous three monthly period.

5.—Taking Leave.

(1) In a case to which placita (a) and (b) of paragraph (2) of subclause (3) apply:—

(a) Leave shall be granted and taken as soon as reasonably practicable after the right thereto accrues due or at such time or times as may be agreed between the employer and the worker or in the absence of such agreement at such time or times as may be determined by the Special Board of Reference having regard to the needs of the employer's establishment and the worker's circumstances.

(b) Except where the time for taking leave is agreed to by the employer and the worker or determined by the Special Board of Reference the employer shall give to a worker at least one month's notice of the date from which his leave is to be taken.

(c) Leave may be granted and taken in one continuous period or if the employer and the worker so agree in not more than three separate periods in respect of the first 13 weeks' entitlement and in not more than two separate periods in respect of any subsequent period of entitlement.

(d) Any leave shall be inclusive of any public holidays specified in this award (or agreement) occurring during the period when the leave is taken but shall not be inclusive of any annual leave.

(e) Payment shall be made in one of the following ways:—

(i) In full before the worker goes on leave;

(ii) at the same time as his wages would have been paid to him if the worker had remained at work, in which case payment shall, if the worker in writing so requires, be made by cheque posted to an address specified by the worker; or

(iii) in any other way agreed between the employer and the worker.

(f) No worker shall, during any period when he is on leave, engage in any employment for hire or reward in substitution for the employment from which he is on leave, and if a worker breaches this provision he shall thereupon forfeit his right to leave hereunder in respect of the unexpired period of leave upon which he has entered, and the employer shall be entitled to withhold any further payment in respect of the period and to reclaim any payments already made on account of such period of leave.

(2) In the case to which paragraph (2)(c) or paragraph (3) of subclause (3) applies and in any case in which the employment of the worker who has become entitled to leave hereunder is terminated before such leave is taken or fully taken the employer shall, upon termination of his employment otherwise than by death pay to the worker, and upon termination of employment by death pay to the personal representative of the worker upon request by the personal representative, a sum equivalent to the amount which would have been payable in respect of the period of leave to which he is entitled to deemed to have been entitled and which would have been taken but for such termination. Such payment shall be deemed to have satisfied the obligation of the employer in respect of leave hereunder.

6.—Granting Leave in Advance and Benefits to be Brought into Account.

(1) Any employer may by agreement with a worker allow leave to such a worker before the right thereto has accrued due, but where leave is taken in such case the worker shall not become entitled to any further leave hereunder in respect of any period until after the expiration of the period in respect of which such leave had been taken before it accrued due.

(2) Where leave has been granted to a worker pursuant to the preceding paragraph before the right thereto has accrued due, and the employment subsequently is terminated, the employer may deduct from whatever remuneration is payable upon the termination of the employment such amount as represents payment for any period for which the worker has been granted long service leave to which he was not at the date of termination of his employment or prior thereto entitled.

(3) Any leave in the nature of long service leave or payment in lieu thereof under a State Law or a long service leave scheme not under the provisions hereof granted to a worker by his employer in respect of any period of service with the employer shall be taken into account whether the same is granted before or after the coming into operation hereof and shall be deemed to have been taken and granted hereunder in the case of leave with pay to the extent of the period of such leave and in the case of payment in lieu thereof to the extent of a period of leave with pay equivalent thereof of the entitlement of the worker hereunder.

7.—Records to be Kept.

(1) Each employer shall during the employment and for a period of 12 months thereafter, or in the case of termination by death of the worker for a period of three years thereafter, keep a record from which can be readily ascertained the name of each worker, and his occupation, the date of the commencement of his employment and his entitlement to long service leave and any leave which may have been granted to him or in respect of which payment may have been made hereunder.

(2) Such record shall be open for inspection in the manner and circumstances prescribed by this award (or agreement) with respect to the time and wages record.

8.—Special Board of Reference.

(1) There shall be constituted a Special Board of Reference for the purpose hereof to which all disputes and matters arising hereunder shall be referred and the Board shall determine all such disputes and matters.

(2) There shall be assigned to such Board the functions of—

(a) the settlement of disputes of any matters arising hereunder;

(b) the determination of such matters as are specifically assigned to it hereunder.

(3) The Board of Reference shall consist of one representative or substitute therefor nominated from time to time by the Confederation of Western Australian Industry (Incorporated) and one representative or substitute nominated from time to time by the Trades and Labor Council of Western Australia together with a chairman to be mutually agreed upon by the organisations named in this paragraph.

9.—State Law.

(1) The provisions of any State Law to the extent to which they have before the coming into operation hereof conferred an accrued right on a worker to be granted a period of long service leave in respect of a completed period of 15 or more years' service or employment or an accrued right on a worker or his personal representative to payment in respect of long service leave shall not be affected hereby and shall not be deemed to be inconsistent with the provisions hereof.

(2) The entitlement of any such worker to leave in respect of a period of service with the employer completed after the period in respect of which the long service leave referred to in paragraph (1) of this subclause accrued due shall be in accordance herewith.

(3) Subject to paragraphs (1) and (2) of this subclause the entitlement to leave hereunder shall be in substitution for and satisfaction of any long service leave to which the worker may be entitled in respect of employment of the worker by the employer.

(4) An employer who under any State Law with regard to long service leave is exempted from the provisions of that law as at 1 April 1958, shall in respect of the workers covered by such exemptions be exempt from the provisions hereof.

10.—Exemptions.

The Special Board of Reference may subject to such conditions as it thinks fit exempt any employer from the provisions hereof in respect of its employees where there is an existing or prospective long service scheme which in its opinion, is, viewed as a whole, more favourable for the whole of the employees of that employer than the provision hereof.

*Editor's Note.

The Judgment and General Order as prescribed by section 94A was published in 58 WAIG Part 1 Subpart 2 at Page 116.

There was no Schedule of Exemptions.

INDUSTRIAL APPEAL COURT—Appeal against decision of Full Bench—

2001 WASCA 374

JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA
CITATION	:	COUSINS –*V*.- YMCA OF PERTH [2001] WASCA 374
CORAM	:	KENNEDY J (PRESIDING JUDGE) SCOTT J PARKER J
HEARD	:	1 DECEMBER 2000
DELIVERED	:	28 NOVEMBER 2001
FILE NO/S.	:	IAC 6 OF 2000
BETWEEN	:	MICHAEL COUSINS, APPELLANT AND YMCA OF PERTH, Respondent

Catchwords—

Industrial Relations (WA) - Unfair dismissal -Application for extension of time to appeal against refusal of Commissioner to reinstate appellant in employment - Decision of Commissioner depending upon assessment of credibility of witnesses - Refusal of Full Bench to extend time - Whether discretion of Full Bench miscarried

Legislation—

Industrial Relations Act 1979 (WA), s 23A, s 83

Minimum Conditions of Employment Act 1993 (WA), s 5(1), s 7(c)

Workplace Relations Act 1996 (Cth), s 177A, s 179

Result—

Appeal dismissed

Category: D

Representation—

Counsel—

Appellant	:	Mr M Richardson (as agent)
Respondent	:	Mr A J Randles

Solicitors—

Appellant	:	Mr M Richardson (as agent)
Respondent	:	Mr A J Randles

Case(s) referred to in judgment(s)—

Abalos v Australian Postal Commission (1990) 171 CLR 167

Alexander v Australian National Airlines Commission [1988] 1 QR 331

Attorney-General v Simpson [1901] 2 Ch 671

City of Geraldton v Cooling [2000] WASCA 364

Colson v Shire of West Pilbara (1986) 66 WAIG 1256

Devries v Australian National Railways Commission (1993) 177 CLR 472

FDR Pty Ltd v Gilmore (1996) 76 WAIG 4434

Gallo v Dawson (1990) 64 ALJR 458

Hill v Rushton Building Contractors Pty Ltd (1987) 67 WAIG 923

Jackamarra v Krakouer (1998) 195 CLR 516

Josephson v Walker (1914) 18 CLR 691

Palata Investments Ltd v Burt & Sinfield Ltd [1985] 1 WLR 942

R v Secretary for the Home Department; Ex parte Mehta [1975] 1 WLR 1087

Ryan v Hazelby & Lester t/a Carnarvon Waste Disposals (1993) 73 WAIG 1752

Case(s) also cited—

A/asian Meat Industry Employees' Union v Sunland Enterprises Pty Ltd (1988) 25 IR 137

Amalgamated Collieries of WA Ltd v True (1938) 59 CLR 417

Association of Professional Engineers, Scientists and Managers Australia v Skilled Engineering Pty Ltd (1994) 54 IR 236

Australasian Meat Industry Employees' Union, Industrial Union of Workers, West Australian Branch v Stewart Butchering and Co Pty Ltd (1993) 73 WAIG 1196

Australia Meat Holdings Pty Ltd v McLauchlan (1998) 84 IR 1

Australian Municipal, Transport, Energy, Water, Ports, Community and Information Services Union v Aboriginal Child Care Agency [1993] 360 IR CommA

Australian Workers' Union, Western Australian Branch, Industrial Union of Workers v Cockburn Cement Ltd (1999) 79 WAIG 1227

Bowling v General Motors-Holden's Pty Ltd (1980) 50 FLR 79

Bradford v Prentice Builders Pty Ltd (1986) 15 IR 342

Brailey v Mendex Pty Ltd (1992) 73 WAIG 26

Burazin v Blacktown City Guardian Pty Ltd, unreported; Industrial Relations Court of Aust (Full Court); No 606/96; 13 December 1996

Chapman v Rossiter (1998) 78 WAIG 4900

Coal and Allied Operations Pty Ltd v Construction, Forestry, Mining and Energy Union (1999) 94 IR 37

Coal and Allied Operations Pty Ltd v The Full Bench of the Australian Industrial Relations Commission [2000] HCA 47

Confederation of Western Australian Industry (Inc) v Western Australian Timber Industry Industrial Union of Workers (1990) 71 WAIG 19

Construction, Forestry, Mining and Energy Union v Giudice (1998) 159 ALR 1

Cooling v City of Geraldton (2000) 80 WAIG 1622

Corlett Bros Pty Ltd v Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch (1975) 55 WAIG 644

Crewe and Sons Pty Ltd v Amalgamated Metal Workers and Shipwrights' Union of Western Australia (1989) 69 WAIG 2623

Esther Investments Pty Ltd v Markalinga Pty Ltd (1989) 2 WAR 196

FDR Pty Ltd v Gilmore (1998) 78 WAIG 1099

Gatti v Shoosmith [1939] Ch 841

Gilmore v Cecil Bros (1996) 76 WAIG 4434

Griffiths v Malika Holdings Pty Ltd (1997) 140 FLR 353

House v The King (1936) 55 CLR 499

Jaggard v Tranby Pty Ltd t/a The Court Hotel (1996) 76 WAIG 4720

Liddell v Lembke t/a Cheryls Unisex Salon (1994) 56 IR 447

Mallinson v Scottish Australian Investment Co Ltd (1920) 28 CLR 66

Max Winkless Pty Ltd v Bell (1986) 66 WAIG 847

McVinish v Flight West Airlines [1999] AIRC, C No 37333/1997

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259

Minister for Police v Western Australian Police Union of Workers (1995) 75 WAIG 1504

Monarch Petroleum NL v Citco Australia Petroleum Ltd, unreported; SCt of WA (Master Seaman); Library No 6015; 16 August 1985

Newcrest Mining Ltd v Australian Workers' Union, Western Australian Branch, Industrial Union of Workers (1992) 73 WAIG 26

Nicolson v Heaven & Earth Gallery Pty Ltd (1994) 37 IR 50

Norbis v Norbis (1986) 161 CLR 513

Perkins v Grace Worldwide (Aust) Pty Ltd (1997) 72 IR 186

PMT Partners Pty Ltd (In Liq) v Australian National Parks & Wildlife Service (1995) 69 ALJR 829

Portius Pty Ltd v Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch (1990) 71 WAIG 19

RGC Mineral Sands Ltd v Construction, Mining, Energy, Timberyards, Sawmills, Woodworkers' Union of Australia WA Branch [2000] WASCA 162

Robe River Iron Associates v Association of Draughting, Supervisory and Technical Employees of Western Australia (1987) 68 WAIG 11

Roc Mineral Sands Ltd v Construction Mining Energy Timberyards Sawmills Woodworkers' Union of Australia, WA Branch (2000) 80 WAIG 2437

Rosemist Holdings Pty Ltd v Khoury (1999) 79 WAIG 645

Tip Top Bakeries v Transport Workers' Union (1994) 74 WAIG 1189

Tranchita v Wavemaster International Pty Ltd (1999) 79 WAIG 1886

Van Stillevoldt (CM) BV v El Carriers Inc [1983] 1 WLR 207

Yew v ACI Glass Packaging Pty Ltd (1996) 71 IR 201

1 **KENNEDY J (Presiding Judge)**: Pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA), by an application dated 7 April 1999, the appellant referred to the Industrial Relations Commission a claim that he had been unfairly dismissed from his employment by the respondent. In his application, he gave the nature of the respondent's business as "Managing sport & rec centres" and the nature of his own work as "Duty manager of Morley Sport & Rec Centre & Alma Venville Rec Centre". He described his main duties as "Duty manager - Responsible for the operations of the centres after hours (Monday - Friday 4.30 pm onwards & weekends)" and "Administration - Help run the centres during normal hours". He gave his type of employment as "casual". He replied in the negative to the question of whether his employment was bound by any award or registered agreement. The appellant sought reinstatement in addition to "(1) Back pay from termination at $290.81 a week; (2) promised pay increase which was to come into place within a couple of weeks of employment. I am seeking this from time of engagement." It is noted that the wage of $290.81 per week was the average of the wages paid to the appellant each week over 32 weeks, which appears to have been the period of his employment. The appellant's claim for the promised pay increase was later abandoned.

2 The appellant's application came on for hearing before Commissioner C B Parks. The hearing was conducted over six days, during which, as the Commissioner indicated, "numerous witnesses were called", and "the total evidence before the Commission both oral and documentary was extensive". An unusual feature of the hearing was that Mr M Richardson, who appeared as agent for the appellant, called the great majority of the witnesses who would normally have been expected to have been called by the respondent, being employees of the respondent whose evidence was generally unfavourable to the appellant. Mr Richardson subsequently sought to impeach their evidence.

3 The learned Commissioner noted that the respondent is a Christian association which conducts a number of operations in the metropolitan area. Two establishments, the Alma Venville Centre, located in Maylands, and the Morley Sports and Recreational Centre, located in Morley, were the places at which the appellant worked for the respondent, principally as a "Duty Manager", but he also on occasions performed duties of a lesser nature. He was designated a "casual" employee. The events that led to the termination of the employment relationship, the respondent claimed, stemmed from a restructuring of the respondent's business so far as it related to each of the centres mentioned. The appellant challenged the respondent's claim that there was any such restructuring as had been alleged.

4 The Commissioner found that Mr Peter Bauchop, the Recreations Operations Manager for the respondent, Ms Lana Leslie, the Health Club Manager at the Alma Venville Centre and the appellant were the persons whose evidence was material in determining whether a dismissal had occurred. Mr Bauchop and Ms Leslie were amongst those called to give evidence on behalf of the appellant.

5 Mr Bauchop gave evidence in relation to the appellant's contract of employment, the circumstances in which the parties parted company, the organisation of the restructuring, and details of the staff employed by the respondent. According to Mr Bauchop, once the Duty Managers, including the appellant, had been informed of the restructuring, he had notified other sporting organisations of the proposed new positions. He had also held a meeting with the Duty Managers, during which he explained to them the details of the new positions and the impact they would have on the respondent's operations. He stated in his evidence that "everybody was clearly on notice that, if they wanted to protect their interests, they needed to apply for one of the two newly created 'permanent' positions with the respondent". The appellant elected not to lodge an application for either of the two available positions.

6 Ms Leslie said she was present at the meeting when the respondent's employment relationship with the appellant was terminated. The Commissioner indicated that her evidence provided him with an overview of the restructuring which had taken place within the respondent's operations, and in particular in the Centre that she managed. Ms Leslie told the Commissioner that, at the conclusion of the meeting, Mr Cousins was requested to return his keys and uniform, and she and Mr Bauchop accompanied the appellant to the outer doors of the premises to make sure he departed.

7 The Commissioner accepted that, on the day the employment relationship terminated, Ms Leslie and Mr Bauchop had told the appellant that he was not being dismissed, but rather that he was not being placed in the roster for future work. The Commissioner found that the appellant, upon hearing this explanation, drew the correct conclusion, namely, that his services were no longer required. He waited 20 days before lodging his application with the Industrial Relations Commission, during which time he was not afforded any further work.

8 One of the major issues which arose was whether the appellant was a casual employee. Notwithstanding his own description of the nature of his employment in his application, the learned Commissioner found that he was not a casual employee, but that he was an employee with an ongoing obligation to the respondent. He went on to hold that the appellant's dismissal had been unfair, essentially, it would seem, because no performance issues had been raised with the appellant at the time of his dismissal.

9 The learned Commissioner then turned to the question of reinstatement. He said—

> "The goal of the respondent was to restructure its operations in such a way that there was a devolution of duties and responsibilities from office administration staff to two new permanent positions, that of a weekday Duty Manager, and that of a weekend Duty Manager, each of whom would be responsible for the organising and supervision of the employees designated casual Duty Managers. The intention of the respondent was that the hours to be worked by the future appointees to the new positions would be such that the hours of work usually covered by the casual Duty Managers was likely to reduce. However, the respondent was prepared to fix the hours of work for each of the new positions upon a consideration of the applicants viewed as potential appointees and their availability to undertake the hours of work. Hence, until such time as the respondent had decided whom it was they would appoint in each of the new permanent positions and fixed the hours and shifts those persons were to work, and the selected persons accepted the positions according to how they were finally tailored, and the commencement dates for the new positions were finalised, there was no reason to seek a variation of, or the termination of, the contract of employment with the [appellant]. What effectively was conveyed to the Duty Managers on behalf of the respondent was that there was to be a 'spill' of their so-called casual positions and their future employment depended upon what outcome there was in relation to the proposed new positions."

10 The Commissioner found that the appellant had "actively agitated employment related complaints, and in relation to the proposed restructure", and he was satisfied that this had alienated Mr Bauchop and was of some influence in relation to the decision that was made. He went on to point out that it was then almost 12 months since the appellant had been dismissed, and it was his view that the appellant's reinstatement in employment was impracticable, both by reason of the restructuring which had been implemented by the respondent, and by reason of his not being satisfied that a reasonable working relationship was able to be established.

11 The Commissioner then considered a claim by the appellant, which was not to be found in his application, that by reason of his eligibility to be a member of the Australian Municipal Administrative Clerical and Services Union, his employment relationship with the respondent was governed by the Social and Community Services Industry - Community Services Workers - Western Australia Award 1996, which is a Federal Award made by the Australian Industrial Relations Commission under the *Workplace Relations Act 1996 (Cth)*. To this was added a claim, in the alternative, under the *Minimum Conditions of Employment Act 1993 (WA)*. These claims had all the hallmarks of afterthoughts.

12 For the appellant, it was contended that s 23A(1)(a) of the *Industrial Relations Act* gives the Commission the power in a claim of harsh, oppressive or unfair dismissal to order the payment to the claimant of any amount to which the claimant is entitled. The Commissioner said, however, that there was a paucity of argument for the appellant with regard to the application of the Federal Award, and he added that no "valid attempt" had been made to prove the existence of the appellant's eligibility to be a member of the union, nor any attempt to prove his classification and salary level within the Federal Award which, he claimed, governed his employment. The Commissioner, in the circumstances, held that he was unable to determine whether the Federal Award applied to the employment relationship; but, in any event, to the extent that the claim of the appellant sought the recovery of entitlements allegedly due by the operation of the Federal Award, s 179 of the *Workplace Relations Act* required that the applicant sue in the Federal Court or in a court of competent jurisdiction. The expression "court of competent jurisdiction" is defined in s 177A of that Act as a District, County or Local Court or a magistrate's court. The Western Australian Industrial Commission does not come within the definition of a court of competent jurisdiction.

13 The Commissioner continued—

> "Were it that the Commission found that the Federal Award had applied to the former employment relationship, and the weekly wage to which the [appellant] was entitled were also established, the coverage of the Federal Award would have ceased upon the dismissal and no entitlement under the Federal Award continued to accrue. Hence the payment of wages which the [appellant] claims beyond the dismissal is not a plea for the recovery of an entitlement but one for compensation on account of a loss, and the assessment of that loss is to be made upon what was the wage of the [appellant] whether that be pursuant to the contract of employment, an award of this Commission or the Federal Award.
>
> However, given that the [appellant] has failed to establish that he had been bound by the Federal Award an assessment of compensation cannot be made with regard to the Federal Award."

14 The learned Commissioner then went on to consider the alternative claim. He said—

> "In the alternative the [appellant] claims to have entitlements which are his due by reason of the *Minimum Conditions of Employment Act 1993* (*the MCE Act*) and such are entitlements that the Commission ought award him pursuant to s 23A of the *[Industrial Arbitration Act]*. The claims made under this limb are each for an enforcement of the *MCE Act*, which enforcement, if it be in relation to a provision of the *MCE Act* that is implied in a contract of service as appears to be the basis of the claims, is pursuant to s 7 of the *MCE Act* required to be prosecuted under s 83 of the Act ie before an industrial magistrate's court. Hence I find that such claims fall outside the jurisdiction of the Commission (see *Chapman v Rossiter* (78 WAIG 4900))."

15 The Commissioner next proceeded to consider the appellant's claim for compensation, having already held that the reinstatement of the appellant was impracticable, which is a precondition to an award of compensation. The Commissioner was satisfied that the appellant had suffered a loss exceeding the maximum amount which the Commission may award under s 23A(4) of the *Industrial Arbitration Act*, being six months' remuneration, and he fixed the compensation accordingly. It amounted to the sum of $7561.

16 The order for the payment of compensation was made on 3 March 2000. On 24 March 2000, which was the last day for instituting the appeal, the respondent filed a notice of appeal to the Full Bench of the Industrial Relations Commission, seeking to set aside the Commissioner's findings that the appellant had not been a casual worker and that he had been unfairly dismissed by the respondent.

17 On 4 April 2000, the appellant filed two notices of application, the first seeking an extension of time to lodge an application for an extension of time to lodge an appeal [*sic*] against the decision of the Commissioner, and the second seeking an extension of time to lodge an appeal against the decision of the Commissioner. The grounds for the applications are almost identical, being, in essence, that although the appellant had not been successful in his application for reinstatement or re-employment, he had reluctantly accepted the decision of the Commission because he had not wished to bear the expense and stress associated with an appeal. However, the respondent having instituted an appeal against the decision, it was claimed, the appellant would now have to bear the expense and stress of an appeal, and he therefore desired to appeal, by way of cross-appeal, against the Commissioner's decision. No affidavit was filed in support of his applications.

18 On the same day that the two applications for extension of time had been filed, the appellant had also filed a notice of appeal. It is to be observed that the *Industrial Relations Act* does not make any provision for cross-appeals as such. In particular, there is no provision equivalent to O 63 r 9 of the *Supreme Court Rules*, which allows a period of 21 days after the service of the notice of appeal for the respondent to file a cross-appeal.

19 The two applications and the "appeal" came on for hearing before the Full Bench of the Commission. At the commencement of the hearing, the President inquired of the appellant's agent, Mr Richardson, whether he said that the appeal had "chances of success". He responded, "Yes, very much so in that." The learned President then asked Mr Richardson why, briefly, he said that, and he added, "without going into your grounds in detail, of course".

20 Mr Richardson then responded—

> "[O]n the reinstatement issue which the Commissioner erred in his discretion in not considering any of the authorities properly, and in brief, it was quite clear that there was no restructure at all in terms of the work that the appellant had been doing and would have gone back to do, that it's done in exactly the same way, and the evidence clearly shows that. And that was the ground the Commissioner gave for – in his very short comments on the – on his decision. He found that it was impractical … because there has been a restructure, without saying more."

21 Mr Richardson then dealt briefly with the alternative claims made by the appellant under s 23A(1)(a) of the *Industrial Relations Act* for payment to the appellant of the amounts to which he claimed to be entitled under the Social and Community Services Industry - Community Services Workers - Western Australian Award 1996, or under the *Minimum Conditions of Employment Act*, each of which has its own mechanism for the recovery of amounts claimed under it - see s 179 and s 177A of the *Workplace Relations Act* and s 7 of the *Minimum Conditions of Employment Act*.

22 It is not clear whether the Full Bench had before it the full transcript of evidence presented to the single Commissioner, although the appeal book prepared on behalf of the appellant did refer to pages of the transcript containing evidence which was thought to be favourable to the appellant. It was properly conceded by the respondent that the length of the delay on the part of the appellant was negligible, and that it had not thereby suffered any great prejudice.

23 At the conclusion of a brief hearing, the Full Bench announced its decision and dismissed the applications. It also dismissed the "appeal", no doubt on the ground that, in the circumstances, it was incompetent. The reasons for decision of the members of the Full Bench were published later.

24 In his reasons, the learned President expressed his opinion that, on the submissions made on behalf of the appellant, there was an argument, because the decision of the Commissioner at first instance "was based upon credibility of evidence, or said to be, that reinstatement may have been not impracticable". Whether it was a strong argument, his Honour said, he was not able to say. As to the other submissions made by the appellant, he indicated he would need to be persuaded, but he was not, that the Commissioner had erred in holding that a benefit payable by reason of the Federal Award was recoverable under s 23A of the *Industrial Relations Act*, or that, whilst there was an argument that the Commissioner was in error, it was a strong argument. The Commissioner had not, in fact, held that the benefit payable under the Federal Award was recoverable under s 23A. Furthermore, the President said he would need to be persuaded that there was merit in the submission that a claim for entitlement under the *Minimum Conditions of Employment Act* was a claim within the jurisdiction of the Commission. He said that, having regard to s 46 of that Act, he was not at that time persuaded that this was a strong argument sustainable on appeal. Nevertheless he accepted that the delay had not been substantial and, in many cases, would not be a bar. As to the argument said to be based on s 46, the respondent rightly accepted that the section had

no application, it being concerned only with offences relating to the keeping of employment records and relating to access to employment records.

25 Mr Richardson, his Honour noted, had informed the Full Bench "with proper and refreshing frankness" that, in fact, the appeal was lodged only because the respondent had appealed and that, otherwise, the appellant had been satisfied with the order of the Commission. From this, his Honour said, it followed that this was the reason for the delay in the appellants lodging the appeal.

26 What Mr Richardson said was, in fact, as indicated in the notice of appeal, that is to say, that whilst the appellant had not been happy with the decision of the Commissioner at first instance, by reason of the expense and disruption involved in his appealing, he had decided to accept the decision. He added that when, on the twenty-first day after the decision, the respondent had instituted an appeal, the reason for the appellant's decision not to appeal had fallen away, and he had then determined that he would seek to appeal.

27 The delay was a mere 11 days, although the learned President drew attention to the fact that both parties had been tardy in pursuing their appeals. The President then went on to suggest that the appellant would not be placed at a disadvantage if his application failed, because he would retain the orders made by the Commissioner if the respondent's appeal failed, and he would, in any event, be able to oppose the appeal by defending the orders made in his favour. He added that, for the respondent, there was no detriment in allowing the application, save and except that it faced an appeal that the appellant had not intended to bring because he was satisfied with the order at first instance. These comments, however, ignored the added benefits which the appellant would gain if he were to be successful in his proposed appeal.

28 The President indicated that he had considered the prospect of the appellant's proposed appeal being successful, but that he was "not unequivocally able to say that the prospect of succeeding on appeal is a real one on the submissions put", and he added that the reasons for the delay were cogently against granting the application, with the resultant prospective detriment to the respondent. He was not satisfied that the justice of the matter, on the authorities to which he referred, required that the appellant's applications to extend time should be granted, in particular, because it appeared that the appellant was attempting to use a cross-appeal as a tactical weapon, "having decided otherwise that he was satisfied with the order made".

29 Chief Commissioner W S Coleman agreed with the President that the appellant's applications should be dismissed. He did not purport to adopt the President's reasons. The learned Chief Commissioner said—

> "More particular to the application for an extension of time is consideration of whether there was a real prospect of the appellant succeeding in the substantive appeal. In this respect the claim for reinstatement appears to be the only ground upon which some semblance of an arguable case may have been mounted. However, this to a significant extent was dependent upon overturning the Commission's findings based on credibility. In my view nothing was put which showed that there was a real prospect of succeeding given the evidence before the Commission in the first instance.
>
> I am unable to conclude that on the material before the Full Bench that rejection of the applications would constitute an injustice."

30 Commissioner S J Kenner, who expressed himself to be in general agreement with the President's reasons, went on to add—

> "Until such time as the respondent lodged its appeal, the agent for the appellant quite candidly admitted that the appellant was content with the fruits of his litigation and submitted to the Full Bench that he had no prior intention to appeal against the decision at first instance."

31 As to the merits, he said—

> "I was not persuaded on the materials before the Full Bench that the appeal would have any reasonable prospect of success. There was, as correctly conceded by the agent for the appellant, evidence before the Commission at first instance as to the impracticability of reinstatement. However, the submission was that there was an issue as to the credibility of such evidence. The appellant faces a substantial hurdle in this regard on appeal and I was not persuaded that there was an arguable case on this ground.

32 In ***Jackamarra v Krakouer*** (1998) 195 CLR 516, the High Court heard an appeal from the Full Court of the Supreme Court of Western Australia in which the Full Court had dismissed an appeal for want of prosecution, an application for an extension of time within which to enter the appeal for hearing having been dismissed, principally on the basis that the appeal lacked any real prospect of success. The Full Court did not have before it a transcript of the evidence or of the exhibits tendered at the trial.

33 The facts in ***Jackamarra v Krakouer*** *(supra)* differed from those in the present case for, as Brennan CJ and McHugh J pointed out at 520, to grant an application for an extension of time within which to lodge an appeal is to put at risk a vested right of the respondent. When the application for an extension of time merely concerns the doing of an act in respect of an appeal already lodged, an even more liberal approach is justified. The Court is then dealing with a pure procedural question, that is to say, should time be extended? The merits of the appeal do not furnish the criterion for granting or refusing such an extension.

34 Brennan CJ and McHugh J, at 519, cited a passage in the judgment of Lord Denning MR in ***R v Secretary for the Home Department; Ex parte Mehta*** [1975] 1 WLR 1087, a case in which an extension of time was being sought for lodging an appeal. His Lordship said, at 1091—

> "We often like to know the outline of the case. If it appears to be a case which is strong on the merits and which ought to be heard, in fairness to the parties, we may think it is proper that the case should be allowed to proceed, and we extend the time accordingly. If it appears to be a flimsy case and weak on the merits, we may not extend the time. We never go into much detail on the merits, but we do like to know something about the case before deciding whether or not to extend the time."

35 The present case, as in ***Palata Investments Ltd v Burt & Sinfield Ltd*** [1985] 1 WLR 942 at 947, is concerned with an application which seeks to put at risk the substantive rights of the respondent, notwithstanding that the respondent is itself appealing. As Brennan CJ and McHugh J pointed out, it is understandable that where the applicant's right of appeal has gone, courts should insist, as they do, that the time for appealing will not be extended unless the proposed appeal has some prospects of success.

36 Their Honours continued at 521 - 522—

> "[9] One reason that an appellate court does not go into 'much detail on the merits' in considering whether the time for an appeal should be extended is because ordinarily it only has 'limited materials and argument'. Unless motions to extend time for appeals are to turn into full rehearsals for those appeals, appellate courts

> can only assess 'the merits' in a fairly rough and ready way. In most cases, that assessment will be made from the statement of the applicant's case rather than from the opposing arguments or any detailed examination of the proofs of the argument. The merits are merely one of the factors that must be considered in determining whether the discretion to extend time should be exercised… The court needs to remind itself also that the parties do not expect to argue the merits issue as elaborately as if they were arguing the appeal itself.
>
> [10] It is one thing to conclude that counsel's statement of the appeal argument contains the ground for its rejection. It is another matter altogether to hold that, although the logic of the argument is impeccable, the appeal has no merits because the applicant has not taken the Court to the detail of the evidence, the statutes or the case law. Given the practice in hearing applications for extension of time, the rules of procedural fairness require that an appellate court should not determine the application on the details of the evidence (if they have been provided) or the lack thereof unless counsel has been given fair notice that the court intends to take that course."

The last sentence is of particular relevance in the present case.

37 In ***Gallo v Dawson*** (1990) 64 ALJR 458, McHugh J said, at 459, in relation to an extension of time for appealing from a single Justice under the *High Court Rules*—

> "The discretion to extend time is given for the sole purpose of enabling the Court or Justice to do justice between the parties: see *Hughes v National Trustees Executors & Agency Co of Australasia Ltd* [1978] VR 257 at 262. This means that the discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon the applicant. In order to determine whether the rules will work an injustice, it is necessary to have regard to the history of the proceedings, the conduct of the parties, the nature of the litigation, and the consequences for the parties of the grant or refusal of the application for extension of time: see *Avery v No 2 Public Service Appeal Board* [1973] 2 NZLR 86 at 92; *Jess v Scott* (1986) 12 FCR 187 at 194-195. When the application is for an extension of time in which to file an appeal, it is always necessary to consider the prospects of the applicant succeeding in the appeal: see *Burns v Grigg* [1967] VR 871 at 872; *Hughes*, at 263-264; *Mitchelson v Mitchelson* (1979) 24 ALR 522 at 524. It is also necessary to bear in mind in such an application that, upon the expiry of the time for appealing, the respondent has 'a vested right to retain the judgment' unless the application is granted: *Vilenius v Heinegar* (1962) 36 ALJR 200 at 201. It follows that, before the applicant can succeed in this application, there must be material upon which I can be satisfied that to refuse the application would constitute an injustice."

38 There is, in my opinion, a significant problem in the decision of the Full Bench in the present matter. It arises from an apparent failure to appreciate the distinction between the principles governing the granting of an extension of time for complying with a particular rule of procedure, of which ***Jackamarra v Krakouer*** *(supra)* is an example, and the seeking of an extension of time for appealing against a judgment, of which ***Gallo v Dawson****(supra)* is an example. The present case falls into the latter category.

39 As was emphasised by McHugh J in ***Gallo v Dawson*** *(supra)*, the discretion to extend time is given for the sole purpose of enabling the Court (or, in this case, the Industrial Relations Commission) to do justice between the parties, and the discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon him. One of the relevant factors relates to what the consequences will be of the grant or refusal of the application for an extension of time. Another relevant factor for granting an extension of time is that the proposed appeal has some prospects of success, whilst conceding, as Brennan CJ and McHugh J said in ***Jackamarra v Krakouer***, that an appellate court can only assess the merits in a fairly rough and ready way, because otherwise the court would have to conduct a full rehearsal for the appeal.

40 It is quite apparent that the learned Commissioner's conclusion that the reinstatement of the appellant was impracticable was arrived at in consequence of his finding that there had been a restructuring which had been implemented by the respondent, and by reason of his not being satisfied that a reasonable working relationship was able to be established between the appellant and staff members of the respondent. As previously noted, he found that the appellant had "actively agitated employment related complaints", and in relation to the proposed restructuring, the Commissioner was satisfied that Mr Bauchop had been alienated by the appellant.

41 It was conceded for the appellant that the reversal of the Commissioner's finding that the reinstatement of the appellant was impracticable could only be achieved by overturning his findings of fact based upon the credibility of the witnesses. It was claimed on the appellant's behalf, however, that if the evidence was examined in detail, it would clearly show that the respondent's officers and witnesses were not telling the truth. Having now examined the considerable amount of material placed before us, I am not persuaded that any basis has been shown for interfering with the Commissioner's findings which clearly were based upon his conclusions as to the credibility of the witnesses.

42 As Kirby J said in ***Jackamarra v Krakouer*** *(supra)* at 543—

> "Of course, if the decision of the primary judge turned on the credibility of the evidence of witnesses called at the trial, the difficulties of disturbing conclusions based upon such findings are well known."

His Honour cited ***Abalos v Australian Postal Commission*** (1990) 171 CLR 167 and ***Devries v Australian National Railways Commission*** (1993) 177 CLR 472. Gummow and Hayne JJ, at 531, citing the same two authorities, also referred to the difficulty of the task of attacking the findings which the primary Judge has made about the effect of oral evidence which he has heard, as being "notorious".

43 In cases turning on disputed evidence, such as in the present case, it is only too common for there to be conflicts in the evidence presented. Some of the conflicting evidence may arise out of lapses in memory and innocent errors in recollection, particularly when those errors relate to peripheral issues, of which many were raised in this case, and upon which Mr Richardson placed particular stress. Some of the conflicting evidence may arise from deliberate lies. It is the difficult, but very necessary, duty of Judges and Commissioners at first instance to arrive at what they believe to be the facts of the matter. Furthermore, it is always open to a Judge or a Commissioner to believe part of what a witness has said in the witness box and to reject another part of that evidence. The Judge or Commissioner who has seen and heard the witnesses is almost invariably going to be in a much better position than is an appellate court or tribunal to assess accurately their credibility. I am not persuaded that Commissioner Parks failed to use the advantage which he had.

44 I turn now to the grounds of appeal, all of which purport to be based upon errors of law. It is unnecessary for the present purposes to characterise the diverse grounds as either errors of fact or of law.

(1) The Full Bench erred in law in not taking cognisance of the legal signification of a cross-appeal.

45 The *Industrial Relations Act* makes no provision for a cross-appeal as such. If a party desires to appeal, that party must institute the appeal within 21 days of the date of the decision against which the appeal is brought (s 49(3)). By s 27(1)(n) of the Act, the Commission (as to which see the definition of "Full Bench" in s 7) is empowered to extend any "prescribed time". Section 5 of the *Interpretation Act 1984 (WA)* defines the expression "prescribed", to mean, for the purposes of this case, a time prescribed by the *Industrial Relations Act*. Furthermore, the appeal is to be heard and determined on the evidence and matters raised in the proceedings before the Commission (s 49(4)).

46 The fact that the respondent had filed its appeal on the twenty-first day after the decision was handed down is no doubt a factor which can be taken into account in determining whether or not to grant an extension of time. In ***FDR Pty Ltd v Gilmore*** (1996) 76 WAIG 4434, the Full Bench granted an extension of time in such a situation. However, as the learned President pointed out in that case, at 4447, the granting of an extension of time is not automatic, and each case turns upon its particular facts. The discretion is conferred for the sole purpose of enabling the court to do justice between the parties and it is always necessary to consider the prospects of success of the applicant. See also ***Ryan v Hazelby & Lester t/a Carnarvon Waste Disposals*** (1993) 73 WAIG 1752.

47 An argument was advanced on behalf of the appellant that, by s 49(5)(b) of the *Industrial Relations Act*, in the exercise of its jurisdiction, the Full Bench has the power to vary the decision in such manner as it considers appropriate. Thus, it was claimed, even if there were no formal notice of "cross-appeal", the "cross-appellant" has the right to argue its case at the hearing of the appeal, and the Full Bench is empowered to vary the decision in favour of the "cross-appellant". Expressed in the terms in which it was, the submission, if correct, would obviate the necessity for having to file a "cross-appeal" in order to attack a decision. For this proposition, ***Attorney-General v Simpson*** [1901] 2 Ch 671 was relied upon. However, it was a very different case from that which is before us. By an Act, *6 Geo I, ch 29*, passed in 1720, powers were conferred on a predecessor of the defendant to construct a "stanch" in a river below St Ives (at which point it was a public navigable river) and to repair and maintain the same, but no obligation was in terms imposed upon him. The Act contained a recital that the making, maintaining, and repairing of the "stanch" would necessarily be a great charge and expense to the grantee, his heirs and assigns, and it was enacted that it should be lawful for the grantee, his heirs and assigns, from and after the repairing or erecting the stanch, from time to time and at all times, to demand and take for all goods which should be carried by boat or other vessel up or down that part of the river the tolls in the Act specified. It was held by Farwell J that the public were entitled to pass through the locks without paying a toll, and through the stanch on payment of the statutory toll, and that the defendant was not liable to maintain or work any of the locks or the stanch. The defendant appealed from the judgment, other than the latter part of the declaration. The plaintiffs gave no notice of cross-appeal. The Court of Appeal while allowing the appeal to the extent of declaring that the defendant was entitled to a reasonable toll for the passage of boats through the locks, exercised its power under O LVIII r 4 of the English rules, to vary the judgment in favour of the plaintiffs by declaring that the defendant was bound to maintain and work both the locks and the stanch, and the judgment was varied accordingly. These two aspects of the case were closely bound up together.

48 Section 49(5) of the *Industrial Relations Act* provides—

> "In the exercise of its jurisdiction under this section the Full Bench may, by order—
>
> (a) dismiss the appeal;
>
> (b) uphold the appeal and quash the decision or, subject to sub-section (6), vary it in such manner as the Full Bench considers appropriate…"

49 Section 49(6) which is not presently relevant, provides that, where the Full Bench varies a decision under s 49(5)(b), the decision so varied shall be in terms which could have been awarded by the Commission that gave the decision. On the face of it, s 49(5)(b) can only operate when an appeal is upheld. If the respondent's appeal should ultimately be upheld, the consequence will be that the appellant's application under s 23A of the Industrial Relations Act will be dismissed, and there will be no scope for any variation of the original decision.

50 If the appellant's argument is correct, should leave to extend the time for instituting his appeal be refused, it would not matter, because he could simply resort to the provisions of s 49(6). That would be an absurd result, which cannot be accepted.

51 The first ground of appeal cannot succeed.

(2) The Full Bench erred in law in finding that the appellant was satisfied with the order of the Commission.

52 The appellant filed no affidavit in relation to his satisfaction or otherwise with respect to the order of the Commission. Mr Richardson merely informed the Full Bench that the appellant, "while not happy with the decision of the Commission in the first instance, decided to accept the remedies that the Commission had awarded, or ordered, because of the expense and disruption involved in appealing". The only member of the Full Bench to use the word "satisfied" was the President. The relevant passage in his Honour's reasons has been set out above. Chief Commissioner Coleman said—

> "The appellant was forthcoming in declaring the reason for lodging the substantive appeal. This, in essence, provided the explanation for the delay. The respondent had not appealed until the expiry of the statutory period. Although accepting the decision of the Commission in the first instance, it was the appeal by the respondent against the determination of unfair dismissal and the relief granted that prompted the applicant (*sic*) to appeal against the failure to gain reinstatement in employment and to pursue the failure to have secured payments under a Federal Award and the *Minimum Conditions of Employment Act*. In the absence of the respondent's appeal those matters were not going to be pursued."

53 Commissioner Kenner said—

> "The reason for the notice of appeal being brought out of time was, on the appellant's submissions, because the respondent to this appeal had itself lodged an appeal against the Commissioner's decision finding in favour of the appellant at first instance and awarding compensation for the unfair dismissal and not reinstatement. Until such time as the respondent lodged its appeal, the agent for the appellant quite candidly admitted that the appellant was content with the fruits of his litigation and submitted to the Full Bench that he had no prior intention to appeal against the decision at first instance."

54 It is apparent, therefore, that this ground of appeal is based upon a misunderstanding of the reasons of the Full Bench. The point being made by the majority of the Full Bench was quite clearly that the appellant had made a considered decision not to appeal against the orders made in his favour by the Full Bench. It was in this sense that the appellant "accepted the decision" or "was content with the fruits of his litigation". The appeal and the proposed appeal raised quite discrete issues.

55 It must be stressed that the fact that a member of the Full Bench expresses his or her "general" agreement with the reasons of another member is not an indication that every observation in those reasons has been adopted. This is especially the case

where the member expressing his or her general agreement with another member's reasons then proceeds to set out in summary form, as did Commissioner Kenner, his own reasons for joining in the ultimate decision. Even if this ground of appeal were to be upheld, it would not, in my opinion, be determinative of the appeal, having regard to what I consider to be the low prospect of the proposed appeal being successful. I would reject this ground.

(3) The Full Bench erred in law in finding that the appellant would not have pursued the failure to have secured payments under a Federal Award that covered his employment and the *Minimum Conditions of Employment Act*

56 The decision of the Commissioner at first instance was that the Industrial Relations Commission did not have jurisdiction to order the payment of any amounts due to the appellant under the Federal Award or the *Minimum Conditions of Employment Act*.

57 The Full Bench did not make the finding complained of by the appellant in this ground. The wording comes from the reasons for judgment of the Chief Commissioner in a passage which I have set out above. The comment was addressed to the decision of the appellant to seek an extension of time for appealing only after the respondent had filed its notice of appeal. The reference to the matters not going to be pursued was only intended, in my view, to indicate that they were not going to be pursued in the Industrial Relations Commission.

58 Section 179(1) of the Act, which is to be found in Div 1 of Pt VIII of the *Workplace Relations Act*, provides that where an employer is required by an award to pay an amount to an employee, the employee may, not later than six years after the employer was required to make the payment to the employee under the award, sue for the amount of the payment in the Court or in any court of competent jurisdiction. As previously noted, "Court" is defined in s 4 of the Act to mean the Federal Court of Australia, whilst s 177A, for the purposes of Div 1 of Pt VIII, defines "court of competent jurisdiction" to mean a District, County or Local Court or a magistrate's court. On the face of it, the Western Australian Industrial Relations Commission has conferred upon it no jurisdiction to enforce Federal Awards.

59 Mr Richardson relied upon two decisions of Commissioner Fielding in support of his argument that the Western Australian Industrial Relations Commission had jurisdiction to hear and determine the appellant's claim for entitlements under the Federal Award. Those decisions were ***Colson v Shire of West Pilbara*** (1986) 66 WAIG 1256 and ***Hill v Rushton Building Contractors Pty Ltd*** (1987) 67 WAIG 923. It is important to observe that s 123 of the *Commonwealth Conciliation and Arbitration Act 1904*, at the time of both those decisions, conferred jurisdiction in this area upon the Federal Court and "any other court of competent jurisdiction" without, in the latter case, defining a court of competent jurisdiction. This is in stark contrast to s 177A of the Workplace Relations Act which now defines the expression in precise terms. The decision of the Full Court in Queensland in ***Alexander v Australian National Airlines Commission*** [1988] 1 QR 331, in which reliance was placed upon ***Josephson v Walker*** (1914) 18 CLR 691 at 695, is readily distinguishable for the same reason. It is not necessary, in the circumstances, to answer this jurisdictional point.

60 I also leave open the question of whether, under s 23A(1)(a) of the *Industrial Relations Act*, a claim for the payment to the claimant of any amount to which the claimant is entitled, but which is unrelated to his or her dismissal, is capable of being a State law providing protection for an employee against harsh, unjust or unreasonable termination (however described in the law) under s 152(1A) of the *Workplace Relations Act* and consequently within the jurisdiction of the Industrial Relations Commission. That was not an issue which was argued before us.

61 It is not necessary to answer the two questions just posed for the reason that, in any event, as the Commissioner at first instance observed, there was a paucity of argument from the appellant with regard to the application of the Federal Award. As he indicated, there had been no valid attempt made to prove the appellant's eligibility. Nor had there been any attempt to prove the classification and salary level within the Federal Award that was alleged to have applied to the appellant, and the Commission was not able, on the evidence, to determine whether the award applied. The appellant has failed to establish any amount to which he is entitled under the Federal Award.

62 The claim under the *Minimum Conditions of Employment Act* was an alternative claim to that made under the Federal Award. No particulars of this claim were provided to us, and we are not in a position to evaluate whether there is any substance in it. Furthermore, the appellant faces another jurisdictional hurdle. In relation to any entitlement of the appellant under the Minimum Conditions of Employment Act, by s 5(1), minimum conditions of employment extend to, and bind, all employees and employers, and they are taken to be implied in any workplace agreement, in any award or, if a contract of employment is not governed by a workplace agreement or an award, in that contract. By s 7(c), a minimum condition of employment may be enforced where the condition is implied in an award, under Pt III of the *Industrial Relations Act*, or where it is implied in a contract of employment under s 83 of the *Industrial Relations Act*, as if it were a provision of an award, industrial agreement or order (other than an order made under s 32 or s 66 of that Act. Section 83 of the *Industrial Relations Act*, which is to be found in Pt III, provides in s 83(1)(a) that an application for the enforcement of an award, industrial agreement or order, shall not be made otherwise than to an Industrial Magistrate's Court.

(4) The Full Bench erred in law in finding that the appellant was using the cross-appeal as a tactical weapon and as a result the justice of the matter did not require that an extension of time be granted

63 Only the President referred to the appellant as having used the cross-appeal as a tactical weapon. The Chief Commissioner did not adopt the reasons of the President but based his decision upon his view that the appellant did not have a "real prospect of succeeding given the evidence before the Commission in the first instance". He added that he was unable to conclude that, on the material before the Full Bench, the rejection of the applications would constitute an injustice.

64 Commissioner Kenner, who merely expressed himself to be "in general agreement" with the President's reasons, went on to make some observations of his own, which effectively summarised his reasons for dismissing the applications. They contained no reference to the appellant's pursuing an appeal as a tactical weapon. His conclusion on the merits was that he was not persuaded that the appeal would have any reasonable prospect of success, the practicability of reinstatement turning upon the credibility of the relevant witnesses. Nor was Commissioner Kenner persuaded that there was an arguable case open to the appellant in relation to his claims under the Federal Award and the *Minimum Conditions of Employment Act*.

65 It is further to be observed that the President's reference to the appellant's cross-appeal as a tactical weapon came after his statement that he was not satisfied that the justice of the matter, on the authorities referred to by him, required that the applications to extend time should be granted for all the reasons which he had given.

66 There is, in my opinion, no merit in this ground.

(5) The Full Bench erred in law in finding that the reasons for the delay were cogently against granting an extension of time

67 This "finding" is only to be found in a paragraph in the President's reasons which dealt with the prospects of the appeal. His Honour said, "I am not unequivocally able to say that the prospect of succeeding on appeal is a real one on the submissions put and the reasons for delay are cogently against granting the application, with the resultant prospective

detriment to the respondent, which I have described above". His Honour then went on to say that he was not satisfied that the justice of the matter, on the authorities referred to by him, required that the applications to extend time be granted, for all of the reasons which he had given. He added that equity, good conscience and the substantial merits of the case and the consideration of the interests of the parties pursuant to s 26(1)(a) and (c) of the *Industrial Relations Act*, lay with the making of the orders which the Full Bench had already made.

68 The Chief Commissioner and Commissioner Kenner each summarised his reasons as I have already set out. Each of them made reference to the decision of the appellant not to appeal until the respondent instituted its appeal; but each then proceeded to deal with the merits of the case. Neither was satisfied that the appellant had a reasonable prospect of success or an arguable case. Neither took up the President's argument regarding the respondent's delay. As with the previous ground of appeal, the alleged finding of the President cannot be attributed to the other members of the Full Bench.

(6) The Full Bench erred in law in not following the principle in *FDR Pty Ltd v Gilmore (supra)*

69 This ground of appeal has already been discussed. ***FDR Pty Ltd v Gilmore*** did not lay down some principle which should be followed. The Full Bench was required to exercise its discretion taking into account all the relevant factors. In this case, the significant factors to emerge from the reasons of the individual members of the Full Bench were the limited prospects of a successful appeal and the conclusion that to refuse the application would not constitute an injustice. There is no substance in this ground of appeal.

(7) The Full Bench erred in law in finding that there was detriment to the respondent in that the appellant was bringing an appeal that he did not intend to bring because he was satisfied with the order

70 The comment that there was "resultant prospective detriment" to the respondent was made by the President. The detriment is referred to in a single sentence where his Honour says that, "For the respondent, there is no detriment in allowing the application, save and except that it faces an appeal that the appellant did not intend to bring because he was satisfied with the order". In its context, this does not appear to me to be a matter upon which the President placed a great deal of weight, and it was not an issue which was taken up by either of the other Commissioners. There really could be little detriment to the respondent, having regard to the fact that it had already instituted an appeal and to its concession that it had not suffered any great prejudice.

71 I am unable to accept that the views expressed in this matter by the President constituted a finding by the Full Bench.

(8) The Full Bench erred in law in finding that the appellant would not be at a disadvantage if the application for an extension of time failed

72 The passage upon which this ground of appeal is based appears in the reasons of the President in a passage which I have previously discussed. For the appellant it was argued that he would lose his right to persuade the Full Bench to exercise its discretion to order reinstatement. Counsel for the respondent, however, citing ***City of Geraldton v Cooling*** [2000] WASCA 364, argued that, if the appellant's appeal seeking reinstatement were to be successful, then, if the respondent is minded to pay compensation, rather than reinstate the appellant, it cannot be compelled to reinstate him.

73 Under s 23A(1)(b) of the *Industrial Relations Act*, the Commission may order the employer to reinstate or re-employ a claimant who has been harshly, oppressively or unfairly dismissed. Subsection (1)(ba) provides that, subject to subs (1a) and subs (4) the Commission may order the employer to pay compensation to the claimant for loss or injury caused by the dismissal. By subs (1a), which was substituted for the previous subs (1a) in 1997, the Commission is prohibited from making an order under subs (1)(ba) unless either it is satisfied that reinstatement or re-employment of the claimant is impracticable or the employer has agreed to pay the compensation instead of reinstating or re-employing the claimant. It is to be noted that the "agreement" is that of the employer. The section does not refer to an agreement between the employer and the claimant. Furthermore, by subs (3), if an employer fails to comply with an order under subs (1)(b) the Commission may, upon further application, revoke that order and, subject to subs (4), make an order for the payment of compensation for loss or injury caused by the dismissal. Subsection (4) provides that the amount ordered to be paid under subs (1)(ba) or (3) is not to exceed six months' remuneration of the claimant. As was said by the Minister for Labour Relations in his second reading speech in the Legislative Assembly on 2 March 1997, as a result of the amendments made to s 23A "employers can now decide whether they wish to compensate employees for loss or injury caused by the dismissal instead of reinstatement or re-employment".

74 In the course of the hearing before us, counsel for the respondent informed the Court that it has always been the respondent's position in the case that reinstatement is impracticable and that it is something which the respondent does not want. It is therefore prepared to pay compensation if the decision should go against it.

75 From a practical point of view, it is pointless for the appellant to pursue his claim for reinstatement.

(9) The Full Bench erred in law in not granting an extension of time when it found that there was an arguable case

76 In two passages in his reasons, the learned President referred to a "strong argument" and later said that, having considered the prospect of the appeal succeeding, he was not "unequivocally" able to say that the prospect of succeeding on appeal was a real one on the submissions put.

77 Chief Commissioner Coleman, in contradistinction to the President, referred to the appropriate test as being whether there was a real prospect of the appellant succeeding in the substantive appeal. He concluded that nothing which had been put to the Full Bench showed that there was a real prospect of the appellant succeeding in the substantive appeal. He indicated that the claim for reinstatement appeared to be the only ground upon which some semblance of an arguable case might have been mounted, but he added that, to a significant extent, it was dependent upon overturning the Commission's findings based on credibility.

78 Commissioner Kenner referred to the test as being whether the appeal would have any reasonable prospect of success and he said he was not persuaded that there was an arguable case on the question of reinstatement or in relation to the claimed entitlements.

79 It is quite erroneous to claim, as Mr Richardson did, that a recognition that the appellant had to overturn the Commissioner's findings based on credibility to succeed in the cross-appeal was itself recognition that there was an arguable case in respect of the impracticability of reinstatement. The use of the word "arguable" in this context is to be treated with some caution. As McHugh and Hayne JJ said in ***Jackamarra v Krakouer*** at 527 [31]—

> "Both parties submitted that the test which the Court should apply before taking either of those steps [to strike out the appeal for want of prosecution or considering whether to grant an extension of time for the taking of the procedural steps necessary to make an appeal ready for hearing] was whether the appeal is 'arguable' or 'fairly arguable'. That apparent agreement may mask more than it reveals; much turns on what is meant by 'arguable' or 'fairly arguable'."

80 At 529 [35] their Honours continued—

> "The parties submitted here that the Full Court should have decided whether the appeal was 'arguable'. It is important to understand what is meant in this context by 'arguable'. If it means no more than that counsel, acting responsibly, can formulate an argument which can properly be advanced in support of the appeal, the test is too loose; if it is clear that that argument will fail, the appeal should not proceed. To permit it to proceed is to subject the respondent to the many costs of litigation."

81 In my opinion, although there may be some inconsistency in the tests referred to by the President, in my opinion, the other members of the Full Bench applied an appropriate test. I would reject this ground of appeal.

(10) The Full Bench erred in law in finding that the cross-appeal had no prospect of success without examining all of the evidence

82 There was no obligation upon the Full Bench to examine all of the evidence before the Commissioner at first instance. To do so would have been to determine the appeal itself.

83 The usual approach to a consideration of the prospects for success of a proposed appeal is set out above in par [9] and par [10] in the joint judgment of Brennan CJ and McHugh J in ***Jackamarra v Krakouer***. An appellate court does not normally go into much detail on the merits and there was no requirement for the Full Bench to go into all the evidence; but where it fell into error, in my opinion, was in discouraging Mr Richardson from dealing with the proposed grounds of appeal. In the circumstances, Mr Richardson did not attempt to argue the merits of the case, and he said only that the Commissioner had not properly considered any of the authorities, and that he had found that it was impracticable to reinstate the appellant because there had been a restructuring which precluded his reinstatement. Mr Richardson omitted to point out to the Full Bench that the Commissioner had also found that reinstatement was impracticable because he was not satisfied that a reasonable working relationship was able to be established between the parties. He made only a fleeting reference to the alternative claim for the payment to the appellant of amounts to which he maintained he was entitled. I do not consider that in this respect the Full Bench complied with the rules of procedural fairness referred to by Brennan CJ and McHugh J in ***Jackamarra v Krakouer*** at 522[10].

84 Mr Richardson, conceded in this Court that a major part of the appellant's case was that the "respondent's witnesses" had not told the truth. The great majority of the "respondent's witnesses", however, as already noted, were called by the appellant himself. The credibility of the witnesses was at all times of critical importance. Clearly, however, the learned Commissioner on the issue of reinstatement rejected the evidence of the appellant and accepted the evidence of the employees of the respondent.

85 Before this Court, Mr Richardson went into considerable detail with respect to the evidence which supported the appellant's case, and he provided us with 139 pages of written submissions. A consideration of the evidence available to us has convinced me that there was ample evidence to support the conclusion of Commissioner Parks that, by the time the matter had come on for hearing before him, reinstatement was impracticable, both by reason of the restructuring in the operations of the appellant which had taken place and by reason of a working relationship between the appellant and the respondent being unable to be restored.

86 Commissioner Parks indicated in his reasons that he had regard to all of the evidence but that, for the purposes of his reasons, he referred only to those aspects of the evidence which he considered to be relevant to the central issues which had been raised.

87 The evidence of Mr Bauchop was that the restructuring undertaken by the respondent did not amount merely to a change in the titles of the respondent's employees. The appointments to the positions of Senior Duty Managers were intended to result in a restructuring of the working rosters, with a reduction in the need for what were described as "casual staff" and consequently a reduction in their number. The Senior Duty Managers were intended to work the majority of the evenings with a team of Assistant Duty Managers working the balance of the evenings, in addition to supporting the Senior Duty Managers by making sure that all of the required procedures were being followed. The aim of the respondent was to establish the best possible team of the more experienced duty managers under the new appointees in order to resolve problems which the respondent had been experiencing.

88 Ms C H Hoesle was appointed as one of the new Senior Duty Managers. She had spoken to the appellant about the planned changes. She found him to be very frustrated and annoyed and said that he had made all sorts of accusations to her. On the other hand, there was evidence of complaints having been made regarding the appellant's behaviour in relation to derogatory remarks which he had made when he addressed women, a matter concerning which Ms V Stamelos had spoken to him. Mr N P Marshall, another employee of the respondent, spoke of the appellant as having been rude to, and harassed, his mother when he was trying to contact Mr Marshall concerning a dispute regarding conditions of employment. Mr Marshall claimed that the majority of the other members of staff disliked the appellant. Having regard to the way he went about his work, they believed he was hindering them a lot and bothering them. He was described as rubbing people up the wrong way. Mr Marshall also claimed that he had seen the appellant rummaging through Mr Bauchop's files in his office, a claim which the appellant denied.

89 Ms Leslie and Mr Bauchop gave evidence regarding the meeting at which the appellant was informed that he would not be placed on the roster for future work. The appellant was said to have been frustrated and annoyed with them. Mr Bauchop was insulted by the appellant for the majority of the time. He described the appellant as being full of rage. The appellant told Mr Bauchop that he was weak, and he made very harsh and cutting comments. Mr Bauchop, on the other hand, claimed that the appellant had previously been very negative, continually asking about an increase in pay and wanting shifts that suited him.

90 Mr V Rettura, an officer of the City of Bayswater who had been seconded to the Morley Recreation Centre, criticised the appellant for having barred his way into his office at the centre on two occasions and for being abrupt and quite rude towards him and also for "barging" into his office and disturbing an interview he was conducting with clients. He also complained of continuing criticism of himself and others by the appellant.

91 The Commissioner made no specific findings on the foregoing evidence of Mr Bauchop and the respondent's other employees, but on that evidence it was clearly open to the Commissioner to conclude, as he did, that a reasonable working relationship was most unlikely to be established in the future between the appellant on the one hand and Mr Bauchop and the respondent's other employees on the other. No reasons of any substance were advanced on behalf of the appellant as to why his evidence should have been preferred to that of the respondent's employees and of Mr Rettura.

92 Under this ground of appeal, the appellant also claimed that Commissioner Parks should have ordered the respondent to pay costs, on the ground that the respondent had treated both the appellant and the Commissioner with arrogance and contempt,

that it had failed to discover and produce all of the relevant documents in its possession and that its officers and witnesses had deliberately lied in the Commission on matters material to the determination of the application for remedies pursuant to an unfair dismissal. Section 27(1)(c) of the *Industrial Relations Act* empowers the Commission to award costs. However, it is only in special circumstances that costs will be ordered to be paid by a party. In this case, Commissioner Parks did not find that the respondent's officers and witnesses had lied and no basis has been shown for departing from the normal rule. In any event, counsel for the respondent indicated that, although some mention of costs had been made in the course of the hearing, no application for costs had actually been made to Commissioner Parks in that regard. Mr Richardson did not challenge this statement. No basis has been demonstrated for any departure by the Commissioner from the normal practice that costs should not generally be awarded in this jurisdiction.

(11) The Full Bench erred in law in not properly applying the principles in *Esther Investments Pty Ltd v Markalinga Pty Ltd* (*supra*) in deciding whether an extension of time should be granted

93 ***Esther Investments Pty Ltd v Markalinga Pty Ltd*** was not a case in which an extension of time for instituting an appeal had been sought. The learned President set out the principles to be derived from ***Gallo v Dawson***, which is the leading authority on the principles to be applied in relation to the granting of extensions of time for instituting appeals, and I have referred in these reasons to the assistance to be derived from the decision in ***Jackamarra v Krakouer*** in this respect. Having reviewed the evidence upon which the appellant has relied I am not persuaded that the strength of the proposed appeal is such as to warrant an extension of time.

(12) The Full Bench erred in law in applying the wrong principles in deciding whether an extension of time should be granted

94 This ground has been sufficiently covered under the preceding proposed grounds of appeal and it is unnecessary for me further to expand upon them.

95 For the foregoing reasons, I would dismiss this appeal.

96 **SCOTT J**: In this matter I have had the opportunity of reading in draft the reasons to be published by the Presiding Judge. I generally agree with his Honour's reasons and the conclusion that the appeal should be dismissed. In particular I endorse the view that it was unfortunate that the Full Bench did not give counsel for the appellant the opportunity of at least outlining the grounds of appeal so that in the broad sense the merits of the appeal could have been evaluated.

97 The merits of the appeal, had the extension of time been granted, have been outlined in considerable detail in this Court and I agree with the conclusions of the Presiding Judge that the grounds of appeal have not been made out.

98 Whilst ordinarily in these circumstances an extension of time would be granted where, as here, the substance of the appeal is without merit, an extension of time should not be granted.

99 I also agree that the appeal should be dismissed.

100 **PARKER J**: I agree with the Presiding Judge, for the reasons he has published, that this appeal should be dismissed.

2001 WAIRC 04472

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	MICHAEL COUSINS, APPELLANT
	v.
	YMCA OF PERTH, RESPONDENT
CORAM	JUSTICE KENNEDY (PRESIDING JUDGE)
	JUSTICE SCOTT
	JUSTICE PARKER
DELIVERED	WEDNESDAY, 28 NOVEMBER 2001
FILE NO/S.	IAC 6 OF 2000
CITATION NO.	2001 WAIRC 04472

Result	Appeal Dismissed
Representation	
Appellant	MR M RICHARDSON (INDUSTRIAL AGENT)
Respondent	MR AJ RANDLES (OF COUNSEL)

Order

HAVING heard Mr M Richardson (Industrial Agent) for the Appellant and Mr AJ Randles (of Counsel) for the Respondent, THE COURT HEREBY ORDERS that—

The Appeal be dismissed.

[L.S.]

(Sgd.) J. SPURLING,
Clerk of the Court.

FULL BENCH—Appeals against decision of Commission—

2001 WAIRC 04445

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIRECTOR GENERAL OF THE DEPARTMENT OF COMMUNITY DEVELOPMENT, APPELLANT
	v.
	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER S J KENNER
DELIVERED	TUESDAY, 18 DECEMBER 2001
FILE NO/S.	FBA 55 OF 2001
CITATION NO.	2001 WAIRC 04445

Decision	Application to dismiss appeal dismissed and orders for particulars.
Appearances	
Appellant	Mr D J Matthews (of Counsel) by leave
Respondent	Ms M In de Braekt (as agent)

Reasons for Decision

THE PRESIDENT—

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

2 This was an application by the abovenamed respondent filed in the guise of a notice of objection and contention which the Full Bench, as a matter of convenience, nevertheless allowed to proceed as an application, even though there is no provision for such a procedure in the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act") and the Industrial Relations Commission Regulations 1985 (hereinafter referred to as "the Regulations") (see s.27(1)(m) and s.27(1)(u) of the Act and see also Regulation 93 of the Regulations).

3 There were also complaints that the appeal sought to raise matters which were not raised at first instance and sought to do so contrary to s.49(4) of the Act. Inter alia, it was also submitted on behalf of the applicant (the respondent) that the appeal has no prospect of success and it is baseless. The appeal was instituted within 21 days of the date of the decision, namely on 16 November 2001.

4 The grounds of appeal allege quite simply that the respondent's alleged conduct did not touch the respondent's employment with the appellant which would mean that the employer was entitled to enquire into that conduct. It is also clear from the notice of appeal that the appellant was appealing against the decision by the Public Service Arbitrator that he should seek disciplinary action against Mr Hand in relation to certain alleged conduct because the alleged conduct did not touch upon Mr Hand's employment. It was also clear that the appellant wishes to have that decision set aside so that disciplinary action may pursue.

5 The grounds of appeal also allege that the Public Service Arbitrator was in error because there was a relevant connection between the respondent's alleged conduct and his employment with the appellant.

6 To a substantial extent, ground 1.2 merely repeats in another form what is alleged in ground 1.1 of the grounds of appeal and is clearly otiose.

7 The primary question is whether the grounds of appeal comply with ground 1.2. The primary question is whether the grounds of appeal, namely ground 1.1, comply with Regulation 29(2) of the Regulations. It is not necessary to consider ground 1.2 because of our earlier comment that in our opinion it is otiose. In order to comply there must be provided the particulars required by Regulation 29(2).

8 The particulars provided as ground 1.2 do not specify that the finding was against the evidence and/or the weight of the evidence, and more significantly does not recite the particulars relied on to demonstrate that allegation. Further no specific reasons are alleged as to why the decision was wrong in law, as it seems to be alleged. In both those deficiencies there is a failure to comply with Regulation 29(2).

9 As to the submissions in relation to s.49(4) of the Act, they are clearly bound up with submissions which would be made as to merit on appeal. Further, those submissions are better made, if they are to be made, when the respondent has had the benefit of the particulars which it says were not provided. As to the submissions concerning the merits of the appeal, those too are premature for the same reasons.

10 Next, notwithstanding the appellant's failure to comply with Regulation 29(2) of the Regulations, the detriment to be suffered by the appellant by the appeal being dismissed for that reason, if of course that course is open, is too great, and it would create too great an injustice. We say that because the appellant then loses the right of appeal which on the grounds as they appear does not appear an obviously groundless appeal.

11 The respondent is left with this opportunity to answer the appeal in any event.

12 Accordingly, it was our opinion that the matter be best resolved by ordering particulars to be provided in accordance with Regulation 29(2), by striking particular 1.2 of the grounds of appeal out as otiose, and by dismissing the rest of the application as premature, for all of those reasons.

13 For those reasons, we agreed to make the orders which the Full Bench made in this matter.

2001 WAIRC 04839

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIRECTOR GENERAL OF THE DEPARTMENT OF COMMUNITY DEVELOPMENT, APPELLANT
	v.
	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER S J KENNER
DELIVERED	TUESDAY, 11 DECEMBER 2001
FILE NO/S.	FBA 55 OF 2001
CITATION NO.	2001 WAIRC 04389

Decision	Application to dismiss appeal dismissed and orders for particulars.
Appearances	
Appellant	Mr D J Matthews (of Counsel) by leave
Respondent	Ms M In de Braekt (as agent)

Order

This matter having come on for the hearing and determination by the Full Bench of a Notice of Contention filed herein on behalf of the abovenamed respondent, on the 10th day of December 2001, and having heard Mr D J Matthews (of Counsel) by leave on behalf of the appellant, and Ms M In de Braekt, as agent, on behalf of the respondent, and the Full Bench having determined that its reasons for decision will issue at a future date, it is this day, the 11th day of December 2001, ordered as follows:-

(1) THAT the appellant, file and serve upon the respondent, full particulars of ground 1.1 of the Grounds of Appeal within 7 days of the date of this order.

(2) THAT ground 1.2 of the Grounds of Appeal be struck out.

(3) THAT the application otherwise be and is hereby dismissed.

By the Full Bench

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

[L.S.]

2001 WAIRC 04440

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAYMAN HOLDINGS PTY LTD ABN 009 309 468 TRADING AS REYNOLDS & ASSOCIATES, APPELLANT
	v.
	MITCHELL ROBERT STUART BARNES, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER A R BEECH
DELIVERED	MONDAY, 17 DECEMBER 2001
FILE NO/S.	FBA 41 OF 2001
CITATION NO.	2001 WAIRC 04440

Decision	Appeal dismissed.
Appearances	
Appellant	Ms L Horwood (of Counsel), by leave
Respondent	Mr D Leask (of Counsel), by leave

Reasons for Decision

THE PRESIDENT—

INTRODUCTION

1 This is an appeal by the abovenamed appellant employer, Dayman Holdings Pty Ltd (hereinafter referred to as "Dayman"), against the whole of the decision of the Commission, constituted by a single Commissioner, given on 1 June 2001 and 18 June 2001 in matter No 1792 of 2000. The appeal is against the decision that the abovenamed respondent, Mr Mitchell Robert Stuart Barnes, was unfairly dismissed and that he had been denied a benefit (not being a benefit arising under an

award or order) which arises out of his contract of employment. However, at the hearing of this matter, the claim for contractual benefits was not pursued.

2 The decision appealed against, formal parts omitted, is in the following terms:-

> "1. Declares that the Applicant was unfairly dismissed.
>
> 2. Orders that the Respondent do pay the Applicant $21,153.85 (gross), to be paid in three equal instalments as compensation.
>
> 3. Orders that the Respondent pay the first instalment by 13 July 2001, the second instalment by 10 August 2001 and the third and final instalment by 7 September 2001."

Extension of Time

3 There was also an application for an extension of time within which to lodge the appeal books. There was a delay in obtaining statements and a further delay caused by the appellant receiving a quote for the cost of obtaining the transcript which was incorrect and excessive. The application was made on 29 August 2001. That is the day on which the appeal books were lodged. The Notice of Appeal was filed on 9 July 2001.

4 The application to extend time within which to file and serve appeal books was granted, it being clear to the Full Bench that no real injustice would be caused to the respondent by the granting of such leave (see *Jackamarra v Krakouer and Another* 195 CLR 516 at 520 per Brennan and McHugh JJ) (see also s.26(1)(a) of the *Industrial Relations Act* 1979 (as amended)).

GROUNDS OF APPEAL

5 The grounds of appeal are as follows:-

> "The Commissioner erred in law and/or fact in—
>
> 1.1 Finding that the employment contract contained no period of notice to terminate, when the Respondent's actions indicated he had accepted the terms of a two week notification period.
>
> 1.2 Failing to find that the Applicant's action of leaving a copy of his accountant's letter advising the draft employment contract was acceptable on Mr Reynolds desk constituted an acceptance of the terms by the Applicant.
>
> 1.3 Finding that the Applicant carried out a senior professional role in the Respondent's business and in so doing failing to have regard to the evidence presented at the hearing as to the Applicant's lack of performance of his duties, unprofessional personal presentation, unprofessional behaviour (displays of temper), and the fact that the Applicant was only billing 31 % of the time he should have been accounting for.
>
> 1.4 Failing to have regard to the fact that the Applicant's effective notice of termination was one month, given that the Commissioner accepted that the Respondent gave the Applicant two weeks to demonstrate real changes in his work and to demonstrate to the Respondent that the Applicant could do the job, and the Applicant was given a further 2 weeks salary at the conclusion of the aforementioned 2 week period.
>
> We accordingly seek an order that the decision be overturned and that the Respondent be required to pay to the Appellant the sum of $3,846.15, being 2 weeks salary paid in lieu of notice, when the Respondent in fact already had reasonable notice that his employment would be terminated if he didn't demonstrate he could perform according to his obligations under his contract of employment."

APPLICATION TO ADDUCE FRESH EVIDENCE

6 It is fair to observe that the grounds of appeal contain no specific attack on the finding that the dismissal was unfair.

7 There was an application on the part of the appellant for leave to adduce fresh evidence. The appellant sought to adduce in this matter the timesheets and statements of one Ken Painter sworn on 13 August 2001 and one Tim Shaw, unsworn. The timesheets are said to be a record of the amount of time that Mr Barnes accounted for whilst he was in the employ of Reynolds and Associates.

8 Evidence was given at the hearing (see page 124a of the transcript at first instance) that Mr Barnes was only accounting for approximately 30% of his time, and this evidence was not challenged. The appellant submitted that expert evidence should be adduced to show that this was an unacceptably low standard. It was stated from the bar table that it was hoped to obtain the sworn statements of two advertising executives with experience in the industry to attest to this fact, but such evidence, even if it were allowed, was not sought to be adduced.

9 It was submitted that the industry standards of the expected percentage of time to be billed was a factor which should be properly considered on appeal. The assertion was that Mr Barnes did not bill more than approximately 30% of his time was not challenged, and the timesheets should be before the Full Bench since the Commissioner at first instance did not appear to give due consideration to this point in her findings. There was nothing in that evidence which seemed germane to the appeal, it was submitted, the application being opposed.

10 The statement from Mr Painter was finalised on 13 August 2001. A letter was sent to Mr Shaw by the appellant's representatives which was lost and a further letter sent to a post office and was returned to sender. Mr Shaw advised during a telephone conversation with the appellant's solicitor on 28 August 2001, it was said, that he was flying to Singapore on business and was due to depart in the next half hour and did not have a facsimile number on which he could be contacted to hand. The matter was heard on 9 and 10 April 2001 and the order was made 18 June 2001 after the hearing, and the contract was sought to be made with Mr Shaw and Mr Painter after that.

11 Indeed, all the attempts to obtain the evidence seem to have occurred after the order appealed against was made.

12 Within the principles laid down in *FCU v George Moss Limited* 70 WAIG 3040 (FB) and in *Orr v Holmes and Another* [1948] 76 CLR 632, it was not established to the Full Bench that the evidence sought to be admitted as fresh evidence could not have been obtained with reasonable diligence for use at the trial. Further evidence does not require to be admitted or a new "trial" ordered on it unless an opposite result would have been reached at the hearing had the new evidence been given. (A new "trial" cannot be allowed if the unsuccessful party will simply put the same case but with further evidence at the new trial). No evidence was adduced at the hearing as to the percentage of time which an employee, like the respondent, could reasonably be expected to have billed. Thus the evidence to be adduced could have had no influence on the result. There was nothing to indicate that the evidence was credible. For all of those reasons, however, I joined with my colleagues in the decision not to admit the evidence.

BACKGROUND

13 The appellant company conducts an advertising agency and Mr Mitchell Robert Stuart Barnes commenced his employment with the appellant on 11 July 2000. He was employed there as Creative Director in support of the appellant's design and advertising operations. He had worked in the advertising industry since late November 1972. Since December 1991, he had mainly worked as a freelancer, contracting to other agencies while building his own business.

14 In November 1999, he started a business called "Stampede Advertising and Marketing". The business primarily offered advertising services rather than design services and his clients were substantially engaged in retail shopping. In particular, he provided advertising services to shopping centres. In the middle of 2000, his business was almost to the point where he was unable to deal with the amount of work which the business was obtaining.

15 Mr Barnes approached Mr Robert John Reynolds, a Director of the appellant company (and its majority shareholder) whose business was principally a design studio. He was of the opinion that Palandri Wines, a prospective joint client of the parties, would principally require the services of a design studio rather than advertising because the services which they require would be the design of prospectuses and wine bottle labels.

16 Mr Reynolds advised Mr Barnes that he was intending to amalgamate with another organisation which would increase his work in the mining sector. In particular, he expected a large increase in work in the area of production of annual reports. Instead of pursuing Palandri Wines and entering into a joint venture, Mr Reynolds suggested that Mr Barnes be employed by the appellant. The appellant had not previously employed a Creative Director but had, from time to time, used the services of one on a contract basis.

17 On 3 July 2000, Mr Barnes wrote to Mr Reynolds concerning their discussions. He then provided samples of work to Mr Reynolds for his review. After reviewing Mr Barnes' work, Mr Reynolds negotiated a salary with him of $100,000.00 per annum and superannuation of $10,000.00 per annum. It was also agreed that he would be paid two six monthly performance based bonuses of $7,500.00 each. Mr Reynolds informed Mr Barnes that he wanted him to commence work straight away, and Mr Reynolds wrote to Mr Barnes on 10 July 2000 making an offer of employment in the following terms:-

> "Further to our conversation this morning, please accept the following as a firm offer of employment with duties to commence immediately.
>
> Your salary will be $100,000 per annum plus superannuation of $10,000. In addition, you will receive performance based bonuses of $7,500 twice yearly (December, June).
>
> This performance is as agreed by you and I and will take into account growth, client satisfaction and profitability.
>
> Mitchell, should you find the a (sic) foregoing enough to excite, join the team, as it can only get better for all of us."

18 On 13 July 2000, Mr Barnes' accountant faxed to him a draft of an employment agreement which, in its material terms, was as follows:-

> "1. **Period of Employment**
>
> 1.1 This Agreement commences on the date it is signed, and is for a minimum term of 12 months. It continues after that until terminated by either party giving not less then 30 days' prior written notice to the other expiring at any time.
>
> 1.2 This Agreement also ratifies the terms of the Employee's employment since the commencement of his employment with the Company.
>
> 2. **Duties**
>
> 2.1 The position in which the Company employs the Employee is as Creative Director in support of the Company's design and advertising operations.
>
> 2.2 The Employee must perform all the functions of that position and such other services as may be determined by the Company from time to time.
>
> 2.3 The Employee must carry out his employment in such manner and at such time as the Company may from time to time reasonably direct.
>
> 3. **Remuneration**
>
> 3.1 The Company shall remunerate the Employee as follows—
>
> | | |
> |---|---|
> | Base salary (paid fortnightly) | $75,000 |
> | Superannuation (paid monthly— refer Clause 3.3) | $36,000 |
> | Performance based bonuses (paid six monthly - refer Clause 4. 1) | $16,000 |
>
> 3.2 On each anniversary of this Agreement, the Company shall review and renegotiate the Employee's remuneration package. Any agreement between the parties as to a renegotiated remuneration package shall be in writing.
>
> 3.3 Superannuation contributions shall be made monthly by the Company to a complying superannuation fund of the Employee's choice at an initial rate of $2,916.67 per month.
>
> 3.4 Upon termination of the employment, all remuneration and other entitlements must be paid only up to the date of termination, adjusted on a daily basis whether or not a full year has elapsed.
>
> 11. **Severability**
>
> 11.1 If anything in this agreement is unenforceable, illegal or void then it is severed and the rest of this agreement remains in force.
>
> 12. **Entire Understanding**
>
> 12.1 This agreement—
>
> (1) is the entire agreement and understanding between the parties on everything connected with the subject matter of this agreement; and
>
> (2) supersedes any prior agreement or understanding on anything connected with that subject matter.

12.2 Each party has entered into this agreement without relying on any representation by any other party or any person purporting to represent that party.

13. **Variation**

13.1 An amendment or variation to this agreement is not effective unless it is in writing and signed by the parties."

19 The draft agreement was given to Mr Reynolds. Mr Reynolds said in evidence that he was shocked when he received the draft agreement prescribing a 12 month period. He passed it to his solicitors for review and they produced a further draft. The only material amendment in the Barnes draft, was the Clause 1 Period of Employment, wherein the new draft Clause 1 stated as follows:-

"1. **Period of Employment**

1.1 3 months probation with 14 days notice by either party of termination.

1.2 This Agreement commences on the date it is signed, and can be terminated by either party giving not less than 30 days' prior written notice to the other expiring at any time.

1.3 This Agreement also ratifies the terms of the Employee's employment since the commencement of his employment with the Company."

20 Having received Mr Reynolds' draft, Mr Barnes sent it to his accountant who advised him that he had perused it and that it was acceptable. A copy of the accountant's letter was left on Mr Reynolds' desk by Mr Barnes. Neither draft of the employment agreement was signed by either party. The terms of engagement required by the appellant was, at all times, a fixed period of 12 months which could not be terminated prior to that time by the giving of notice, according to Mr Barnes.

21 Mr Barnes also said that, by providing a copy of the letter from his accountant to Mr Reynolds, he accepted the terms and conditions of the draft employment agreement. Accordingly, the appellant therefore argued that Mr Barnes' employment was subject to a period of three months' probation which could be terminated by the giving of 14 days' notice by either party.

22 At law, the Commissioner at first instance observed that, an acceptance is a communication to the offer of an unqualified assent to both the terms of the offer and to the implied invitation in every offer that the offeree commit himself or herself to a contract. Whether or not there is an acceptance is to be determined objectively by reference to the words or actions of the offeree. Such an enquiry involves two sub-questions, both of which must be positively answered. Had there been an unqualified assent and, has this assent been communicated to the offeror? The Commissioner so observed (see Cheshire and Fifoot's Law of Contract, 7th Edition, at paragraph 3.22).

23 The Commissioner held that neither draft constituted a concluded agreement. The Commissioner also found that the duration of the contract was not fixed and no period of notice to terminate was agreed at law and the contract of employment could be terminated by the giving of reasonable notice.

24 The Commissioner found that the work samples tendered in evidence revealed that the style of work prepared by Mr Barnes was completely different to the style of work created by others engaged by the appellant. Whilst the appellant's counsel argued that the real reason for termination of the employment was because of the failed merger between the appellant's business and other agencies which meant that insufficient work was generated to enable the appellant to pay Mr Barnes the salary that was negotiated, no evidence of the appellant's financial affairs or client numbers was adduced in support of this contention.

25 The Commissioner held that the real reason for the termination was Mr Barnes' style of work and his way of working which was different from the style of work which the appellant wished to produce for its clients. She was satisfied that Mr Barnes was given two weeks to change and it was apparent from all of the evidence given in the proceedings that his style of work was incompatible with the requirements of the appellant's business. She was therefore satisfied that the appellant was entitled to terminate Mr Barnes' employment by the giving of notice of termination.

26 The appellant paid Mr Barnes two weeks' pay in lieu of notice. The question is whether two weeks' pay in lieu of notice satisfied the requirements to give Mr Barnes reasonable notice or payment in lieu of reasonable notice.

27 The Commissioner held that the termination was unfair in that the appellant failed to provide a reasonable period of notice or to make a payment to Mr Barnes in lieu of a reasonable period of notice. She gave attention to a number of relevant factors as the Full Bench decided in *Tarozzi v WA Italian Club (Inc)* 71 WAIG 2499 (FB).

28 The Commissioner then had regard to the fact that Mr Barnes had 28 years' experience in the advertising industry; that before he had entered into employment with the appellant made a gross profit of $37,619.00 in his own agency and that he recommenced his own agency in October 2000; the gross income of the business in three months was negligible; and, further, the length of service was not long but his salary was high and he carried out a senior professional role.

29 In all of the circumstances, the Commissioner was of the view that Mr Barnes should have been given three months' notice to terminate or three months' salary in lieu of notice. She took into account that he was already paid two weeks' pay in lieu of notice and made an order that he be paid 11 weeks' pay as compensation, being a sum of $21,153.85.

ISSUES AND CONCLUSIONS

30 I should first of all say that there are no grounds of appeal directed to the finding that the respondent was unfairly dismissed and no submissions or no cogent submissions were made to that effect. The hub of this appeal was that there was an express term of notice of termination appearing in the contract of service, which was a written contract of service, or was at least evidenced in writing.

31 The material facts were not in dispute. There was a written offer of employment on 10 July 2000 made by Dayman to Mr Barnes. The offer contained few terms of employment but offered an annual salary with bonuses. In particular no term of notice of termination and no reference to termination was contained in the offer.

32 Mr Barnes commenced work on 11 July 2000. After Mr Barnes commenced employment he asked his accountant to prepare an employment agreement. On 13 July 2000 his accountant faxed to him a draft of a written employment agreement. This contained a number of terms (see pages 21-22 of the appeal book (hereinafter referred to as "AB")). Naturally it contained the period of employment clause, Clause 1, which has been produced above, which prescribed a minimum term for the agreement of twelve months terminable by either party on 30 days prior written notice.

33 That draft was given to Mr Reynolds who, in evidence, said that he was shocked when he read the written draft containing the proposed minimum fixed twelve months term. His solicitors reviewed the draft and produced a further draft with the only material amendment (see page 22(AB)) providing for a three month probation period terminable on 14 days notice by either party, and providing for no less than 30 days prior written notice of a termination on either side.

34 That draft was received by Mr Reynolds and sent to his solicitors. Mr Barnes' accountant advised that the draft was acceptable. Mr Barnes left a copy of that letter on Mr Reynolds' desk. It was common ground that neither draft of the agreement was executed by any party.

35 There was no evidence that either party ever orally, or in any other way, indicated that he or it would sign such an agreement.

36 The appellant's case was that by providing a copy of the letter from his accountants, Slee and Stockden Pty Ltd, (see page 47(AB)) dated 20 August 2000 to Mr Reynolds, the respondent accepted the terms and conditions of the appellant's draft agreement.

37 Thus, the appellant's case was that the respondent's employment was subject to three months' probation terminable by the giving of 14 days notice by either party.

38 It is trite to observe that where an offer is made a binding contract will result when, and only when the offeree has accepted the offer (see Contract Law in Australia, 3rd Edition, Carter and Harland, page 32).

39 The Commissioner correctly referred above to the law relating to offer and acceptance.

40 There are a number of specific requirements within that framework:-

(a) The offer and acceptance must precisely correspond; that which has been proposed by the offeree must be accepted in toto, no more and no less.

(b) Any departure from the offer will result in the purported acceptance being ineffective. It will amount to a counter offer (see Contract Law in Australia, 3rd Edition, (op cit) at page 38).

(c) Acceptance must also be unequivocal in that nothing further is left to be negotiated between the parties, and the language used must be such as would clearly convey a definite decision by the offeree to be bound by the terms of the offer (see *Ballas v Theophilos (No 2)* [1957] 98 CLR 193 and *Appleby v Johnson* (1874) LR 9 CP 158).

(d) Perhaps the current situation, where a purported acceptance is ineffective and operates merely as a counter offer, is where it proposes one or more terms which are in addition to, or at any rate different in some respects from those contained in the offer to which offers (see *Mooney v Williams* [1905] 3 CLR 1 (and see generally Contract Law in Australia, 3rd Edition, (op cit) at pages 218-219).

41 In this case, there was no concluded written agreement because there was no offer which was accepted, or at least and most relevantly, no offer of employment which was accepted, which contained a terms which provided for the giving of notice of termination of the contract of employment. I say that because:-

(a) Neither draft agreement constituted a concluded agreement, and neither was agreed to or executed, and there was no evidence to that effect.

(b) There was an offer of employment made orally on 10 July and accepted orally on 11 July, which contained no provision for notice of termination.

(c) There was no evidence of any agreement by Dayman to any minimum fixed term of twelve months' employment. Indeed the contrary was the case as evidenced by the counter offer in Dayman's draft agreement.

(d) (i) Both the draft agreements contain the clear expression that the agreement "commences on the date on which it is signed, and that the agreement is the entire agreement and understanding between the parties".

(ii) Thus "the agreement" could have no effect until executed by both parties; and did have no effect, because neither "agreement" was executed.

(e) There was no evidence of any other agreed term of notice of termination.

(f) (i) In any event, even if that were not so, the mere placing of the letter from Slee and Stockden Pty Ltd on Mr Reynold's desk did not, and could not, constitute an acceptance of anything. The letter contained the advice that the agreement "appears acceptable". It is nothing other than advice.

(ii) In any event the letter (see page 47(AB)) contains "several comments", which comments clearly suggest amendments which might be made to the draft agreement.

(iii) Thus, the letter in its terms, placed on the Reynolds desk, properly constituted a further counter offer because of the suggested amendments. The letter was not evidence of acceptance of Dayman's draft agreement.

(iv) Alternatively, it was put there as a cause for discussion.

(v) There is no evidence otherwise.

42 There was no communication by the offeree to the offeror of an unqualified consent to the terms of the offer by either party as offeree in relation to either draft agreement. Indeed, Mr Barnes' response by putting the accountant's letter on Mr Reynold's desk was, to the contrary, at most, an equivocal acceptance. In fact, it was no acceptance.

43 Thus it was open to find on the evidence, and on the principles to which I have referred to above, that there was no executed or indeed concluded agreement by which the parties agreed to any period of notice to terminate. The Commissioner was correct to so find.

44 The extent of the notice to be given was never agreed. It was therefore the Commissioner's duty to imply a term of reasonable notice (see *Tarozzi v WA Italian Club (Inc)* (FB) (op cit) and see also *Thompson v Gregmaun Farms Pty Ltd* 80 WAIG 1733 (FB).

45 The duration of the contract was never fixed. It was open to so find.

46 The nub of this appeal was that there was an express term of notice of termination applying in the contract of service which was a written contract of service.

47 (a) As to Ground 1.3, there is no merit in that ground. The Commissioner clearly found that the respondent carried out a senior professional role. That it was alleged that he did not carry out his role adequately, effectively or profitably, is surely not relevant to the role which he was engaged to perform and the finding was not in error.

(b) Put shortly as was submitted on behalf of the respondent that he carried out a professional role, is entirely a different question from how he performed in that role. In any event, there was no evidence that his billing of 31% of his time was inadequate, according to any proven standard. That ground is not inadequate.

48 As to Ground 1.4, in my opinion, the purported giving of 2 weeks' notice in which time the respondent should demonstrate changes in his work, is quite irrelevant to the question before the Commission of what should be implied in the contract as a term of reasonable notice. Such a ground could not succeed.

49 The question before the Commission, once the Commission found no express contractual provision prescribing a term of notice of termination, was what period to imply, as a matter of law as a term of reasonable notice. Since there was no express provision for notice, then as a matter of law, and because the contract was an employment contract, a period of reasonable notice is to be implied in accordance with the principles applied in *Tarozzi v WA Italian Club (Inc)* (FB) (op cit) which applies the principles discussed and expressed in Macken, McCarry and Sappideen, "The Law of Employment", 4th Edition at pages 164-168. There was no appeal against the Commission's actual finding as to what constituted reasonable notice.

50 Such reasonable notice was not given or paid in accordance with the Commissioner's finding as to what notice should be implied as reasonable notice. The failure to pay reasonable notice as required by the Commission constituted unfairness within the principles in *Miles and Others t/a Undercliffe Nursing Home v FMWU* 65 WAIG 385 (IAC), (see also *Thompson v Gregmaun Farms Pty Ltd* (FB) (op cit)). (Alternatively, it was a contractual benefit duly claimable) (see *AWI Administration Services Pty Ltd v Birnie* 81 WAIG 2849 (FB) and the cases cited therein).

51 The Commissioner did not err in the exercise of her discretion (see *House v The King* [1936] 55 CLR 499) and indeed it would not seem that the grounds of appeal contained any such allegation.

52 There was no error made either in implying the term of three months in the contract of service as a matter of law and none demonstrated.

53 I would, for those reasons, dismiss the appeal.

CHIEF COMMISSIONER W S COLEMAN—

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

COMMISSIONER A R BEECH—

55 I have had the advantage of reading in draft form the Reasons for Decision of His Honour the President and I agree with his conclusions. I wish to add the following observations regarding some of the arguments advanced during the course of the appeal.

56 There is a distinction to be made between an employer giving notice to terminate the contract of employment and an employer giving an employee two weeks to improve his or her performance. The giving of notice to terminate the contract is a unilateral right given to a party to a contract and it operates to determine the contract by effluxion of the period of notice (*Birrell v. Australian National Airlines Commission* (1984) 9 IR 101; 5 FCR 447). Giving an employee two weeks to improve performance is rather the giving of a warning by the employer to the employee that there is a need for him or her to improve their performance otherwise other action may be taken including the action of terminating the contract of employment. It is not possible to run the two concepts together as the appellant here purports to do and suggest that this gave Mr Barnes "close to the alternative 30 days' notice" of termination of his contract of employment.

57 On the facts of the matter before the Commission at first instance, the appellant advised Mr Barnes he had 2 weeks to improve his performance. That was not notice to terminate the contract of employment as the respondent itself recognized because after the 2 two-week period it purported to terminate the contract by the separate act of paying Mr Barnes two weeks' wages apparently in lieu of notice.

58 It cannot be said, therefore, that the two-week period given to Mr Barnes, and the payment of an additional two weeks' wages at the expiry of that period, can be seen as being equivalent to the giving of 30 days' notice of termination.

59 Finally, it is as well to observe that giving notice and paying salary in lieu of giving notice, are also quite different concepts. It is quite settled that an employer cannot give payment in lieu of notice if the contract of employment does not provide for it unless the parties themselves agree (*Sanders v. Snell* (1998) 72 ALJR 1508 at 1582). To imply a term in the contract which would allow the payment in lieu of notice in the absence of agreement would fly in the face of the express term of the very contract which the appellant urged upon the Commission at first instance. In any event, for the reasons given by His Honour, there was no provision made in the contract of employment which actually existed for termination.

60 Ultimately, there was no provision agreed between the parties regarding the termination of Mr Barnes' employment and accordingly the Commission had to assess what was reasonable notice. That reasonable notice, as is made clear in *Tarozzi v. The Italian Club* relied upon by the appellant itself, is a matter of the construction of the contract and not the behaviour of the individual employee concerned.

THE PRESIDENT

61 For those reasons, the appeal is dismissed.

Order accordingly

2001 WAIRC 04460

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAYMAN HOLDINGS PTY LTD ABN 009 309 468 TRADING AS REYNOLDS & ASSOCIATES, APPELLANT
	v.
	MITCHELL ROBERT S BARNES, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER A R BEECH
DELIVERED	MONDAY, 17 DECEMBER 2001

FILE NO/S.	FBA 41 OF 2001
CITATION NO.	2001 WAIRC 04460

Decision	Applications to extend time to file appeal books granted and application for leave to adduce fresh evidence dismissed.
Appearances	
Appellant	Ms L Horwood (of Counsel), by leave
Respondent	Mr D Leask (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on the 23rd day of November 2001, and having heard Ms L Horwood (of Counsel), by leave, on behalf of the appellant and Mr D Leask (of Counsel), by leave, on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 17th day of December 2001, it is this day, the 17th day of December 2001, ordered as follows:-

(1) THAT the applications filed herein to extend time to file and serve the appeal books in appeal No. FBA 41 of 2001 out of time be and are hereby granted.

(2) THAT the application by the appellant for leave to adduce fresh evidence be and is hereby dismissed.

By the Full Bench

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

[L.S.]

2001 WAIRC 04442

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAYMAN HOLDINGS PTY LTD ABN 009 309 468 TRADING AS REYNOLDS & ASSOCIATES, APPELLANT
	v.
	MITCHELL ROBERT S BARNES, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER A R BEECH
DELIVERED	MONDAY, 17 DECEMBER 2001
FILE NO/S.	FBA 41 OF 2001
CITATION NO.	2001 WAIRC 04442

Decision	Appeal dismissed.
Appearances	
Appellant	Ms L Horwood (of Counsel), by leave
Respondent	Mr D Leask (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on the 23rd day of November 2001, and having heard Ms L Horwood (of Counsel), by leave, on behalf of the appellant and Mr D Leask (of Counsel), by leave, on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 17th day of December 2001, it is this day, the 17th day of December 2001, ordered that appeal No FBA 41 of 2001 be and is hereby dismissed.

By the Full Bench

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

[L.S.]

2001 WAIRC 04455

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER DELLYS, APPELLANT
	v.
	ELDERSLIE FINANCE CORPORATION LIMITED, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER P E SCOTT
	COMMISSIONER J H SMITH
DELIVERED	TUESDAY, 18 DECEMBER 2001

FILE NO/S.	FBA 42 OF 2001
CITATION NO.	2001 WAIRC 04455

Decision	Appeal dismissed.
Appearances	
Appellant	Mr D Howlett (of Counsel), by leave
Respondent	Mr D M Jones, as agent

Reasons for Decision

THE PRESIDENT—

INTRODUCTION

1 This is an appeal by the abovenamed appellant, Mr Peter Glenn Dellys, against the decision of the Commission, constituted by a single Commissioner, on 28 June 2001, whereby, on an application brought by Mr Dellys pursuant to s.29(1)(b)(i) and (ii) of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act"), the Commissioner declared that the applicant was harshly, oppressively or unfairly dismissed by the abovenamed respondent and ordered that the respondent pay, as and by way of compensation, the sum of $26,251.10 to Mr Dellys, less taxation. The appeal was against part of the decision only, insofar as it related to quantum of compensation and contractual benefits, and also insofar as the decision related to the finding that Mr Dellys' job had not been made redundant and he had not been dismissed as a result of the redundancy.

GROUNDS OF APPEAL

2 The grounds of appeal are as follows:-

"**Application and Amended Application**

The Commissioner—

1. Erred in referring, in his decision to the application filed on 2 August 2000 and to details contained in that application and not to the amended application that was sent to the Commission on 16 November 2000 and amended in accordance with that document, along with further amendments, at the hearing on 29 January 2001.
2. Erred in the quantum of the compensation granted to the appellant.

Unfair Dismissal

The Commissioner—

3. Erred in not including, as part of the appellant's compensation, commissions that the appellant would have earned during the period of reasonable notice to which he was entitled as an implied term of his contract.
4. Erred in not awarding the appellant superannuation entitlements payable by reference to the quantum of the commissions that the appellant was entitled to during the notice period.
5. Erred in deducting contractual benefits, by way of a redundancy payment and payment in lieu of notice, from the award of compensation, when those sums were not subject to mitigation of loss.

Reasonable Notice

The Commissioner—

6. Erred in deciding that the appellant was not entitled to reasonable notice of termination of his employment as an implied term of his contract of employment, in addition to a reasonable redundancy payment.
7. Erred in not awarding the appellant commission entitlements payable by reference to the quantum of the reasonable notice that the appellant was entitled to.
8. Erred in not awarding the appellant superannuation entitlements payable by reference to the quantum of the reasonable notice that the appellant was entitled to.

Redundancy and Redundancy Payment

The Commissioner—

9. Erred in not deciding that the appellant was made redundant by virtue of his job or position being made redundant.
10. Erred in deciding that the appellant was not entitled to a reasonable redundancy payment as an implied term of his contract of employment, in addition to a period of reasonable notice.
11. Erred in not awarding the appellant commission entitlements payable by reference to the quantum of the reasonable redundancy payment that the appellant was entitled to.
12. Erred by not awarding the appellant superannuation entitlements payable by reference to the quantum of the reasonable redundancy payment that the appellant was entitled to.
13. Erred in not notifying the parties that he was going to consider the question of whether the redundancy was genuine and allowing the parties to make submissions on that matter.
14. Erred in holding that there was an onus on the employer to prove that the appellants redundancy was genuine.

Contractual Benefits - Commissions

The Commissioner—

15. Erred in deciding that the appellant was not entitled to contractual benefits being commission payments as claimed, as a term of his contract of employment.
16. Erred by not awarding the appellant superannuation entitlements payable by reference to the quantum of the commissions that the appellant was entitled to."

3 There was no cross appeal.

BACKGROUND

4 The original application was made pursuant to s.29(1)(b)(i) and (ii) of the Act by the appellant. Mr Dellys was employed by the respondent as their National Agency Manager from 4 May 1998. His contract of employment was said to be contained in a letter dated 22 April 1998 (see pages 65-66 of the appeal book (hereinafter referred to as "AB")) signed by the Executive Director of the respondent, Mr Murray E Little, and signed by Mr Dellys on 23 April 1998.

5 On commencement of his employment, Mr Dellys was paid a base salary of $50,000.00 with commission being 10% of fees earned, and called an incentive component (see paragraph 2 of the agreement (page 65(AB)). There is also provision for another commission component in paragraph 3 of that letter. Paragraph 4 of that letter provides for superannuation which was expressed as follows (see page 66(AB)):-

> "4. Superannuation, which is paid under the Superannuation Guarantee Act (currently 6%)."

6 On 14 July 2000, Mr Dellys was dismissed by Mr Little. He alleged that he was summarily dismissed. It is not necessary to go into a great deal of detail as to the facts surrounding the dismissal. However, on 14 July 2000, Mr Little walked into Mr Dellys' office and gave him a letter which advised that his position was being made redundant, and that he was therefore dismissed as at close of business, that is 5.00 pm, on that day (see page 83 (AB)). In the letter, Mr Little also advised that Mr Dellys would be paid a redundancy payment equal to six weeks' salary, along with one month's salary in lieu of notice, and his annual leave entitlements. Further, by the letter it was advised whether any accrued commission entitlements owing would be calculated and paid to him as soon as possible. They were so paid on 20 September 2000. There was oral advice from Mr Little to Mr Dellys that day that the dismissal was due to a "restructure" and not due to his performance. He was paid one month's salary in lieu of notice, which Mr Dellys asserted was not in accordance with the terms of his contract of employment. He did leave that afternoon.

7 Mr Dellys was also paid three weeks' for every completed year of service as a severance payment which was six weeks' pay in total. (It was certainly not expressed to be a gratuitous payment).

8 Mr Dellys claimed that he was not paid a reasonable redundancy payment and that the respondent acted in breach of the *Minimum Conditions of Employment Act* 1993 (hereinafter referred as "the MCE Act"), s.40 and s.41, in particular, it would seem.

9 In what was the amended application, that of 16 November 2000, by way of compensation and in the alternative to reinstatement, he claimed the maximum compensation.

10 It was found that Mr Dellys had sought to mitigate his loss.

11 At the time of the conclusion of the hearing at first instance, he had not been employed for 33 weeks and had received only unemployment benefits, by way of income, but nothing in the form of remuneration. The submission on behalf of Mr Dellys was that that 33 weeks' remuneration was the extent of his loss.

12 The Commissioner at first instance found that Mr Dellys received six weeks' redundancy pay and four weeks' pay in lieu of notice which must be deducted from that loss. Therefore, the loss proven as consequent upon his unfair dismissal was 23 weeks.

13 The Commissioner found that, notwithstanding that there were a range of salaries "used for the annual salary of Mr Dellys", the figure for annual salary was $54,954.00 to which would be added a figure of $4,396.32 for superannuation as part of his remuneration, making a total of $59,350.32. Thus, 23 weeks loss equalled $26,251.10. Having made that finding, that was the sum which was awarded for compensation.

14 The Commissioner then went on to note that Mr Dellys had claimed for a 12 months' redundancy payment and a 12 months' notice payment, together with commissions relating to these two components. The Commissioner also noted that these were not funds that "featured" in the signed contract of employment and were not sums which the Commission could readily imply into the contract or award.

ISSUES AND CONCLUSIONS

15 The appeal is against part or parts of 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)), and, by grounds 1 and 2, Mr Dellys alleges that the Commissioner at first instance erred in referring to the application filed on 2 August 2000 and not to the amended application forwarded on 16 November 2000. (It was never filed). There were also grounds alleging that the Commissioner erred in the quantum of compensation ordered to be awarded.

16 There was also a ground of appeal alleging that the Commissioner erred in awarding an amount or amounts in "lieu of" reasonable notice, and another ground of appeal complaining that Mr Dellys had not been paid an amount by way of a reasonable redundancy payment. It was also alleged that the Commissioner erred in not awarding Mr Dellys superannuation payments and commission as part of his claim for contractual benefits.

17 The application before the Commissioner was the amended application (see pages 11-16(AB)). By that application, there was a claim for reinstatement and for the maximum compensation as an alternative. There was also a claim for contractual benefits as follows (see page 16(AB)) paragraph 14:-

> "**Contractual Benefits**
>
> | | |
> |---|---|
> | Reasonable Notice | 12 months pay
$76,743.69 |
> | Reasonable Redundancy pay | 12 months pay
$76,743.69 |
> | Commission forfeited due to summarised dismissal (July 2000) | $12,500.00" |

18 There was also a claim for statutory benefits as follows:-

> "Statutory superannuation entitlements based on 2 years pay or on the amount of reasonable notice and/or reasonable redundancy payment ordered by the Commission.
>
> $7,693.56"

19 The total benefits claimed was in the amount of $173,680.94.

The Contractual Benefits, Claims and Mitigation

20 Claims for contractual benefits have been described and defined in detail in *Ahern v AFTPI* 79 WAIG 1867 (FB) and in *AWI Administration Services Pty Ltd v Birnie* 81 WAIG 2849 (FB) (see also *Perth Finishing College Pty Ltd v Watts* 69 WAIG 2307 (FB)).

Was there a redundancy?

21 The Commissioner at first instance found that the termination of Mr Dellys' employment was not a redundancy as defined in s.40 of the MCE Act. There a redundancy is defined 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."

22 It was submitted on behalf of the appellant and conceded on behalf of the respondent that the dismissal was a dismissal for redundancy and that it was unfair (see pages 33-34 of the transcript on appeal).

23 It is quite clear from the findings made by the Commissioner at first instance (see paragraph 29, page 30(AB)) that a new job was created importing some but not all of the duties formerly performed by Mr Dellys. In other words, his own position was actually abolished and was no longer required. He did not apply for the new job, having been told that he did not have the skills to do it. He was then dismissed.

24 There was a redundancy as defined in the MCE Act and at common law (see *Gromark Packaging v FMWU* 73 WAIG 220 (IAC) and *Kounis Metal Industries Pty Ltd v TWU* 73 WAIG 14 (IAC) and see also the classic definition by Bray CJ in *R v Industrial Commission of SA; ex parte Adelaide Milk Supply Co-Op Ltd and Others* [1977] 16 SASR 6 at 8 where His Honour said:-

> "… the concept of redundancy in the context we are discussing seems to be simply this, that a job becomes redundant when the employer no longer desires to have it performed by anyone. A dismissal for redundancy seems to be a dismissal, not on account of any personal act or default of the employee dismissed or any consideration peculiar to him, but because the employer no longer wishes the job the employee has been doing to be done by anyone."

25 Both by concession and by the facts, Mr Dellys' job was made redundant within the statutory and the common law definition and he was retrenched or dismissed. It was an error to decide otherwise.

26 The dismissal, as the Commissioner found, was procedurally and substantially unfair, and therefore was correctly conceded to be unfair. In particular, there were no consultation or discussions in breach of the implied terms of the contract of employment (see the MCE Act, s.40 and s.41).

27 In terms of the common law redundancy there was, in effect, a summary dismissal without discussions or reasonable explanation or warning, and, in the circumstances of this case, there was also, even without the aid of the MCE Act or any implied terms, the dismissal was, for those reasons, too, as the Commissioner at first instance correctly found, unfair.

28 It was therefore conceded and rightly in this appeal that he was unfairly dismissed, and it was conceded on behalf of the appellant that the decision to make him redundant was unfair, and the dismissal of Mr Dellys, as a result, was unfair.

Commissions

29 Mr Dellys certainly had an entitlement to an incentive payment based on 10% of net application/approval/extension commitment fees which he generated. He also had an entitlement to an incentive component based on the calculation of the volume of new business written by agents (see page 65(AB)). He claimed commissions in his amended application and described them in his written statement (see pages 35, 46, 48, and 56 (AB)). He worked until the close of business on 14 July 2000 and he was not paid any commission payments for July.

30 It was submitted that commissions were estimated by Mr Dellys to be $12,500.00, that is, the sum which he would have earned during the period of his notice had he been allowed to work it out. He was denied the benefit of those entitlements which were contractual benefits.

31 The respondent's submission was that the original contract of employment (see page 65-66(AB)) contains an express term providing for a 10% incentive component, payable quarterly. This payment was unilaterally discontinued by the respondent and commuted to a salary increase of approximately $5,500.00. A new incentive package was reintroduced and backdated to 1 July 1999. No details of that incentive package are made known (see the memorandum of 1 February 2000 (page 74(AB))).

32 There was a payment of commission made to Mr Dellys on 28 September 2000 (see page 85-86(AB)). It was therefore submitted that, without more evidence as to the terms of the contract, it was not permissible to guess "the entitlement" particularly. In my opinion, that is not so. There was sufficient evidence from the payments made on 28 September 2000 (see also the calculations submitted and relied on at pages 174-176(AB)) as to the amount of commission claimable. It was made quite clear, too, by that payment that the payment of commission was considered to be a term of the contract and therefore that there was an entitlement under the contract to benefits. It was open to so find and should have been so found.

Notice of Termination

33 This ground of appeal alleged that the Commissioner at first instance erred in failing to imply a term of reasonable notice into the contract. The Commissioner's reason for so finding was that:-

> "Given my findings and given that these sums are not sums that feature in the signed contract of employment, they are not sums which the Commission could readily imply into the contract or award."

(See paragraph 33, page 31 (AB)).

34 First, the law is clear. When a contract of employment does not provide for notice of termination the Commission is required to imply a reasonable length of notice of termination when no length of notice is expressed (see *Tarozzi v WA Italian Club (Inc)* 71 WAIG 2499 (FB) and Macken, McCarry and Sappideen, "The Law of Employment", 4th Edition, at pages 165-168). It was properly conceded that that was so in this case. In deciding what is reasonable notice, a number of factors will be relevant. What is reasonable notice will depend on the circumstances of the case. In this case, there was no express term providing for what was reasonable notice. The Commissioner at first instance erred as a matter of law in failing to imply such a term.

35 The question of relevant factors in deciding what is a reasonable term arises (see *Tarozzi v WA Italian Club (Inc)* (op cit) and Macken, McCarry and Sappideen (op cit). The relevant factors in this case, which, of course, are not necessarily common to all cases, (and do not constitute an exhaustive list) are as follows:-

(a) Mr Dellys was the respondent's National Agency Manager for a period of a little over two years, not a lengthy period. He was of managerial rank.

(b) His salary was $50,000.00 together with commission which was about $85,000.00 per year, although his salary was also increased after his employment.

(c) He had left a position with Leaseplan Australia Ltd where he was Director of Sales. His package there was $85,000.00 plus a fully maintained vehicle.

(d) He was aged 43 years.

(e) He had and has no qualifications as such.

(f) It was difficult to find employment.

(g) The job attracts a reasonably high salary.

(h) There was no evidence of his job inability at all.

(i) He had quite some years of experience.

(j) He left a job with some security and the investment of that security to come to the respondent employer.

(k) He lost superannuation by his dismissal at the same time as he lost his salary.

36 In my opinion, reasonable notice to be determined as at the time of his dismissal, taking into account all of those factors, amounted to four months. An amount equal to three months' salary for reasonable notice should have been ordered to be paid to Mr Dellys as a contractual benefit (see *Hotcopper Australia Ltd v Saab* 81 WAIG 2704 (FB) as to the competence of such an order and *Thompson v Gregmaun Farms Pty Ltd* 80 WAIG 1733 (FB)). I deal with his right to claim an amount equal to the loss of reasonable notice as part of a claim of loss and compensation claimed therefor later in these reasons.

Severance (or Redundancy) Payment

37 I now turn to the question of the claim for a reasonable severance payment. It was submitted for Mr Dellys that he was entitled to an amount by way of severance payment. His position was made redundant, as was conceded and properly conceded. There was, as was correctly submitted, in the circumstances of this case, no onus on the employer to prove that the redundancy was genuine. The appellant carries the onus of establishing that the dismissal was unfair.

38 It is, of course, quite clearly the case that, in relation to the determination of a claim for severance pay as a contractual benefit, all that has to be established is that there was a redundancy. Then, according to authority (see *AFMEPKIU v Goldfields Contractors Pty Ltd* 80 WAIG 5346 at 5347 (FB); *Thompson v Gregmaun Farms Pty Ltd* (FB) (op cit) at 1736 and 1739; *AWI Administration Services Pty Ltd v Birnie* (FB) (op cit)) the term requiring the making of a reasonable severance payment, whether that obligation is express or implied, and a term requiring the giving of reasonable notice of termination, whether that obligation is express or implied, are different and separate.

39 It is the law that there is an implied term of the contract that an employer is required to make a reasonable redundancy payment (see *Rogers v Leighton Contractors Pty Ltd* 79 WAIG 3551 at 3553 (FB); *Lawson and Others v Joyce Australia Pty Ltd* 76 WAIG 20 (FB); *Coles Myer Ltd t/a Coles Supermarkets v Coppin and Others* 73 WAIG 1754 (IAC); see also *Thompson v Gregmaun Farms Pty Ltd* (FB) (op cit)). A reasonable redundancy is required to be calculated on the total remuneration package (see *Matthews v Coles Myer Limited* (1993) 47 IR 229, 232).

40 It was submitted that, although the case was not conducted on that basis at first instance, the Full Bench should reconsider those authorities. In my opinion, the Full Bench should not reconsider those authorities since there is no basis upon which it should. However, were I to do so then the following matters should be considered and the following reasoning would apply. As the respondent submitted, the contract of employment was not a contract reduced to a complete written form, and many of the necessary provisions do not appear in it (e.g. hours of work, notice, sick leave, etc.). It was submitted that, where a term is implied in fact rather than in law, the implication of the term is subject to the test that it is necessary for the reasonable or effective operation of the contract (see *Breen v Williams* 186 CLR 71 at 123-124 and *Hawkins v Clayton and Others* [1987-1988] 164 CLR 538 at 573). It was submitted that there was no evidence that the parties had intended to include such terms. That was supported by the submission that *Byrne and Frew v Australian Airlines Ltd* (1995) 185 CLR 410 at 442 is authority for the proposition that the Commission must reach some conclusion as to the intentions of the parties before considering any presumed or imparted intention.

41 In this case, whilst the contract deals with a number of terms of the contract and including some very important terms, it does not purport to deal with all of them. Therefore some terms of the contract have been left to be implied and some because there would be oral evidence that they exist (see *Coles/Myer Ltd t/a Coles Supermarkets v Sweeting and Others* 73 WAIG 225 at 230-231 (FB) citing what Deane J said in *Hawkins v Clayton and Others* (op cit)):-

> "There should be no precise mechanical test. The most that can be said consistently with some degree of flexibility is that, in a case such as this, we must determine whether the implication of the particular term is necessary for the reasonable or effective operation of a contract of that nature of the circumstances of the case. We qualify that, too, by saying that a term may be implied in a contract by established mercantile usage or professional practice, or by a past course of dealing between the parties. In this case, very few terms of the contract were spelt out. The question is whether there be an implication of a term that there be redundancy payments and that they are necessary for the reasonable or effective operation of the contract of that nature in the circumstances of the case. The answer must "Yes". The answer must be, too, that it would be reasonable and necessary, too, to so imply. The answer must be that redundancy is contemplated and that there is an agreement for payments to be made."

42 This was a case in which there was an informal agreement in the form of a letter or perhaps merely a letter evidencing an agreement. In my opinion, that could not be said to be a formal contract. It contained, for example, no provision for termination by either party, no provision for sick leave or holiday pay, and no provision for public holiday pay. Indeed, the agreement is said to be subject to his entering into a workplace agreement or subject to a written agreement. There was no evidence that any such workplace or other agreement was entered into on a monthly basis or subject to mutual agreement.

43 In any event, there is something to be said for the proposition that this agreement is an agreement for the probation period, with a more formal or different agreement to apply after the probation period and upon Mr Dellys' "appointment to full time staff" (see page 65 (AB)). If that be so, then the agreement insofar as is applied to "full time" employment was so informal as to be accounted an informal contract. Accordingly, the principles applied in *Lawson and Others v Joyce*

Australia Pty Ltd (FB) (op cit) at page 23 derived from *Byrne and Frew v Australian Airlines Ltd* (HC) (op cit) at page 422 apply:-

> "A majority, consisting of Brennan CJ, Dawson and Toohey JJ, held that in a case where employment contracts such as these were under consideration:-
>
> (1) A rigid approach should be avoided in cases such as the present where there is no formal contract.
>
> (2) In those cases the actual terms of the contract must first be inferred before any question of implication arises.
>
> (3) It is necessary to arrive at some conclusion as to the actual intention of parties before considering any presumed or imputed intention.
>
> (4) The court cited with approval the dictum of Deane J in Hawkins v Clayton and Others [1987-1988] 164 CLR 539 at 573 (HC):-
>
> > "The most that can be said consistently with the need for some degree of flexibility is that, in a case where it is apparent that the parties have not attempted to spell out the full terms of their contract, a court should imply a term by reference to the imputed intention of the parties if, but only if, it can be seen that the implication of the particular term is necessary for the reasonable or effective operation of a contract of that nature in the circumstances of the case. That general statement of principle is subject to the qualification that a term may be implied in a contract by established mercantile usage or professional practice or by a past course of dealing between the parties."
>
> This is a case where no formal contract existed between the parties. Accordingly, the Commission was in error insofar as it might be said to have taken the approach taken in BP Refinery (Westernport) Pty Ltd v Shire of Hastings [1978] 52 ALJR 20. The actual terms of the contract are apparent, at least insofar as wages or salary, long service leave and holidays are concerned.
>
> Next, the question arises as to what the actual intention of the parties was before considering any presumed or imputed intention. However, a term can only be implied on the authority of Hawkins v Clayton and Others (op cit) (HC) and Byrne and Frew v Australian Airlines Ltd (op cit) (HC) if, and only if, it can be seen that the implication of the particular term is necessary for the reasonable or effective operation of a contract of that nature in the circumstances of the case."

44 As in *Lawson and Others v Joyce Australia Pty Ltd* (FB) (op cit) and the other authorities in which the Full Bench has decided the same principle and which I have mentioned above, and for the same reasons, such a term ((ie) that a reasonable severance payment or redundancy be paid), should be implied into the contract as necessary for the reasonable or effective operation of the contract in the circumstances of the case. Further, and significantly, it is quite clear that the payment of a reasonable severance payment was recognised by the respondent employer as a term of the contract by the payment of what purported to be such a reasonable payment, but which for reasons I will refer to hereinafter was not. This was strong evidence of the intention of the parties insofar as that evidence was required.

45 As Deane J said in *Hawkins v Clayton and Others* (op cit) there should be no precise mechanical test and that one applies a degree of flexibility and concludes that such a term should be implied as necessary for the reasonable or effective operation of the contract of employment. Secondly, the term should be implied as a matter of law and as a matter of necessity in the contract for the reasons expressed in *Lawson and Others v Joyce Australia Pty Ltd* (FB) (op cit) (at page 24) as a necessary incident of a particular class of contract, namely an employment contract. To do so is not an arbitral act. To do so is to properly determine that such a term is a necessary incident of a definable category of contractual relationship; since if this term were not implied the contract of employment would result in the employee's rights being seriously undermined.

46 If that were wrong then, according to the well known rules in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* [1978] 52 ALJR 20 (the cumulatives test), such a term can and should be implied to give to the contract business efficacy.

47 Finally and conclusively, there was the performance of the contract by the employer by payment of an amount by way of severance payment, upon which act it relied as a defence to both a claim for contractual benefits and severance pay.

48 The judgment of the Federal Court in *Riverwood International Australia Pty Ltd v McCormick* [2000] FCA 889 is persuasive only and exists in the face of a line of Full Bench authority in this Commission.

49 There was also important evidence that such a term was a term of the contract. That evidence was the partial performance by the respondent of such a term by the payment of the amount of the redundancy payment.

50 Further, it is necessary to imply a term of reasonable notice and of the requirement to pay an amount of reasonable redundancy as a matter of law. The required term of reasonable notice is implied in an employment contract as is a term of reasonable redundancy (see *Lawson and Others v Joyce Australia Pty Ltd* (FB) (op cit)) as a matter of law because a contract of employment is a particular category of contract.

51 Further, the implication of the term is required because, unless a term is implied, the contract could be rendered worthless (see *Lawson and Others v Joyce Australia Pty Ltd* (FB) (op cit)) at page 27 and my comments supra). It is not to the point that it is not contained in a statute or that in other jurisdictions such has not been said to be the law. The Commission must decide what the law is in this jurisdiction, including what is the common law of the Commission The implication of a term requiring an employer to pay reasonable compensation has been the law in this Commission for some years (see *Coles/Myer Ltd t/a Coles Supermarkets v Sweeting and Others* (FB) (op cit)). In any event, and significantly, there is importantly a recognition of the principle in South Australia and federally where a dismissal was first held to be unfair because the amount of a reasonable severance payment was not made (see the cases cited in *Thompson v Gregmaun Farms Pty Ltd* (FB) (op cit) and *Rogers v Leighton Contractors Pty Ltd* (FB) (op cit), in particular, *Wynn's Wine Growers v Foster* 16 IR 381 and *Westen v Union des Assurances de Paris (No 2)* (1996) 88 IR 268 and *Leddicoat v Schiavello Commercial Interiors SA* (FC) (unreported) No SI 1153 of 1995 (delivered 18 October 1995)).

52 For those reasons there was in the contract and should have been found to have been an implied term that reasonable severance pay was to be paid, and, indeed, such a term was sought to be part performed.

53 What is reasonable severance pay is to be calculated in accordance with the factors referred to in *Thompson v Gregmaun Farms Pty Ltd* (FB) (op cit) and *Rogers v Leighton Contractors Pty Ltd* (FB) (op cit) and taking into account also other relevant matters. It is also necessary to consider what a redundancy payment is an indemnity for. It is an indemnity for the loss suffered as a result of a dismissal not due to the fault of the employee. It also acts as compensation for any loss of non-transferable benefits, provides income maintenance during any period of unemployment following the loss of a job, compensates for problems and uncertainties, and to some extent for loss of future earnings and other benefits. It also compensates for the loss of seniority and/or an employee's investment in his job. Those characteristics were properly

identified in the *Termination Change and Redundancy Case* (1984) 8 IR 34 at 70. To that I would add that a severance payment may assist to prepare for the education of an employee for different employment or to assist him/her to obtain other employment. These factors do demonstrate some overlap with the implied contractual term that there be reasonable notice of termination, although both represent different rights and obligations in the context of a contract of employment (see *AWI Administration Services Pty Ltd v Birnie* (op cit)).

54 I would not regard *WA Access Pty Ltd v Vaughan* 81 WAIG 373 (FB), on a fair reading, authority for the proposition that loss is confined to the period of notice prescribed by an award. In this case, there was a summary dismissal and the finding made was of substantive unfairness as well as procedural unfairness, a finding which it was open to make.

55 I would also make it clear that an amount equal to an amount of reasonable notice is not at all a necessary measure of loss . Proven loss occasioned by unemployment after an unfair dismissal is an additional loss in most cases.

56 In this case, taking all of these factors into account, a fair amount for a contractual entitlement by way of a redundancy payment would be an amount equal to six weeks' lost remuneration, which remuneration includes commissions and superannuation payments.

Superannuation Payments – Are they a Contractual Entitlement?

57 The submission was that Mr Dellys had a contractual entitlement to be paid superannuation on his remuneration in accordance with the percentage payments calculated under the *Superannuation Guarantee (Administration) Act* 1992 (Cth) (see page 66(AB)).

58 In *Thompson v Gregmaun Farms Pty Ltd* (FB) (op cit) at pages 1735 and 1739 per Sharkey P and Kenner C and in *Keane v Lomba Pty Ltd* 78 WAIG 810 at 811 (FB), the Full Bench held that where statutory superannuation contribution payments have not been made they may not be recovered as a contractual benefit. It was submitted by the appellant that the Full Bench should distinguish *Keane v Lomba Pty Ltd* (FB) (op cit) and *Thompson v Gregmaun Farms Pty Ltd* (FB) (op cit).

59 It was submitted that Mr Dellys had a written contract of employment that gave a contractual entitlement to be paid the percentage superannuation payment under the *Superannuation Guarantee (Administration) Act* 1992 (Cth). That was not the case in *Keane v Lomba Pty Ltd* (FB) (op cit) (see page 810) where the application was for an order for the payment of a superannuation guarantee fund charge.

60 It was also submitted that no statute compels an employer to pay to an employee or to an employee's superannuation fund a percentage of the employee's salary as a superannuation benefit. We were referred to the *Superannuation Guarantee Charge Act* 1992 (Cth) and the *Superannuation Guarantee (Administration) Act* 1992 (Cth). It was submitted that the relevant requirement in the later Act is that if an employer does not make a payment to an employee in the nature of a percentage of the employee's salary by way of superannuation then the employer must pay the superannuation guarantee charge (see s.13, s.14, s.20 and s.21). The charge is, of course, the amount of the prescribed superannuation contribution. In this case, the only entitlement which Mr Dellys had was that a percentage of his salary be paid into the superannuation fund by way of his contract of employment.

61 The crux of the claim, it was submitted, was that Mr Dellys was not seeking to claim the superannuation charge, but was seeking to have the superannuation contributions that the employer was contributing to a fund on behalf of Mr Dellys applied to additional payments that Mr Dellys claims to be entitled to by way of contractual benefits, because, if those contractual benefits had been paid, they would have been calculated on the employee's remuneration, including commission, and not just base salary.

62 Further, it was submitted that there can be no intention to cover the field in relation to payments made to superannuation funds by employers on behalf of employees.

The Nature of Superannuation

63 It was not in issue that Mr Dellys was an employee as defined in the *Superannuation Guarantee (Administration) Act* 1992 (Cth). There is a superannuation guarantee scheme which is implemented by the *Superannuation Guarantee Charge Act* 1992 (Cth) and the *Superannuation Guarantee (Administration) Act* 1992 (Cth). The scheme requires all employers to provide a prescribed minimum level of superannuation support in each financial year for all employees. The firstnamed Act imposes the charge on employees and the second Act provides the administrative arrangements for the scheme. The Acts require employers to provide a minimum level of superannuation support as prescribed. That support, by way of a contribution which is equal to a percentage of salary or wages, is defined to include commission (see the definition of salary and wages in the *Income Tax Assessment Act* 1936 (Cth), s.12(3)). In 1998, the prescribed rate of contribution was six percent of salary or wages as defined. In 1999/2000, it was seven percent. In the financial year 2001 it was eight percent. In this case, the letter evidencing the agreement or at least the probationary employment agreement (see pages 65-66(AB)) specifically recognised the obligation to pay superannuation contributions which it also identified as paid and as a liability under the *Superannuation Guarantee (Administration) Act* 1992 (Cth). That is, it specifically identified the statutory obligations of the employer and the statutorily prescribed rate of contribution as the quantum of the employer's contribution obligation.

64 In *Keane v Lomba Pty Ltd* (FB) (op cit) the Full Bench per Sharkey P and Coleman CC at page 811 and per Cawley C at page 812 held that the Superannuation Acts conferred the benefit of a prescribed superannuation contribution on an employee, and imposed on the employer an obligation to pay it enforceable under that legislation.

65 There was nothing submitted to the Full Bench to make me find otherwise. The fact that a letter evidencing a contract of employment identifies and expresses the liability to pay superannuation contributions at the prescribed rate and by reference to the statutory obligation does not make the obligation to pay a contractual obligation. The contract merely identifies the statutory obligation and refers to it.

66 Nothing was submitted to me either of any cogency to persuade me that the view which the Full Bench in *Keane v Lomba Pty Ltd* (FB) (op cit) as expressed in detail that the Commonwealth legislation did not cover the field. I refer also to the view which I expressed in *Thompson v Gregmaun Farms Pty Ltd* (FB) (op cit). Because there is a statutory obligation, as I said there, there is no need to convert it into a contractual obligation. Accordingly, it is plainly unnecessary and of no effect for the contract, either expressly or impliedly, to provide for matters already covered by statute, namely statutorily prescribed and enforceable contributions. (Again I say what I said in *Thompson v Gregmaun Farms Pty Ltd* (FB) (op cit) that if a contract prescribed higher rates of contribution than those prescribed by the statute then that might be a different matter). However, the amount of the contributions to superannuation funds in this case did not, for those reasons, form part of the contract, and were not benefits which the appellant is entitled to claim as benefits due to him under the contract.

67 For the reasons expressed in *Keane v Lomba Pty Ltd* (FB) (op cit) and *Thompson v Gregmaun Farms Pty Ltd* (FB) (op cit), the amount of superannuation contributions were not competently claimed as contractual benefits under s.29(1)(b)(ii) of the

Act. However, insofar as it was necessary to say so, superannuation was properly calculable on the total amount of remuneration, which included the quantum of commissions.

Compensation

68 The Commissioner at first instance found that the compensation was to be calculated by reference to Mr Dellys' salary. Added to that was the superannuation component payable on the salary less the six weeks' redundancy payment and four weeks' payment in lieu of notice (see the Commissioner's reference to the reduction of the amount at paragraph 32, page 31(AB)).

69 In this case, as was submitted by the appellant, the Commission can order the payment of compensation up to the statutory limit ((ie) an amount equal to six calendar months' salary) (see s.23A(4) of the Act), even though the employer has already paid an amount (see *Capewell v Cadbury Schweppes Australia Ltd* 78 WAIG 299 at 303 and *Gilmore and Another v Cecil Bros and Others* 78 WAIG 1099 (IAC)). This includes an amount of what might be said to be compensation and includes the case where that payment was in lieu of notice and a redundancy payment (see *Capewell v Cadbury Schweppes Australia Ltd* (op cit)).

70 The Commissioner is required to make a finding as to loss and/or injury, if any, if any loss and/or injury has been established by the applicant and established as caused by an unfair dismissal (see s.23A(1)(ba) of the Act). The Commissioner must then assess the amount of compensation which should be ordered to be paid in respect of such loss and/or injury, and assess it in accordance with equity, good conscience and the substantial merits of the case. Primarily that means that an amount must be awarded to put the applicant employee back, so far as is possible, in the position which he/she would have been in had he/she not been unfairly dismissed and suffered loss or injury (see *Gilmore and Another v Cecil Bros and Others* 76 WAIG 4434 (FB) and *Bogunovich v Bayside Western Australia Pty Ltd* 79 WAIG 8 (FB), for example).

71 There is no appeal by either party against the quantum of compensation awarded to be paid to compensate for the loss of salary equal to 23 weeks, being $26,251.10.

72 Essentially, the submission for the respondent employer was that the total amount of redundancy and severance pay payments, made by the employer, should not have been deducted from the total amount of salary loss of 33 weeks to give a figure of 23 weeks' loss. This was submitted to be on the authority of *Gilmore and Another v Cecil Bros and Others* (IAC) (op cit).

73 The question of what is the loss that was required to be first established according to the well known principles laid down in the cases to which I have referred above, and also referred to in a large number of others including *Tranchita v Wavemaster International Pty Ltd* 79 WAIG 1886 (FB). Whilst the amount awardable for compensation is capped, as I have observed, at an amount equal to six calendar months' remuneration, loss is not necessarily rigidly required to fall within the definition of "remuneration". The loss must be caused, however, by the unfair dismissal.

74 Further, too, in any event, remuneration is widely defined (see *Gilmore and Another v Cecil Bros and Others* (IAC) (op cit) and *Capewell v Cadbury Schweppes Australia Ltd* (op cit) where in the latter case the Full Bench defined that term widely at page 301). Remuneration is a wider term than mere wages or salaries and includes benefits, remedies, goods, services, advantages, etc, payable under or emanating from or because of the contract of employment.

What then was the loss established?

Salary

75 There was a loss of an amount equal to 33 weeks' salary, because that was the time during which having mitigated his damages, Mr Dellys was unemployed following and caused by his unfair dismissal. Next, subject to what I have said above as to his entitlement to reasonable notice, he was not paid an amount equal to reasonable notice and he suffered a loss as a result. He was entitled, not having been given reasonable notice, to an amount equal to the amount which he should have earned during reasonable notice. That amount, of course, included salaries and commissions and other forms of remuneration.

Commission

76 Ground 3 related to commissions or incentive payments. The core of the submission was that the Commissioner at first instance erred in not including commissions lost as a result of Mr Dellys' summary dismissal in the amount of compensation ordered to be paid, when the Commissioner did not award this part as a contractual benefit. The next question is whether Mr Dellys established as part of his loss the loss of commissions which he would have earned had he not been dismissed. It is clear that as a result of his dismissal he was unable to earn the commission which he would have otherwise earned during the 33 weeks during which he was unemployed following his unfair dismissal and because of it. That applies in the same way as he had an inability to earn his salary because his contract had been terminated unfairly. That amount, of course, does not include commission earned up to 14 July 2000, and therefore payable as a contractual benefit. It was a term of his written contract that he would receive commissions, also called incentive payments, based on the amount of new business written by agents and modified by the average weight achieved. The total amount paid to Mr Dellys in 2000 was $17,942.91. In my opinion, it was open to find on that evidence that it was more probably than not, based on the earned commissions calculated as earned by him in February, May and June 2000 (see page 176(AB)) and averaged, that he would more probably than not have earned, had he remained in employment, that amount or a similar amount for a period of 12 months after his employment ceased. That evidence was not, of course, strongly controverted. Thus, it was open to find that, on the balance of probabilities, he would have earned in the ensuing 12 months approximately that which he had earned in total commissions in 2000, namely $17,942.91, or in six months half of that amount, namely $8,971.45. This then was a component of an added loss for which he was entitled to be compensated (see the calculations put in evidence through him at page 176(AB)), subject to what I say hereinafter.

Superannuation Contributions

77 The next item of loss is an amount equal to the amount of superannuation contributions to which he would have been entitled because of the operation of the statutes to which I have referred on his contract of employment. In other words, because of and caused by his unfair dismissal he lost superannuation payments based on the total of wages and commission which he would have earned during the 33 weeks he was unable to be employed, having lost his employment, and payable at the rate of six percent and later seven percent for the 33 week period as and from 14 July 2000. It does not matter that these amounts were to be paid because of a statutory liability upon the employer. The fact is that the value of the contributions to his superannuation which otherwise would have been paid on his behalf and/or to his benefit were lost. I see nothing in *Furey v CSA (WA)* (1999) FCA 1492 per Carr J which detracts from such a view. Mr Dellys' loss of superannuation benefits arose and was caused by the fact that he was unfairly dismissed, his employment was unfairly terminated, and his benefiting from the statutory contribution by his employer ended because his contract of employment

was unfairly terminated. It was a loss caused by that unfair dismissal which he was entitled to be compensated for by the payment of an amount equal to the amount of contributions lost and which should have been made, again subject to what I say hereinafter.

78 In my opinion also the judgement of the Full Court of Western Australia in *Villasevil v Pickering* (2001) 24 WAR 167 at 178-182 is authority for the proposition which I now advance. An allowance can be awarded even in the absence of actual evidence (see *Villasevil v Pickering* (op cit), citing and applying *Jongen v CSR Ltd* [1992] Aust Torts Reports 61,706).

Reasonable Severance Pay

79 If a reasonable severance payment was not made, and it was required to be made, that was a loss caused to him by his unfair dismissal, and was itself, in any event, evidence of an unfair dismissal (see *Thompson v Gregmaun Farms Pty Ltd* (FB) (op cit) and the authorities cited therein). It was open to so find and should have been found. The failure to pay such an amount would constitute a loss, too, to the appellant for which he was entitled to be compensated, subject to what I say hereinafter.

80 The question about overlapping of notice required to be given or the amount thereof in a wage or salary amount and the amount of a severance payment, of course, has to be considered. However, notwithstanding that, *Gilmore and Another v Cecil Bros and Others* (IAC) (op cit) is authority for the proposition that the Commission can order the payment of an amount up to the maximum statutory caps limit and not reduce that amount by amounts such as had been paid in this instance already by the employer, before the question of the claim for loss on an unfair dismissal is determined. I am not of opinion that one should, nor can one correctly, order an amount over and above the established loss in this case, however, by way of compensation. Thus, I would reduce the amount ordered to be already paid for redundancy and notice of termination paid for compensation, insofar as it is relevant to do so, by the amounts already paid for notice and a severance payment. Further, and quite clearly, the amount of reasonable severance pay of equal to six weeks' remuneration by salary, commission and superannuation for severance payment, insofar as that amount coincided with the amount for notice which might properly be ordered to be paid for notice may be not part of the loss. In this case, the amount of six weeks, even though it embraced a number of the ingredients which I have outlined above, properly leads to a figure assessed at six weeks' remuneration, which includes superannuation contributions and commission proven to have been lost, but not as precise items but as factors relevant to the proper and fair assessment of a lump sum for a severance payment, having regard to the rationale of a severance or redundancy payment. I am of opinion that the equity, good conscience and the substantial merits of the case do not enable there to be an award of an amount greater than that necessary to compensate for the loss or injury actually proven to have been suffered in this case. On reflection, I think, too, that generally, as a matter of law, that should be the case in applications for unfair dismissal in this Commission, particularly where there is an accompanying claim for a contractual benefit identical to or similar to the claim for the whole or part of the loss ((ie) that where an order for the payment of a contractual benefit is made it should not be an amount found to be part of any loss and compensated therefor). I deal with the question of overlapping on a different basis next in these reasons.

CONCLUSIONS

81 The questions which arose in this matter then went to what findings ought to have been made in relation to loss and the compensation therefore, and, in particular, to the claims for contractual benefits.

82 Before the Commissioner at first instance there were two claims. One was made under s.29(1)(b)(i) of the Act, the other was made under s.29(1)(b)(ii) of the Act. The first was the claim alleging unfair dismissal and claiming reinstatement which was not ordered and resulting in an order for compensation of loss. The second was for contractual entitlements which is an entirely separate claim, although the two claims were made together and heard together.

Reconciling the Two Claims

83 How then should the s.29(1)(b)(i) and (ii) orders which it is open to make for contractual entitlements and for compensation for loss caused by an unfair dismissal be reconciled? First, both s.29(1)(b)(i) and (ii) of the Act, the former read with s.23A of the Act, are remedial or beneficial provisions which are to be interpreted liberally (see *Bogunovich v Bayside Western Australia Pty Ltd* (FB) (op cit)). The same reasoning which was applied in *Bogunovich v Bayside Western Australia Pty Ltd* (FB) (op cit) to s.29(1)(b)(i) applications applies to claims for contractual benefits so that the statutory provisions are properly characterised as remedial.

84 It is noteworthy that there is no limit on what should be claimed for contractual benefits. Nor is an applicant required to mitigate such a claim. Thus, the first order where two such claims are heard together or where two such claims are heard and determined and the applicant succeeds, is an order for the full amount of the contractual benefits to which the applicant is entitled and which he/she has been denied. There is no scope in the jurisdiction for reduction of those amounts in a manner which deprives the claimant of his/her full contractual benefits (*Belo Fisheries v Froggett* 63 WAIG 2394 (IAC) is not an authority to the contrary). The right to claim and be ordered to be paid contractual benefits is separate to and quite independent of any claim based on an allegation of harsh, oppressive or unfair dismissal.

85 Therefore, however, since those have been paid or have been ordered to be paid in full, they cannot be claimed as a loss. Further, in particular, no loss has been caused because they have been claimed and ordered to be paid as a contractual benefit.

Compensation

86 Accordingly, for those reasons, the Commissioner at first instance, acting correctly as a matter of law, should have found that there was an unfair dismissal on the basis of redundancy. The Commissioner should also have found that three months' notice should have been implied into the contract and, further, that severance pay should have been paid. As a result, it was open to find that, for those reasons, the dismissal was unfair as it was, too, for a breach of s.40 and s.41 of the MCE Act.

87 The loss which should have been found and was found and which finding is not the subject of an appeal was, therefore, as follows:-

(a) 33 weeks' loss of remuneration, including salary and commission.

(b) An amount equal to 33 weeks' superannuation contributions lost calculated on a total amount of weekly salary and commission.

(c) An amount equal to 12 weeks' remuneration (salary and commission) in lieu of notice (less one month's remuneration paid).

(d) A sum equal to six weeks' remuneration (already paid) for a severance payment and an amount equal to lost superannuation contributions.

88 That total amount is then required to be capped at an amount equal to six calendar months' remuneration which is an amount of $26,251.10.

Contractual Benefits

89 In my opinion, Mr Dellys was entitled to succeed in a claim for denial of contractual benefits, namely a sum equal to three months' salary and commission for reasonable notice (less the amount of four weeks' salary for notice paid to him and not therefore denied). There was no denial of the claim for a severance or redundancy payment because the amount of such a reasonable payment was paid.

FINALLY

90 Mr Dellys is not entitled to claim an amount equal to superannuation contributions as a contractual benefit for the reasons which I have expressed above. Further, since he is entitled to claim contractual benefits, as denied, and obtain an order for their payment, then those contractual benefits become the subject of a separate order on the s.29(1)(b)(ii) application, and those amounts are not, therefore part of any proven loss which requires compensation therefor to be ordered.

91 It was also open to find not only that Mr Dellys had been unfairly dismissed for redundancy, but that he had been unfairly dismissed without reasonable notice, that he had been unfairly dismissed both substantively and procedurally, as the Commissioner at first instance found, and that having been dismissed because his position had become redundant, he had been unfairly dismissed because he was paid no reasonable severance payment.

THE CALCULATION PROPOSED ORDER SUMMARISED

92 Thus, the amount properly to be included for loss was:-

An amount equal to six months' salary		$27,577.00
An amount equal to six months' loss of superannuation entitlements		$ 4,396.32
An amount equal to six months' commission		$8,571.45
An amount equal to three months' commission plus superannuation and salary in lieu of notice		$25,764.40
An amount equal to six weeks' remuneration for severance payment		$ 3,225.55
		$69,234.72
Less		
One month's salary paid for reasonable notice		$ 4,396.32
Less six weeks' salary also @ $4,396.32 per month paid for severance pay		$ 6,584.48
Amount		$16,980.80
Total		$58,243.90
Less amount of contractual benefit ordered to be paid, namely an amount equal to two months' salary and commission in lieu of reasonable notice not paid		
		$12,142.00
(1)	Amount of order for compensation	$46,101.90
	Capped at	$27,577.00
(2)	Amount of order for contractual benefit	$12,142.00

93 I would therefore uphold the appeal and vary the order made at first instance to, insofar as it is necessary, reflect payment of those amounts.

94 I would issue a minute of proposed order to reflect these reasons.

COMMISSIONER P E SCOTT AND COMMISSIONER J H SMITH—

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

96 The Commission found at first instance that the termination was substantively unfair because the Appellant was underperforming and he should have been advised that he was underperforming and counseled. The Commission at first instance found that the Appellant's termination was procedurally unfair, in that there was no consultation or discussion about making his position redundant that meets the requirements of s.41 of the *Minimum Conditions of Employment Act* 1993.

97 In light of the contention made on behalf of the Appellant and conceded on behalf of the Respondent that the Commission at first instance erred in holding that the Respondent had not discharged its onus to prove that the Appellant's termination was a genuine redundancy, it follows that the Full Bench must assess the loss that follows from that finding at law. As the parties agree that the finding grounding that the termination was substantively unfair should be set aside, the Commission has to assess the loss that follows from the finding that when the Appellant was made redundant, the manner of termination was procedurally unfair. In *WA Access Pty Ltd v Vaughan* [2000] WAIRC 01179 (2000) 81 WAIG 373 the Full Bench set aside an award for 17 weeks' compensation, and made an award of 2 weeks' compensation. The President observed that the employer effected the genuine redundancy in an unfair manner, in that, no notice was given of the forthcoming redundancy, there was no discussion of measures which might be taken to minimize the effect, no leave was given for job interviews and discussion with unions as required by Clause 32A of the *Metal Trades (General) Award* 1966. In assessing the loss that flowed from the procedural unfairness the President held at [71]; 378:

> "In the circumstances, the loss was of a sufficient period of notice to the respondent and to his union to enable him and the union, in accordance with the award, to prepare for his dismissal and, given that he had served about twelve months, a further amount of two weeks' pay should be ordered to be paid and to recognize that the dismissal was a redundancy".

98 Nothing has been put forward on behalf of the Appellant in this matter to show that even if the consultations or discussions had occurred in compliance with s.41 of the *Minimum Conditions of Employment Act* that the Appellant's employment would

not have been terminated on 14 July 2000. Consequently, in the absence of any claim for injury that may flow from the manner of termination the Appellant has been unable to establish any loss that flows from the finding of procedural unfairness.

99 As to the consequences of the finding to be made by this Full Bench that the Appellant's employment was terminated on grounds of redundancy, it is argued on behalf of the Appellant that the Appellant was not paid a reasonable redundancy payment or given reasonable notice. The Appellant claims these amounts as contractual benefits. However, it is a consequence of a finding that a termination for redundancy, which is not accompanied by a reasonable redundancy payment, is harsh, unjust and unreasonable (*Rogers v Leighton Contractors Pty Ltd* (1999) 79 WAIG 3551 per the President at 3552 and Beech, C at 3554 and the cases cited therein).

100 In calculating a reasonable redundancy payment and making an award for such a payment either as an award of compensation or as a contractual benefit, the principles of assessment are the same. (See *WA Access Pty Ltd v Vaughan* op cit). Firstly, a period of reasonable notice must be considered when determining a reasonable redundancy or severance payment. Then the two should be assessed globally. In *AWI Administration Services Pty Ltd v Birnie* [2001] WAIRC 0415 at [206] to [208] (2000) WAIG 2849 at 2863 Chief Commissioner Coleman and Commissioner Smith observed—

> "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."
>
> 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).
>
> 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."

101 In relation to reasonable notice, we agree with the President for the reasons he expresses that the Appellant should have been given 3 months' notice. As to the claim for reasonable redundancy pay, when the loss of non-transferable credits are considered regard must be had to the fact that the Appellant was employed by the Respondent for just over 2 years and 2 months. In the circumstances when both notice and reasonable redundancy pay are looked at globally and regard is had to the fact that a period of reasonable notice is 3 months, we are of the view that 6 weeks' redundancy pay paid to the Appellant cannot be said to be unreasonable. Further, it is our view for the reasons discussed by the Chief Commissioner and Commissioner Smith in *AWI Administration Services Pty Ltd v Birnie* (op cit) at [214] – [215]; 2864, that an award for payment in lieu of notice should be assessed on the basis of earnings the Appellant would have received had he been given notice. In this matter the Appellant's written contract of employment entitled him to an incentive payment based on a calculation of the volume of new business written by agents weighted with the average rate they achieve. The Appellant received three incentive payments in 2000. These payments were made in September 2000 and were calculated as follows—

> "Commission Payable to P G Dellys: 1 June 1999 to 31 July 2000

	February $	May $	June $
Agency Consumer Income	41,885.37	71,974.41	94,919.91
Agency Commercial Income	19,677.38	31,146.84	50,672.27
Agency Fees Earned	27,500.00	30,000.00	20,000.00
Sub-Total	89,062.75	133,121.25	165,592.18

	February $	May $	June $
Less Earned by D Hawkesford		9,455.44	34,029.66
Sub-Total	89,062.75	123,665.81	131,562.52
Less Base Salary P Dellys	54,954.00	54,954.00	54,954.00
Net Balance for Calculation of Commission	34,108.75	68,711.81	76,608.52
Commission @ 10% of Net Balance	$3,410.88	$6,871.18	$7,660.85
Total Payable	$17,942.91"		

102 The Appellant put forth 3 cases for assessment of an incentive payment for July 2000 had he been afforded the opportunity of working out the period of 1 month's notice. The first figure is based on the payment made for June 2000 of $7,660.85. The second is an average of the payments received in February, May and June 2000 being $5,980.97 per month (if those figures can be regarded as monthly payments). The third figure was calculated by the Appellant by using June percentages and estimated July sales, which the Appellant calculates at $12,500. The Appellant did not work in July 2000 so figure of $12,500 is an estimate only. Further, although the Appellant's Counsel claimed the payments for February, May and June as monthly payments, there is no claim made by the Appellant that there are any incentive payments that have not been paid as incentives earned prior to the date his employment was terminated. Nor has any record of any other payment made in the 1999/2000 financial year been produced. In addition, the Applicant's contract of employment expressly provides that incentive payments are paid "calendar quarterly in arrears". Consequently it is apparent that the payments were quarterly, so that none of 3 assessments can be relied upon.

103 In our view in making an order to compensate the Appellant for the failure to afford him 3 months' reasonable notice, it is appropriate to calculate that amount by averaging the incentive payments made to the Appellant in the past 12 months of his employment, that is the payments received in February, May and June 2000. Accordingly, after having regard to the fact that the Appellant was paid 1 month's pay in lieu of notice, we would have awarded the Appellant an amount of $19,323.31, calculated at the rate of $54,954.00 per annum for salary, $4,396.32 per annum for superannuation and $17,942.91 per annum for incentives, being a total of $77,293.23 per annum or $6,441.10 per month. From that amount we would have deducted 1 month's salary that was paid in lieu of notice, being an amount of $4,396.32. Consequently, we would have awarded the Appellant $14,926.99 as pay in lieu of notice.

104 As to redundancy pay, the Appellant was paid 6 weeks' salary (calculated at $4,396.32 per month). As set out above, it is our view that was a reasonable payment. Further, it is our view that in calculating the rate of redundancy pay, no amount should be allowed for incentives or for superannuation. For the reasons expressed by Chief Commissioner Coleman and Commissioner Smith in *AWI Administration Services Pty Ltd v Birnie* and set out above, it is our view that the observations made by the President in *Thompson v Gregmaun Farms Pty Ltd* (2000) 80 WAIG 1733 at 1736 should not be followed, wherein the President, (with whom Commissioner Scott agreed), applied the factors that apply to the calculation of compensation for reasonable notice to redundancy pay. In that case the President held redundancy pay should be a payment equal to a period of remuneration that included a bonus and superannuation. Unlike the provision of notice, a redundancy payment is a payment made to an employee on ceasing employment. The Appellant's entitlement to superannuation payments and incentives payment arises out of the performance of work that is carried out by him from week to week. As one of the main reasons why a redundancy payment is to be made is to compensate an employee for the loss of non transferable benefits such as sick leave and long service leave and that if such leave was taken or paid out the payment would not attract any commission payments it is it is our view that redundancy pay should be calculated on an employee's base or ordinary pay. Further we observe that historically redundancy payments have been calculated in this way. In the *Termination, Change and Redundancy Case* (op cit) the Full Bench of the Federal Commission at page 73 after hearing extensive submissions in respect of the nature of redundancy pay referred to a summary of the elements of monetary compensation for retrenchment in a Report of the Committee of Inquiry into Technological Change in Australia 1980. The Report stated that one of the aims of a redundancy payment was to act as temporary income maintenance whilst the retrenched employee searches for another job and to allow for the possibility of retraining or relocation to take up a new job. The Full Bench then held that payment of severance pay is justifiable compensation for non-transferable credits and the inconvenience and hardship imposed on employees and took into account in fixing the quantum the standards established by recent decisions of the Commission. The Full Bench in setting a test case standard determined a formula for payment based on years of service calculated as the ordinary time rate of "pay".

105 As there is no cross appeal by the Respondent seeking to vary the decision of the Commission at first instance, we would dismiss the Appellant's Appeal.

THE PRESIDENT—

106 For those reasons, the appeal is dismissed.

Order accordingly

2001 WAIRC 04456

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER DELLYS, APPELLANT
	v.
	ELDERSLIE FINANCE CORPORATION LIMITED, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER P E SCOTT
	COMMISSIONER J H SMITH
DELIVERED	TUESDAY, 18 DECEMBER 2001

FILE NO/S.	FBA 42 OF 2001
CITATION NO.	2001 WAIRC 04456

Decision	Appeal dismissed.
Appearances	
Appellant	Mr D Howlett (of Counsel), by leave
Respondent	Mr D M Jones, as agent

Order

This matter having come on for hearing before the Full Bench on the 27th day of September 2001, and having heard Mr D Howlett (of Counsel), by leave, on behalf of the appellant and Mr D M Jones, as agent, on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 18th day of December 2001, it is this day, the 18th day of December 2001, ordered that appeal No FBA 42 of 2001 be and is hereby dismissed.

By the Full Bench

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

[L.S.]

2001 WAIRC 04482

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CLIFTON JOHN FOX, APPELLANT
	v.
	NEWS ILLUSTRATED PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 20 DECEMBER 2001
FILE NO/S.	FBA 46 OF 2001
CITATION NO.	2001 WAIRC 04482

Decision	Appeal dismissed.
Appearances	
Appellant	Mr B F Stokes, as agent
Respondent	Mr A J Thompson, as agent

Reasons for Decision

THE PRESIDENT—

1 This is an appeal pursuant to s.49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act") by the abovenamed appellant, Clifton John Fox, (hereinafter called "Mr Fox"), against the whole of the decision of the Commission, constituted by a single Commissioner, given on 11 July 2001 in matter No 1492 of 2000. The decision is constituted by an order that the application before the Commission be dismissed.

2 The appellant now appeals against that decision on the following grounds:-

GROUNDS OF APPEAL

3 The grounds of appeal are as follows:-

"The learned Commissioner erred in law and in fact in finding that—

1. The Appellant's contract of service included a term that the Appellant had to reach sales of $5,000 per week from the 1st of July, 00 before he would start on salary of $35,000 gross per annum. There was no evidence that this term was agreed between the parties. It is conceded that the original contract was varied by the parties to include a term that salary be deferred until the Appellant reached a total sales target of $5,000 gross. This finding was not open on the evidence as a finding or inference of fact and is against the weight of all the evidence and wrong in law;
2. The Appellant's contract of service included a term that sales commission was only payable upon publication and was to be calculated after deducting GST. There was no evidence at all that this was agreed by the parties in late June, '00. Even if this finding is sound there was no evidence that it was agreed by the parties or could reasonably be inferred that that term applied to the operation of the sales threshold. This finding was against inferences reasonably arising from the Respondent's accounting documentation.
3. The Appellant's contract of service included a term that there was to be no entitlement for commission upon sales earned but unpaid for if termination intervened. There was no evidence that this was agreed and there was no properly qualified and independent evidence that this was a common practice in the industry.
4. Prior to resignation the Appellant had not reached the $5,000 gross sales threshold.
5. The resignation tendered on the 30th back-dated to the 28th August 2000 was not a constructive dismissal constituting an unfair dismissal within the terms of section 29 of the Act but a voluntary unilateral

termination of employment by the Appellant In reaching this inference from the facts the learned Commissioner failed to consider or adequately consider the following—

(a) the unreasonable actions of Messrs. Tan and Williams the Appellant's superiors and agents of the Respondent prior to resignation;

(b) the sales director's failure to discipline Messrs. Tan and Williams;

(c) the unilateral assignment of the Appellant exclusively to telephone cold calling which wasn't part of his training or work duties, which represented the offer of a new contract of employment and the Respondent's repudiation of the existing contract and the unreasonable treatment by the Respondent's supervisor of the Appellant during that assignment;

(d) the Respondent's purported alteration of the terms of the sales commission threshold from fortnightly to weekly and then to a deadline date;

(e) the Respondent's attempts in August (through its sales director) to impose a unilateral condition that once on salary the level of sales the Appellant achieved would have to be maintained at least at the minimum level of $5,000 per weekly issue;

(f) the Respondent's refusal to invite the Appellant to the Belmont Small Business Awards presentation despite all his work in ensuring it was a success;

(g) the refusal of the editor to advise the Appellant of the then level of his sales on the 26th or 28th August, 00;

(h) the failure of the sales director to make any arrangements for the implementation of the salary package prior to leaving on holiday on the 18th August, 00;

(i) the failure of the editor to advise the Appellant on the 26th or 28th August, 00 when or if at all the promised salary package would be implemented, &

(j) the Respondent's failure to start the Appellant on salary from the 28th August, 00.

6. Failing to find in the alternative, these acts of the Respondent constituted a repudiation of its contract of service with the Appellant constituting unfair dismissal.

7. Failing to enforce at the commencement of the second day of hearing the Respondent's undertaking to provide full documentation regarding sales and commission earned by the Appellant given on the first day of hearing.

8. Failing to find that the Appellant was entitled to all unpaid commission as no agreement existed to the contrary.

9. Failing to properly weigh the conflicting evidence of the parties and make findings of fact accordingly."

ORDERS SOUGHT

(a) The order to dismiss be set aside;

(b) An order that the Appellant was unfairly dismissed issue;

(c) The Respondent to comply with its undertaking to provide full disclosure of sales and commission records within 14 days, &

(d) The application be referred back to the learned Commissioner for assessment of quantum of compensation and contractural (sic) benefit denied."

BACKGROUND

4 At first instance, evidence was given by the appellant himself and on his behalf by Mr Clyde Gale Adams and Mr Steven William Hazelwood, who were former employees of the respondent.

5 On behalf of the respondent, evidence was given by Mr Gerrit Jan Kleyn, the managing editor and chief executive officer of the respondent, Mr Allan Williams, a sales representative employed by the respondent, Ms Janet Elis Veldhuis, the respondent's accounts manager, and Mr Elton Aaron Swarts, a director of the respondent responsible for sales.

6 On 20 September 2000, Mr Fox applied to the Commission for orders on the grounds that he had been harshly, oppressively and unfairly dismissed from his employment by the respondent, News Illustrated Pty Ltd. He also claimed, as contractual benefits to which he said he was entitled and was denied, unpaid salary and unpaid commission.

7 In April 2000, Mr Fox, who had been for 16 years a sales person employed in the wholesale and retail areas, made an application to Corporate Teamwork Management Group Pty Ltd (hereinafter referred to as "Corporate Teamwork") for appointment to a position with the respondent as a sales representative, to sell advertising space in a publication called "Business News", published and sold by the respondent company in Perth in this State. The newspaper advertisement had promised, he said, that the successful applicants would receive an attractive remuneration package plus incentive bonuses, coupled with the promise of ongoing professional training for a sales team and enhancement of individual career development. No copy of the advertisement appears in the Appeal Book. At the time he was unemployed and in receipt of unemployment benefits which he remained in receipt of for some time afterwards. In his letter to Corporate Teamwork, Mr Fox declared that, after reading the requirements of the position as advertised in the newspaper, he found himself inspired to apply. Corporate Teamwork was engaged by the respondent after interviews by Ms Betty Christie and Mr Swarts (Ms Betty Christie was the Corporate Teamwork person involved in these matters) to select and train sales personnel.

8 Mr Fox was one of the sales persons selected and he was trained over a period of four weeks. His training included personal mentoring sessions and groups sessions, which were designed to develop sales techniques in the newspaper industry and to fine tune selling skills so that the participants were prepared to begin making sales by 1 July 2000.

9 The personal mentoring sessions involved discussions between the teachers and participants to develop the procedure for "prospecting" which the applicants were to implement during their free days. During training, he continued to receive unemployment benefits. He was given what are termed "sales scenarios" which were written predictions of what he might earn. Whilst he was undergoing training, he was told also that he would receive a car allowance of $90.00 per week, and if he made sales that he would receive 25% of whatever he sold. He was paid the car allowance.

10 Mr Fox's case was that, from the outset, he had applied for a job with remuneration, but that, after he had gone for a number of interviews, he was told that the remuneration would not start until the successful completion of the five week

training programme. Instead, he would receive a car allowance and, if any sales were made during the month of June 2000, 25% commission would be paid.

11 Mr Fox claimed that the remuneration package which he had been offered and agreed to was for $35,000.00 salary plus a car allowance and that he would start on it or at the successful completion of the training period. He thought that that would be on 1 July 2000.

12 Of great importance was the document called a job description (see pages 50-52 of the appeal book (hereinafter referred to as "AB")) which, on the evidence, was given to him on or about 24 May 2000 by Mr Swarts and Ms Christie. In fact, the document, properly read, purports to constitute evidence in writing of a contract of employment and is not merely a job description. The remuneration clause is very relevant and I reproduce it hereunder (see page 52(AB)):-

"• Salary: $35000.00 per annum— payable as $1346.15 per fortnight

• Car Allowance: $4,680.00 per annum— payable as $180.00 per fortnight

• Superannuation at SGC Rate.

• Performance Bonus—

(a) Personal sales—

> *Average sales per issue - $5,000 - $6999 = 7.5% bonus – paid fortnightly

> *Average sales per issue - S7000 - $8999 = 15% bonus –paid fortnightly

> *Average sales per issue - $9000+ = 20% bonus – paid fortnightly

**Average sales per issue are based on personal sales for 1 month - divided by the number of issues published in that month*.

(b) Participating in achievement of Sales Team budget - a shared bonus to be divided according to your personal contribution percentage towards the total sales.

Other concessions: Office space and equipment will be provided, together with all stationery and other items required for the position.

Remuneration during probation period (1 month) – Due to the high standard of professional training provided during this period, no salary will be paid.

Remuneration will be paid as follows—

• *Commission on sales 25%*

• *Car Allowance $180 per fortnight*."

13 There were discussions between Mr Fox and the Corporate Teamwork representative, Ms Christie, and Mr Swarts, on 3 July 2000, in which she told him that the salary would not take effect until he had reached $5,000.00 in sales, then, as he put it, Mr Fox would have a salary in his hand. Mr Fox thought that that meant he was to sell a total of $5,000.00 worth of advertising before the salary would commence. Mr Fox said in evidence that he agreed to that proposition, even though it was different to what he had envisaged when he applied for the job, and was a changed arrangement. He was, he said, prepared to accept the contract on that basis, even though it was different to what he envisaged when he applied for the job. It was also different to what Ms Christie had told him at training. He was also not told in training that "telemarketing" was to be one of his duties. There was, however, no evidence denying Mr Fox's evidence of the text of the advertisement. Mr Fox thought that he had every reason to believe that the first offer was for a job with a salary, but he was prepared to accept, reluctantly, that there had been a change and stayed on.

14 The main region which Mr Fox was given to work in was Belmont, and the main area in which he was required to look for advertising customers was in the motoring industry.

15 Mr Fox understood that, when he reached a total of $5,000.00, he would go onto remuneration.

16 On 6 July 2000, Mr Kleyn, who was known as "Harry" Kleyn, asked him into his office and offered him a retainer of $200.00 per week together with the car allowance of $90.00 per week until he was able to reach a $5,000.00 sales threshold.

17 In late July 2000, the respondent moved premises and Mr Fox had access to a telephone other than his own private phone, and a desk, for the first time. It was about this time, too, that Mr Swarts replaced Ms Veldhuis as sales manager. Mr Fox was responsible to Mr Swarts who conducted regular sales team meetings. He was also subject to and directable by Mr Williams. It was about this time that the publication of "Business News", the publication in which he said advertising changed from a fortnightly to a weekly publication.

18 Mr Fox said that he was moved to "telemarketing" in July 2000, in an area which was called new products and services. Mr Swarts said in evidence that this was not a demotion, but 90% of his time was spent in this area under Mr Williams' training, direction and instruction. He said that Mr Williams did not give him extensive training in using the telephone. No demonstration script was provided although Mr Williams did say that there was a written format. He claimed that Mr Williams talked over him and criticised him all the time whilst he was doing his telephone selling. He did not like what he called telemarketing and he had no desire to be what he called a telemarketer. Mr Williams and Mr Swarts denied that this was telemarketing, but it was certainly, on all of the evidence, selling on the telephone and sometimes "cold" selling. Mr Williams denied that his behaviour was overcritical or overbearing in the course of his instructions. However, Mr Adams, in his evidence, was quite critical of Mr Williams' attitude and manner of speaking to Mr Fox.

19 Mr Fox said, in evidence, that Mr Swarts had said that he was costing the organisation money and that he was going to take away the 25% commission, which had been paid up until then. He did not receive his commission in one pay and he had not reached his $5,000.00 threshold at that time. Mr Swarts and Mr Williams, to whom he complained, and who were corroborated by Ms Veldhuis, said in evidence that the failure to pay commission was an oversight and that it was remedied.

20 In August 2000, Mr Fox said that he was told that the $5,000.00 threshold meant $5,000.00 per issue of the newspaper, which at that time was fortnightly. On 3 August 2000, the publication changed to become a weekly publication.

21 On 4 August 2000, Mr Swarts issued to him a sales team budget in private to, as Mr Swarts put it, "avoid embarrassment".

22 On 11 August 2000 Mr Swarts, at a meeting, gave Mr Fox free rein to make appointments with clients and to speak to them in person which involved, he said, a degree of working from home. During the conversation which led to that decision Mr Swarts told Mr Fox that the commission of 25% would no longer be paid, Mr Fox said that it was only restored after he complained on 15 August 2000.

23 Mr Fox did agree in evidence, however, that he may have misinterpreted the alleged "removal" of the 25% commission. He agreed then that as soon as he disputed the alleged removal of it, the error was remedied (see page 63 (AB)) because of course, as I mention hereinafter the evidence of the witnesses for the respondent, that the failure to pay the commission on that one occasion was an oversight.

24 On 13 August 2000, he was still doing "telemarketing" under the supervision of Mr Williams.

25 On or about 14 August 2000, during a telephone call with representatives of Toyota he "lost the deal". It was not disputed by Mr Williams, who was present, that Mr Williams was angry about the loss of the deal and called him a "f----wit". This was in the presence of Ms Veldhuis and a lady called Linda, and Mr Fox said that he was embarrassed. Mr Swarts took no disciplinary action, in the formal sense, against Mr Williams but told him that he was quite displeased by the outburst. He told Mr Williams to paraphrase it, to fix the matter up. Mr Williams apologised to Mr Fox. However Mr Fox's complaint was that the respondent's actions in relation to Mr Williams was inadequate. Mr Swarts said in evidence that it was adequate and that Mr Fox was satisfied with what had been done.

26 The next day, 15 August 2000, there was a sales meeting, and Mr Laurence Tan, another sales representative, accused Mr Fox of being a drug user. This, Mr Fox said, was not a jocular remark. Mr Swarts and Ms Jenny Volich, who were present, expressed their displeasure. Afterwards Mr Tan, at the strong request of Mr Swarts, came up and apologised for his comment. Mr Fox said that he did not think that the apology was sincere. Mr Swarts took no other action in the matter and said that Mr Fox had said that he was satisfied with what Mr Tan had done. Mr Fox said that he was not happy with the apologies which, he said, were insincere.

27 On 15 August 2000, he had a meeting with Mr Swarts in the course of which he said that he complained about Mr Williams' behaviour. They discussed, too, the telemarketing which Mr Fox said he did not like and which he referred to as "cold calling". He told Mr Swarts that he was not trained in telemarketing and that he did not wish to be a telemarketer now or in the future because he did not have the attributes. It was at that meeting that he said the 25% commission was discussed and reinstated. That, of course, as I have already observed, was contrary to the evidence of the respondent's witnesses, who said that it had never been withdrawn. I should add that Mr Williams and Mr Swarts denied in evidence that he was engaged in telemarketing as distinct from telephone selling, but he was still engaged in selling a product by telephone.

28 He did not agree with the minutes produced of the meeting of 15 August 2000 (see exhibit S8, page 54(AB)), and he sent a memorandum to Mr Swarts on 16 August 2000 (see exhibit S9, pages 55-56(AB)). That memorandum confirmed his being given free rein as a salesman. Most significantly, he expressed the following comments about his remuneration in that memorandum at page 56(AB):-

> "Once the training was complete, Elton (Director WABN), Betty Christie (Corporate Teamwork) and myself agreed that as I had to achieve $5,000 worth of sales (no time limit set) before the above remuneration would take effect."

29 Mr Fox said that there was no discussion that day about his being given 30 days or one month, within which to achieve the required sales results of $5,000.00 worth of sales per week. The first he knew of that was when he saw the memorandum after the meeting, he said.

30 He also put a copy of his memorandum of 16 August 2000 on Mr Kleyn's desk.

31 On 18 August 2000, Mr Fox had another meeting with Mr Swarts, which was recorded with the knowledge of Mr Swarts, and reduced to transcript, produced in evidence in copy form as exhibit S10 (see pages 57-64(AB)). At that time, he was, he said, very close, if he had not already achieved the $5,000.00 target. He was given no time limit to achieve this target. At this meeting there was discussion about what was a fair limit within which to achieve his target, but no time was agreed to or set on 18 August 2000. This was contrary to the evidence of Mr Swarts who said that he had been given 30 days within which to achieve the requisite target or be terminated.

32 At pages 63-64(AB) there is recorded the discussion about that time limit, which supports Mr Fox's evidence:-

> "ES: Okay I'll give you another thirty days, I'll hit the reset button and give you another thirty days…..…..pause……... And if you tell me Elton I'm going to take forty five I'm going to argue the toss on a couple of days mate, is that a fair call. What would you do, what do you think I should be supporting this position for in ten years that still haven't reached five thousand."

33 There is no suggestion in that transcript that he should achieve his targets within 30 days or less. Significantly, there is also transcript of other discussions, too, which are relevant to these matters, which I reproduce hereunder (see pages 63-64(AB)):-

> "CF: Do you really think that's the go.
>
> ES: What do you thinks a fair time.
>
> CF: Well there's no time stipulated.
>
> ES: I'm not asking what was, I'm asking Clifton Fox think of fair time.
>
> CF: The same amount of time that I have already given Business News basically for free.
>
> ES: But we pay you, over and above what we said we would pay you…….pause…….So I contest that you've done it for free.
>
> CF: Alright I'm not prepared to give commitment until Business News is prepared to give a commitment with my are, because I'm not actually on contract."

34 He said that the telemarketing was a totally different job from what he had been trained to do. He also said that the first time that he knew that $5,000.00 was not related to threshold but to issues and to publication was at that meeting. Before 15 August 2000, it was a threshold, not a weekly target which he had to achieve and he did not agree with the changes proposed on 15 August 2000. There is, in fact, no evidence that he did.

35 Mr Fox had a conversation with Mr Kleyn about the small business awards being promoted by the respondent and on which Mr Fox had been working for two weeks, in a sales meeting on 27 August 2000. On that day, too, he discussed with Mr Kleyn, in the absence of Mr Swarts, who was away, both his sales and his employment contract. He told him that he would have to find someone who would pay his salary and give him a contract. He asked that he be put on a contract and be paid a salary.

36 He said that Mr Kleyn became extremely red faced and walked away. Mr Kleyn denied that he had walked away. Mr Fox said that he kept a complete record of his sales and reached the necessary threshold of sales on 15 August 2000. Mr Fox said that he had exceed the $5,000.00 threshold, and that is why he had asked for his salary to be paid. That is a salary of $35,000.00, not the mere $200.00 which he was being paid in addition to a car allowance.

37 It was Mr Fox's evidence that he had a clear understanding of the terms of the contract, but he did not agree with it being changed from $5,000.00 in sales before salary commenced, to $5,000.00 in 30 days, and then $5,000.00 on every issue. At no stage, did he make such an agreement, even though it may have been put to him, he said.

38 Mr Fox said that he then went home totally disillusioned, that night, and sat in front of the computer and typed out his resignation (see exhibit S12). He did attend the office on 29 August 2000 for the last time. In the meantime, he had delivered his notice of resignation, backdated to 28 August 2000. The letter of resignation, in full, formal parts omitted, reads as follows:-

> "Dear Harry
>
> I herewith formally tender my resignation as Advertising Accounts Manager, from WA Business News effective from 28 August 2000.
>
> Yours faithfully"

39 Mr Fox then went to the respondent's office on 29 August 2000 to attend to what he called "a few loose ends". Those were his last days in the office. Mr Fox attended the small business awards function, not in his capacity as an employee, but as a guest of Ms Carol Hanlyn, the manager of Belmont Enterprise Centre. He provided documentary evidence relating to his sales (see exhibit S13) and gave evidence of mitigation of loss. The crux of his claim was that his employer had forced him to resign.

40 There was evidence from Mr Hazelwood, on behalf of Mr Fox. His evidence was as follows. He had attended the same training course with the intention of working for the respondent in a similar position to Mr Fox. He had no experience of selling advertisements before that. During the training period, he received a petrol allowance of $90.00 per week, and, for any sales made during that time, he was to receive 25% commission. He also continued to receive unemployment benefits for some time. After the qualification period, his understanding was that he would receive a salary of $35,000.00. He was then told that the salary would not be paid until $5,000.00 worth of advertising per month was sold, at the end of the training session. This was later changed to $5,000.00 per week. In cross examination he said that he had decided that he would not work in a work place which did not respect him. He also admitted, in cross examination, that he resigned voluntarily, and that no term of notice had been agreed at the beginning of his employment. He added that, after his discussion with Mr Kleyn, he had concluded that he was never going to get a contract, and his correct salary, so he decided therefore to leave. He said that what motivated him was that he had been promised a contract. He did not, he said, enjoy a good relationship with Mr Swarts, whom he described as dictatorial, aggressive and uncompromising. If the job had been advertised as a commission job only, he would not have applied for it, he said. He said that he thought that the process was a scam. He was not given any sales leads, except numbers from a telephone book. There was evidence given that a number of other people had not renewed contracts.

41 Mr Hazelwood said that he thought that the training course was a scam and a waste of four or five weeks and had contemplated bringing it to this Commission. His evidence was not shaken in cross examination.

42 There was evidence too from Mr Clyde Adams, who was employed by the respondent to sell advertising beginning in 1997 and finishing in February 2001. Mr Adams was critical of Mr Swarts' treatment of employees. He said that he, Mr Adams, was a bit of an admirer of Mr Fox who was trying to do the right thing. He criticized the attitude and comments of Mr Williams to Mr Fox and also Mr Tan's comments to Mr Fox.

43 Mr Kleyn gave evidence that Corporate Teamwork, a training and recruitment organisation, was appointed to recruit and train staff. The respondent had decided that "Business News", the product of the respondent, would need to go weekly and therefore sales staff needed to be engaged and trained. The respondent was looking for people with the ability to be able to canvass and get support for advertising; and the respondent engaged Corporate Teamwork at what Mr Kleyn described as "great expense".

44 He admitted that the advertisement for a salesperson read that the successful applicant would receive an attractive remuneration package which he identified as $35,000.00 per annum and a car allowance. However, he said that it would operate after the first month when the employee could achieve $5,000.00 per issue. He also said that the $35,000.00 salary was to be paid at the end of the training period, subject to satisfactory completion of the probationary period. Thus after four weeks a new set of conditions, in this case, was put to Mr Fox which he agreed to.

45 Mr Kleyn had very little direct involvement with the hiring of applicants, who were all interviewed by Ms Christie of Corporate Teamwork. He said that each trainee, at the end of the month's training, was reviewed and that all had been given the job description (see exhibit S4). The final interview, a third interview, after two interviews were conducted by Ms Christie, was attended by Mr Kleyn and Mr Swarts. Mr Kleyn was of the opinion that the payments agreed to be made to Mr Fox were clear. In the initial stages before training was completed, he was to receive 25% commission on all sales made; he would not then immediately go on to a remuneration package, but would stay on 25% for a period of time. The cost of sales and commission were interrelated, Mr Kleyn said. If a person could not achieve at least $5,000.00 in sales per week, it was very difficult to endorse a salary. Thus, trainees would be coached to progressively put them into the package as they increased their sales.

46 Mr Kleyn said in evidence that Mr Fox did not satisfy the requirement of being able to achieve sales during the probationary period. This, of course, was not put to Mr Fox in cross examination. The document, he admitted, does not say that the employee has to make $5,000.00 worth of sales per issue for salary to commence (see page 118 of the transcript at first instance (hereinafter referred to as "TFI") that is referring to exhibit S4). He was unable to answer the question whether a fair interpretation of the document exhibit S4 was that it provided that the employee start on $35,000.00 salary

and earn bonuses after that. He also amplified his evidence by saying that there was a probation period and that there was then an appraisal of the employee. Then he said there was an assessment as to whether the employee would receive a salary. Mr Fox did not go on salary, Mr Kleyn said, but was given $200.00 per week extra. He was never paid a salary or a performance bonus. The assessment at the end of the four week training period was, he said, that there was no confidence that Mr Fox would achieve the required sales. He also said that the $35,000.00 salary was to be paid at the end of the training subject to satisfactory completion of the probationary period.

47 Mr Kleyn said that he thought that Mr Fox had demonstrated a good capacity to work and was quietly confident that he would be able to achieve the $5,000.00 sales per issue. As a vote of confidence, therefore, he was given an extra $200.00 per week on top of the 25% commission to give him some income. The salary of $200.00 was paid to Mr Fox because he, according to Mr Kleyn, demonstrated a good capacity for work and they were quietly confident that he would be able to achieve. Mr Kleyn explained how the commissions were calculated. He had seen the views of Mr Fox expressed in his memorandum dated 16 August 2000 (exhibit S9) and that correctly expressed the remuneration package. He denied that Mr Fox had been "removed".

48 On 28 August 2000, Mr Kleyn said that, to the best of his recollection, he had not seen Mr Fox for some time because he had been out selling. He said that Mr Fox had walked into Mr Kleyn's office and simply said "I'm leaving, it's not working out for me." Mr Kleyn expressed surprise, he said. Mr Fox told him that he thought that he was not getting support that "the team was not behind him", and that he wanted to move on and look for something better. Mr Kleyn said that Mr Fox did not raise the issue of money, but merely gave his notice to which Mr Kleyn responded with an expression of surprise. The meeting was amicable, Mr Kleyn said. As far as Mr Kleyn was concerned, Mr Fox resigned of his own volition. The respondent, Mr Kleyn said that he was not trying to get rid of Mr Fox.

49 There was evidence from Mr Williams, a sales representative employed by the respondent and Mr Fox's supervisor. He gave evidence of the course through which he had gone and that he was paid by commission and required to reach a target of $5,000.00 minimum per week. Before Mr Fox's resignation, he was given free rein to go about his business and was working on a Belmont Business Award. Mr Fox never mentioned to Mr Williams that he felt like he was being forced out of the job or that the $5,000.00 per week threshold was too hard to reach.

50 Mr Williams said that Mr Fox was not asked to do telemarketing but was a telephone salesperson. A good salesperson on the telephone, he said, should be able to wrap up the deal. He said that he had provided Mr Fox with a script. He was of the opinion that Mr Fox needed a lot more coaching before he was given free rein. He admitted that on 14 August 2000 he said something inappropriate to Mr Fox, next day he apologised. He also said that when Mr Fox mentioned that his commission had been "stopped", Mr Williams went to Mr Swarts and found out that it was an oversight. He said that he had given Mr Fox a lot of training.

51 Mr Swarts gave evidence that the trial period was to continue until Mr Fox reached sales figures of $5,000.00 per issue. This target had not been reached so they extended the period to enable him to get "up to speed with sales".

52 All of the employees had to achieve $5,000.00 sales per issue of the publication he said.

53 As to the incident involving Mr Tan and Mr Williams, Mr Swarts said that he had followed these incidents through and Mr Fox had assured him that they were no longer an issue with him. On 15 August 2000 when he and Mr Fox met, he gave Mr Fox a free rein for one month to achieve the required sales results of selling $5,000.00 worth of advertisements per week (see page 192 (TFI)). (He did not use the words "on publication"). His evidence was that at the meeting on 18 August 2000 he gave Mr Fox 30 days to achieve the target of $5,000.00 and that Mr Fox had accepted that proposition. Mr Swarts said that he told Mr Fox "at the end of the month we'll review matters and if targets are being met, we will pay you the salary. Conversely if targets are not met we will graciously part ways." He went on to say that Mr Fox did not tell him that he had achieved his $5,000.00 threshold or that he was unable to achieve this.

54 Mr Swarts referred to exhibit S7 which he described as a cash flow budget. This was a document, he said, which predicted that Mr Fox would still be on $400.00 plus petrol allowance and commission, but not salary as at 21 December 2000, some four months approximately in the future. I would observe that this was well after his probationary period had ended. I would also observe that he was not informed, on the evidence, that he was still on probation nor of the term of any such period.

55 Mr Swarts said that he was not prepared to tell the board that Mr Fox would achieve $5,000.00 sales per issue (that is concumulative but per issue). In the initial training period a target of $5,000.00 sales was set, he said. No recruit met the original target and the respondent told them that they were not prepared to put them on the commission until they reached the initial target he said. It is fair to observe that no initial target was referred to in the job description document (exhibit S4). Mr Swarts did not say that what Mr Fox said in his memorandum of 16 August 2000, was wrong at the time. When Mr Fox mentioned that his commission had been stopped Mr Swarts said that he had found out it was an oversight. He had said too that Mr Fox had been given a lot of training.

56 There was evidence given by Mr Swarts about managing the sales team of which Mr Fox was a member. Mr Swarts confirmed that he had taken disciplinary action against Mr Williams in relation to one matter, but sales persons did not have forever to sell $5,000.00 worth of advertising and the salary package conditions cut in once $5,000.00 worth of sales per issue was reached.

Commission

57 In respect of the claim of commission, Mr Fox produced a bundle of documents relating to sales figures. He claimed that he had not been paid his sales commission or his total wages. He also said that he had been regularly told that his commission would be paid "on the gross" ((ie) that commission was to be calculated on the gross value of sales made, including the amount of goods and services tax (GST) payable). Later he found out that they were "on the net".

58 He did admit that he was paid commission only on published orders because "that is the way Harry and Elton ran it". That evidence agreed with their evidence. Mr Fox admitted in evidence that he was paid commission in July and August 2000 and up to 31 August 2000. He was unable, in relation to exhibit S13, to say which orders, referred to therein, were published or not.

59 The evidence for the respondent from Mr Kleyn, Mr Swarts and Ms Veldhuis was that all of the commission and all of the wages had been paid, and that it was never agreed, nor did the respondent pay commission on the gross amount of the sale. Commission was paid on the amount of the sale calculated net of GST. Further, it was the respondent's evidence that commission was not paid on advertising material published after a sales representative had left the respondent's employment. Further, it was the respondent's evidence and case that the respondent paid commission only after an advertisement appeared in a published issue of Business News.

Findings

60 The Commission, in this matter, observed that each of the witnesses had appeared to give evidence truthfully and that therefore the Commission had to analyse the inferences which ought to be drawn from the evidence and reach conclusions as to what "most likely" happened.

61 Having done that and reviewed the authorities relating to constructive dismissal, (see pages 25-27 (AB)), the Commissioner found that Mr Fox had answered an advertisement that did not form part of the contract of employment. He found that the Commissioner had undergone interviews for employment. The Commissioner made a number of findings of fact (see pages 27-28 (AB)) and concluded that he was not in fact dismissed and that the Commission therefore had no jurisdiction.

62 The Commissioner at first instance concluded that Mr Kleyn had told the truth and there was no evidence that he was dictatorial or aggressive, as Mr Hazelwood had alleged. It was common ground that there was a resignation, the Commissioner found. Mr Stokes, on behalf of Mr Fox, said that there had been a constructive dismissal.

63 The Commissioner referred to *Attorney-General v WA Prison Officers' Union* 75 WAIG 3166 (IAC). He concluded, on those authorities, that on the balance of probabilities, the best view of what occurred was that Mr Fox applied for a job after seeing an advertisement in the newspaper. That the terms of the advertisement did not become part of the contract because there was no offer and acceptance of the terms by the mere making of an application to be considered as an employee.

64 The Commissioner then found that Mr Fox decided that he did not want to continue and that he was not pushed.

65 The question was who really terminated the contract and the real answer to that question is that Mr Fox decided that he wanted to terminate the contract, the Commissioner found. Mr Fox eventually decided that what the respondent required of him for what it was prepared to pay was just too onerous and it was in his best interests to go somewhere else and that is what he did, the Commissioner found. There was no dismissal and the jurisdiction contained in s.29 of the Act was therefore not excited and the application was dismissed for want of jurisdiction.

66 As to contractual benefits, the contract was not as Mr Fox claimed it to be, the Commissioner found.

67 It is for the appellant to establish that the exercise of the discretion at first instance miscarried in accordance with the principles laid down in *House v The King* [1936] 55 CLR 499 (see also *Gromark Packaging v FMWU* 73 WAIG 220 (IAC)).

68 If the appellant does not do so, then the Full Bench has no warrant to interfere with the exercise of the discretion at first instance, and, importantly, has no warrant to substitute the exercise of its discretion for that of the Commissioner at first instance.

ISSUES AND CONCLUSIONS

69 Save and except for the finding as to lack of jurisdiction, this is an appeal against a discretionary decision of the Commissioner at first instance, constituted by a single Commissioner. It was a discretionary decision as that as defined in *Norbis v Norbis* (1986) 161 CLR 513 and see also *Coal and Allied Operations Pty Ltd v AIRC* (2000) 74 ALJR 1348 (HC).

70 In my opinion, it was open to find as follows on all of the evidence, much of which was not conflicting evidence:

(a) The appellant answered an advertisement which led him to believe that he would be paid a salary and bonuses after training, as well as commission. If it had merely been a commission job he would not have applied for it.

(b) The evidence of the advertisement, and of exhibit S4, the so called job description document, makes it clear that the agreement was held out to be, at least after training or probation, a salaried and not exclusively commission remunerated position.

(c) At or about the beginning of the training period he was presented, by Ms Christie and Mr Swarts, with the document (exhibit S4) called a job description, which on the evidence of Mr Kleyn, was to be read with the advertisement, (exhibit S2), which is not in the appeal book, but in relation to the contents of which Mr Kleyn gave some oral evidence.

(d) It is quite clear on a fair reading of all of that document the contract describes remuneration of $35,000.00 per annum with a car allowance and superannuation. The clause also prescribes the payment of performance bonuses for sales. The document does not prescribe a minimum sales target of $5,000.00 or any other amount, merely a minimum sales target to be achieved to earn a bonus and that figure is $5,000.00.

(e) The clause does specify that average sales per issue are based on personal sales for one month provided by the number of issues published in that month.

(f) There is a prescription that no salary will be paid during the probationary or training period of one month. There is a prescription that the remuneration will be a car allowance of $180.00 per fortnight and commission on sales of 25%. There is no provision as to the conditions which apply for the earning of, and payment of commission.

(g) Both parties did agree at the end of the probation period of one month, although Mr Fox was reluctant to agree, and felt constrained to agree, to a variation of the term of agreement whereby he was to be paid no salary until he had obtained sales of $5,000.00. In the meantime he continued to be able to earn commission and was paid $90.00 per week car allowance. This was an agreed variation to the original contract of employment as evidenced by exhibit S4. There is, as I have said, no evidence that he was informed that his probation period was being extended.

(h) Then by way of further variation he was offered, and accepted $200.00 per week salary.

(i) He was never paid the amount of salary of $35,000.00 referred to in exhibit S4, nor was he paid any of the bonuses referred to therein. Indeed he was paid no more salary than $200.00 per week. However, he accepted that offer and continued to be employed on that basis.

(j) He therefore entered into an agreement to accept different remuneration from that payable and paid during the probationary period and different remuneration from that agreed in exhibit S4, to be paid at the conclusion of the probationary period. These agreements were entered into at the initiative of the respondent and reluctantly entered into by Mr Fox.

(k) The agreement, exhibit S4, contains no requirement for "cold selling" on the telephone. It specifically refers to following up telephone enquiries which are generated from various marketing programs; and that is clearly the case when read with the other elements of "prospecting" and other items referred to in exhibit S4 (see page 50 (AB)). There is no reference to a telephone sales person or a telemarketer in the document.

(l) The submission was that when he engaged himself in telephone selling under Mr Williams' tutelage, that the contract of employment was repudiated because, as I infer it, of the nature of the variation in function from a salesman to a telephone salesman. His assertion was that he did not seek or obtain to be employed as a telephone

sales person. The fact is, and it was open to find, that he did engage in telephone selling under whatever name and that he continued to do so until his having protested to Mr Swarts and Mr Swarts permitted him to have free rein as a salesman in the field. He then ceased to be a telephone salesman.

(m) Thus, there was no repudiation. There was an agreement for engaging telephone selling until his protest was heard and his period as a telephone salesman, by agreement, ended.

(n) Accordingly, this was another variation of the contract, if variation it was, which occurred by agreement.

(o) Next, there was the question of the revocation of payment of commission dealt with eventually by Mr Swarts and Mr Fox. This was clearly established on the evidence to be an oversight which was remedied when there was a complaint made to Mr Williams and Mr Swarts by Mr Fox. There was Ms Veldhuis' evidence that this was an oversight and even Mr Fox admitted in evidence that he could have misinterpreted what had occurred. It was open, therefore to find, clearly this was an oversight.

(p) Next came the incident of 14 August 2000 where Mr Williams called Mr Fox a f----wit and Mr Tan accused him in front of his fellow employees of being a drug user. It is quite clear on the evidence that Mr Tan was criticised by Ms Veldhuis and Mr Swarts when he made the remark, but Mr Williams too was reprimanded by Mr Swarts for the remark which he made to Mr Fox, and that both apologised. Mr Fox said that he is not satisfied now with what was done. Mr Swarts says that Mr Fox told him that, at the time, that he was satisfied with what was done. In my opinion it matters not. The steps taken, given the unpleasant treatment of Mr Fox, were adequate in the circumstances. There were reproofs for unacceptable conduct and required apologies were given.

(q) Next it is quite clear, on the evidence of Mr Swarts and his forecast budget, that it was his intention at least, that Mr Fox would continue to remain in employment on $200.00 per week salary, commission and $90.00 per week car expenses for some months.

(r) Next, on 16 August 2000 there was no evidence at all that there was any limit agreed to by Mr Fox for the period in which he would receive a sales target, on any fair reading of the transcript of the meeting of Mr Fox with Mr Swarts that day.

(s) Then comes the final event of 27 August 2000 when Mr Fox asked Mr Kleyn to commence to pay him the salary of $35,000.00, which was the effect of his request that he be put on salary or be given a contract. Mr Kleyn refused. All of this, it was clear, was too much for Mr Fox who regarded himself as the victim of a scam and he resigned. It was his own action, and as he admitted, voluntary.

(t) His resignation was caused and/or brought about, on his evidence, and by the treatment which he had received.

(u) At the time of his giving his resignation he had worked for two weeks on the Small Business Awards project.

71 It was alleged in the grounds of appeal that the resignation dated 30 August 2000 and backdated to 28 August 2000 was not an unfair dismissal constituted by a constructive dismissal, or in fact an unfair dismissal at all.

72 A number of facts are referred to, which it was submitted, if adequately considered or considered at all, would have led the Commission directly to the conclusion that there was a dismissal. To reach that conclusion it was necessary to find that the facts justified a finding that the employer dismissed Mr Fox.

73 In *Pisconeri v Laurens & Munns incorporating Munns Nominees Pty Ltd and George Laurens Pty Ltd* 79 WAIG 3187 the Full Bench adopted what Rowland J said in *The Attorney-General v WA Prison Officers' Union* (op cit) where His Honour said that there must be a deliberate and dominant purpose of coercing an employee to resign. Kennedy J, in the same case said as follows:-

> *"...In this context, it does not appear to me to be particularly helpful to introduce any notion of constructive dismissal, the only question being whether or not Mr De Grussa was "dismissed" by his employer. There is nothing in the Industrial Relations Act equivalent to s55(2)© of the Employment Protection (Consolidation) Act 1978 (UK) which expressly created the concept of constructive dismissal. The position for the present purposes is, in my view, summarised in the judgement of Stephenson LJ in Southern v Franks Charlesly & Co [1981] IRLR 278 at 280—*
>
> > *"Did he trip or was he pushed? Was it murder or was it suicide? I know that such a simple consideration of starkly contrasted alternatives is too often outlawed by authority in deciding the issue of dismissal vel non. Even if the question, 'Was the employee dismissed?' cannot always be answered by answering the question, 'Who really terminated his contract?' the real answer to the second question gives the right answer to the first question in this case."*

74 Put shortly the case for the appellant, as it was submitted, was that the facts referred to in ground 5 of the appeal, as I have mentioned above in the grounds of appeal, when properly considered, should have led the Commission to the conclusion that Mr Fox was coerced into resigning and that the dominant purpose of the conduct of the respondents achieved the termination, and thus the dismissal of Mr Fox.

75 I would observe the following. First of all none of those facts, if proven, establishes an intention to force Mr Fox to resign. The evidence was, and it was not disbelieved by the Commission at first instance, that they wished to retain him and thought that he would develop satisfactorily. That evidence was accepted by the Commission and I did not read the evidence otherwise.

76 That it was intended to retain him, albeit at reduced remuneration, compared to that referred to in S4, was borne out by the forward budget of Mr Swarts which made provision for the payment of a salary for some months. The putting him on notice that he should meet his target within 30 days, a time limit with which he did not agree, was not alleged to constitute an act evidencing an intention to dismiss Mr Fox, such as to push him rather than permit him to jump. (It is not so alleged in the grounds of appeal).

77 Matters such as the alleged inadequate disciplining of Mr Tan and Mr Williams were not evidence of a course of conduct directed to his dismissal, in my opinion. They were events which occurred involving individuals. In any event the disciplinary actions which were taken were adequate, for the reason which I have expressed above. There was, as I have said, also no unilateral assignment to cold calling. Mr Fox, as directed, engaged in cold calling and continued in it until, by mutual agreement, this period as a cold caller was ended. That was not evidence of any intention to dismiss him.

78 The alteration of the commission threshold from fortnightly to weekly and then to a deadline, fitted first with the changes in the frequency of publications to weekly publications and then with the employer's perceived necessity to achieve a sales target of $5,000.00 within a particular period of time. That was a particular period of time to which Mr Fox did not agree.

79 The refusal to invite him to the Belmont Small Business Awards presentation was a quite irrelevant fact. Firstly, the employment by then had ceased. Secondly, although the act might have been ungracious, it was not evidence of any intention to dismiss him.

80 The alleged attempts to fix a sales target of a minimum of $5,000.00 per week, even if it were not reasonably achievable, was not, in the circumstances of the case, evidence of an intention to force Mr Fox to resign but merely prescribed for him a required sales target. Further, the failure to place Mr Fox on "salary" and indeed the refusal, could not, in the circumstances, be reasonably interpreted as unequivocal evidence of an intention to force his resignation. These were refusals to vary the contract to meet his terms of the remuneration, or reinstate the original terms which had been superseded by agreed variation.

81 Accordingly, the Commissioner did not err in finding that there had not been a dismissal. That is not to say, of course, that the imposition of terms at variance with those originally represented to him, and the variation of the contract so that there was no agreement to pay him a salary on the terms of the original agreement, and the general treatment of Mr Fox by the respondent, was not unclear and might even have been exploitative.

82 However, whether the course of conduct of the respondent commencing with the advertising of the position, constituted a breach of the *Trade Practices Act* (Commonwealth) or the *Fair Trading Act* (WA) s.14, was not a question for the Commission in this matter. Further, the fact that the employer embarked on a course of unreasonable and/or unfair conduct which caused the appellant to leave, is not at least as I read the authorities, unless its dominant purpose was to cause his resignation and clearly effect a dismissal, evidence of a dismissal.

83 For the reasons which I have expressed I do not think that the Commission erred in finding that there was no proven course of conduct on the part of the respondent having the dominant purpose and seeking to achieve and, in fact, achieving his dismissal by forcing to him to tender a resignation and the Commission did not err in finding that there was no dismissal and no jurisdiction.

Commission

84 In relation to the claim for commission, the written contract does not prescribe the terms and conditions surrounding the earning of commission. Further, there was no submission at first instance that, for efficacy, a term or terms should be implied in the contract to fill that vacuum.

85 The evidence of the terms of the contract was oral. First, it was open to the Commission to find that commission was payable only on publication of the advertisement procured by a salesperson. Mr Fox himself admitted that that was how the respondent ran things. There was no evidence that he deviated from that.

86 Next, in any event, he did not establish any other term of the contract on the evidence which might have entitled him to commission. There was clear evidence from the respondent's witness that Mr Fox had been paid all of the commission due to him. Further, the uncontradicted evidence was that commission was calculated on the value of the advertisement after GST had been deducted. There was no evidence that anything different was agreed and no evidence that there was any term of the contract to the contrary.

87 There is evidence on behalf of the respondent that sales representatives were not paid commission in respect of a publication of an advertisement which took place after sales representatives left the employ of the respondent. There was no evidence that Mr Fox was informed of this and, in fact, he said that he was not informed of it. However, Mr Fox himself gave no evidence to establish what the actual term of the contract, in relation to entitlement of the commission, was.

88 Finally there was evidence from the witnesses for the respondent, in particular Ms Veldhuis, that all of the commission had been paid by the respondent and there was insufficient evidence from him that it had not been so paid.

89 The Commission did not err in finding the contractual benefits claimed had not been proved to have been contractual benefits nor had the entitlement to contractual benefits been proved.

Documents

90 By ground 7 it is alleged that the Commission failed to enforce, at the commencement of the second day of the hearing, an undertaking by the respondent to "provide full documentation" in relation to the sales and commission earned by Mr Fox. No order was sought for the production or discovery of the documents on that day (see pages 101-102 (TFI)) or it would seem at all. There was no error committed by the Commission in that regard.

Finally

91 No other ground is made out for the reasons which I have expressed. There was no jurisdiction to hear and determine the application claiming relief for harsh, oppressive or unfair dismissal.

92 The claim for contractual benefits was not established at first instance. For those reasons I would dismiss the appeal.

CHIEF COMMISSIONER—

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

COMMISSIONER A R BEECH—

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

THE PRESIDENT—

95 For those reasons, the appeal is dismissed.

Order accordingly

2001 WAIRC 04483

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CLIFTON JOHN FOX, APPELLANT
	v.
	NEWS ILLUSTRATED PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 20 DECEMBER 2001

FILE NO/S.	FBA 46 OF 2001
CITATION NO.	2001 WAIRC 04483

Result	Appeal dismissed.
Representation	
Appellant	Mr B F Stokes, as agent
Respondent	Mr A J Thompson, as agent

Order

This matter having come on for hearing before the Full Bench on the 12th day of November 2001, and having heard Mr B F Stokes, as agent, on behalf of the appellant and Mr A J Thompson, as agent, on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 20th day of December 2001, it is this day, the 20th day of December 2001, ordered that appeal No FBA 46 of 2001 be and is hereby dismissed.

By the Full Bench

[L.S.]

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

2001 WAIRC 04391

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEPHEN LAROSE, APPELLANT
	v.
	KIAM CORPORATION LIMITED, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER P E SCOTT
DELIVERED	TUESDAY, 11 DECEMBER 2001
FILE NO/S	FBA 47 OF 2001
CITATION NO.	2001 WAIRC 04391

Decision	Appeal dismissed.
Appearances	
Appellant	Mr D Gordon (of Counsel) by leave and with him Mr M Morgan (of Counsel) by leave
Respondent	Mr J Uphill, as agent

Reasons for Decision

THE PRESIDENT:

INTRODUCTION

1 In appeal No FBA 47 of 2001 the abovenamed appellant, Mr Stephen LaRose, appealed against the decision of the Commission at first instance, pursuant to s.49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act"), such a decision having been made on 13 July 2001 whereby the Commission, constituted by a single Commissioner, dismissed an application made by the appellant pursuant to s.29(1)(b)(i) of the Act.

GROUNDS OF APPEAL

2 The appeal is made on the following grounds:-

"1. Pursuant to section 49(2) of the *Industrial Relations Act*, 1979 ("the Act") the Appellant seeks to appeal the decision of the learned Commissioner.

2. The learned Commission failed to have regard to the Appellant's rights pursuant to section 29(1)(b)(i) of the Act that his employment with the Respondent was not to be terminated in a harsh, oppressive or unfair manner.

3. The learned Commissioner failed to give proper consideration to the fact that there were three different reasons proffered by the Respondent as to why the Appellant's employment was terminated namely:

3.1 on 1 September 2000 the Appellant was informed by the Respondent his employment was terminated as Western Mining did not need him back on site;

3.2 several days later at another meeting the Appellant was informed by the Respondent his employment was terminated as Mr Andrew Ellison of the Respondent overheard a conversation where it is alleged that the Appellant and another employee, Mr Luke Hudson, were intending to steal a caddy welder from site; and

3.3 in the Respondent's closing submissions it was submitted by Mr Uphill, agent for the Respondent, the Appellant's employment was terminated for unsatisfactory work performance.

4. The learned Commissioner should have had regard to the principles of natural justice in determining whether the Appellant's employment was terminated in a harsh, oppressive or unfair manner given that the Appellant was not afforded the opportunity to respond to any of the allegations made against him prior to the termination of his employment,.

5. The learned Commissioner failed to give proper consideration to the final reason proffered by the Respondent, outlined in 3.3 above, as to why the Applicant's employment was terminated as no evidence was adduced by the Respondent supporting this submission.

6. The learned Commissioner failed to give proper weight to investigation procedure undertaken by the Respondent as it was never proven that the Appellant had an intention to steal from site.

7. The learned Commissioner failed to consider what are the proper investigation procedures, detailed in *C v Smith Snack Food Company* [1997] WAIR Comm 129 (2 July 1997), for investigating allegations of theft against an employee.

8. The learned Commissioner erred in law by not applying the rule of *Jones v Dunkel* (1959) 101 CLR 298 which had the effect of him making inappropriate findings.

9. The learned Commissioner erred in preferring the evidence of Mr Ellison to the Appellant. Exhibits "ABE1" and "ABE2" indicate the written material supporting Mr Ellison's evidence was of recent construction.

10. The learned Commissioner should have regard to and given appropriate weight to the evidence of Ms Michelle Greenwell regarding the Respondent's instructions to her to not truthfully inform the Respondent's employees, including the Appellant, as to why their employment was terminated.

11. The learned Commissioner erred in not finding that the Appellant is entitled to compensation pursuant to section 23A(1)(a) of the Act.

12. The above grounds of appeal are matters of public interest in that they are all principles to be applied in unfair dismissal claim and as such are paramount to the work of the Commission.

13. Relief Claimed

    13.1 The Appellant seeks to have the decision of Commissioner Wood set aside.

    13.2 The Appellant considers reinstatement with the Respondent would not be practical.

    13.3 The Appellant seek six moths (sic) compensation, based on the amount of $8,064.00 per month, for his unfair dismissal as he has not been able to secure full time employment since being terminated by the Respondent and is now on unemployment benefits.

    13.4 Pursuant to section 23A(1)(c) of Act the Appellant seeks an ancillary order for the Respondent to provide the Appellant with a statement of duties."

BACKGROUND

3 The appellant was employed as a mechanical fitter by the respondent company, Kiam Corporation Limited (hereinafter referred to as "Kiam"), at the Leinster Nickel Operation. There, together with other contracting persons and companies, Kiam was a contractor to the mining company whose operation it is, namely Western Mining Corporation. The appellant was responsible for the repair and maintenance of equipment. The appellant alleged that he was unfairly dismissed on 1 September 2000 in that he was dismissed for allegedly discussing with another employee the intended stealing of company property. The appellant did not seek reinstatement, but sought compensation for lost income, such loss being caused, he claimed, by his unfair dismissal.

4 The respondent alleged that on 31 August 2000, the General Manager, Mr Andrew Ellison, overheard two employees discussing their intentions to steal a caddy welder from the site, namely the Leinster Nickel Operation. The respondent conducted an investigation and says that the appellant, Mr LaRose, was identified as one of the participants in the conversation. After consultation with Western Mining Corporation a decision was taken to "remove the appellant from the site". He was then dismissed on 1 September 2000.

5 Mr LaRose said that he was employed full time by the respondent from March 2000 to 1 September 2000 and that he had a problem having pay matters fixed up, and that, in fact, there was a delay in paying what was due to him. He also had difficulty obtaining work clothing and a Workplace Agreement and experienced problems on site due to a mobile scaffold falling over. Because of these problems, at one stage, he spoke to another contractor on the site, Skilled Engineering, regarding the terms of an employment contract which they might offer.

6 On Thursday, 31 August 2000, in the afternoon and just prior to leaving the site, Mr LaRose spoke to a person called Rebecca on the telephone regarding his pay. He says that she did not know what was happening about his pay and he was furious as a result. He was flying out that day with two other employees, Mr Luke Hudson and Mr Gary Kruger. Mr Kruger was a Western Mining employee and a Maintenance Team Leader ((ie) a sort of Foreman or Supervisor). Mr LaRose went and had a couple of beers and got some food and then went to the airport with the other two employees. He said that they were talking about the scaffold incident and his pay difficulties. On the plane he sat opposite the aisle from Mr Hudson and had a three way conversation with Mr Hudson and Mr Vernon Reed, a Western Mining Storeman. Mr Hudson and Mr LaRose were due to fly back to the site on the Monday.

7 On Friday, 1 September 2000, Ms Michelle Greenwell, the personnel officer for the respondent, telephoned Mr LaRose and advised him that he was not needed back on site by Western Mining. He asked if he had been sacked and she said "Not at this particular time. Come in on Monday and we we'll sort it out". He then went to the respondent's offices in Rockingham with Mr Hudson. He said they were told there by Ms Greenwell that Western Mining did not require them back on site but that she did not know why. Mr LaRose said that he did not believe her and that he rang one of his colleagues at the site but could get no further information. He then spoke to Mr Robbie Ellis, another team leader, who told him that it was alleged that Mr LaRose was intending to steal a power generator.

8 After that Mr LaRose and Mr Hudson had a second meeting with Ms Greenwell who told them that the reasons why they were sacked was because their conversation was overheard by Mr Ellison on the way home in the aeroplane. The appellant said that this was the last contact he had with the respondent. He said that he thought that he was sacked because he was "rocking the apple cart", and at about the same time he said the respondent's contract was under threat.

9 Mr LaRose was cross examined and denied that he and Mr Hudson talked about having approached Skilled Engineering to take over the contract. He said that all conversation at the airport was with Mr Kruger and Mr Hudson, not just with Mr Hudson. He said that they were out in front of the airport, not in the terminal because Mr Kruger is a smoker. He did

not deny that on the plane, Mr Hudson and he continued a conversation in which they made remarks critical of the respondent. He denied that he said that he intended to steal the caddy welder.

10 Mr Hudson gave evidence, but he was not effectively able to be examined by Counsel for the appellant. He had entered into a confidentiality agreement with the respondent arising from a conciliation conference before the Commission. He said that he did not wish to violate the agreement and he was not questioned further by Counsel for the appellant or by Mr Uphill for the respondent.

11 Mr Ellison gave evidence that at the airport on 31 August 2000 he heard two people talking about Kiam. He said that he went and stood side on from about two feet away from them, and that the two men were talking about a safety incident on the Leinster site. They said that Western Mining and Kiam were looking to blame people for the incident. They talked about a discussion one of the men had had with the payroll office in Kalgoorlie and about discussions which they had had with Skilled Engineering. He heard the men say, he said, that they had asked Skilled Engineering to see if they could take the contract off Kiam and how much they would be paid by Skilled Engineering. They then discussed whether they could get more money and Mr LaRose said that he was owed money by Kiam and to obtain this he would steal a caddy welding machine from the company for repayment of the money. After 15 or 20 minutes they were approached by another person, and there was a five minute general discussion of various things to do with Western Mining but nothing of "a derogatory nature" was said. All three men went outside and Mr Ellison assumed that they had a cigarette before boarding the plane. He says that he did not know who the two people were at the time because he had not seen them before. He sat behind the men on the plane and they continued their conversation criticising the respondent, and said they hoped that Skilled Engineering would get the contract. He said Mr Hudson was directly in front of him and Mr LaRose was on his left on the other side of the aisle.

12 Mr Ellison returned to Perth and contacted his personnel department to confirm which Kiam employees were on the flight and their seat numbers. He said in evidence that he also checked to see if there was any money owing to those employees. Once it was confirmed that Mr Hudson and Mr LaRose were the two employees on the plane and it was confirmed by Mr Reece Power in Kalgoorlie that no monies were owing to them, he made a decision to terminate their services. Before the dismissal occurred he instructed Ms Greenwell to talk to the Kiam site superintendent, Mr Peter Smith, to have him inform Western Mining of the conversation.

13 In order to save "aggravation" the company took a decision to advise Mr Hudson and Mr LaRose that they were being put off because Western Mining was reducing numbers on site. He advised Ms Greenwell to effect the termination. He then instructed Ms Greenwell to talk to them again a couple of days later as they had spoken to Western Mining who had told them that it was a Kiam issue, not a Western Mining issue.

14 Ms Greenwell gave evidence that Mr Ellison called her on 31 August 2000 when he got off the plane. She said that he asked her to find out who the two employees were on the plane and she telephoned the site supervisor, Mr Smith, who advised her of their names. They were the only two Kiam employees on the flight. She was also asked to enquire whether there was any substance in their complaints. She told Mr Ellison what Mr Smith had said. Mr Ellison advised her to ring Mr LaRose and Mr Hudson and tell them that they were not required to return to the site. When they were asked why they were not to return to the site she advised them to come in on Monday and she would discuss it with them. Her evidence was that she and John Brown told the two men that they would not need to return to the site because the crew was being cut down. That was her advice also. She said that they decided to do this to avoid animosity. One of them subsequently telephoned her indicating that he did not believe the reasons given to him for the termination. She was told that they had contacted somebody from Western Mining who said that their employment was terminated because of a discussion overheard on the plane. She advised them to come in again then discuss it and they did so. They were angry that she had not been "upfront" with them in the first place. The real reasons for their dismissal was then explained to them.

FINDINGS AT FIRST INSTANCE

15 The Commissioner at first instance found as follows:-

(a) That he had no doubt that the process of the dismissal was flawed by its lack of initial directness and honesty.

(b) There was no suggestion of a threat or other reason which might otherwise be used to explain why Mr LaRose was initially mislead.

(c) He was finally given the correct reason only after his own enquiries had disclosed it.

16 This was a procedural flaw but only one factor to be considered in deciding the question of whether the dismissal was unfair or not.

17 The process of investigation was not flawed.

18 Mr Ellison caused enquiries to be made as to who were the Kiam employees on the flight and whether they owed monies which might lend legitimacy to their complaints. Having received an answer to those questions he decided to terminate their services and pay them notice in lieu.

19 Mr LaRose was not summarily dismissed.

20 Kiam has shown that there was sufficient evidence to raise an issue as to the existence or non existence of a factual issue.

21 It was not relevant that Mr LaRose had a previous offence for stealing which occurred some years ago.

22 The evidence of Mr Ellison was preferred to that of Mr LaRose by the Commissioner at first instance. He preferred the evidence of Mr Ellison which was straightforward and unchanged under cross examination. Mr Ellison decided that he could not trust the two employees any further and instructed that their services be terminated.

23 He found that the conversation between Mr LaRose and Mr Hudson included discussion about their intention to steal company property, and that this discussion led to a breakdown in trust between employer and employees sufficient to warrant dismissal.

24 The Commissioner at first instance then dismissed the application.

ISSUES AND CONCLUSIONS

25 The decision appealed against was a discretionary decision as that is defined in *Norbis v Norbis* (1986) 161 CLR 513 (see also *Coal and Allied Operations Pty Ltd v AIRC* (2000) 74 ALJR 1348 (HC)).

26 Further, since the Commissioner's finding as to the credibility of witnesses was important in these proceedings, and the Commissioner had the advantage of seeing and hearing the witnesses, the well known principle in *Devries and Another v Australian National Railways Commission and Another* [1992-1993] 177 CLR 472 and explained in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306 (HC) applies.

27 Because the decision at first instance was a discretionary decision, it was for the appellant to establish upon this appeal that the exercise of the discretion had 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 has no warrant to interfere with the exercise of the discretion at first instance, unless it is established that the exercise of the discretion miscarried according to the well known principles laid down in *House v The King* (op cit) and *Gromark Packaging v FMWU* (IAC) (op cit).

28 First, the important question in this matter was whether Mr LaRose, in the hearing of Mr Ellison, had said that he was owed money by Kiam, and that to obtain that money he would steal a caddy welding machine from which, it would seem, to realise the amount of the money which he was owed. (I should add that it was not an issue that he was an employee and not a contractor to Kiam although there was some discussion of that at one stage).

29 The Commissioner at first instance, having heard and seen the witnesses, and there being a direct conflict in the evidence of Mr Ellison and Mr LaRose on this point, preferred the evidence of Mr Ellison. The Commissioner preferred the evidence of Mr Ellison on that point because his evidence was straightforward and unchanged in cross examination. On a fair reading of the transcript there was nothing to suggest that that preference was not open to the Commission. Further, that finding was not seriously challenged in submissions made upon appeal. Further, the finding based on that preference, namely that Mr Ellison heard Mr LaRose say to Mr Hudson that he intended to steal Kiam's property and that led to a breakdown in trust between employer and employee, was not challenged on this appeal either.

30 It was submitted that such a statement was made by Mr LaRose as a matter of bravado, that is that he did not seriously say that he intended to steal. However, Mr LaRose did not say that in evidence and it was not so found, nor was there a basis upon which it might be so found.

31 What the Commissioner at first instance did find, and which he was also entitled to find, on the evidence, was that the process of dismissal was unsatisfactory. It was unsatisfactory because:-

(a) It was expressed to Mr LaRose to be occurring for a reason which was false.

(b) Mr LaRose was afforded no opportunity to put his side of events.

(c) He was not told the true reason for his dismissal and he was not given an opportunity to put his side of matters until he had made his own enquiries and pressed for the reasons.

(d) The need to avoid any likely aggravation did not justify, and could not, the course of denying procedural fairness.

(e) The process of investigation and dismissal was manifestly flawed.

32 However, the lack of procedural fairness was one factor only to be considered, (see *Shire of Esperance v Mouritz* 71 WAIG 891 (IAC) per Kennedy J).

33 In this case, given that Mr LaRose was found, and correctly found, to have been expressing a clear intention to steal from his employer for reasons which he expressed, and which were open to be taken seriously, the employer was entitled to lose trust in the honesty and fidelity of Mr LaRose, and entitled to fairly terminate the contract of employment for that reason.

34 The Commissioner at first instance was entitled to find, on the evidence, that the employer was entitled to lose that trust. In addition, it was not denied that Mr LaRose was canvassing too with Mr Hudson, the question of putting an end to Kiam's contract with Western Mining, in favour of another contractor. That was some corroboration of the extent of the animosity of Mr LaRose for Kiam, and the seriousness of his expressed intention to steal the welder. That in the past there might have been procedural unfairness was patently not relevant to the fact that there was procedural unfairness in this case in the treatment of other employees.

35 In those circumstances, the dismissal, although procedurally flawed, was not, because of the valid substantive reasons for it, unfair. It was not a summary dismissal, although a summary dismissal in itself might have been both justified and fair. To dismiss Mr LaRose for his expressed intention to steal from his employer was in this case not unfair for the reasons which I have mentioned.

36 As to the submission that the rule in *Jones v Dunkel and Another* [1958-1959] 101 CLR 298 was not applied, there was no substance in that. There was no scope for its application at all. There was no summary dismissal requiring the justification of the same by the employer on the evidence; and in any event, the appellant bears the onus of establishing on all of the evidence that the dismissal was unfair, according to the well known principles in *Miles and Others t/a Undercliffe Nursing Home v FMWU* 65 WAIG 385 (IAC).

37 It is trite to observe that it is for the applicant who alleges that he/she has been unfairly dismissed, to establish his/her case and not to rely on witnesses being called by the respondent, who might or might not establish the applicant's case, and who are not called to do so, in any event.

38 No ground of appeal was made out. There was no miscarriage of the exercise of the discretion, at first instance, established. I would dismiss the appeal.

39 CHIEF COMMISSIONER: I have had the advantage of reading the Honourable President's draft of his reasons for decision. I agree that the appeal should be dismissed.

40 In dismissing the application for unfair dismissal the Commission at first instance found that the appellant expressed an intention to steal company property. This conclusion was reached after hearing evidence from the respondent's general manager about a conversation he overheard between the appellant and another employee. The appellant flatly denied that he had stated such an intention (Transcript p. 42).

41 The appeal was pursued on the basis that even if the conversation did occur there was insufficient investigation undertaken by the employer to justify the decision to terminate the appellant's employment. Furthermore the conversation between the two employees even if it included the intention to steal equipment could not be relied upon to justify the respondents actions in dismissing the appellant when the respondent knew that there were outstanding issues with the appellant about safety and wages. It was submitted that an alleged claim for outstanding wages gave rise to an "honest claim of right".

42 The fundamental issue is whether or not the appellant expressed an intention to steal from his employer. The finding of fact made in the first instance was based on the credibility of the witness. As the Hon President makes clear there was nothing before the Full Bench to show that the Commissioner had misused his advantage in concluding that the appellant expressed the intention to steal from the respondent (Devries and Another v Australian National Railways Commission and Another [1992 – 93] 177 CLR 472).

43 Faced with the unambiguous threat that the appellant intended to steal equipment it is difficult to comprehend what investigation the employer should then have been obliged to embark upon. The loss of trust engendered by the expressed intention to steal warranted dismissal. Although there were procedural flaws associated with the process by which the

termination was effected, these were not fatal to the efficacy of the dismissal. They were but a factor to be considered in the circumstances of the case and were indeed assessed by the Commission in the first instance.

44 The alleged grievances held by the appellant on issues going to safety and wages could not render the intention to steal the employers equipment a reasonable objective in pursuit of an "honest claim of right" when that intention is so fundamentally a breach of the terms of the appellants contract of employment.

45 COMMISSIONER P E SCOTT: I have had the benefit of reading the reasons for decision of His Honour, the President. I agree that the grounds of appeal are not made out.

46 As noted by His Honour, the Commissioner at first instance was entitled to prefer the evidence of Mr Ellison to that of the appellant, and he did so. The appellant submitted that if he had made a statement about intending to steal, then it ought to have been seen as bravado and not taken seriously. This was not put to the Commissioner at first instance. On the contrary, in his evidence before the learned Commissioner, the appellant had simply denied making the statement. On this basis the learned Commissioner was not obliged to take account of any alleged bravado on the part of the appellant in making the statement which, relying on Mr Ellison's evidence, he found to have been made.

47 There was no error in the learned Commissioner finding that there was a justifiable breakdown of trust in the employment relationship because of the appellant's actions, and that this justified dismissal, a dismissal not being for misconduct.

48 Although there were flaws in the process of dismissal, as found by the Commissioner at first instance, these flaws do not render the dismissal, otherwise justified, unfair. Rather the issue of procedural fairness is one factor only to be considered (*Shire of Esperance v Mouritz* 71 WAIG 891 (IAC) Kennedy J.).

49 As there has been no identifiable error found, I would dismiss the appeal.

THE PRESIDENT:

50 For those reasons, the appeal is dismissed.

Order accordingly

2001 WAIRC 04420

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	STEPHEN LAROSE, APPLELLANT
	v.
	KIAM CORPORATION LIMITED, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER P E SCOTT
DELIVERED	TUESDAY, 11 DECEMBER 2001
FILE NO/S.	FBA 47 OF 2001
CITATION NO.	2001 WAIRC 04420

Decision	Application for extension of time granted
Appearances	
Appellant	Mr D Gordon (of Counsel), by leave, and with him Mr M Morgan (of Counsel), by leave
Respondent	Mr J Uphill, as agent

Order

This matter having come on for hearing before the Full Bench on the 28th day of November 2001, and having heard Mr D Gordon (of Counsel), by leave, and with him Mr M Morgan (of Counsel), by leave, on behalf of the appellant, and Mr J Uphill, as agent, on behalf of the respondent, and the Full Bench having reserved its decision in the matter, and reasons for decision being delivered on the 11th day of December 2001, it is this day, the 11th day of December 2001, ordered that the application for extension of time for the filing of appeal books be and is hereby granted.

By the Full Bench

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

[L.S.]

2001 WAIRC 04392

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	STEPHEN LAROSE, APPELLANT
	v.
	KIAM CORPORATION LIMITED, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER P E SCOTT

DELIVERED	TUESDAY, 11 DECEMBER 2001
FILE NO/S.	FBA 47 OF 2001
CITATION NO.	2001 WAIRC 04392

Decision	Appeal dismissed.
Appearances	
Appellant	Mr D Gordon (of Counsel), by leave, and with him Mr M Morgan (of Counsel), by leave
Respondent	Mr J Uphill, as agent

Order

This matter having come on for hearing before the Full Bench on the 28th day of November 2001, and having heard Mr D Gordon (of Counsel), by leave, and with him Mr M Morgan (of Counsel), by leave, on behalf of the appellant, and Mr J Uphill, as agent, on behalf of the respondent, and the Full Bench having reserved its decision in the matter, and reasons for decision being delivered on the 11th day of December 2001, it is this day, the 11th day of December 2001, ordered that appeal No FBA 47 of 2001 be and is hereby dismissed.

By the Full Bench

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

[L.S.]

2001 WAIRC 04343

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PENRHOS COLLEGE (INC), APPELLANT
	v.
	MARILYN MUGGERIDGE, RESPONDENT
FULL BENCH	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 7 DECEMBER 2001
FILE NO/S.	FBA 52 OF 2001
CITATION NO.	2001 WAIRC 04343

Decision	Appeal dismissed.
Appearances	
Appellant	Mr R H Gifford (as agent) and with him Dr I Fraser
Respondent	Mr T J Dixon (of Counsel) by leave

Reasons for Decision

THE PRESIDENT—

1 This is an appeal by the abovenamed appellant employer against the decision of the Commission, constituted by a single Commissioner, in proceedings brought pursuant to s.29(1)(b) of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act").

2 The appeal is brought against the decision of the Commissioner constituted by an order on 5 September 2001 in the following terms, formal parts omitted:-

> "1. DECLARES that Ms Marilyn Muggeridge was harshly, oppressively and unfairly dismissed from her employment, as a home economics assistant, by the respondent effective 20 September 2000.
>
> 2. DECLARES that reinstatement of Ms Muggeridge is impracticable;
>
> 3. ORDERS the respondent to pay to Ms Muggeridge the sum of $13,760.00 less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1936 and actually paid within 7 days of the date of this order."

GROUNDS OF APPEAL

3 The grounds of appeal are, as amended, as follows:-

> "1. The learned Commissioner erred in concluding that the written warning issued to the applicant on 25 November 1999 was unfairly issued. In relying upon an acknowledgement made by the College's Administrator concerning the resolution process put in place leading up to the warning, the Commissioner failed to attribute adequate weight (including drawing appropriate inferences) to other evidence to the effect that—
>
> (i) the commencement of the resolution process involved a meeting between the applicant and the Administrator on 17 September 1999, in which she was confronted with his concerns about her relationship with the Head of Department, and about performance matters, by which he invited her to provide a written response to the issues raised; and that such later response provided undertakings to him dealing with such matters.
>
> (ii) that such process, involving consultations between the applicant and the Head of Department, did initially involve an 'observer of (the applicant's) choice'.

(iii) subsequent to the 'unpleasant exchange' between the applicant and the Head of Department on 17 November 1999, the Secretary of the relevant Union was sought by the College to be involved in the process to assist in a resolution being reached, but to no avail.

(iv) the warning letter of 25 November 1999, when read as a whole, not only dealt with the manner in which the applicant related to the Head of Department, but also to her inability to recognise the Head of Department's position (with all that such implies).

2. In terms of the relationship between the applicant and the Head of Department, over the course of the 2000 teaching year, the learned Commissioner, whilst concluding that some tension continued between them, failed to give due weight (other than in relation to the health and safety issue), to the evidence of a deterioration in the relationship between them and whether there was any fault that could be laid at one or the other, for such a circumstance.

3. As to performance issues over the course of the 2000 teaching year, the learned Commissioner, in finding, in particular, that the failure by the applicant to set up for classes or to do so properly, was one of the most significant issues, but only occurred, in an overall context, on a very small number of occasions, failed to give adequate weight to the evidence that the Head of Department had put strategies in place to overcome the problem, which strategies were not availed of.

4. (Consequent upon the position maintained by Ground 1 hereof) the learned Commissioner erred in concluding that it was, in effect, a necessary requirement that the applicant be warned that her job was in jeopardy (concerning the performance and relationship matters) by failing to give due weight (including drawing appropriate inferences) to evidence relating to the fact that—

(i) the College's concerns relating to the relationship and performance issues were put directly to the applicant by the Head of Department, who had been left that responsibility by the Administrator, and who regularly reported to him.

(ii) the manner in which the applicant perceived that which was put to her in these circumstances and whether this was reasonable, including her initial failure in the course of the 2000 teaching year, to acknowledge the existence of the original warning at all.

5. The learned Commissioner erred in concluding that it was, in effect, a necessary requirement that the applicant be given the opportunity to explain her position to the Administrator, in relation to the health and safety issue, by failing to give appropriate weight to the evidence that such explanation was sought by the Head of Department and was conveyed to the Administrator, who had no basis not to accept it; especially in light of the fact that the applicant's termination did not result from that event alone.

6. On the understanding that the learned Commissioner concluded (by implication) that the diary notes of the Head of Department were self serving, he erred in doing so, in that he failed to take proper account of the evidence, concerning the purpose for which they were compiled.

7. In the alternative, with respect to the award of compensation made by the learned Commissioner, the Commissioner, in concluding that the applicant be compensated for her loss, to the fullest extent possible, failed to give any weight to the consideration, forming part of the authorities upon which he relied, as to how long the applicant may have remained in her employment, had she not been dismissed.

9. Penrhos College seeks by this Appeal application, the quashing of the learned Commissioner's Order."

BACKGROUND AND EVIDENCE

4 Ms Marilyn Muggeridge, was an employee as and from 3 February 1997 of the abovenamed appellant. She was employed by Penhros College (Inc), which is a secondary school, as a Home Economics Assistant (Clothing and Fabrics). That is, she supported and assisted teachers in their teaching role in a particular area.

5 Her employment came to an end as a consequence of a letter written to her on or about 28 August 2000 by the appellant. There was a further letter dated 5 September 2000 by which the contract of employment was brought to an end.

6 Ms Muggeridge commenced these proceedings pursuant to s.29(1)(b) of the Act, alleging that her dismissal was harsh, oppressive and unfair, and also claiming severance pay, but that claim was not pressed when the matter was heard by the Commissioner. The claim was opposed in its entirety.

The Evidence

7 The applicant at first instance, the respondent on appeal, Ms Muggeridge, testified that she commenced employment in the Home Economics department of the appellant on 3 February 1997. She said that she enjoyed her work and had a productive and good working relationship with the then head of department, one Ms Karen Bridle. That evidence was not challenged or contradicted. Her letter of appointment and subsequent documents referring to the terms and conditions of her employment were tendered as exhibit A2 (pages 47-49 of the appeal book (hereinafter referred to as "AB")). Her employment was also subject to the terms of the *Independent Schools Administrative and Technical Officers Award* 1993.

8 In or about July 1998, there was a change of personnel in the Home Economics department, with Mrs Lisa Marie Balbi assuming the position of acting head of department from this time. At the end of 1999 she became permanent head of the department. Ms Muggeridge supported and assisted her in her teaching role. She also did the same for other teachers in accordance with her duty statement. Ms Muggeridge testified that she had a very good working relationship with Mrs Balbi in late 1998 and in early 1999. Some time after that, in September, October and November 1999, there were some difficulties which arose in the working relationship between Ms Muggeridge and Mrs Balbi. Ms Muggeridge was not able to articulate what those difficulties were, but she said that there was some change in Mrs Balbi's requirements of her, compared to what had previously been the position under Ms Bridle.

9 Some tensions arose, and, as a result, a meeting occurred between Ms Muggeridge and Mr Charles Llewellyn Woodford, the appellant's administrator. Mr Woodford had, amongst other things, the responsibility for the supervision of the teaching staff including, of course, Ms Muggeridge. At this meeting a number of matters were raised relating to Ms Muggeridge's attitude to Mrs Balbi as head of department, and to other performance matters. She denied the allegations.

10 These matters were set out in a letter dated 17 September 1999 (exhibit R1, pages 70-71(AB)) written by Mr Woodford to Ms Muggeridge. Whilst Ms Muggeridge recalled going through these matters with Mr Woodford, she did not agree with the content of the letter and said that she had no knowledge of a number of the matters raised in it. The letter of 17 September 1999, formal parts omitted, reads as follows:-

> "Thank you for meeting with me today to discuss my concerns regarding your relationship with the Head of your department and some of the teaching staff along with the decline in the level of your performance.

The issues I referred to you are as follows:-

The lack of respect you have shown to the Head of Department and some teachers in the department; the manner in which you answer back when asked to do a task; that you continually question instructions given to you and that you generally behave in a confrontational manner towards the Head of Department.

Contradicting teachers' instructions to students in front of the students. (ie the zip incident)

Questioning students and disciplining them at your discretion despite the teacher's presence in the classroom.

Displaying a lack of initiative and having to be directed to carry out tasks, in contrast with the previous two years when you were full of initiative.

Completing tasks that suits you and leaving other jobs out; forgetting to do jobs.

Rushing through some tasks and not including the necessary detail (ie pattern drafting) where as previously you were meticulous with your work.

In the course of our discussion I understood you to say that you did not regard your manner to the Head of Department as confrontational and that yo did not recognise that your performance level had declined. You also expressed some confusion over the degree of initiative that is expected of you.

As continued employment is conditional upon an acceptable level of behaviour and satisfactory performance, I urge you to arrange a meeting with Mrs Balbi, in the presence of an observer of your choice, to resolve all the issues I have raised and provide me with a written response to each issue referred to in this letter. I expect the letter to be on the basis of agreement between yourself and the Head of Department.

We will review the situation on Wednesday 10 November 1999."

11 During the meeting on 17 September 1999, Mr Woodford, because he also was not in possession of all of the relevant facts, requested Ms Muggeridge and Mrs Balbi to meet, in an endeavour to resolve the problems. He also requested Ms Muggeridge to provide a response to the matters set out in his letter. Ms Muggeridge testified that she then met with Mrs Balbi to discuss the issues set out in exhibit R1, leading to a letter from her to Mr Woodford by way of response, dated 1 November 1999 (exhibit R4, page 74(AB)). In that letter she agreed to do certain things and not do certain other things.

12 At the first meeting with Mrs Balbi, Mr Shane Mawer of The Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers (hereinafter referred to as "the ISSOA") was present. Mr Mawer was there as Ms Muggeridge's union representative. They went through the matters mentioned in Mr Woodford's letter. Ms Muggeridge then wrote a letter of response based on the discussion. Mrs Balbi was not happy with the first letter Ms Muggeridge wrote to Mrs Balbi and so made changes. Every time Ms Muggeridge wrote a letter Mrs Balbi would read it with her in the office whilst others were present (see pages 19-20 of the transcript at first instance (hereinafter referred to as "TFI")) and come back with changes. That letter eventually was completed on 1 November 1999.

13 After this initial meeting, and in response to a process put in place by Mr Woodford, both Ms Muggeridge and Mrs Balbi met on a weekly basis to discuss work matters. Ms Muggeridge gave evidence that she thought that the process was helpful in assisting in the communications between her and Mrs Balbi. She did say, however, that she felt that Mrs Balbi's approach involved targeting her and she also thought that sometimes Mrs Balbi was being vindictive. Ms Muggeridge said in evidence that she was trying to do her job in the manner required by Mrs Balbi, was trying not to speak to her in an aggressive or confrontational manner, and making every effort to make sure that they had a workable relationship. A number of summaries of the meetings were prepared by Mrs Balbi, with responses prepared by Ms Muggeridge, and these documents were tendered as exhibit R8 (pages 156-163(AB)). According to all parties the weekly meetings were stressful. Nevertheless, Ms Muggeridge adhered to the arrangement.

14 There was another meeting on 22 November 1999 at which were present Ms Teresa Howe from the ISSOA, Mr Woodford, Mrs Balbi and Ms Muggeridge. Mr Woodford had wanted Ms Muggeridge to have an observer present. (Mr Woodford suggested that the ISSOA should be involved (see page 90(TFI)). The continuing difficulties between Ms Muggeridge and Mrs Balbi were discussed. In particular, reference was made to an unpleasant exchange which occurred between them at one of the weekly meetings on 17 November 1999. Mr Woodford was not at that meeting.

15 Mr Woodford was particularly concerned about what he perceived to be the confrontational manner of communication between Ms Muggeridge and Mrs Balbi.

16 Indeed Ms Muggeridge was accused of being confrontational. After this meeting, a letter dated 25 November 1999 was written by Mr Woodford to Ms Muggeridge, which, formal parts omitted, was as follows:-

"Since our meeting on 17 September 1999 when we discussed my concerns about your relationship with the Head of your Department and some performance issues, there has been some short term improvement in your relationship with the Head of Department.

However, in the last fortnight the situation has deteriorated to an intolerable level culminating with the unpleasant exchange you had with your Head of Department at your appraisal meeting 17 November 1999.

At the meeting on Monday 22 November attended by you and I, Mrs Teresa Howe from the ISSOA and your Head of Department it became quite evident that we would not reach a resolution. From your denial of matters referred to in verbal or written communication between you and Mrs Balbi, it is apparent you did not share the same interpretation of the events/issues as Mrs Balbi.

Independently and in the company of Mrs Howe, we have interviewed several staff from the Food & Textiles Technology Department. Having given due regard to all the comments we have heard, I have reached the conclusion that you are unable to clearly recognise your Head of Department's point of view and are unaware of the manner in which you respond to her.

You must desist from the confrontational manner in which you communicate with Mrs Balbi. Failing this we will not be able to retain your services and the next instance of unacceptable behaviour will result in dismissal.

To assist you with resolving this issue I offer you the services of the College Counsellor. On the other hand, if you do not believe that you can modify your attitude towards Mrs Balbi I strongly recommend you seek alternative employment thereby avoiding having a dismissal on your record.

Please do not hesitate to contact me if you need to discuss this matter."

(Exhibit R2, page 74(AB))

17 Ms Muggeridge testified that she had no doubt that this letter was a letter of warning. She said that that was why she made every effort to ensure that she did her job. She said also that her working relationship with Mrs Balbi was "fine".

18 After she received this letter, she went on summer leave and, as she said, intended to return to school for a fresh start. When she did resume, and during 2000, she made every effort, she said, to perform her duties well. She said that she received no warnings at all throughout this period. In particular, she gave evidence that, after she received exhibit R2, she had no further direct contact with Mr Woodford. She said that during the 2000 school year, she did not consider her job to be in jeopardy. She said that she thought that everything in 2000 was fine.

19 On 4 May 2000, at about 4.25pm, she was closing down the computers and just flicking through all of the programmes on the computer, bringing up things, when Mrs Balbi walked into the department. Mrs Balbi accused her of playing cards on the computer which she denied. Mrs Balbi asked her if she had nothing better to do and asked her about a number of things that she had done.

20 The next morning, on 5 May 2000, Mrs Balbi said she had a discussion with Ms Muggeridge about these things and Ms Muggeridge said that she felt that she was picking on her. This was Ms Muggeridge's opinion, particularly because she had tidied and cleaned up the night before and she indicated that there was one piece of paper on the desk.

21 According to Ms Muggeridge, Mrs Balbi told her that her job was on the line and she told Mrs Balbi that she had already received her letter of warning. She then asked Mrs Balbi if she was giving her a warning, and Mrs Balbi said "No". She said "you've already got your letter of warning from 1999". Ms Muggeridge replied "Yes, I do. I've already got my letter of warning from 99" (see page 31(TFI)). Ms Muggeridge did not take it that she was being given a warning.

22 A number of matters said to relate to her work performance were put to Ms Muggeridge and these were alleged to have occurred in the period February to August 2000. These matters were the subject of evidence from Mrs Balbi, and further contained in a document headed "diary notes re - Marilyn Muggeridge 2000" tendered as exhibit R7 (pages 148-155(AB)). The tender of that evidence was the subject of objection, but it was admitted in evidence. These were notes regularly made by Mrs Balbi which Ms Muggeridge was unaware of until the hearing. The notes commenced on 18 February 2000.

23 An issue arose, too, about a diary which Ms Muggeridge kept, having been suggested that she wrote in her diary what was required of her, and that she wrote this in detail. The diary had room for entries for only one line for each class, so she took it upon herself to make her own notes on loose leaf paper because there was no space in the actual book used as a diary (see exhibit R5, pages 75-146(AB)).

24 The matters relating to work performance included allegations that Ms Muggeridge arrived late for work and left early; that she took longer than usual lunch breaks; that she did not assist teachers in class as directed; that she failed on occasions to properly set up for class or failed to set up class at all as required; that she forgot to undertake certain tasks, some of which were minor in nature; and generally displayed a lack of application to her work. There were also complaints by Mrs Balbi in evidence and in exhibit R7, that there was an ongoing uncooperative attitude exhibited by Ms Muggeridge. Many of these incidents were denied by Ms Muggeridge, or, Mrs Balbi's version of them were denied by her, or, alternatively, she was unable to recall them. What was of most concern to the appellant was Ms Muggeridge's failing to set up classes or properly set up classes. Ms Muggeridge could only recall one instance where she failed to set up a class. However, on the appellant's evidence, this occurred on at least four occasions out of 2400. Ms Muggeridge thought that in 2000 she was "doing the job fine". She thought that Mrs Balbi and she had a good working relationship.

25 On or about 7 August 2000, Ms Muggeridge injured herself after slipping over on an area of wet floor. She gave evidence that she notified Mrs Balbi of the incident and was informed that a note would be made and that it would be followed up. She heard nothing further, and took it upon herself to inform the appellant's health and safety officer of the incident, believing this was the appropriate thing to do. She did so because she was unaware of the process with an accident in the workplace. She found out that there was a health and safety officer and went and spoke to her about it, because up to that point there had been no changes in the department for three and a half years in relation to cleaners and wet floors. Nothing had been resolved. She had fallen and was angry about it. Further, she was told that she should have filled out an accident report at the time. There was some involvement by the cleaning staff of the appellant after this.

26 The day after the incident, Ms Muggeridge informed Mrs Balbi that she had spoken to the head cleaner about the matter.

27 On or about 11 August 2000, the appellant's health and safety officer, Ms Julie Hitchins, requested Ms Muggeridge's attendance at a meeting about the incident. She had spoken to her a couple of times. Ms Muggeridge was in class at the time, and she informed the teacher, Ms Margaret Jones, that she would be leaving the class for approximately five to 10 minutes to attend the meeting. She did so, and returned about 10 minutes later. She said that when she returned she was confronted by Mrs Balbi who asked where she had been. Ms Muggeridge said that she told Mrs Balbi that she had advised her teacher, Ms Jones, of her whereabouts. She also told Mrs Balbi that she did not have a practical class at that time. She strenuously denied that she would have left whilst she had a class on.

28 Ms Muggeridge's evidence was that she wanted to avoid going into detail about her whereabouts as she was sensitive to the fact that she had initially reported the matter to Mrs Balbi, but had later herself dealt with the health and safety officer about the incident. There was no argument at this point, Ms Muggeridge said, between Mrs Balbi and herself. She denied that she told Mrs Balbi that she did not have to advise her as to where she was and agreed that if this had been said, that it would be insubordinate.

29 On 28 August 2000, Mrs Balbi informed Ms Muggeridge that she should report to Mr Woodford's office. (This was the first time that Mr Woodford had spoken to her in 2000). She had no prior knowledge of the subject of the meeting. She gave evidence that on arriving in Mr Woodford's office, she was handed a letter dated 28 August 2000 (as she said, "out of the blue") and asked to read it. Formal parts omitted, the letter read as follows:-

> "Over the last 12 months we have had continuing discussions with you regarding a number of unsatisfactory aspects of your job performance and your interactions with your Head of Department. Our intention was to indicate these to you and to work with you to rectify this situation. This culminated in a letter to you dated 25 November 1999 in which we indicated the seriousness of the situation and its possible consequences to you in retaining your position.
>
> Since our intention is to work positively with our staff and work together to maintain a friendly and productive work environment we were gratified to see some early signs of improvement in both of the areas in question. However this improvement has not been sustained and the situation has reached crisis point.
>
> Since sending you the November 1999 letter I have kept myself informed about your progress during periodic discussions with the Head of Food & Textiles Technology. An examination of the situation indicates that there are a number of areas in which your performance has been unsatisfactory. These are:-
>
> - Punctuality, late arrivals for work
> - Taking extended lunch breaks
> - Attitude to your work

- Relationship with Head of Department
- Repeatedly not setting up for lessons
- Setting up in wrong classrooms

The matter of not setting up for classes or setting up in the wrong room is of particular concern as it is very disruptive for the students and the teacher involved. It reflects on the quality of teaching provided at Penrhos College. Of even greater concern is your repeated resistance to respond to the ongoing counselling offered by Mrs Balbi on strategies to overcome this problem and how to improve your performance.

There is also the issue of your behaviour recently during an incident resulting from your unexplained lengthy absence from the department during class time. Your response to the Head of Department, insisting she did not need to know where you were and that you did not have to tell her, was insubordinate.

I conclude that the situation is much like it was last November and your continued employment at Penhros College is not viable. I request that you give four weeks notice of your resignation or you will leave me with no alternative but to terminate your employment.

It is intended that you will not be required to serve out your notice thereby providing you with four weeks to seek other employment."

(Exhibit A8, pages 62-63(AB))

30 Ms Muggeridge gave evidence that the letter came as a complete shock to her, that she had no opportunity to respond to the allegations in it, that she tried to speak up but Mr Woodford would not let her answer. She said in evidence that she thought that she was doing her job well, that there was no indication that she had not improved, or her relationship with Mrs Balbi hadn't improved. She was requested to return her keys and collect her belongings as a part of this process. She did so. She said also that she was asked to leave Penrhos College immediately. She said that she felt ashamed and embarrassed by this and was in shock. Mr Woodford then escorted her from the premises in full view of the other staff. Mr Woodford admitted that other staff might have seen her leaving the premises.

31 Upon considering her position, Ms Muggeridge testified that she refused to resign as suggested in the letter of 28 August 2000, and subsequently received a letter dated 5 September 2000 terminating her employment by paying two weeks salary in lieu of notice (see exhibit A9, page 64(AB)). She said that the allegations of unsatisfactory performance referred to in the letter of 28 August 2000 were never put to her either by Mr Woodford or by Mrs Balbi. She also said that she had no discussions at all with Mr Woodford during 2000 concerning her employment.

32 She gave evidence that as a consequence of the manner and timing of the dismissal by the appellant, she felt personally aggrieved, distressed, betrayed, shocked and deeply hurt. She said that it took up to 19 January 2001 to receive the monies to which she claimed that she was lawfully entitled on termination of her employment. She was not able, after her dismissal, to find any gainful employment.

33 The evidence for the appellant was given by Mr Woodford and Mrs Balbi.

34 Mr Woodford did say that Ms Muggeridge's performance in 1997 and 1998 was better than good and did not reflect in her performance in 1999. When he wrote the letter to Ms Muggeridge of 25 November 1999, he concluded that Ms Muggeridge was unable to recognise a head of department's view and that her manner of speaking to the head of department was confrontational. The confrontational behaviour, he said, was unacceptable.

35 In the last two weeks of August 2000, having received information from Mrs Balbi, Mr Woodford, having made his own inquiries, as he said in evidence, decided that Ms Muggeridge could no longer remain in employment and decided to suggest that she resign. I should add that those inquiries included inquiries of other teachers and took about a fortnight to conclude. He wanted to assure himself, he said, that there was no harassment by Mrs Balbi who he thought that he was rather hard on. He quite readily admitted that his last direct involvement in Ms Muggeridge's employment was the meeting on 22 November 1999, leading to his issuing of exhibit R2. He said in evidence that he had then made his position clear that if the performance and behaviour did not alter, then the appellant would not be able to retain Ms Muggeridge in employment. He gave evidence that he tried to put in place the weekly meeting process to reconcile Mrs Balbi and Ms Muggeridge in their working relationship. Mr Woodford admitted, too, that the formal meeting process which took place was stressful on both Mrs Balbi and Ms Muggeridge and probably was a mistake, in retrospect. He requested Mrs Balbi to keep and produce a diary of events for him so he could monitor the position.

36 As a result of the 11 August 2000 incident, Mr Woodford said that he came to the conclusion that Mrs Balbi and Ms Muggeridge could not work together, and this incident was "the straw that broke the camel's back". This, he said, was insubordination. He had been concerned that in the very first meeting he had on 17 September 1999 with Ms Muggeridge, she did not appear to recognise that there were issues between her and Mrs Balbi.

37 He also made it clear in evidence that he understood that his letter of 25 November 1999 was his last letter in the matter and that his next action would be termination. He said that he had had a year to think about the situation, and could see no other option to the action which he took. He said "I could see nothing wrong with the way the head of department was managing her department and I could see faults in the way Ms Muggeridge was performing (see page 85(TFI)).

38 He had reached the conclusion, following the meetings involving Mrs Balbi, Ms Howe, Mr Mawer and Ms Muggeridge, that Ms Muggeridge was unable to recognise a head of department's point of view and that she did not recognise that her manner of speaking to the head was confrontational. He did not see fault on Mrs Balbi's part. He described the letter of 25 November 1999 as the first letter of warning and said that it dealt not only with her confrontational behaviour but also with her performance. He had been informed that she was a very good employee up until September of 1999.

39 Mr Woodford was cross-examined. He said that Ms Muggeridge was meticulous in relation to the performance of her duties, and he did not expressly state that work performance issues would lead to her dismissal. He said that, in his view, there were, however, underlying work performance issues.

40 Based upon reports given to him by Mrs Balbi, Mr Woodford said that Ms Muggeridge's performance in terms 1 and 2 of 2000 was acceptable, and that there were areas of improvement in her performance during that time. He did say, in fact, that in terms 1 and 2 of 2000, her performance and conduct were acceptable and tolerable (see page 117(TFI)). It was also clear from Mr Woodford's evidence that many of the allegations put to Ms Muggeridge based upon the content of exhibit R7, Mrs Balbi's diary notes, were not of great consequence. It also appeared from his evidence, that the main concern which he had was his view that productivity in the home economics department was being compromised, and, in particular, he was concerned about the failure by Ms Muggeridge to set up for classes. In this regard, he accepted that there were a total of four classes only not set up during the entire term 3. He also regarded, on Mrs Balbi's report, Ms Muggeridge's behaviour as insubordinate because of the alleged unexplained lengthy absence from the classroom.

41 No specific warnings about her work performance, as opposed to her attitude to Mrs Balbi, were given to Ms Muggeridge during the 2000 school year. Mr Woodford relied on the November 1999 letter (exhibit R2) in this regard. In fact, he gave her no warnings at all before the letter requiring her resignation was handed to her (exhibit A8).

42 Mr Woodford, in evidence, accepted that the detail of the scrutiny placed upon Ms Muggeridge by Mrs Balbi, including matters of an apparently minor nature, might well have contributed to the degree of tension between them in their working relationship. He admitted that if there had been a less intensive process that might have assisted in the relationship between Mrs Balbi and Ms Muggeridge improving. Indeed, he said, that the cessation of formal meetings in 2000 had taken a fair bit of the sting out of the relationship.

43 He said that Mrs Balbi had some concerns about Ms Muggeridge's health and her concern was that this may have affected her work performance to an extent. He was not unaware of those problems (see page 129(TFI)). This issue was never raised by Mr Woodford with Ms Muggeridge or anyone else. The performance issues mentioned in the letter of 28 August 2000 (exhibit A8), apart from the relationship with the head of department, were not, as Mr Woodford agreed, the subject of any express warning by him, or anyone else, either orally or in writing. Mr Woodford reached the conclusion in August 2000 that whatever attempts Mrs Balbi was making had not succeeded.

44 The issue referred to in the third last paragraph of exhibit A8, the letter of 28 August 2000, was never raised directly with Ms Muggeridge so as to ascertain her version of the events. Further, Mr Woodford accepted that the termination meeting that took place on 28 August 2000, leading to Ms Muggeridge leaving the appellant's employment that day presented her with a fait accompli, and she had no opportunity of responding to the allegations contained in that letter. He also accepted that in or about March 2000, Ms Muggeridge asked Mrs Balbi whether she was being warned for her work performance, and, if so, could she be provided a letter to this effect. Mr Woodford declined to provide a letter because on his evidence exhibit R2 sufficed. I should observe, too, that there was no evidence of any involvement invited of, or by, the ISSOA in those events.

45 Mrs Balbi gave evidence that she was the acting head of department of home economics from mid 1998, and was formally in that position from about the beginning of 2000, as she said. Mrs Balbi gave evidence, too, that she had concerns about Ms Muggeridge's confrontational manner with her and what she perceived to be a questioning of her authority in her position as head of department. Mrs Balbi testified that she kept a diary of occurrences involving Ms Muggeridge and herself on Mr Woodford's suggestion and showed it to him in their various discussions. As far as she was aware, she said, Ms Muggeridge knew that she was keeping a diary. Mrs Balbi alleged that the class diary which she had suggested that Ms Muggeridge keep was not properly kept because programme notes were not always in her diary. It was her evidence that Ms Muggeridge's performance was acceptable in terms 1 and 2 of 2000, although there were incidents as noted in her diary.

46 During 2000, Mrs Balbi met Mr Woodford regularly to discuss Ms Muggeridge's performance and how Mrs Balbi was managing the situation. Mrs Balbi said that, in March 2000, several incidents occurred where classes were not set up appropriately.

47 Mrs Balbi said that, in term 2, Ms Muggeridge really was not making an attempt to overcome some of the problems which they were having. Mrs Balbi asked her why she was continuing to do things and to disadvantage herself by not proving that she could carry out her duties appropriately. Mrs Balbi described Ms Muggeridge as responding negatively and harshly and continuing to be defensive.

48 Mrs Balbi alleged in evidence that, in term 3 of 2000, matters took a turn for the worse. She testified that Ms Muggeridge on several occasions failed to set up class or set up incompletely, and that this had a disrupting effect on her students in the school timetable. Mrs Balbi also gave evidence about many of the matters the subject of her diary notes contained in exhibit R7. Mrs Balbi did say that Ms Muggeridge told her that she had a health problem. Mrs Balbi said that she "took sick days" on a number of occasions. Mrs Balbi expressed herself as being concerned about her health, saying that "She seems to have been extremely tired and run down" (see pages 234-235(TFI)).

49 In August 2000, in relation to the incident where Ms Muggeridge had slipped over, Mrs Balbi gave evidence that Ms Muggeridge was abrupt in her dealings with her. Mrs Balbi said that she was disappointed that Ms Muggeridge did not tell her that she had already taken the matter up with the appellant's occupational health and safety officer. Mrs Balbi said that when she raised this issue with Ms Muggeridge, she, Mrs Balbi, was told that the absence from the classroom was none of her business and this upset Mrs Balbi. She had made a decision, she said, that the situation could no longer be tolerated and that it was having too many detrimental effects on her department as a whole. It seems that this led to Mrs Balbi going to see Mr Woodford to discuss the matter in the first week of August 2000 and clearly led to the meeting and letter of 28 August 2000. Mrs Balbi said that she conferred with colleagues about how to handle the situation with Ms Muggeridge. She did not think that she was victimising her.

FINDINGS AT FIRST INSTANCE

50 I summarise the findings of the Commissioner at first instance as follows.

51 The Commissioner was satisfied that the witnesses gave their evidence to the best of their ability, and had no reason to doubt the overall veracity of the evidence given by each witness, despite there being some inconsistencies and some areas in which the oral evidence did not precisely correspond with the documentary evidence.

52 He found that, some time before September 1999, tension developed in the working relationship between Ms Muggeridge and Mrs Balbi. The reason for this tension was not clear on the evidence to ground any particular finding.

53 The Commissioner was satisfied that before this time, Ms Muggeridge was a very well performing employee, described by Mr Woodford in his evidence as meticulous in the performance of her duties. She enjoyed her position and had an affinity with arts and crafts work.

54 A meeting took place in September 1999, in relation to which some allegations about her working relationship with Mrs Balbi and work performance issues were put. These were the subject of regular meetings between them, at least for a period of time up to in or about November 1999. These meetings were stressful, and led to an exacerbation of the tension between them. The Commissioner accepted Mr Woodford's evidence and found that he regarded that process, in retrospect, as an error.

55 As a result of these regular meetings, there was a meeting on 25 November 1999 leading to the issuance of a letter of the same date being sent to Ms Muggeridge.

56 There had been an "unpleasant exchange" which led to that meeting, and there were complaints by the appellant that Ms Muggeridge was confrontational in her manner. This issue was the subject of the express warning in the letter of 25 November 1999.

57 In terms 1 and 2 of 2000, some improvement in the position appeared to occur, between Ms Muggeridge and Mrs Balbi.

58 Ms Muggeridge understood her obligations to the appellant as set out in exhibit R4.

59 At about the time of the start of the 2000 teaching year, Mrs Balbi commenced to keep a detailed diary in which events were recorded concerning Ms Muggeridge's day to day work performance. This diary was recorded in great detail, and included many matters which were admitted by the appellant to be relatively minor or inconsequential. The Commissioner was satisfied on the evidence that Ms Muggeridge's performance was subject to quite intense scrutiny by Mrs Balbi.

60 The Commissioner was satisfied on the evidence that despite the improvements in working performance, some tension in the working relationship between Ms Muggeridge and Mrs Balbi continued in the year 2000.

61 It was apparent on the evidence that Mrs Balbi seemed to have expectations of Ms Muggeridge, which Ms Muggeridge thought she was meeting, contrary to the assessment of Mrs Balbi.

62 The Commissioner was satisfied and found that one of the most significant issues occurring in the year 2000 was Ms Muggeridge's failure to set up for class or to do so properly on four occasions referred to in term 3. In any event, four instances of such occurring was a very small number of the total. Such occurrences were disruptive to the school program.

63 Ms Muggeridge did experience some health difficulties at about this time, which were broadly known by the appellant, and it was aware that this may have "impacted" in some way on her performance at work.

64 Of all of the "performance" type issues referred to by Mrs Balbi in her evidence, and referred to in the letter of 28 August 2000 (exhibit A8), none of those issues were ever the subject of any warnings to Ms Muggeridge from either Mrs Balbi or Mr Woodford that her employment was in jeopardy. There was no communication at all between Mr Woodford and Ms Muggeridge in 2000.

65 As to the events of August 2000, those events probably did further exacerbate the tension between Ms Muggeridge and Mrs Balbi.

66 The Commissioner was satisfied that Mrs Balbi did probably feel somewhat put out by the fact that Ms Muggeridge directed her inquiries to the appellant's occupational health and safety officer and not through her, after the initial report.

67 He also accepted that there may have been an exchange between Ms Muggeridge and Mrs Balbi when Ms Muggeridge was questioned about her absence from the classroom. He was also satisfied and found that it was this matter which led to the meeting on 28 August 2000 involving Mr Woodford. Mr Woodford did not speak to Ms Muggeridge about the health and safety matter to ascertain her version of the events, and she had no inkling of what this meeting was about when she attended the meeting. She also had no opportunity at all at that meeting to respond to the matters put to her by Mr Woodford. As described by Mr Woodford in his evidence, this meeting was a fait accompli, leading to Ms Muggeridge's dismissal on 5 September 2000.

68 The Commissioner went on to find that the dismissal of Ms Muggeridge was harsh, oppressive and unfair, the foundation for the dismissal being in terms of being warned of its possibility, the letter of 25 November 1999.

69 The evidence that the warning that issued from the meeting that took place on 25 November 1999 was predominantly, if not exclusively, based upon allegations of Ms Muggeridge's confrontational manner with Mrs Balbi.

70 The meeting concerned arose out of the weekly meeting of 17 November 1999, and was a part of the process put in place by the appellant, conceded by it to have been a mistake. The weekly meeting process was very stressful for both Ms Muggeridge and Mrs Balbi, particularly Ms Muggeridge.

71 It was harsh to base a written warning upon the outcome of a process which the appellant itself conceded was, in the circumstances, inappropriate and one which certainly did not ease tensions between the parties concerned, but rather, appeared to have had the opposite effect.

72 The written warning itself, having been issued in unfair circumstances, and then being completely relied upon by the appellant, subsequently, in the Commissioner's view, tainted the entire ensuing period with unfairness. This was all the more so given that the performance issues, not expressly the subject of the 25 November 1999 letter, were in many respects minor, and the issue of setting up classes, occurring over a relatively small number of occasions in term 3.

73 In relation to the performance allegations set out in the appellant's letter of 28 August 2000, it was clear on the evidence that none of these issues were ever put to Ms Muggeridge in the context of her employment being in jeopardy.

74 This situation was exacerbated by the fact that some time in term 2, Ms Muggeridge inquired of Mrs Balbi whether she was being formally warned for some of these performance issues, which drew no further response from Mr Woodford, and, at best, a general response from Mrs Balbi.

75 The final meeting on 28 August 2000 was clearly, as admitted by the appellant to its credit, a fait accompli, with no opportunity at all for Ms Muggeridge to respond.

76 Of particular note in this regard, was the fact that the health and safety issue, described by the appellant as the "straw that broke the camel's back", was not the subject of any inquiries of Ms Muggeridge by Mr Woodford as to her version of the events before deciding to dismiss her.

77 The dismissal therefore was harsh because Ms Muggeridge was denied any opportunity to defend herself.

78 As to quantum, the Commissioner found that it was not established that Ms Muggeridge had any claim for compensation for injury and did find that she took all reasonable steps to mitigate her loss, the contrary not having been established.

79 He found that no other income had been earned in the intervening period following the dismissal and therefore assessed compensation in a sum equivalent to the loss of six months remuneration, that being $13,760.00 in round terms.

80 He attached considerably less weight to exhibit R7, Mrs Balbi's diary notes than to the oral evidence adduced in the proceedings.

ISSUES AND CONCLUSIONS

81 The decision made in this matter was a discretionary decision, as that is defined in *Norbis v Norbis* (1986) 161 CLR 513 and *Coal and Allied Operations Pty Ltd v AIRC* (2000) 74 ALJR 1348 (HC). It follows, of course, that the Full Bench has no warrant to interfere with the exercise of the discretion at first instance, unless the appellant establishes that the exercise of such discretion miscarried and does so in accordance with the well known principles in *House v The King* [1936] 55 CLR 499 and *Gromark Packaging v FMWU* 73 WAIG 220 (IAC).

82 Further, insofar as the decision of the Commission at first instance depended on the advantage enjoyed by the Commissioner in seeing and hearing the witnesses at first instance, then the well known principles in *Devries and Another v Australian National Railways Commission and Another* [1992-1993] 177 CLR 472, as explained in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306, also applied.

83 On all of the evidence, as I have outlined it above, some time in 1999, tension developed at work between Mrs Balbi and Ms Muggeridge. There was no evidence but that, before that occurred, Ms Muggeridge was a well performed employee. That

was admitted by Mr Woodford who described her as meticulous in the performance of her duties. To some extent, that was corroborated by the evidence of Ms Muggeridge that she got on well with Mrs Balbi's predecessor. Once the problems between Mrs Balbi and Ms Muggeridge surfaced, there was a series of meetings, some of which were attended by representatives of Ms Muggeridge's union. However, the first meeting was on 17 September 1999 between Mr Woodford and Ms Muggeridge.

84 The ISSOA was involved following what was described as an unpleasant exchange between Mrs Balbi and Ms Muggeridge on 17 November 1999 (and indeed prior to that on Mr Woodford's suggestion). The difficulties between the two were not resolved and the letter of 25 November 1999, which was a warning of dismissal unless Ms Muggeridge changed her attitude and approach to Mrs Balbi, her head of department, was written by Mr Woodford to Ms Muggeridge. The letter, inter alia, did warn about an alleged inability on the part of Ms Muggeridge to recognise the head of department's position.

85 On a fair reading, however, the letter of 25 November 1999 was not directed to any criticism of Ms Muggeridge's performance or the manner of her performance of her duties, but to her attitude to and dealings with Mrs Balbi as head of department, which is a different matter. That letter was sought to be relied upon by the appellant as the foundation for Ms Muggeridge's dismissal which was said to take effect on 5 September 2000. That letter also was predominantly, if not exclusively, based upon allegations of Ms Muggeridge's confrontational manner. Further, the letter recorded the meeting of 17 November 1999 as a basis.

86 That was part of a weekly process of meetings between the two which was something of a mistake, as the appellant admitted, and which put "stress" on Mrs Balbi and Ms Muggeridge but was later abandoned as an error. These meetings, even with union officials present, did not work or did not resolve matters in the end. The Commissioner so found and he was entitled to find as he did.

87 In my opinion, symptomatic of the problem was that Ms Muggeridge's written response to the matters raised in the letter of 17 September 1999 was not, in fact, her written response. Her written response was unilaterally amended, presumably to satisfy her own views, by Mrs Balbi. It is difficult to understand how Ms Muggeridge could properly or fairly respond to letters which made criticisms of her when her response was edited by and/or approved by Mrs Balbi, the person who was the source of the criticisms.

88 Put another way, in my opinion, when there were differences between the two ladies and where each plainly had her own point of view, it was manifestly unfair for Mrs Balbi to seek to resolve the matter by approving, as it were, Ms Muggeridge's responses to complaints which, in their genesis, were Mrs Balbi's complaints, and which gave rise to a warning that Ms Muggeridge would be dismissed.

89 Importantly, at all times, too, Ms Muggeridge had denied that she was at fault. It was also open to find that there were performance issues which were, in many respects, minor, and that the issue of setting up classes occurred on a very small number of occasions in term 3. In any event, performance, as such, was not raised in the letter of 25 November 1999, as I have already observed.

90 The issue of her confrontational manner, as alleged, was the subject of the express warning to Ms Muggeridge in that letter, and the Commissioner was entitled to so find. It is clear from the evidence that Ms Muggeridge resolved to make a new start in 2000, and it is clear on all of the evidence that she did in the first and second terms. On her evidence, one infers this continued into the third term, but Mrs Balbi had difficulties, on her evidence.

91 Mrs Balbi commenced and continued in 2000 to keep a detailed diary of events, particularly as it related to Ms Muggeridge's conduct. That diary described matters in great detail including a large number events of a palpably minor and inconsequential nature, as even the appellant admitted. There was an improvement in her performance as Mr Woodford admitted and as did Mrs Balbi to some extent.

92 However, there was still tension between them. There was, however, no serious complaint about her work or attitude in terms 1 and 2. Mrs Balbi was meeting Mr Woodford regularly to discuss Ms Muggeridge's conduct and performance. What Mrs Balbi noticed, as well as was informed, was that Ms Muggeridge had health problems and seemed very tired. She exhibited signs of "ditheriness".

93 One significant matter arose in term 3 of 2000. Mrs Balbi's complaint was that Ms Muggeridge either failed to set up classes or to do so properly on four occasions. However, this amounted to four out of about 2400 and constituted a very small number of failures as the Commissioner correctly found. Further, as the Commissioner correctly found, on all of the evidence the tiredness and health difficulties displayed by Ms Muggeridge were known to the appellant and Mrs Balbi in particular. Indeed Mrs Balbi saw these reflected in her work at times, and it was quite possible, as the Commissioner correctly observed, that some faults, if faults they were, were affected by these factors.

94 There was also the minor and disputed incident about the card game on the computer which resulted in an indirect, informal and serious threat, quite unjustified by the seriousness of the incident, even if Mrs Balbi's version of it were accepted.

95 There was Mrs Balbi's comment that Ms Muggeridge's employment was still in jeopardy because of the warning given on 25 November 1999.

96 There was no warning, however, issued in respect of any of the matters raised by Mrs Balbi in evidence, many of which were relatively minor and even trivial, or those allegations contained in the letter of 28 August 2000. There was certainly no warning before 28 August 2000 that her employment was in jeopardy. There was no communication at all between Mr Woodford and Ms Muggeridge until 28 August 2000 when the letter was handed to her.

97 Much was made of the incident of 7 August 2000 when Ms Muggeridge fell over.

98 The Commissioner did not disbelieve Ms Muggeridge's evidence that she was absent from class after the incident with the knowledge of the responsible teacher, Ms Jones.

99 Further, she denied and was not disbelieved in the denial, telling Mrs Balbi that her falling over on the wet floor and subsequent pursuit of the matter with the occupational health and safety officer was not Mrs Balbi's business. It is difficult to understand, in any event, why, having reported the incident to her department head, she should not pursue the matter further through the occupational health and safety officer, whose responsibility it would seem to be. I cannot see, in the context of all of 2000, up to 28 August 2000, that this could be said to be the final straw. There was, on all of the evidence, not sufficient evidence of serious misconduct to justify the action taken.

100 In any event Mr Woodford did not obtain her version of events and particularly the events following 7 August 2000, which were made the cause of the final action to dismiss her by him on Mrs Balbi's complaint, as it clearly was. If he had, he would have been able to discover what Ms Jones knew. That was unfair.

101 Further, when Mr Woodford called Ms Muggeridge to the meeting at which he handed her the letter requiring her to choose between resignation and dismissal on 28 August 2000, she was neither told of its reason or subject matter in advance, but was, as the Commissioner correctly found, presented with her dismissal as a fait accompli. That was unfair.

102 The Commission was required to find whether the dismissal was harsh, oppressive or unfair in accordance with the well known statements of principle in *Miles and Others t/a Undercliffe Nursing Home v FMWU* 65 WAIG 385 (IAC). Lack of procedural fairness can itself render a dismissal unfair but also may not be sufficient by itself to render a dismissal unfair (see *Shire of Esperance v Mouritz* 71 WAIG 891 (IAC)).

103 The warning given on 25 November 1999 was a warning which actually warned of dismissal but it arose out of the meeting of 17 November 1999, which was part of a process of meetings admitted to be unsatisfactory as stressful to both Mrs Balbi and Ms Muggeridge. The Commissioner so found and was entitled on the evidence to so find.

104 Further, the letter pre-empted Ms Muggeridge's response to the allegations against her which response became the approved response on the evidence of Mrs Balbi because she amended Ms Muggeridge's drafts. For she, as the accuser, to do that when there were differences between them, leading to a warning of dismissal, was quite unfair, even when it was at Ms Muggeridge's request. It was open to so find.

105 Further it was open to find that no complaint about her performance, rather than her attitude to Mrs Balbi, was a ground for the warning of dismissal. Further it was open to find, as I have observed, that the performance problems to that time were minor and could not properly or justifiably ground such a warning of dismissal. Accordingly, it was open to find, for those reasons, that the warning of 25 November 1999 was unfairly given and provided no fair basis for the action taken on 28 August 2000.

106 Next, fairness required that Ms Muggeridge be warned or formally spoken to about her alleged failures in performance during 2000. This simply did not occur.

107 In any event, the only incidents which might have been thought to be serious, that of the four classroom preparation flaws in the third term, and the incident of 11 August 2000, were matters (where Ms Muggeridge disputed any fault) which were manifestly minor or relatively minor. In my opinion, even put at best for the appellant, the incident of 11 August 2000 was so minor as not to constitute the "final straw" at all. In my opinion, too, it was open, if Ms Muggeridge's view was accepted or was at least not disbelieved, (as it was not) to disregard the incident altogether. An inquiry would have revealed this.

108 In my opinion there was no evidence that Ms Muggeridge's performance was so bad during 2000 to warrant her quasi – summary dismissal, or her dismissal at all.

109 In any event her sickness and tiredness were accepted by the appellant through Mrs Balbi and were strong mitigating factors.

110 Next, not one matter raised in the letter of 28 August 2000 was raised with her on the basis that her employment was in jeopardy. Not one warning was given to her about those matters in advance advising her to that effect. Further, the letter of 25 November 1999 constituted no warning relating to the events of 2000 when there was an improvement in performance, even if the letter of 25 November 1999 related to performance, which it did not. The letter of 25 November 1999 was also not such a warning and could not be relied upon, since it was unfairly given too distant in time, and bore no relation to the matters relied on to justify her dismissal. Indeed, Mrs Balbi declined to say that Ms Muggeridge was being given a formal warning in term 2 in relation to the alleged card game on the computer incident; which was not a matter of discipline or fault in any event, and, if it were, was so minor as not to warrant any warning.

111 The final meeting on 28 August 2000 was quite unfair because, without warning and without being given an opportunity to deny or otherwise respond, Ms Muggeridge was presented with what amounted to a summary dismissal. In particular, no attempt at all was made to ascertain her version of the health and safety incident, that which was said to be the final straw, before she was dismissed. The dismissal was also unfair because there was simply no evidence of lack of performance or misconduct or failure in attitude or approach sufficient to justify the dismissal, particularly a dismissal which had many of the features of a summary dismissal. It was open to so find.

112 Ms Muggeridge, of course, had a very different and exculpatory version of the event. There is no evidence that Ms Jones, another teacher who could have assisted, was asked about it, either. That alone was certainly unfair. For all of those reasons, within the principles laid down in *Miles and Others t/a Undercliffe Nursing Home v FMWU* (IAC) (op cit), the dismissal was open to be found to be procedurally and substantially unfair.

113 However, for all of those reasons, the Commissioner was entitled to find and correct in finding that the dismissal was unfair.

Compensation

114 It was submitted that the Commissioner erred in assessing compensation because he failed to give weight to how long Ms Muggeridge may have remained in her employment, had she not been dismissed. The approach is not that adopted by the majority in *Tranchita v Wavemaster International Pty Ltd* 79 WAIG 1886 (FB), which is contrary to the Full Bench's decisions in *Gilmore and Another v Cecil Bros and Others* 78 WAIG 1099 (IAC); *Capewell v Cadbury Schweppes Australia Ltd* 78 WAIG 299 (FB); *Bogunovich v Bayside Western Australia Pty Ltd* 79 WAIG 8 (FB); *Swan Yacht Club (Inc) v Bramwell* 78 WAIG 579 (FB); *Manning v Huntingdale Veterinary Clinic* 78 WAIG 1107 (FB). The Commission must first make a finding as to the loss which has been proven before assessing compensation.

115 In establishing that loss the employee establishes the probability of his/her remaining in employment for a period of time (be it long or short or indefinitely foreseeable) on the balance of probabilities (see *Malec v J C Hutton Pty Ltd* 92 ALR 545 (HC) which is referred to in *Bogunovich v Bayside Western Australia Pty Ltd* (FB) (op cit) . There was no evidence that she intended to leave her employment or that she would be fairly dismissed. It was not put to her or established that she was likely to be fairly dismissed. In my opinion, given the facts of this case, there was no probability that in the foreseeable future, particularly in the six months after the date of her unfair dismissal, she could be fairly dismissed or would leave, but for the events leading to and constituting her unfair dismissal.

116 For those reasons it is quite clear that the exercise of the discretion at first instance did not miscarry as alleged in the grounds of appeal. The appeal is not made out and should therefore be dismissed.

CHIEF COMMISSIONER W S COLEMAN—

117 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—

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

THE PRESIDENT—

119 For those reasons, the appeal is dismissed.

Order accordingly

———

2001 WAIRC 04342

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PENRHOS COLLEGE (INC), APPELLANT
	v.
	MARILYN MUGGERIDGE, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 7 DECEMBER 2001
FILE NO/S.	FBA 52 OF 2001
CITATION NO.	2001 WAIRC 04342

Decision	Appeal dismissed.
Appearances	
Appellant	Mr R H Gifford (as agent) and with him Dr I Fraser
Respondent	Mr T J Dixon (of Counsel) by leave

Order

This matter having come on for hearing before the Full Bench on the 30th day of October 2001 and the 16th day of November 2001, and having heard Mr R H Gifford, as agent, and with him Dr I Fraser on behalf of appellant and Mr T J Dixon (of Counsel), by leave, on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 7th day of December 2001, wherein it was found that the appeal should be dismissed, it is this day, the 7th day of December 2001, ordered that appeal No. FBA 52 of 2001 be and is hereby dismissed.

By the Full Bench

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

[L.S.]

2002 WAIRC 04513

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JAMES STEVEN O'BRIEN, APPELLANT
	v.
	PERTH METALWORK CO PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER P E SCOTT
DELIVERED	MONDAY, 7 JANUARY 2002
FILE NO/S.	FBA 58 OF 2001
CITATION NO.	2002 WAIRC 04513

Decision	Withdrawn by consent

Order

The Notice of Appeal herein, having been filed in the Commission on the 3rd day of December 2001, and having been served upon the respondent on the 3rd day of December 2001, and a Declaration of Service having been filed in the Commission on the 3rd day of December 2001, and the abovenamed appellant, on the 10th day of December 2001, having advised the Commission in writing that the appellant sought to withdraw the appeal, and the abovenamed respondent, on the 18th day of December 2001, having advised the Commission, in writing, that the respondent consented to the appeal being withdrawn by the appellant, and the Full Bench having decided that the consent to the withdrawal of the appeal constituted special circumstances so as to exempt the parties and each of them from further compliance with Regulation 29 of the *Industrial Relations Commission Regulations* 1985 and having so exempted them, and the parties having been deemed to waive the rights conferred on them by s.35 of the *Industrial Relations Act* 1979 (as amended), it is this day, the 7th day of January 2002, ordered, by consent, as follows:-

(1) THAT there be leave granted and leave is hereby granted for appeal No FBA 58 of 2001 to be withdrawn.

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

By the Full Bench

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

[L.S.]

COMMISSION IN COURT SESSION—Matters dealt with—

2001 WAIRC 04378

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BURSWOOD CATERING AND ENTERTAINMENT PTY LTD, RESPONDENT
CORAM	COMMISSION IN COURT SESSION
	COMMISSIONER A R BEECH
	COMMISSIONER J H SMITH
	COMMISSIONER S WOOD
DELIVERED	TUESDAY, 11 DECEMBER 2001
FILE NO.	A 4 OF 2001
CITATION NO.	2001 WAIRC 04378

Result	Application for adjournment refused.
Representation	
Applicant	Mr J. Welch
Respondent	Mr G. Blyth (as agent)

Reasons for Decision – Application for adjournment

1 COMMISSION IN COURT SESSION: The substantive matter before the Commission is the claim by the applicant union for a new award to be known as the *Burswood Catering and Entertainment Pty Ltd Employees Award 2001*. The claim was lodged in the Commission on 3 October 2001. The Commission in Court Session has set the matter down for four days of hearing to commence on 7 January 2002. On 6 December 2001 the respondent sought an adjournment. It claims that the Senior Workplace Relations Officer from Burswood who would give instructions in the matter is not available until 14 December 2001, "leaving only six working days before the holiday break for the Christmas / New Year period" and then three working days after that break before the beginning of the four day hearing. This will mean less than a day being available to prepare each witness which is seen by the respondent as being a grossly inadequate time. Further, December and January are notoriously the busiest times of the business cycle for the hospitality industry in addition to which Burswood is in the process of opening new facilities, hiring new employees and hosting the Hopman Cup. Burswood submits it will be extremely damaging to its business to require persons to devote the time required to instruct representation in the preparation of this application. Burswood makes the point that only eight employees are affected by the present application and that Burswood has offered a choice to prospective employees based upon either coverage under the existing *Restaurant, Tearoom and Catering Workers' Award*, *1979* or the Australian Workplace Agreement which is offered. The Commission in Court Session understands that a further 100 employees are yet to be employed by the respondent on this understanding.

2 For its part, the applicant union opposes the application. It submits that the respondent is part of the Burswood group and that as the claim for a new award is based upon the enterprise bargaining agreement otherwise applicable to the Burswood group's operations, the respondent is well acquainted with the subject matter of the claim. The applicant union submits that the respondent has available to it more human resource or industrial relation staff than merely the Senior Workplace Relations Officer from the Burswood group. Further, for as long as the choice for prospective employees is between the *Restaurant, Tearoom and Catering Workers' Award*, *1979* rather than the AWA on offer, then potential employees are affected to their detriment.

3 The decision whether to grant a refusal is a matter for the discretion of the Commission in Court Session. 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 serious injustice to the other party (*Myers v. Myers* [1969] WAR 19).

4 The Commission in Court Session takes into account that the business sought to be covered by the proposed award is already operating. We do not place weight on the legal distinction drawn by the respondent between it and others in the Burswood group for the purposes of any injustice. We regard the personnel available to the respondent as being sufficiently familiar with the substantive claim before the Commission. While we appreciate the time of the year means that it is a busy time in the hospitality industry, as elsewhere, we do not accept that in an industrial relations matter such as this, the fact that the respondent is busy is sufficient reason in itself for granting an adjournment. Further, we find there will be a serious injustice to the applicant union and its potential members if the application for an adjournment is granted. The choice for the prospective employees who may otherwise be members of the applicant union will be between the *Restaurant, Tearoom and Catering Workers' Award*, *1979* and the AWA on offer. If the applicant union's claim is successful, about which we make no comment, then the choice properly to be given to prospective employees would be between the conditions of the new award and the AWA on offer. We note that the respondent would not give an undertaking to the Commission in Court Session that in the event the substantive application is successful, staff would be given a further choice based upon that new award.

5 We conclude that when the injustice to the applicant union and its potential members is balanced against the injustice claimed by Burswood, the balance is against granting the adjournment.

2001 WAIRC 04478

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BURSWOOD CATERING AND ENTERTAINMENT PTY LTD, RESPONDENT
CORAM	COMMISSION IN COURT SESSION
	COMMISSIONER A R BEECH COMMISSIONER J H SMITH COMMISSIONER S WOOD
DELIVERED	THURSDAY, 20 DECEMBER 2001
FILE NO.	A 4 OF 2001
CITATION NO.	2001 WAIRC 04478

Result	Application for interlocutory orders – granted in part.
Representation	
Applicant	Mr J. Welch by way of written submissions.
Respondent	Mr G. Blyth (as agent) by way of written submissions

Reasons for Decision – Interlocutory Matters

1 THE COMMISSION IN COURT SESSION: This is the unanimous decision of the Commission in Court Session. Commissioner Wood, who is not present, has advised that he agrees with these Reasons and the Order to issue.

2 The applicant union's request for issues regarding the provision of witness statements, the evidence to be relied upon by the parties and any discovery that may be required by the parties was dealt with by way of written submissions. The Commission in Court Session has before it, and has considered, the letter from the applicant union of 13 December 2001, the Reply of the respondent of 17 December 2001 and the response of the applicant union dated 18 December 2001. The Commission in Court Session appreciates the issues raised by both the applicant union and the respondent in this matter. The Commission also appreciates the timetabling issues involved in this matter.

3 It is the view of the Commission in Court Session that it would be assisted by the provision of witness statements. However, the Commission in Court Session believes that issues that would otherwise be covered in statements-in-reply will be able to be covered in the ordinary course of evidence once the hearing commences. Further, the Commission in Court Session will not require the provision of full written submissions. Rather, it will be assisted merely by a brief outline of the contentions between the parties. The Commission in Court Session believes that the parties ought be able to file and serve the witness statements and the brief outline of the contentions between the parties by 4.00pm on Friday, 4 January 2002. The witness statements will be able to be adopted by each witness as his or her evidence-in-chief and do not need to be in affidavit form. The Commission in Court Session considers that these requirements ought be able to be met and constitute a significantly less onerous requirement than that suggested by the applicant union. The Commission in Court Session notes the preparedness of the union to provide its witness statements by 5.00pm on 21 December. The Commission in Court Session endorses that preparedness and if the union is prepared to provide its witness statements by that time it should do so.

4 In relation to discovery as sought by the applicant union, the Commission in Court Session has noted that the respondent does not object to the request for discovery and inspection of the documents cited as (1) and (2) relating to floor plans. On that basis, the Commission requests the parties to agree on a timetable for the discovery and inspection of the documents and does not propose to issue an order reflecting this agreed position. In relation to the union's claim cited in its paragraph (3) the Commission in Court Session notes the respondent's statement that it has no control over the documents, if any, relating to Burswood Ltd. The Commission in Court Session merely notes that if the respondent has custody or possession of the documents sought it would expect the respondent to provide discovery and inspection of those documents which are relevant to the proceedings, subject to any valid claim of privilege if appropriate.

5 Accordingly, a Minute of a Proposed Order now issues and the parties are requested to advise the Commission in Court Session by 12.00 noon on Friday, 21 December 2001 in writing of any proposed changes sought to the Order. In the absence of any advice, an Order will issue in the terms of the Minute.

2001 WAIRC 04491

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BURSWOOD CATERING AND ENTERTAINMENT PTY LTD, RESPONDENT
CORAM	COMMISSION IN COURT SESSION
	COMMISSIONER A R BEECH COMMISSIONER J H SMITH COMMISSIONER S WOOD
DELIVERED	FRIDAY, 21 DECEMBER 2001
FILE NO.	A 4 OF 2001
CITATION NO.	2001 WAIRC 04491

Result Application for interlocutory orders – granted in part.
Representation
Applicant Mr J. Welch by way of written submissions.
Respondent Mr G. Blyth (as agent) by way of written submissions

---

Order

HAVING HEARD Mr J. Welch on behalf of the applicant and Mr G. Blyth (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders:

THAT the applicant and the respondent each file and serve a written statement of the evidence of each witness to be called in this matter, together with a brief outline of its contentions, by 4.00pm Friday, 4 January 2002.

COMMISSION IN COURT SESSION
(Sgd.) A.R. BEECH,
[L.S.] Commissioner.

PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

2001 WAIRC 04362

DEPARTMENT FOR COMMUNITY DEVELOPMENT (FAMILY RESOURCE WORKERS, WELFARE ASSISTANTS AND PARENT HELPERS) AWARD 1990

No. PSA A1 of 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
v.
DIRECTOR GENERAL FAMILY AND CHILDREN'S SERVICES (NOW KNOWN AS DEPARTMENT OF COMMUNITY DEVELOPMENT), RESPONDENT

CORAM COMMISSIONER P E SCOTT
PUBLIC SERVICE ARBITRATOR

DELIVERED MONDAY, 10 DECEMBER 2001
FILE NO. P 36 OF 2001
CITATION NO. 2001 WAIRC 04362

Result Award Varied

Order

HAVING heard Mr G Wauhop and with him Mr J Dasey on behalf of the applicant and Ms A Davison on behalf of the respondent and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Department for Community Development (Family Resource Workers, Welfare Assistants and Parent Helpers) Award 1990 (No. PSAA 1 of 1989) be varied in accordance with the following Schedule and that such variation shall have effect on and from the 5th day of December 2001.

(Sgd.) P. E. SCOTT,
[L.S.] Commissioner.
Public Service Arbitrator

SCHEDULE

1. Schedule C – Travelling Allowance: Delete this Schedule and insert the following in lieu thereof—

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 36 (2)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 35(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 36 (2)(b))
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
		$	$	$
(1)	WA - South of 26° South Latitude	10.05		

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 36 (2)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 35(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 36 (2)(b))
(2)	WA - North of 26° Latitude	12.85		
(3)	Interstate	12.85		
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
		$	$	$
(4)	WA - Metropolitan			
	Hotel or Motel	172.60	86.30	57.55
(5)	Locality South of 26°			
	South Latitude	143.80	71.90	47.95
(6)	Locality North of 26° South Latitude			
	Broome	222.75	111.40	74.25
	Carnarvon	176.75	88.40	58.90
	Dampier	184.30	92.15	61.45
	Derby	182.35	91.20	60.80
	Exmouth	193.60	96.80	64.55
	Fitzroy Crossing	259.35	129.70	86.45
	Gascoyne Junction	126.35	63.20	42.10
	Halls Creek	236.85	118.45	78.95
	Karratha	284.85	142.45	94.95
	Kununurra	209.85	104.95	69.95
	Marble Bar	162.85	81.45	54.30
	Newman	252.20	126.10	84.05
	Nullagine	147.30	73.65	49.10
	Onslow	173.40	86.70	57.80
	Pannawonica	180.25	90.10	60.10
	Paraburdoo	189.85	94.95	63.30
	Port Hedland	215.20	107.60	71.75
	Roebourne	124.50	62.25	41.50
	Sandfire	122.35	61.20	40.80
	Shark Bay	131.15	65.60	43.70
	Tom Price	201.45	100.75	67.15
	Turkey Creek	140.85	70.45	46.95
	Wickham	156.90	78.45	52.30
	Wyndham	151.35	75.70	50.45
(7)	Interstate - Capital City			
	Sydney	218.95	109.45	73.00
	Melbourne	224.95	112.50	75.00
	Other Capitals	177.30	88.65	59.05
(8)	Interstate - Other than Capital City	143.80	71.90	47.95
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
(9)	WA - South of 26° South Latitude	68.10		
(10)	WA - North of 26° South Latitude	79.90		
(11)	Interstate	79.90		

TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMODATION ONLY IS PROVIDED.

(12)	WA - South of 26° South Latitude	
	Breakfast	12.70
	Lunch	12.70
	Dinner	32.65

(13)	WA - North of 26° South Latitude	
	Breakfast	14.05
	Lunch	21.65
	Dinner	31.35
(14)	Interstate	
	Breakfast	14.05
	Lunch	21.65
	Dinner	31.35

DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE 25(3)(e)(i))

(15)	Each Adult	20.45
(16)	Each Child	3.50

MIDDAY MEAL (CLAUSE 25(2)(j))

(17)	Rate per meal	4.95
(18)	Maximum reimbursement per pay period.	24.75

2001 WAIRC 04364

GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD 1989

No. PSA A3 of 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	ALBANY PORT AUTHORITY AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	MONDAY, 10 DECEMBER 2001
FILE NO.	P 31 OF 2001
CITATION NO.	2001 WAIRC 04364

Result Award Varied

Order

HAVING heard Mr G Wauhop and with him Mr J Dasey on behalf of the applicant and Ms A Davison on behalf of the respondents and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Government Officers Salaries, Allowances and Conditions Award 1989 (No. PSAA 3 of 1989) be varied in accordance with the following Schedule and that such variation shall have effect on and from the 5th day of December 2001.

[L.S.]

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

SCHEDULE

1. Schedule F – Clause 30 – Camping Allowance: Delete this Schedule and insert the following in lieu thereof—

South of 26° South Latitude

ITEM			RATE PER DAY
1	Permanent Camp	Cook provided by the Department	29.30
2	Permanent Camp	No cook provided by the Department	39.05
3	Other Camping	Cook provided by the Department	48.80
4	Other Camping	No cook provided	58.60

North of 26° South Latitude

ITEM			RATE PER DAY
1	Permanent Camp	Cook provided by the Department	35.20
2	Permanent Camp	No cook provided by the Department	44.95
3	Other Camping	Cook provided by the Department	54.70
4	Other Camping	No cook provided	64.50

2. Schedule J – Travelling, Transfer and Relieving Allowance: Delete this Schedule and insert the following in lieu thereof—

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38 (1)(b)(ii)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 41(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38 (1)(b) (ii))
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
		$	$	$
(1)	WA - South of 26° South Latitude	10.05		
(2)	WA - North of 26° Latitude	12.85		
(3)	Interstate	12.85		
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
		$	$	$
(4)	WA - Metropolitan Hotel or Motel	172.60	86.30	57.55
(5)	Locality South of 26° South Latitude	143.80	71.90	47.95
(6)	Locality North of 26° South Latitude			
	Broome	222.75	111.40	74.25
	Carnarvon	176.75	88.40	58.90
	Dampier	184.30	92.15	61.45
	Derby	182.35	91.20	60.80
	Exmouth	193.60	96.80	64.55
	Fitzroy Crossing	259.35	129.70	86.45
	Gascoyne Junction	126.35	63.20	42.10
	Halls Creek	236.85	118.45	78.95
	Karratha	284.85	142.45	94.95
	Kununurra	209.85	104.95	69.95
	Marble Bar	162.85	81.45	54.30
	Newman	252.20	126.10	84.05
	Nullagine	147.30	73.65	49.10
	Onslow	173.40	86.70	57.80
	Pannawonica	180.25	90.10	60.10
	Paraburdoo	189.85	94.95	63.30
	Port Hedland	215.20	107.60	71.75
	Roebourne	124.50	62.25	41.50
	Sandfire	122.35	61.20	40.80
	Shark Bay	131.15	65.60	43.70
	Tom Price	201.45	100.75	67.15
	Turkey Creek	140.85	70.45	46.95
	Wickham	156.90	78.45	52.30
	Wyndham	151.35	75.70	50.45
(7)	Interstate - Capital City			
	Sydney	218.95	109.45	73.00
	Melbourne	224.95	112.50	75.00
	Other Capitals	177.30	88.65	59.05
(8)	Interstate - Other than Capital City	143.80	71.90	47.95
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
(9)	WA - South of 26° South Latitude	68.10		
(10)	WA - North of 26° South Latitude	79.90		
(11)	Interstate	79.90		

TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED.

(12)	WA - South of 26° South Latitude	
	Breakfast	12.70
	Lunch	12.70
	Dinner	32.65
(13)	WA - North of 26° South Latitude	
	Breakfast	14.05
	Lunch	21.65
	Dinner	31.35
(14)	Interstate	
	Breakfast	14.05
	Lunch	21.65
	Dinner	31.35

DEDUCTION FOR NORMAL LIVING EXPENSES

(15)	Each Adult	20.45
(16)	Each Child	3.50

MIDDAY MEAL

(17)	Rate per meal	4.95
(18)	Maximum reimbursement per pay period.	24.75

2001 WAIRC 04363

GOVERNMENT OFFICERS (SOCIAL TRAINERS) AWARD 1988

No. PSA A20 of 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	CHIEF EXECUTIVE OFFICER, DISABILITY SERVICES COMMISSION, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	MONDAY, 10 DECEMBER 2001
FILE NO.	P 35 OF 2001
CITATION NO.	2001 WAIRC 04363

Result Award Varied

Order

HAVING heard Mr G Wauhop and with him Mr J Dasey on behalf of the applicant and Ms A Davison on behalf of the respondents and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Government Officers (Social Trainers) Award 1988 (No. PSAA 20 of 1985) be varied in accordance with the following Schedule and that such variation shall have effect on and from the 5th day of December 2001.

[L.S.]

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

SCHEDULE

1. Schedule D – Clause 25 – Miscellaneous Allowances: Delete this Schedule and insert the following in lieu thereof—

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 25 (6) (b) (ii)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 25 (3) (c))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 25 (6) (b) (ii))
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
		$	$	$
(1)	WA - South of 26° South Latitude	10.05		
(2)	WA - North of 26° Latitude	12.85		
(3)	Interstate	12.85		
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
		$	$	$
(4)	WA - Metropolitan Hotel or Motel	172.60	86.30	57.55
(5)	Locality South of 26° South Latitude	143.80	71.90	47.95
(6)	Locality North of 26° South Latitude			
	Broome	222.75	111.40	74.25
	Carnarvon	176.75	88.40	58.90
	Dampier	184.30	92.15	61.45
	Derby	182.35	91.20	60.80
	Exmouth	193.60	96.80	64.55
	Fitzroy Crossing	259.35	129.70	86.45
	Gascoyne Junction	126.35	63.20	42.10
	Halls Creek	236.85	118.45	78.95
	Karratha	284.85	142.45	94.95
	Kununurra	209.85	104.95	69.95
	Marble Bar	162.85	81.45	54.30
	Newman	252.20	126.10	84.05
	Nullagine	147.30	73.65	49.10
	Onslow	173.40	86.70	57.80
	Pannawonica	180.25	90.10	60.10
	Paraburdoo	189.85	94.95	63.30
	Port Hedland	215.20	107.60	71.75
	Roebourne	124.50	62.25	41.50
	Sandfire	122.35	61.20	40.80
	Shark Bay	131.15	65.60	43.70
	Tom Price	201.45	100.75	67.15
	Turkey Creek	140.85	70.45	46.95
	Wickham	156.90	78.45	52.30
	Wyndham	151.35	75.70	50.45
(7)	Interstate - Capital City			
	Sydney	218.95	109.45	73.00
	Melbourne	224.95	112.50	75.00
	Other Capitals	177.30	88.65	59.05
(8)	Interstate - Other than Capital City	143.80	71.90	47.95
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
(9)	WA - South of 26° South Latitude	68.1		
(10)	WA - North of 26° South Latitude	79.9		
(11)	Interstate	79.9		

TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED.

(12)	WA - South of 26° South Latitude	
	Breakfast	12.70
	Lunch	12.70
	Dinner	32.65
(13)	WA - North of 26° South Latitude	
	Breakfast	14.05
	Lunch	21.65
	Dinner	31.35
(14)	Interstate	
	Breakfast	14.05
	Lunch	21.65
	Dinner	31.35

DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE 25 (3) (e) (i))

(15)	Each Adult	20.45
(16)	Each Child	3.50

MIDDAY MEAL (CLAUSE 25 (2) (j))

(17)	Rate per meal	4.95
(18)	Maximum reimbursement per pay period.	24.75

2001 WAIRC 04414

GRAYLANDS SELBY-LEMNOS AND SPECIAL CARE HEALTH SERVICES AWARD 1999

No. PSA A1 of 1999

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT *v.* COMMISSIONER OF HEALTH METROPOLITAN HEALTH SERVICE BOARD (NOW KNOWN AS DEPARTMENT OF HEALTH), RESPONDENT
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DELIVERED	WEDNESDAY, 12 DECEMBER 2001
FILE NO.	P 34 OF 2001
CITATION NO.	2001 WAIRC 04414

Result Award Varied

Order

HAVING heard Mr G Wauhop and with him Mr J Dasey on behalf of The Civil Service Association of Western Australia Incorporated and the Hospital Salaried Officers Association of Western Australia (Union of Workers) and Ms A Davison on behalf of the respondent and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Graylands Selby-Lemnos and Special Care Health Services Award 1999 (No. PSAA 1 of 1999) be varied in accordance with the following Schedule and that such variation shall have effect on and from the 5th day of December 2001.

[L.S.]

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

SCHEDULE

1. Schedule C – Camping Allowance: Delete this Schedule and insert the following in lieu thereof—

South of 26° South Latitude

ITEM			RATE PER DAY
1	Permanent Camp	Cook provided by the Department	29.30
2	Permanent Camp	No cook provided by the Department	39.05
3	Other Camping	Cook provided by the Department	48.80
4	Other Camping	No cook provided	58.60

North of 26° South Latitude

ITEM			RATE PER DAY
1	Permanent Camp	Cook provided by the Department	35.20
2	Permanent Camp	No cook provided by the Department	44.95
3	Other Camping	Cook provided by the Department	54.70
4	Other Camping	No cook provided	64.50

The allowances prescribed in this schedule shall apply from 5 December 2001, and shall be varied in accordance with any movement in the equivalent allowances in the Public Service Award 1992.

2. Schedule I – Travelling, Transfer and Relieving Allowance: Delete this Schedule and insert the following in lieu thereof—

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38 (2)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 41(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38 (2)(b))
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
		$	$	$
(1)	WA - South of 26° South Latitude	10.05		
(2)	WA - North of 26° Latitude	12.85		
(3)	Interstate	12.85		
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
		$	$	$
(4)	WA - Metropolitan Hotel or Motel	172.60	86.30	57.55
(5)	Locality South of 26° South Latitude	143.80	71.90	47.95
(6)	Locality North of 26° South Latitude			
	Broome	222.75	111.40	74.25
	Carnarvon	176.75	88.40	58.90
	Dampier	184.30	92.15	61.45
	Derby	182.35	91.20	60.80
	Exmouth	193.60	96.80	64.55
	Fitzroy Crossing	259.35	129.70	86.45
	Gascoyne Junction	126.35	63.20	42.10
	Halls Creek	236.85	118.45	78.95
	Karratha	284.85	142.45	94.95
	Kununurra	209.85	104.95	69.95
	Marble Bar	162.85	81.45	54.30
	Newman	252.20	126.10	84.05
	Nullagine	147.30	73.65	49.10
	Onslow	173.40	86.70	57.80
	Pannawonica	180.25	90.10	60.10
	Paraburdoo	189.85	94.95	63.30
	Port Hedland	215.20	107.60	71.75
	Roebourne	124.50	62.25	41.50
	Sandfire	122.35	61.20	40.80
	Shark Bay	131.15	65.60	43.70
	Tom Price	201.45	100.75	67.15
	Turkey Creek	140.85	70.45	46.95
	Wickham	156.90	78.45	52.30
	Wyndham	151.35	75.70	50.45
(7)	Interstate - Capital City			
	Sydney	218.95	109.45	73.00
	Melbourne	224.95	112.50	75.00
	Other Capitals	177.30	88.65	59.05
(8)	Interstate - Other than Capital City	143.80	71.90	47.95

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38 (2)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 41(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38 (2)(b))
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
(9)	WA - South of 26° South Latitude	68.10		
(10)	WA - North of 26° South Latitude	79.90		
(11)	Interstate	79.90		
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMODATION ONLY IS PROVIDED.				
(12)	WA - South of 26° South Latitude			
	Breakfast	12.70		
	Lunch	12.70		
	Dinner	32.65		
(13)	WA - North of 26° South Latitude			
	Breakfast	14.05		
	Lunch	21.65		
	Dinner	31.35		
(14)	Interstate			
	Breakfast	14.05		
	Lunch	21.65		
	Dinner	31.35		
DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE 41(5)(a))				
(15)	Each Adult	20.45		
(16)	Each Child	3.50		
MIDDAY MEAL (CLAUSE 42(11))				
(17)	Rate per meal	4.95		
(18)	Maximum reimbursement per pay period.	24.75		

The allowances prescribed in this schedule shall be varied in accordance with any movement in the equivalent allowances in the Public Service Award 1992.

2001 WAIRC 04360

PUBLIC SERVICE AWARD 1992

No. PSA A4 of 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	ABORIGINAL AFFAIRS (NOW KNOWN AS DEPARTMENT OF INDIGENOUS AFFAIRS) AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	MONDAY, 10 DECEMBER 2001
FILE NO.	P 29 OF 2001
CITATION NO.	2001 WAIRC 04360
Result	Award Varied

Order

HAVING heard Mr G Wauhop and with him Mr J Dasey on behalf of the applicant and Ms A Davison on behalf of the respondents and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Public Service Award 1992 (No. PSAA 4 of 1989) be varied in accordance with the following Schedule and that such variation shall have effect on and from the 5th day of December 2001.

[L.S.]

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

SCHEDULE

1. Schedule C – Camping Allowance: Delete this Schedule and insert the following in lieu thereof—

South of 26 º South Latitude

ITEM			RATE PER DAY
1	Permanent Camp	Cook provided by the Department	29.30
2	Permanent Camp	No cook provided by the Department	39.05
3	Other Camping	Cook provided by the Department	48.80
4	Other Camping	No cook provided	58.60

North of 26 º South Latitude

ITEM			RATE PER DAY
1	Permanent Camp	Cook provided by the Department	35.20
2	Permanent Camp	No cook provided by the Department	44.95
3	Other Camping	Cook provided by the Department	54.70
4	Other Camping	No cook provided	64.50

2. Schedule I - Travelling, Transfer and Relieving Allowance: Delete this Schedule and insert the following in lieu thereof—

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFCERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38(2)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 41(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38(2)(b))
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
		$	$	$
(1)	WA - South of 26º South Latitude	10.05		
(2)	WA - North of 26º Latitude	12.85		
(3)	Interstate	12.85		
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
		$	$	$
(4)	WA - Metropolitan Hotel or Motel	172.60	86.30	57.55
(5)	Locality South of 26º South Latitude	143.80	71.90	47.95
(6)	Locality North of 26º South Latitude			
	Broome	222.75	111.40	74.25
	Carnarvon	176.75	88.40	58.90
	Dampier	184.30	92.15	61.45
	Derby	182.35	91.20	60.80
	Exmouth	193.60	96.80	64.55
	Fitzroy Crossing	259.35	129.70	86.45
	Gascoyne Junction	126.35	63.20	42.10

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFCERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38(2)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 41(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38(2)(b))
	Halls Creek	236.85	118.45	78.95
	Karratha	284.85	142.45	94.95
	Kununurra	209.85	104.95	69.95
	Marble Bar	162.85	81.45	54.30
	Newman	252.20	126.10	84.05
	Nullagine	147.30	73.65	49.10
	Onslow	173.40	86.70	57.80
	Pannawonica	180.25	90.10	60.10
	Paraburdoo	189.85	94.95	63.30
	Port Hedland	215.20	107.60	71.75
	Roebourne	124.50	62.25	41.50
	Sandfire	122.35	61.20	40.80
	Shark Bay	131.15	65.60	43.70
	Tom Price	201.45	100.75	67.15
	Turkey Creek	140.85	70.45	46.95
	Wickham	156.90	78.45	52.30
	Wyndham	151.35	75.70	50.45
(7)	Interstate - Capital City			
	Sydney	218.95	109.45	73.00
	Melbourne	224.95	112.50	75.00
	Other Capitals	177.30	88.65	59.05
(8)	Interstate - Other than Capital City	143.80	71.90	47.95

ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL

(9)	WA - South of 26^{o} South Latitude	68.10
(10)	WA - North of 26^{o} South Latitude	79.90
(11)	Interstate	79.90

TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED.

(12)	WA – South of 26^{o} South Latitude	
	Breakfast	12.70
	Lunch	12.70
	Dinner	32.65
(13)	WA - North of 26^{o} South Latitude	
	Breakfast	14.05
	Lunch	21.65
	Dinner	31.35
(14)	Interstate	
	Breakfast	14.05
	Lunch	21.65
	Dinner	31.35

DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE 41(5)(a))

(15)	Each Adult	20.45
(16)	Each Child	3.50

MIDDAY MEAL (CLAUSE 42(11))

(17)	Rate per meal	4.95
(18)	Maximum reimbursement per pay period.	24.75

AWARDS/AGREEMENTS—Variation of—

2001 WAIRC 04314

ARTWORKERS AWARD

No. A30 of 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE WESTERN AUSTRALIAN BUILDERS' LABOURERS, PAINTERS & PLASTERERS UNION OF WORKERS, APPLICANT
	v.
	TOWN OF NARROGIN & ANOTHER, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	MONDAY, 3 DECEMBER 2001
FILE NO/S	APPLA 1777 OF 2001
CITATION NO.	2001 WAIRC 04314

Result	Award varied
Representation	
Applicant	Ms L Dowden and Ms J Harrison
Respondents	Mr K Dwyer

Order

HAVING HEARD Ms L Dowden on behalf of the Applicant and Mr K Dwyer on behalf of the Respondents, and by consent, the Commission, being satisfied that the claim complies with the terms of the Wage Fixing Principles set out in the General Order of the Commission No. 752 of 2001, dated 25 July 2001, hereby, pursuant to the powers conferred on it under the Industrial Relations Act 1979, orders—

THAT the Artworkers Award No. A30 of 1987 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 3rd day of December 2001.

FURTHERMORE, the Commission by consent of the parties, records the following—

(a) The application is to be split into application 1777A of 2001 and application 1777B of 2001 to allow the issue regarding ordinary time earnings to be discussed between the parties.

(b) The calculations relating to the allowances varied in the attached Schedule have been effected as a result of figures supplied from ABS Catalogue 6401.0 (Table 2B), ABS Catalogue 6401.0 (Table 3A), ABS Catalogue 6401.00 (Table 7A), ABS Catalogue 6401.0 (Table 7G) and ABS Catalogue 6401.00 (Table 7I).

(c) Attached following the schedule is Exhibit 1, tendered at hearing, demonstrating the calculation schedule for the variations sought.

(Sgd.) W. S. COLEMAN,
[L.S.] Chief Commissioner.

SCHEDULE

1. Clause 7. - Special Rates and Provisions: Delete subclause (9) of this clause and insert in lieu thereof the following—

(9) Travel Allowance

A fares allowance of $13.30 per day shall be paid to employees required to work away from their usual place of employment.

2. Clause 11. – Overtime: Delete subclause (2) of this clause and insert in lieu thereof the following—

(2) Where an employee is required to work overtime and such overtime is worked for a period of at least two hours in excess of and continuous with the required daily hours of work, the employee shall be provided with a meal free of cost, or shall be paid the sum of $9.30 as meal money.

3. Clause 18. – Living Away from Home – Distant Work: Delete subclause (4) of this clause and insert in lieu thereof the following—

(4) An employee, to whom the provisions of subclause (1) of this clause apply, shall be paid an allowance of $27.10 for any weekend that the employee returns home from the job, but only if—

(a) the employee advises the employer or the employer's agent of the intention no later than the Tuesday immediately preceding the weekend in which the employee so returns;

(b) the employee is not required for work during that weekend;

(c) the employee returns to the job on the first working day following the weekend; and

(d) the employer does not provide, or offer to provide, suitable transport.

4. Clause 19. – Motor Vehicle Allowances: Delete subclause (3) of this clause and insert in lieu thereof the following—

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

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

Area and Details	Engine Displacement (In Cubic Centimetres)		
	Over 2600cc	1600cc -2600cc	1600cc & Under
Rate per kilometre (Cents)	cents/km	cents/km	cents/km
Metropolitan Area	60.9	49.0	42.6
South West Land Division	56.9	50.2	43.8
North of 23.5° South Latitude	63.3	56.2	49.0
Rest of the State	58.8	51.8	45.0
Motor Cycle (in all areas)	19.2		

5. Clause 30. – Superannuation: Delete subclause (3)(b) of this clause and insert in lieu thereof the following—

(b) The level of contributions required under the Superannuation Guarantee (Administration) Act 1992 are as follows—

Percentage	Financial Year (1 July - 30 June)
6	1996 - 1997
6	1997 - 1998
7	1998 - 1999
7	1999 - 2000
8	2000 – 2001
8	2001 – 2002
9	2002 – 2003

2001 WAIRC 04312

BUILDING TRADES AWARD 1968

No. 31 of 1966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE WESTERN AUSTRALIAN BUILDERS' LABOURERS, PAINTERS & PLASTERERS UNION OF WORKERS, APPLICANT
	v.
	CRYSTAL SOFTDRINKS & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	MONDAY, 3 DECEMBER 2001
FILE NO/S	APPLA 1725 OF 2001
CITATION NO.	2001 WAIRC 04312

Result	Award varied
Representation	
Applicant	Ms L Dowden and Ms J Harrison
Respondents	Mr K Richardson
	Mr K Dwyer

Order

HAVING HEARD Ms L Dowden on behalf of the Applicant and Mr K Richardson and Mr K Dwyer on behalf of the Respondents, and by consent, the Commission, being satisfied that the claim complies with the terms of the Wage Fixing Principles set out in the General Order of the Commission No. 752 of 2001, dated 25 July 2001, hereby, pursuant to the powers conferred on it under the Industrial Relations Act 1979, orders—

THAT the Building Trades (General) Award 1968, No. 31 of 1966 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 3rd day of December 2001.

FURTHERMORE, the Commission by consent of the parties, records the following—

(a) The application is to be split into application 1725A of 2001 and application 1725B of 2001 to allow the issue regarding ordinary time earnings to be discussed between the parties.

(b) The calculations relating to the allowances varied in the attached Schedule have been effected as a result of figures supplied from ABS Catalogue 6401.0 (Table 2B), ABS Catalogue 6401.0 (Table 3A), ABS Catalogue 6401.00 (Table 7A), ABS Catalogue 6401.0 (Table 7G) and ABS Catalogue 6401.00 (Table 7I).

(c) Attached following the schedule is Exhibit 1, tendered at hearing, demonstrating the calculation schedule for the variations sought.

(Sgd.) W. S. COLEMAN,
[L.S.] Chief Commissioner.

SCHEDULE

1. Clause 10. – Wages: Delete subclause (4) of this clause and insert in lieu thereof—

(4) Tool Allowance: (Per Week)

		$
(a)	Bricklayers and Stoneworkers	14.80
(b)	Plasterers	17.20
(c)	Carpenters and Joiners	20.90
(d)	Joiners - Assembler A or B	10.50
(e)	Plumbers	20.90
(f)	Painters	5.20
(g)	Signwriters	5.20
(h)	Glaziers	5.20

Note 1: The tool allowance prescribed in paragraphs (a) to (h) inclusive of this subclause, each include an amount of 5 cents for the purpose of enabling the employees to insure their tools against loss or damage by theft or fire.

Note 2: The abovenamed allowances shall not be paid where the employer supplied the employee with all necessary tools.

2. Clause 14. – Fares and Travelling Time

(a) Delete subclause (1)(c) of this clause and insert in lieu thereof the following—

(1) (c) Where an employer requests a worker to use his own car and the worker agrees, an amount of 73 cents per kilometre shall be paid for kilometres in excess of the kilometres a worker would normally incur in travelling between his home and his depot or shop.

(b) Delete subclause (1)(d) of this clause and insert in lieu thereof the following—

(1) (d) This subclause shall be deemed to be complied with where an employer adopts the practice of paying an amount of $13.30 on each day a worker is required to report to the job away from his shop.

3. Clause 19. – Overtime: Delete subclause (6) of this clause and insert in lieu thereof the following—

(6) Any employee who is required to continue working for more than two hours after his usual knock-off time on any day shall be supplied by the employer with a reasonable meal or, in lieu of such meal, shall be paid an allowance of $9.30 for that meal.

Provided that this subclause shall not apply to a worker who has been notified on the previous day that he would be required to work such overtime.

4. Clause 23. – Distant Work

(a) Delete subclause (4) of this clause and insert in lieu thereof the following—

(4) The employer shall pay all fares which shall be deemed to include the cost of transporting the employee's tools, in connection with such travelling, and shall pay the cost of each ordinary meal actually and reasonably required during such travelling but the minimum allowance for such meal shall be $9.30.

Provided that the amount of the return fare shall not be payable if the worker be dismissed for misconduct or, within one working week of his commencing work on the job, for incompetency or if the worker terminates or discontinues his work on the job within one month of his commencing thereon.

Provided further that where such travelling is to or from or within the area of the State north of latitude 26°S., the following provisions shall apply:-

(a) The amount of the original fare shall be deducted from the subsequent earnings of the worker.

(b) One-third of the amount of such fare shall be refunded by the employer to any worker who continues for each of the first three months of the duration of the job, with the full fare being refunded by the employer to a worker who continues in his service until the completion of any job of less than three months' duration or to any worker dismissed by the employer within the first three months of the employment unless such dismissal was due to the worker's misconduct.

(c) Where a worker continues in the employer's service at a distant job for three months or six months, he shall be paid by the employer either one half or the full amount as the case may be, of the fares incurred in returning to his home, with the full amount of such fares being payable by the employer to a worker who continues in his service until the completion of any job of less than six months' duration or to any worker dismissed by the employer within the first six months of the employment unless such dismissal was due to the worker's misconduct.

(b) Delete subclause (6)(a) of this clause and insert in lieu thereof the following—

(6) (a) A worker not required to work during a weekend who works as required during the ordinary hours of work on the working day before and the working day after a weekend, and who notifies his employer no later than the previous Tuesday of his intention to return home at the weekend and who returns home for that weekend, shall be paid an allowance of $27.10 for each such occasion unless travelling facilities are provided.

(c) Delete subclause (9) of this clause and insert in lieu thereof the following—

(9) Where an employee, supplied with board and lodging by his employer, is required to live more than one half of a mile from the job, he shall be provided with suitable transport to and from that job or be paid an allowance of $13.30 per day provided that where the time actually spent in travelling either to or from the job exceeds twenty minutes, that excess travelling time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

2002 WAIRC 04311

BUILDING TRADES (CONSTRUCTION) AWARD 1987

No. R 14 of 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE WESTERN AUSTRALIAN BUILDERS' LABOURERS, PAINTERS & PLASTERERS UNION OF WORKERS, APPLICANT
	v.
	ADSIGNS PTY LTD & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	MONDAY, 3 DECEMBER 2001
FILE NO/S	APPLA 1683 OF 2001
CITATION NO.	2001 WAIRC 04311

Result	Award varied
Representation	
Applicant	Ms L Dowden and Ms J Harrison
Respondents	Mr K Richardson
	Mr K Dwyer

Order

HAVING HEARD Ms L Dowden on behalf of the Applicant and Mr K Richardson and Mr K Dwyer on behalf of the Respondents, and by consent, the Commission, being satisfied that the claim complies with the terms of the Wage Fixing Principles set out in the General Order of the Commission No. 752 of 2001, dated 25 July 2001, hereby, pursuant to the powers conferred on it under the Industrial Relations Act 1979, orders—

THAT the Building Trades (Construction) Award 1987, No. R14 of 1978 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 3rd day of December 2001.

FURTHERMORE, the Commission by consent of the parties, records the following—

(a) The application is to be split into application 1683A of 2001 and application 1683B of 2001 to allow the issue regarding ordinary time earnings to be discussed between the parties.

(b) The calculations relating to the allowances varied in the attached Schedule have been effected as a result of figures supplied from ABS Catalogue 6401.0 (Table 2B), ABS Catalogue 6401.0 (Table 3A), ABS Catalogue 6401.00 (Table 7A), ABS Catalogue 6401.0 (Table 7G) and ABS Catalogue 6401.00 (Table 7I).

(c) Attached following the schedule is Exhibit 1, tendered at hearing, demonstrating the calculation schedule for the variations sought.

(Sgd.) W. S. COLEMAN,
[L.S.] Chief Commissioner.

SCHEDULE

1. Clause 8. – Rates of Pay: Delete subclause (6) of this clause and insert in lieu thereof the following—

(6) Tool Allowance

Tool allowances shall be paid to tradesmen as prescribed hereunder:-

	Per Week $
Carpenters, Joiners, Plumbers, Stonemasons, Stoneworkers	20.90
Plasterers, Fixers	17.20
Bricklayers	14.80
Roof Tile Fixers	10.90
Signwriters, Painters, Glaziers	5.20

2. Clause 12A. – Fares and Travelling (Except Plumbers)

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

(2) Perth Metropolitan Radial Area

When employed on work located within a radius of 50 kilometres from the G.P.O. Perth - $13.30 per day.

(b) Delete subclause (5) of this clause and insert in lieu thereof the following—

(5) Travelling Outside Radial Areas

Where an employee travels daily from inside any radial area mentioned in subclauses (2), (3) or (4) of this clause to a job outside that area, he/she shall be paid :-

(a) the allowance prescribed in subclause (2) of this clause;

(b) in respect of travel from the designated radius to the job and return to that radius—

(i) the time outside ordinary working hours reasonably spent in such travel calculated at ordinary hourly "on site" rates to the next quarter of an hour with a minimum payment of one-half an hour per day for each return journey;

(ii) any expenses necessarily incurred in such travel, which shall be 39 cents per kilometre where the employee uses his/her own vehicle.

(c) Delete subclause (11) of this clause and insert in lieu thereof the following—

(11) Transfer During Working Hours

An employee transferred from one site to another during working hours shall be paid for the time occupied in travelling and, unless transported by the employer, shall be paid reasonable cost of fares by most convenient public transport between such sites.

Where an employer requests an employee to use his/her own vehicle to effect such a transfer and the employee agrees to do so the employee shall be paid an allowance at the rate of 73 cents per kilometre.

3. Clause 12B. – Fares and Travelling - Plumbers Only

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

(2) Travel beyond defined radius

When working on jobs beyond the defined radius from the centre (as defined) the fares as defined and one quarter of an hour travelling time plus an allowance for travelling time calculated at the ordinary time rate of pay for the time required to travel to the job site and back from and to the defined radius and calculated at a speed not exceeding the legal speed limit and with a minimum payment of a quarter of an hour for each such journey.

Where an employee provides his/her own transport, an additional allowance of 39 cents per kilometre shall be payable for the distance involved in travelling beyond the defined radius and return thereto, which shall compensate for any fares incurred by public transport.

(b) Delete subclause (3) of this clause and insert in lieu thereof the following—

(3) Transport During Working Hours

Where an employee is required by an employer to travel to any other job site during the course of his/her daily engagement he/she shall be paid all fares necessarily incurred except where transport is provided by the employer to and from such site, and all time spent in such travel shall be regarded as time worked.

Provided that where an employer requests an employee to use his/her own car to effect such a transfer and such employee agrees to do so the employee shall be paid an allowance at the rate of 73 cents per kilometre.

(c) Delete subclause (5)(a) of this clause and insert in lieu thereof the following—

(5) Definitions—

(a) Radius and Fares:-

The radius shall be 50 kilometres and the fares shall be $8.70 per day.

4. Clause 20. – Meal Allowance: Delete this clause and insert inlieu thereof the following—

20. - MEAL ALLOWANCE

An employee required to work overtime for at least one and a half hours after working ordinary hours inclusive of any time worked for accrual purposes as prescribed in clauses 13(1) or 18(4) shall be paid by his/her employer an amount of $9.30 to meet the cost of a meal.

Provided that this clause shall not apply to an employee who is provided with reasonable board and lodging or who is receiving a distant work allowance in lieu thereof as provided for in subclause (3) of Clause 21. - Living Away From Home - Distant Work and is provided with a suitable meal.

5. Clause 21. – Living Away From Home – Distant Work

(a) Delete subclause (3)(b) from this clause and insert in lieu thereof the following—

(3) Entitlement

(b) Pay an allowance of $308.50 per week of seven days but such allowance shall not be wages. In the case of broken parts of the week occurring at the beginning or ending of employment on a distant job the allowance shall be $44.10 per day.

Provided that the foregoing allowances shall be increased if the employee satisfies the employer that he/she reasonably incurred a greater outlay than that prescribed. In the event of disagreement the matter may be referred to a Board of Reference for determination; or

(b) Delete subclause (4)(a)(iii) from this clause and insert in lieu thereof the following—

(4) (a) Forward Journey—

(iii) For any meals incurred while travelling at $9.30 per meal.

Provided that the employer may deduct the cost of the forward journey fare from an employee who terminates or discontinues his/her employment within two weeks of commencing on the job and who does not forthwith return to his/her place of engagement.

(c) Delete subclause (6)(a) from this clause and insert in lieu thereof the following—

(6) (a) Weekend Return Home: An employee who works as required during the ordinary hours of work on the working day before and the working day after a weekend and who notifies the employer or his/her representative, no later than Tuesday of each week, of his/her intention to return to his/her usual place of residence at the weekend and who returns to his/her usual place of residence for the weekend, shall be paid an allowance of $27.10 for each occasion.

(d) Delete subclause (7)(b) from this clause and insert in lieu thereof the following—

(7) (b) Camping Allowance: An employee living in a construction camp where free messing is not provided shall receive a camping allowance of $127.80 for every complete week he/she is available for work. If required to be in camp for less than a complete week he/she shall be paid $18.40 per day including any Saturday or Sunday if he/she is in camp and available for work on the working days immediately preceding and succeeding each Saturday and Sunday. If an employee is absent without the employer's approval on any day, the allowance shall not be payable for that day and if such unauthorised absence occurs on the working day immediately preceding or succeeding a Saturday or Sunday, the allowance shall not be payable for the Saturday or Sunday.

6. Clause 32. – Special Tools and Protective Clothing: Delete subclause (5)(b) of this clause and insert in lieu thereof the following—

(5) (b) The employer shall make available, during working hours, a suitable grindstone or wheel together with power (hand or mechanically driven) for turning it. If a grindstone or wheel is not made available the employer shall pay to each carpenter or joiner $4.61 per week in lieu of same.

7. Clause 33. – Compensation for Clothes and Tools: Delete subclause (2)(a) of this clause and insert in lieu thereof the following—

(2) (a) An employee shall be reimbursed by his/her employer to a maximum of $1215.00 for loss of tools or clothes by fire or breaking and entering whilst securely stored at the employer's direction in a room or building on the employer's premises, job or workshop or in a lock-up as provided in this award or if the tools are lost or stolen whilst being transported by the employee at the employer's direction, or if the tools are accidentally lost over water or if tools are lost or stolen during an employee's absence after leaving the job because of injury or illness.

Provided that an employee transporting his/her own tools shall take all reasonable care to protect those tools and prevent theft or loss.

2001 WAIRC 04405

COCKBURN CEMENT LIMITED AWARD 1991

No. A14 of 1991

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGIN & ELECT DIV, WA BRANCH, THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA - WESTERN AUSTRALIAN BRANCH, THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS, TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH, MERCHANT SERVICE GUILD OF AUSTRALIA, WESTERN AUSTRALIAN BRANCH, UNION OF WORKERS, APPLICANTS *v.* COCKBURN CEMENT LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	TUESDAY, 11 DECEMBER 2001
FILE NO.	APPLICATION 462 OF 2001
CITATION NO.	2001 WAIRC 04405

Result Award Varied

Order

HAVING heard Ms C. Bowden on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch; Ms L. Dowden for The Construction, Forestry, Mining and Energy Union of Workers; Ms F. Bennett for The Automotive, Food, Metals, Engineering Printing and Kindred Industries Union of Workers - Western Australian Branch and Mr N. Hodgson for the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch and Mr P. Cocks on behalf of the Respondent, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders—

THAT the Cockburn Cement Limited Award 1991 be varied in accordance with the following Schedule and that such variation shall have effect on and from 11 December 2001.

(Sgd.) J. F. GREGOR,
Commissioner.

[L.S.]

SCHEDULE

Clause 3. – Area and Scope: Delete subclause (1) of this clause and insert in lieu the following—

(1) This Award shall apply to Cockburn Cement Limited, the employees employed in the classifications contained in Clause 5. - Wages of this award at the Main Works in Russell Road and Woodman's Point, Dongara and the following unions—

- The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch;
- The Australian Workers' Union, Western Australian Branch, Industrial Union of Workers;
- Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Engineering and Electrical Division (Western Australian Branch);
- The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers' Union of Australia, Western Australian Branch;
- Merchant Service Guild of Australia, Western Australian Branch, Union of Workers;
- Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch;

2001 WAIRC 04317

EARTH MOVING AND CONSTRUCTION AWARD

No. 10 of 1963

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION (FEDERAL UNION), APPLICANT
	v.
	GOLDFIELDS CONTRACTORS PTY LTD & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	MONDAY, 3 DECEMBER 2001
FILE NO/S	APPLA 1829 OF 2001
CITATION NO.	2001 WAIRC 04317

Result	Award varied
Representation	
Applicant	Ms L Dowden and Ms J Harrison
Respondents	Mr K Dwyer

Order

HAVING HEARD Ms L Dowden on behalf of the Applicant and Mr K Dwyer on behalf of the Respondents, and by consent, the Commission, being satisfied that the claim complies with the terms of the Wage Fixing Principles set out in the General Order of the Commission No. 752 of 2001, dated 25 July 2001, hereby, pursuant to the powers conferred on it under the Industrial Relations Act 1979, orders—

THAT the Earthmoving and Construction Award, No. 10 of 1963 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 3rd day of December 2001.

FURTHERMORE, the Commission by consent of the parties, records the following—

(a) The application is to be split into application 1829A of 2001 and application 1829B of 2001 to allow the issue regarding ordinary time earnings to be discussed between the parties.

(b) The calculations relating to the allowances varied in the attached Schedule have been effected as a result of figures supplied from ABS Catalogue 6401.0 (Table 2B), ABS Catalogue 6401.0 (Table 3A), ABS Catalogue 6401.00 (Table 7A), ABS Catalogue 6401.0 (Table 7G) and ABS Catalogue 6401.00 (Table 7I).

(c) Attached following the schedule is Exhibit 1, tendered at hearing, demonstrating the calculation schedule for the variations sought.

(Sgd.) W. S. COLEMAN,
[L.S.] Chief Commissioner.

SCHEDULE

1. Clause 11. – Meal Money: Delete this clause and insert in lieu thereof the following—

11. - MEAL MONEY

When an employee is required for overtime without having been notified on the previous day, he/she shall be supplied with a meal or be paid $9.30 in lieu thereof, and if owing to the overtime worked, a second or subsequent meal is required he/she shall be supplied with each meal or be paid $5.70 for each meal so required. Provided no such meal or payment is due unless the employee works more than two hours after the usual knock off time. Provided that an employee who is allowed not less than one hour and a half in which to get a meal before resuming work, and facilities for obtaining a meal are available, shall not be entitled to meal money or a meal under this clause.

2. Clause 17. – Living Away from Home Allowance:

(a) Delete subclause (1)(b) of this clause and insert in lieu thereof the following—

(b) pay an allowance of $308.50 per week of seven days but such allowance shall not be wages. In the case of broken parts of the week occurring at the beginning or the ending of the employment on a distant job the allowance shall be $44.10 per day.

(b) Delete subclause (4)(a) of this clause and insert in lieu thereof the following—

(4) (a) An employee who works as required during the ordinary hours of work on the working day before and the working day after a weekend and who notified the employer or his/her representative, not later than Tuesday of each week, of his/her intention to return to his/her usual place of residence for the weekend, shall be paid an allowance of $26.60 for each such occasion.

3. Clause 23. – Travelling Allowance—

(a) Delete subclause (1)(a) of this clause and insert in lieu thereof the following—

(1) (a) An employee required on any day to report directly to the job shall be paid the following allowance to compensate him/her for excess fares and travelling time from the employee's home to his/her place of work and return.

Within a radius of 50 kilometres from the G.P.O. Perth $13.30 per day.

(b) Delete subclause (2) of this clause and insert in lieu thereof the following—

(2) On country work where camping facilities are not provided and travel cannot be made by public conveyance, an employee required to travel to or from the place of work shall, unless a conveyance be provided by the employer (free of charge) to transport him/her to and from the place of work and a central pick-up place, be paid allowances in accordance with the following scale.

	Per Day
	$
3 kilometres each way and up to and including 8 kilometres each way	5.50
over 8 kilometres each way and up to including 16 kilometres each way	10.20
over 16 kilometres each way and up to and including 32 kilometres each way	12.80
over 32 kilometres each way	15.30

2001 WAIRC 04406

ELECTRONICS INDUSTRY AWARD

No. A 22 of 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGIN & ELECT DIV, WA BRANCH, APPLICANT *v.* ACTION ELECTRONICS PTY LTD, ALDETEC PTY LTD, LION ELECTRONICS, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DELIVERED	TUESDAY, 11 DECEMBER 2001
FILE NO.	APPLICATION 1637 OF 2001
CITATION NO.	2001 WAIRC 04406
Result	Award Varied

Order

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

THAT the Electronics Industry Award No. A22 of 1985 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period commencing on and from 11 December 2001.

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

SCHEDULE

1. Clause 9. – Overtime: Delete paragraph (f) of subclause (3) of this clause and insert in lieu the following—

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid **$8.40** for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required he/she shall be supplied with each such meal by the employer or be paid **$5.65** for each meal so required.

2. Clause 13. – Car Allowance: Delete subclause (3) of this clause and insert in lieu the following—

(3) A year for the purpose of this Clause shall commence on 1 July and end on 30 June next following.

RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE ON EMPLOYER'S BUSINESS
MOTOR CAR

AREA AND DETAILS	**ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES)**		
Rate per kilometre (cents)	**Over 2600cc**	**1600cc -2600cc**	**1600cc & Under**
Metropolitan Area	64.6	57.7	50.1
South West Land Division	66.0	59.0	51.4
North of 23.5^{o} South Latitude	72.3	65.1	56.7
Rest of the State	67.9	61.1	53.0
MOTOR CYCLE (IN ALL AREAS)	22.0 cents per kilometre		

3. Clause 15. – Distant Work: Delete subclauses (4) and (5) of this clause and insert in lieu the following—

(4) An employee, to whom the provisions of subclause (1) of this Clause apply, shall be paid an allowance of **$27.16** for any weekend that the employee returns home from the job, but only if—

(a) The employee advises the employer or the employer's agent of the employee's intention no later than Tuesday immediately preceding the weekend in which the employee so returns;

(b) The employee is not required for work during that weekend;

(c) The employee returns to the job on the first working day following the weekend; and

(d) The employer does not provide, or offer to provide, suitable transport.

(5) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of $11.95 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

4. Clause 20. – Special Provisions: Delete this clause and insert in lieu the following—

(1) **Dirt Money**: An employee shall be paid an allowance of **40 cents** per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

(2) **Confined Space:** An employee shall be paid an allowance of **47 cents** per hour when, because of the dimensions of the compartment or space in which he is working, he is required to work in a stooped or otherwise cramped position or without proper ventilation.

(3) **Hot Work:** An employee shall be paid an allowance of **40 cents** per hour when he works in the shade in any place where the temperature is raised by artificial means to be between 46.1 and 54.4 degrees celsius.

(4) **Height Money:** An employee shall be paid an allowance of **$1.90** for each day on which the employee works at a height of 15.5 metres or more above the nearest horizontal plane.

(5) (a) Where, in the opinion of the Board of Reference the conditions under which work is to be performed are, by reason of excessive heat, exceptionally oppressive, the Board may—

(i) Fix an allowance, or allowances, not exceeding the equivalent of half the ordinary rate;

(ii) Fix the period (including a minimum period) during which any allowance so fixed is to be paid; and

(iii) Prescribe such other conditions, relating to the provision of protective clothing or equipment and the granting of rest periods, as the Board sees fit.

(b) The provisions of paragraph (a) of this subclause do not apply unless the temperature in the shade at the place of work has been raised by artificial means beyond 54.4 degrees celsius.

(c) An allowance fixed pursuant to paragraph (a) of this subclause includes any other allowance which would otherwise be payable under this clause.

(6) **Diesel Engine Ships:** The provisions of subclauses (1) and (2) hereof do not apply to an employee when the employee is engaged on work below the floor plates in diesel engine ships, but the employee shall be paid an allowance of **66 cents** per hour whilst so engaged.

(7) **Percussion Tools:** An employee shall be paid an allowance of **24 cents** per hour when working pneumatic rivetter of the percussion type and other pneumatic tools of the percussion type.

(8) **Chemical, Artificial Manure and Cement Works:** An employee, other than a general labourer, in chemical, artificial manure and cement works, in respect of all work done in and around the plant outside the machine shop, shall be paid an allowance calculated at the rate of **$9.82** per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this clause.

(9) An employee who is sent to work on any gold mine shall be paid an allowance of such amount as will afford the employee a wage not less than the employee would be entitled to receive pursuant to the award which would apply if the employee was employed by the gold mine concerned.

(10) An employee who is required to work from a ladder shall be provided with an assistant on the ground where it is reasonably necessary for the employee's safety.

(11) Special Rates Not Cumulative: Where more than one of the disabilities entitling an employee to extra rates exist on the same job, the employer shall be bound to pay only one rate, namely - the highest for the disabilities so prevailing. Provided that this subclause shall not apply to Confined Space, Dirt Money, Height Money or Hot Work, the rates for which are cumulative.

(12) Protective Equipment—

(a) An employer shall have available a sufficient supply of protective equipment (as for example, goggles (including anti-flash goggles), glasses, gloves, mitts, aprons, sleeves, leggings, gumboots, ear protectors, helmets or other efficient substitutes thereof) for use by his employees when engaged on work for which some protective equipment is reasonably necessary.

(b) An employee shall sign an acknowledgment when issued with any article of protective equipment and shall return that article to the employer when he is finished using it or on leaving his employment.

(c) An employee to whom an article of protective equipment has been issued shall not lend that article to another employee and if he does both he and that other employee shall be deemed guilty of wilful misconduct.

(d) An article of protective equipment which has been used by an employee shall not be issued by the employer to another employee until it has been effectively sterilised but this paragraph only applies where sterilisation of the article is practicable and is reasonably necessary.

(e) Adequate safety gear (including insulating gloves, mats, and/or shields where necessary) shall be provided by employers for employees required to work on live electrical equipment.

(13) (a) The employer shall, when practicable, provide a waterproof and secure place, on each job, for the safe-keeping of an employee's tools when not in use.

(b) The employer shall indemnify an employee in respect of any tools of the employee stolen, if the employer's failure to comply with this subclause is a material factor in contributing to the stealing of the tools.

(14) An employee holding either a Third Year First Aid Medallion of the St. John Ambulance Association of a "C" standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid **$7.54** per week in addition to his ordinary rate.

(15) Where an employee is required to carry out soldering or similar work, the employer shall be responsible to ensure that the work place is well ventilated.

(16) Where an employee is required to carry out intricate or finite work the employer shall be responsible to ensure that the work place has sufficient lighting and the necessary equipment to assist viewing of the work.

(17) No employee shall be requested or compelled to lift an object of more than 30kg without assistance being rendered.

5. Clause 33. – Wages—

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

(2) **Leading Hands—**

In addition to the appropriate rate of wage prescribed in subclause (1) of this clause a leading hand shall be paid—

(a)	If placed in charge of not less than three and not more than ten other employees	$20.13
(b)	If placed in charge of more than ten but not more than twenty other employees	$30.81
(c)	If placed in charge of more than twenty other employees	$39.66

B. Delete subclause (5) of this clause and insert in lieu the following—

(5) **Tool Allowance**

(a) Where an employer does not provide a technician, serviceperson, installer or an apprentice with the tools ordinarily required by that person in the performance of work as a technician, serviceperson, installer or an apprentice the employer shall pay a tool allowance of—

(i) **$11.16** per week to such technician, serviceperson, installer; or

(ii) In the case of an apprentice a percentage of **$11.16** being the percentage which appears against his year of apprenticeship in subclause (3) of this clause for the purpose of such technician, serviceperson, installer or apprentice applying and maintaining tools ordinarily required in the performance of work as a technician, serviceperson, installer or apprentice.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.

(c) An employer shall provide for the use of technicians, servicepeople, installers or apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A technician, serviceperson, installer or apprentice shall replace or pay for any tools supplied by the employer if lost through his negligence.

PART II – CONSTRUCTION

6. Clause 5. – Special Rates and Provisions: Delete subclause (2) of this clause and insert in lieu the following—

(2) (a) The employer shall, where practicable, provide a waterproof and secure place on each job for the safekeeping of a employee's tools when not in use and a employee's working clothes and where an employee is absent from work because of illness or accident and has advised the employer to that effect in accordance with the provisions of Clause 11. - Sick Leave of PART I - GENERAL of this award the employer shall ensure that the employee's tools and working clothes are securely stored during his absence.

(b) Subject to paragraph (c) hereof where the employee's tools or working clothes are lost by fire or breaking and entering whilst securely stored in the place provided by the employer under paragraph (a) hereof the employer shall reimburse the employee for that loss but only up to a maximum of **$240.26**.

(c) The provisions of paragraph (b) hereof shall only apply with respect to tools and working clothes used by an employee in the course of his employment as set out in a list furnished to the employer at least twenty four hours before being lost by fire or theft and if the employee has reported any theft to the police.

7. Clause 6. – Allowance for Travelling and Employment in Construction Work: Delete subclause (1) of this clause and insert in lieu the following—

(1) An employee, who, on any day, is required by the employee's employer to report directly to the job, shall be paid an allowance in accordance with the provisions of this subclause to compensate for travel patterns and costs peculiar to the industry, which includes mobility requirements of employees, and the nature of employment in construction work covered by this award—

(a) On places within a radius of 50 kilometres from the General Post Office, Perth - **$13.00** per day.

(b) For each additional kilometre to a radius of 60 kilometres from the General Post Office, Perth - **67 cents** per kilometre.

(c) Subject to the provisions of paragraph (d), work performed at places beyond a 60 kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees, with the consent of the union, agree in any particular case that the travelling allowance for such work shall be paid under this clause, in which case an additional allowance of **67 cents** per kilometre shall be paid for each kilometre in excess of the 60 kilometre radius.

(d) In respect of work carried out from an employer's depot situated outside a radius of 60 kilometres from the General Post Office, Perth the main Post Office in the town in which such depot is situated shall be the centre for the purpose of calculating the allowance to be paid.

(e) Where transport to and from the job is supplied by the employer from and to the depot or such other place more convenient to the employee as is mutually agreed upon between the employer and the employee, half the above rates shall be paid, provided that the conveyance used for such transport is equipped with suitable seating and weather proof covering.

8. Clause 7. – Distant Work: Delete subclauses (6) and (7) of this clause and insert in lieu the following—

(6) An employee, to whom the provisions of subclause (1) of this clause apply, shall be paid an allowance of **$26.55** for any weekend that the employee returns home from the job, but only if -

(a) The employee advises the employer or the employee's agent of the employee's intention not later than the Tuesday immediately preceding the weekend in which the employee so returns;

(b) The employee is not required for work during that weekend;

(c) The employee returns to the job on the first working day following the weekend; and

(d) The employer does not provide, or offer to provide, suitable transport.

(7) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from the job or be paid an allowance of $11.72 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

9. Clause 10. – Wages: Delete subclauses (5), (6) and (7) of this clause and insert in lieu the following—

(5) **Construction Allowances—**

(a) In addition to the appropriate rates of pay prescribed in this clause an employee shall be paid—

(i) **$35.66** per week if engaged on the construction of a large industrial undertaking or any large civil engineering projects.

(ii) **$32.15** per week if engaged on a multi-storeyed building, but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which he/she is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(iii) **$18.92** per week if engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of PART I - GENERAL of this award.

(b) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.

(6) **Leading Hand—**

In addition to the appropriate rate of wage prescribed in subclause (1) of this clause a leading hand shall be paid—

(a)	If placed in charge of not less than three and not more than ten other employees	$20.13
(b)	If placed in charge of more than ten but not more than twenty other employees	$30.81
(c)	If placed in charge of more than twenty other employees	$39.66

(7) (a) Where an employer does not provide a Technician, Serviceperson, Installer or Apprentice with the tools ordinarily required by that Serviceperson, Technician or Installer in the performance of work as a Technician, Installer or Apprentice the employer shall pay a tool allowance of—

(i) **$11.16** per week to such Technician, Serviceperson or Installer, or

(ii) In the case of an apprentice a percentage of **$11.16** being the percentage referred to in subclause (3) of Clause 33. - Wages of PART I - GENERAL of this award,

for the purpose of such Technician, Serviceperson, Installer or Apprentice supplying and maintaining tools ordinarily required in the performance of work as a Technician, Serviceperson, Installer or Apprentice.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.

(c) An employer shall provide for the use of Technicians, Servicepersons, Installers and Apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A Technician, Serviceperson, Installer or Apprentice shall replace or pay for any tools supplied by the employer if lost through that person's negligence.

2001 WAIRC 04313

ENGINE DRIVERS' (BUILDING AND STEEL CONSTRUCTION) AWARD

No. 20 of 1973

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA - WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	MASTER BUILDERS ASSOCIATION OF WA & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	MONDAY, 3 DECEMBER 2001
FILE NO/S	APPLA 1726 OF 2001
CITATION NO.	2001 WAIRC 04313

Result	Award varied
Representation	
Applicant	Ms L Dowden and Ms J Harrison
Respondents	Mr K Richardson
	Mr K Dwyer

Order

HAVING HEARD Ms L Dowden on behalf of the Applicant and Mr K Richardson and Mr K Dwyer on behalf of the Respondents, and by consent, the Commission, being satisfied that the claim complies with the terms of the Wage Fixing Principles set out in the General Order of the Commission No. 752 of 2001, dated 25 July 2001, hereby, pursuant to the powers conferred on it under the Industrial Relations Act 1979, orders—

THAT the Engine Drivers' (Building and Steel Construction) Award, No. 20 of 1973 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 3rd day of December 2001.

FURTHERMORE, the Commission by consent of the parties, records the following—

(a) The application is to be split into application 1726A of 2001 and application 1726B of 2001 to allow the issue regarding ordinary time earnings to be discussed between the parties.

(b) The calculations relating to the allowances varied in the attached Schedule have been effected as a result of figures supplied from ABS Catalogue 6401.0 (Table 2B), ABS Catalogue 6401.0 (Table 3A), ABS Catalogue 6401.00 (Table 7A), ABS Catalogue 6401.0 (Table 7G) and ABS Catalogue 6401.00 (Table 7I).

(c) Attached following the schedule is Exhibit 1, tendered at hearing, demonstrating the calculation schedule for the variations sought.

(Sgd.) W. S. COLEMAN,
[L.S.] Chief Commissioner.

SCHEDULE

1. Clause 11. – Meal Allowance: Delete subclause (1) of this clause and insert in lieu thereof the following—

(1) Where an employee, without being notified on the previous day or earlier, has to continue working after the usual knock-off time for more than two hours, he/she shall be provided with any meal required or shall be paid $9.30 in lieu thereof, and if owing to the overtime worked, a second or subsequent meal is required he/she shall be supplied with each meal or be paid $5.70 for each meal so required. Provided that this subclause shall not apply to an employee residing in the same locality as his/her place of employment who can reasonably return home for a meal.

2. Clause 22. – Allowance for Travelling and Employment in Construction Work

(a) Delete subclause (1)(a) in this clause and insert in lieu thereof the following—

(1) (a) On places of work within a radius of 50 kilometres from the General Post Office, Perth $13.30 per day.

(b) Delete subclause (1)(b) in this clause and insert in lieu thereof the following—

(1) (b) For each additional kilometre up to a radius of 60 kilometres from the General Post Office, Perth 73 cents per kilometre.

(c) Delete subclause (1)(c) in this clause and insert in lieu thereof the following—

(1) (c) Subject to the provisions of paragraph (d) of this subclause, work performed at a place beyond a 60 kilometre radius from the General Post Office, Perth, shall be deemed to be distant work unless the employer and the employees, with the consent of the union, agree in any particular case that the travelling allowances for such work shall be paid under this clause in which case an additional allowance of 73 cents per kilometre shall be paid for each kilometre in excess of the 60 kilometres.

(d) Delete subclause (2) in this clause and insert in lieu thereof the following—

(2) For travelling during working hours from and to the employer's place of business or from one job to another,

an employee shall be paid by the employer at ordinary rates. The employer shall pay all fares and reasonable expenses in connection with such travelling. Provided that if an employer requests the employee to use his/her own vehicle the employer shall pay a car allowance of not less than 73 cents per kilometre for each kilometre the employee travels in response to such request.

3. Clause 23. – Distant Work

(a) Delete subclause (1)(b) in this clause and insert in lieu thereof the following—

(1) (b) pay an allowance of $308.50 per week of seven days but such allowance shall not be wages. In the case of broken parts of the week occurring at the beginning or the end of the employment on a distant job, the allowance shall be $44.10 per day.

(b) Delete subclause (4)(a) in this clause and insert in lieu thereof the following—

(4) (a) An employee who works as required during the ordinary hours of work on the working day before and the working day after a week-end and who notifies the employer or his/her representative, not later than Tuesday of each week, of his/her intention to return to his/her usual place of residence at the week-end and who returns to his/her usual place of residence for the week-end, shall be paid an allowance of $27.10 for each such occasion.

(c) Delete subclause (7) in this clause and insert in lieu thereof the following—

(7) Where an employee, supplied with board and lodging by his/her employer, is required to live more than 800 metres from the job he/she shall be provided with suitable transport to and from that job or be paid an allowance of $16.10 per day provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

2001 WAIRC 04422

ENGINEERING AND ENGINE DRIVERS' (NICKEL SMELTING) AWARD 1973

No. 4 of 1973

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGIN & ELECT DIV, WA BRANCH, THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANTS
	v.
	WESTERN MINING CORPORATION LIMITED, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	FRIDAY, 14 DECEMBER 2001
FILE NO.	APPLICATION 1877 OF 2001
CITATION NO.	2001 WAIRC 04422

Result Award Varied

Order

WHEREAS on 23rd October 2001 the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch applied to amend the Engineering and Engine Drivers' (Nickel Smelting) Award 1973 to increase allowance in accordance with Principle 5 of the Statement of Principles outlined by the Commission in Court Session in the 2001 State Wage Case Decision; and

WHEREAS on 9th November 2001 the Respondent, WMC Resources Ltd, filed an Answer which agreed with the increases in non expense related allowances in accordance with the said Wage Case Decision in Principles including using the Furniture Trades formula. It also agreed with increases in meal allowances as set out in Schedule 3 but objected to the rounding of dollar amounts applied to the adjustments and counter-proposed that such rounding ought to be in accordance with what it described as traditional rounding methods; and

WHEREAS such rounding methods have not been applied to this Award in the past; and

WHEREAS the Commission is of the opinion that these issues should properly be raised before a Commission in Court Session when dealing with the State Wage Principles and therefore has decided that the amendments to the Award will be allowed in the form set out in the Schedule to the Application.

NOW THEREFORE having heard Ms C. Bowden on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch, Ms F. Bennet for The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch, Ms L. Dowden for the Construction, Forestry, Mining and Energy Union of Workers and Ms K. Smallacombe for the Respondent, the Commission pursuant to the powers conferred on it by the *Industrial Relations Act, 1979,* the Commission, hereby orders—

THAT the Engineering and Engine Drivers' (Nickel Smelting) Award 1973 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period on and from 11th December 2001.

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

SCHEDULE

1. Clause 8. – Overtime: Delete paragraph (c) of subclause (3) of this clause and insert in lieu the following—

(c) Subject to the provisions of paragraph (d) of this subclause, an employee required to work overtime for more than one hour shall be supplied with a suitable meal by the employer or be paid $6.05 for a meal and if, owing to the amount of overtime worked, a second or subsequent meal is required, he/she shall be supplied with each such meal by the employer or be paid $6.05 for each meal so required. Any dispute as to the suitability of meals supplied shall be determined by a Board of Reference.

2. Clause 9. – Shift Work: Delete subclause (2) of this clause and insert in lieu the following—

(2) A shift employee, in addition to the ordinary rate, shall be paid $9.70 per shift of eight hours when on afternoon and night shift.

3. Clause 25. – Special Rates and Provisions: Delete this clause and insert in lieu the following—

Metal and Electrical Trades—

(1) Height Money: An employee shall be paid an allowance of $1.10 for each day on which he/she works at a height of 50 feet or more above the nearest horizontal plane.

(2) An employee shall be paid an allowance of 22 cents per hour when engaged on work of an unusually dirty nature, where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

(3) Confined Space: An employee shall be paid 30 cents per hour extra when working in "confined space", which means a compartment or space the dimensions of which necessitate working in a stooped or otherwise cramped position, or without proper ventilation.

(4) When employed for more than one hour in the shade, an employee shall be paid—

(a) (i) in places where the temperature is raised by artificial means to between 46 and 55 degrees celsius - 22 cents per hour extra;

(ii) in places where the temperature exceeds 55 degrees celsius - 30 cents per hour extra;

(b) where the work continues for more than one hour in temperatures exceeding 55 degrees celsius, employees shall also be entitled to 10 minutes rest after each hour's work without deduction of pay.

(5) Breathing Apparatus: An employee shall be paid 10 cents per hour extra when he/she is required to wear self-contained breathing apparatus (other than dust masks).

(6) Protective Equipment—

(a) The employer shall have available a sufficient supply of protective equipment (as, for example, breathing apparatus and masks, hand screens, goggles, glasses, gloves, aprons, leggings and gum boots) for use by their employees when engaged on work for which some protective equipment is reasonably necessary. It shall be a defence to an employer charged with a breach of this subclause if he/she proves that he/she was unable to obtain either the item of equipment the subject of the charge or a suitable substitute.

(b) Every employee shall sign an acknowledgement on receipt of any article of protective equipment and shall return same to the employer when he/she has finished using it or on leaving their employment.

(c) No employee shall lend another employee any such article of protective equipment issued to such first mentioned employee, and if the same are lent, both the lender and the borrower shall be deemed guilty of wilful misconduct.

(d) Before goggles, glasses or gloves or any such substitute which have been used by an employee are re-issued by the employer to another employee, they shall be effectively sterilised.

(e) During the time any article of protective equipment is on issue to the employee, he/she shall be responsible for any loss or damage thereto, fair wear and tear attributable to ordinary use excepted.

(7) The special rates and allowances prescribed by this clause shall be paid irrespective of the time at which the work is performed and shall not be subject to any premium or penalty additions.

(8) Any dispute which may arise between the parties to this award in relation to the application of any of the foregoing special rates and provisions may be determined by the Board of Reference.

(9) An electrician - special class, an electrical fitter and/or armature winder or an electrical installer who holds and in the course of employment may be required to use a current "A" or "B" grade licence issued pursuant to the relevant regulation in force on the 28th day of February 1978 under the Electricity Act 1945, shall be paid an allowance of $16.04 per week.

4. Clause 26. – Rates of Pay and Classification Definitions: Delete subclauses (9) and (10) of this clause and insert in lieu the following—

(9) Tool Allowance—

A tradesperson to whom the employer does not supply all necessary tools shall be paid a tool allowance of $11.15 per week.

A "tradesperson", for the purpose of this clause, shall be deemed to be an employee who is paid an equal rate of wage or higher than the classification "fitter".

(10) Industry Allowance—

(a) Each employee shall be paid an allowance of $80.60 per week.

(b) The allowance recognises, and is in payment for, all aspects of work in the industry, including the location and nature of individual operations within it.

(c) The allowance shall be paid in addition to the rate of wage set out in this clause and shall be paid for all purposes of the award.

2001 WAIRC 04452

ENGINEERING TRADES (GOVERNMENT) AWARD, 1967 AWARD

Nos. 29, 30 & 31 of 1961 and 3 of 1962

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGIN & ELECT DIV, WA BRANCH AND ANOTHER, APPLICANTS *v.* THE MINISTER FOR WORKS, MINISTER FOR EDUCATION, HON MIN FOR HEALTH, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DELIVERED	TUESDAY, 18 DECEMBER 2001
FILE NO.	APPLICATION 1742 OF 2001
CITATION NO.	2001 WAIRC 04452

Result Award Varied

Order

HAVING heard Mr C. Young on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch; Ms F. Bennett for The Automotive, Food,

Metals, Engineering Printing and Kindred Industries Union of Workers - Western Australian Branch and Ms A. Davison on behalf of the Respondents, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders—

THAT the Engineering Trades (Government) Award, 1967 Award Nos. 29, 30 & 31 of 1961 and 3 of 1962 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on and from 11th December 2001.

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

SCHEDULE

1. Clause 14. – Overtime: Delete subclause (3) of this clause and insert in lieu the following—

(3) The provisions of this subclause apply to all employees.

(a) Overtime provisions will not apply until the ordinary hours which includes the daily accrual time towards a rostered day off as provided in Clause 13. - Hours of Duty, have been worked.

(b) Overtime on shift work shall be based on the rate payable for shift work.

(c) (i) When overtime work is necessary it shall, wherever reasonably practicable be so arranged that employees have at least ten consecutive hours off duty between the work on successive days.

(ii) An employee (other than a casual employee) who works so much overtime between the termination of their ordinary work on one day and the commencement of their ordinary work on the next day that he/she has not had at least ten consecutive hours off duty between those times shall, subject to this paragraph, be released after completion of such overtime until he/she has had ten consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

(iii) If, on the instructions of their employer, such an employee resumes or continues work without having had such ten consecutive hours off duty, he/she shall be paid at double time rates until he/she is released from duty for such period and he/she shall then be entitled to be absent until he/she has had ten consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

(iv) Where an employee (other than a casual employee or an employee engaged on continuous shift work) is called into work on a Sunday or holiday preceding an ordinary working day, he/she shall, wherever reasonably practicable, be given ten consecutive hours off duty before their usual starting time on the next day. If this is not practicable then the provisions of subparagraphs (ii) and (iii) of this paragraph shall apply mutatis mutandis. Provided that overtime worked as a result of a recall, shall not be regarded as overtime for the purpose of this paragraph, when the actual time worked is less than three hours on such recalls or on each of such recalls.

(v) The provisions of this paragraph shall apply in the case of shift employees who rotate from one shift to another, as if eight hours were substituted for ten hours when overtime is worked—

(aa) for the purpose of changing shift rosters; or

(bb) where a shift employee does not report for duty; or

(cc) where a shift is worked by arrangement between the employees themselves.

(d) When an employee is recalled to work after leaving the job—

(i) He/she shall be paid for at least three hours at overtime rates provided that employees of Transperth shall not be obliged to work for the three hours if the job for which he/she has been recalled has been completed in less time;

(ii) Time reasonably spent in getting to and from work shall be counted as time worked.

(e) Subject to the provisions of paragraph (f) of this subclause, an employee required to work overtime for more than one hour shall be supplied with a meal by the employer or be paid **$8.25** for a meal if, owing to the amount of overtime worked, a second or subsequent meal is required, he/she shall be supplied with each such meal by the employer or be paid **$5.79** for each meal so required.

(f) The provisions of paragraph (e) of this subclause do not apply—

(i) in respect of any period of overtime for which the employee has been notified on the previous day or earlier that he will be required; or

(ii) to any employee who lives in the locality in which the place of work is situated in respect of any meal for which he can reasonably go home.

(g) If an employee to whom subparagraph (i) of paragraph (f) of this subclause applies has, as a consequence of the notification referred to in that subclause, provided himself with a meal or meals and is not required to work overtime or is required to work less overtime than the period notified, he shall be paid, for each meal provided and not required, the appropriate amount prescribed in paragraph (e) of this subclause.

(h) An employee required to work continuously from 12 midnight to 6.30am and ordered back to work at 8.00am the same day shall be paid **$3.82** for breakfast.

(i) (i) An employer may require any employee to work reasonable overtime at overtime rates, and such employee shall work overtime in accordance with such requirements.

(ii) No union or association party to this award, or employee or employees covered by this award, shall in any way, whether directly or indirectly, be a party to or concerned in any ban, limitation, or restriction upon the working of overtime in accordance with the requirements of this paragraph.

(j) The provisions of this subclause do not operate so as to require payment of more than double time rates, or double time and a half on a holiday prescribed under this award, for any work except and to the extent that the provisions of Clause 17. - Special Rates and Provisions of this award apply to that work.

2. Clause 17. – Special Rates and Provisions: Delete this clause and insert in lieu the following—

(1) **Height Money:** An employee shall be paid an allowance of **$1.88** for each day in which he works at a height of 15.5 metres or more above the nearest horizontal plane, but this provision does not apply to linespersons nor to riggers and splicers on ships or buildings.

(2) **Dirt Money:** Dirt money of **40 cents** per hour shall be paid as follows—

(a) To employees employed on hot or dirty locomotives, or stripping locomotives, boilers, steam, petrol, diesel or electric cranes, or when repairing Babcock and Wilcox or other stationary boiler in site (except repairs on bench to steam and water mounting), or when repairing the conveyor gear in conduit of power houses and when repairing or overhauling electric or steam pile-driving machines and boring plants.

(b) Bitumen Sprayers – Large Units—

(i) To employees whilst engaged on work appertaining to the spraying of bitumen but exclusive of the standard chassis engine from the front end of the main tank to the back end of the plant. Provided that work on the compressor and its engines shall not be subject to dirt money.

(ii) To motor mechanics in the motor section for all work performed on the standard chassis form and including the sump to the rear end of the chassis, but excluding the engine and parts forward thereto unless the work is of a specially dirty nature, where clothes are necessarily unduly soiled or damaged by the nature of the work done. Provided that to employees engaged as above on sprays of the Bristow type, dirt money of **43 cents** per hour shall be paid.

(c) Bitumen Sprayers – Small Units—

(i) To employees for work done on main tank, its fittings, pump and spray arms.

(ii) To motor mechanics on work from and including the sump to the rear end of the chassis, but excluding the engine and parts forward thereto unless the work is of a specially dirty nature where clothes are necessarily unduly soiled or damaged by the nature of the work done.

(d) To employees on all other dirty tar sprays and kettles.

(e) Diesel Engines: Work on engines, or on gear box attached to engines, but excluding work on rollers (wheels) on which a diesel powered roller travels.

(f) Dirt Money shall only be paid during the stages of dismantling and cleaning and shall not cover employees who receive portions of the work after cleaning has taken place.

(g) Notwithstanding anything contained in the foregoing provisions, dirt money shall not be paid unless work is of an exceptionally dirty nature where clothes are necessarily unduly soiled or damaged by the nature of the work done.

(3) **Confined Space—**

46 cents per hour extra shall be paid to an employee working in any place, the dimensions of which necessitate the employee working in an unusually stooped or otherwise cramped position, or where confinement within a limited space is productive of unusual discomfort.

(4) Any employee actually working a pneumatic tool of the percussion type shall be paid **23 cents** per hour extra whilst so engaged.

(5) **Hot Work**: An employee shall be paid an allowance of 40 cents per hour while working in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees Celsius.

(6) (a) Where, in the opinion of the Board of Reference, the conditions under which work is to be performed are, by reason of excessive heat, exceptionally oppressive, the Board may—

(i) fix an allowance, or allowances, not exceeding the equivalent of half the ordinary rate;

(ii) fix the period (including a minimum period) during which any allowance so fixed is to be paid; and

(iii) prescribe such other conditions, relating to the granting of rest periods, as the Board sees fit.

(b) The provisions of paragraph (a) of this subclause do not apply unless the temperature in the shade at the place of work has been raised by artificial means beyond 54.4 degrees Celsius.

(c) An allowance fixed pursuant to paragraph (a) of this subclause includes any other allowance which would otherwise be payable under this clause.

(7) Boiler Work—

An employee required to work in a boiler which has not been cooled down shall be paid at the rate of time and one-half for each hour or part of an hour so worked in addition to any allowance to which he/she may be entitled under subclauses (2) and (3) of this clause.

(8) Any employee working in water over his/her boots or, if gumboots are supplied, over the gumboots, shall be paid an allowance of **$1.04** per day.

(9) Employees using Anderson-Kerrick steam cleaning units or unit of a similar type on cranes or other machinery shall be paid an allowance of **40 cents**.

(10) **Well Work:** Any employee required to enter a well nine metres or more in depth for the purpose in the first instance of examining the pump, or any other work connected therewith, shall receive an amount of **$2.21** for such examination and **84 cents** per hour extra thereafter for fixing, renewing or repairing such work.

(11) **Ship Repair Work**: Any employee engaged in repair work on board ships shall be paid an additional **$4.08** per day for each day on which so employed.

(12) An employee shall, whilst working in double bottom tanks on board vessels, be paid an allowance of **$1.60** per hour.

(13) An employee shall, whilst using explosive powered tools, be paid an allowance of **13 cents** per hour, with a minimum payment of **92 cents** per day.

(14) **Abattoirs**—

An employee employed in and about an abattoir shall be paid an allowance calculated at the rate of **$13.07** per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this clause. The allowance prescribed herein may be reduced to **$11.99** with respect to any employee who is supplied with overalls by the employer.

(15) Employees engaged to iron ore and manganese or loading equipment at the Geraldton Harbour shall be paid an allowance of **41 cents** per hour, with a minimum payment of four hours.

(16) **Morgues**—

An employee required to work in a morgue shall be paid **41 cents** per hour or part thereof, in addition to the rates prescribed in this clause.

(17) Special Rates Not Cumulative—

Where more than one of the disabilities entitling an employee to extra rates exists on the same job the employer shall be bound to pay only one rate, namely - the highest for the disabilities so prevailing.

Provided that this subclause shall not apply to confined space, dirt money, height money or hot work, the rates for which are cumulative. Provided further that this subclause shall not operate so as to prevent the payment of the allowance prescribed for ship repair work in addition to the extra rate prescribed for confined space (but only if the employer and the employee agree that the degree of discomfort is so exceptional as to warrant the payment of this extra rate in addition to the allowance for ship repair work) or for pneumatic tools, or boiler work.

(18) The work of an electrical fitter shall not be tested by an employee of a lower grade.

(19) An employee required to repair or maintain incinerators shall be paid **$2.37** per unit

(20) Protective Equipment—

(a) The employer shall make available a sufficient supply of protective equipment (as for example hand screens, goggles, glasses, gloves, aprons, leggings, gumboots and oilskins) for use by employees when engaged on work for which some protective equipment is reasonably necessary.

(b) Every employee shall sign an acknowledgement on receipt thereof, but such equipment shall at all times remain the property of the employer.

(c) During the time the same are on issue to the employee he/she shall be responsible for any loss or damage thereto, fair wear and tear attributable to ordinary use excepted.

(d) No employee shall lend another employee any protective equipment issued to such first mentioned employee, and if the same are lent both the lender and the borrower shall be deemed guilty of wilful misconduct.

(e) Before any protective equipment which has been used by an employee is reissued by the employer to another employee it shall, where necessary, be effectively sterilised.

(f) Protective cream shall be supplied to moulders when considered necessary by the employer.

(21) (a) Subject to the provisions of this clause, an employee whilst employed on foundry work shall be paid a disability allowance of **28 cents** for each hour worked to compensate for all disagreeable features associated with foundry work, including heat, fumes, atmospheric conditions, sparks, dampness, confined space and noise.

(b) The foundry allowance herein prescribed shall also apply to apprentices and unapprenticed juniors employed in foundries. Provided that where an apprentice is, for a period of half a day or longer, away from the foundry for the purpose of receiving tuition, the amount of foundry allowance paid to him shall be decreased proportionately

(c) The foundry allowance herein prescribed shall be in lieu of any payment otherwise due under this clause and does not in any way limit an employer's obligations to comply with all relevant requirements of Acts and Regulations relative to conditions in foundries.

(d) For the purpose of this subclause foundry work shall mean—

(i) Any operation in the production of castings by casting metal in moulds made of sand, loam, metal moulding composition or other material or mixture of materials, or by shell moulding, centrifugal casting or continuous casting; and

(ii) Where carried on as an incidental process in connection with and in the course of production to which paragraph (i) of this definition applies, the preparation of moulds and cores (but not in the making of patterns and dies in a separate room), knock-out processes and dressing operations, but shall not include any operation performed in connection with—

(aa) non-ferrous die casting (including gravity and pressure);

(bb) casting of billets and/or ingots in metal mould;

(cc) continuous casting of metal into billets;

(dd) melting of metal for use in printing;

(ee) refining of metal.

(22) An electronics tradesperson, an electrician – special class, an electrical fitter and/or an armature winder or an electrical installer who holds and in the course of employment may be required to use a current "A" grade or "B" grade licence issued pursuant to the relevant regulation in force on the 28th day of February, 1978 under the Electricity Act, 1948 shall be paid an allowance of **$15.82** per week.

(23) Where an employee is engaged in a process involving asbestos and is required to wear protective equipment, ie: respiratory protection in the form of a high efficiency class H particulate respirator and/or special clothing, a disability allowance of 50 **cents** per hour shall be paid for each hour or part thereof that such employee is so engaged.

(24) **Towing Allowance:** A Level 1, 2 or 3 Tradesperson who drives a tow truck towing an articulated bus in traffic shall be paid an allowance of **$3.60** per shift when such duties are performed. This allowance shall be payable irrespective of the time such work is performed and is not subject to any premium of penalty additions.

(25) For employees employed in the painting branch of Transperth, washing facilities and soap suitable as a solvent for paint mixtures, shall be provided in some convenient place for use by such employees before meals and after finishing work each day.

(26) **First Aid Allowance**: A worker, holding either a Third Year First Aid Medallion of the St John Ambulance Association or a "C: Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties, shall be paid **$7.68** per week in addition to his/her ordinary rate.

(27) **Polychlorinated Biphenyls**

Employees required to remove or handle equipment or fittings containing polychlorinated biphenyls (PCBs) for which protective clothing must be worn shall, in addition to the rates and provisions contained in this Clause, be paid an allowance of **$1.60** per hour whilst so engaged.

(28) **Nominee Allowance—**

A licensed electrical fitter or installer who acts as a nominee for the employer shall be paid an allowance of **$13.79** per week.

(29) **Hospital Environment Allowance—**

Notwithstanding the provisions of this clause, the following allowances shall be paid to maintenance employees employed at hospitals listed hereunder—

(a) (i) **$11.04** per week for work performed in an hospital environment; and

(iii) **$3.83** per week for disabilities associated with work performed in difficult access areas, tunnel complexes, and areas with great temperature variation at—

Princess Margaret Hospital
King Edward Memorial Hospital
Sir Charles Gairdner Hospital
Royal Perth Hospital
Fremantle Hospital

(b) $7.95 per week for work performed in a hospital environment at—

Kalgoorlie Hospital
Osborne Park Hospital
Albany Hospital
Bunbury Hospital
Geraldton Hospital
Mt Henry Hospital
Northam Hospital
Swan Districts Hospital
Perth Dental Hospital

(c) **$5.27** per week for work performed in a hospital environment at—

Bentley Hospital
Narrogin Hospital
Rockingham Hospital
Armadale Hospital
Busselton Hospital
Collie Hospital
Katanning Hospital
Murray Hospital
Wyndham Hospital
Derby Hospital
Port Hedland Hospital
Sunset Hospital
Broome Hospital
Carnarvon Hospital
Esperance Hospital
Merredin Hospital
Warren Hospital

3. Clause 18. – Car Allowance: Delete subclause (3) of this clause and insert in lieu the following—

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

RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE ON EMPLOYER'S BUSINESS

AREA AND DETAILS	ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES)		
DISTANCE TRAVELLED EACH YEAR OF EMPLOYER'S BUSINESS	OVER 2600cc cents per km	OVER 1600 cc -2600 cc cents per km	1600 cc & UNDER cents per km
Metropolitan Area	63.3	54.9	48.7
South West Land Division	65.1	56.5	50.2
North of 23.5° South Latitude	71.4	62.3	55.5
Rest of the State	67.3	58.4	51.8
Motor Cycle (in all areas)	21.9 cents per kilometre		

4. Clause 19. – Fares and Travelling Allowances: Delete subclause (1) of this clause and insert in lieu the following—

(1) An employee in the Architectural Division of the Public Works Department who is required to start and finish on the job shall be paid an allowance in accordance with the provisions of this subclause to compensate for travel patterns and costs peculiar to the industry, which includes mobility requirements of employees, and the nature of employment in construction work—

(a) On places within a radius of fifty kilometres from the General Post Office, Perth - **$13.57** per day;

(b) For each additional kilometre to a radius of sixty kilometres from the General Post Office, Perth – 71 cents per kilometre;

(c) Subject to the provisions of paragraph (d) work performed at places beyond a sixty kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees with the consent of the union, agree in any particular case that the travelling allowance for such work shall be paid under this clause in which case an additional allowance of 71 cents per kilometre shall be paid for each kilometre in excess of the sixty kilometre radius.

(d) In respect of work carried out from an employer's depot situated outside a radius of sixty kilometres from the General Post Office Perth, the main Post Office in the town in which such depot is situated shall be the centre for the purpose of calculating the allowance to be paid.

(e) Where transport to and from the job is provided by the employer from and to their depot or such other place more convenient to the employee as is mutually agreed upon between the employer and the employee, half the above rates shall be paid; provided that the conveyance used for such transport is provided with suitable seating and weatherproof covering.

5. Clause 20. – Distant Work - Construction: Delete subclauses (6) and (7) of this clause and insert in lieu the following—

(6) An employee to whom the provisions of subclause (1) of this clause apply shall be paid an allowance of **$27.92** and for any weekend that he/she returns to his home from the job but only if—

(a) The employer or his/her agent is advised of the intention no later than the Tuesday immediately preceding the weekend in which the employee so returns;

(b) He/she is not required for work during that weekend;

(c) The employee returns to the job on the first working day following the weekend; and

(d) The employer does not provide or offer to provide suitable transport.

(7) Where an employee supplied with board and lodging by the employer, is required to live more than eight hundred metres from the job, he/she shall be provided with suitable transport to and from that job or be paid an allowance of **$12.22** per day provided that where the time actually spent in travelling either to or from the job exceeds twenty minutes, that excess travelling time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

6. Clause 21. – District Allowance: Delete subclause (6) of this clause and insert in lieu the following—

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

COLUMN I DISTRICT	COLUMN II STANDARD RATE	COLUMN III EXCEPTIONS TO STANDARD RATE	COLUMN IV RATE
	$ Per Week	Town Or Place	$ Per Week
6	62.30	Nil	Nil
5	50.90	Fitzroy Crossing	68.50
		Halls Creek	
		Turner River Camp	
		Nullagine	
		Liveringa (Camballin)	63.80
		Marble Bar	
		Wittenoom	
		Karratha	60.10
		Port Hedland	55.80
4	25.65	Warburton Mission	69.15
		Carnarvon	24.15
3	16.20	Meekatharra	25.65
		Mount Magnet	
		Wiluna	
		Laverton	
		Leonora	
		Cue	
2	11.50	Kalgoorlie	3.80
		Boulder	
		Ravensthorpe	15.30
		Norseman	
		Salmon Gums	
		Marvel Loch	
		Esperance	
1	Nil	Nil	Nil

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

7. First Schedule – Wages—

A. Delete subclause (5) of this schedule and insert in lieu the following—

(5) (a) In addition to the rates contained in subclauses (2) and (3) hereof, employees designated in classifications C 14 to C 7 inclusive shall receive an all purpose industry allowance of **$12.50**.

(b) This allowance shall be paid in two instalments, as follows—

(i) $6.30 of the allowance shall be paid after the first 12 months of Government service; and

(ii) the remaining $6.20 – totalling $12.50 – shall be paid on completion of 24 months of Government service.

(c) The industry allowance shall be adjusted in accordance with any movements to the wage prescribed in subclause (2) hereof, as follows—

(i) the increase shall apply to the 'plus 24 months of service' rate;

(ii) the increase is to be rounded to the nearest ten cents;

(iii) the rate is to be divided by two to calculate instalments in accordance with subparagraphs (i) and (ii) of paragraph (b) hereof, provided that the instalment rates are not expressed in less than ten cents amounts; and

(iv) in the event of such an equal division of the industry allowance not resulting in the rates being expressed in less than ten cent amounts, as provided in subparagraph (iii) hereof, the division shall be unequal and weighted to the 12 months' service instalment.

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

(8) (a) Leading Hands

A tradesperson placed in charge of three of more other employees shall, in addition to the ordinary rate, be paid per week—

	$
If placed in charge of not less than three and not more than ten other employees	20.00
If placed in charge of more than ten and not more than twenty other employees	30.50
If placed in charge of more than twenty other employees	39.20

(b) Any tradesperson moulder employed in a foundry where no other jobbing moulder is employed shall be paid at the rate prescribed for leading hands in charge of not less than three an not more than ten other employees.

(c) A Certificated Rigger or Scaffolder on ships and buildings, other than a Leading Hand, who, in compliance with the provisions of the Occupational Health, Safety and Welfare Act and Regulations 1988, is responsible for the supervision of not less than three other employees, shall be deemed to be a Leading Hand and be paid at the rate prescribed for a Leading Hand in charge of not less than three and not more than ten other employees.

(d) In addition to any rates to which an employee may be entitled under this clause a Mechanic-in-Charge, employed by the Department of Conservation and Land Management in the following towns, shall be paid per week -

	$
Manjimup, Collie	48.90
Harvey, Dwellingup, Mundaring, Yanchep	24.50
Ludlow, Nannup, Margaret River, Kirup, Walpole, Pemberton	12.30
Jarrahdale	12.30

C. Delete subclauses (10) to (12) inclusive of this schedule and insert in lieu the following—

(10) Construction Allowance

(a) In addition to the appropriate rate of pay prescribed in subclause (1) hereof, an employee shall be paid—

(i) **$35.20** per week if engaged on the construction of a large industrial undertaking or any large civil engineering project;

(ii) **$31.70** per week if engaged on a multi-storeyed building but only until the exterior walls have been erected, the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which he/she is required to work. A "multi-storeyed building" is a building which when completed will consist of at least five storeys.

(iii) **$18.70** per week if engaged otherwise on construction work falling within the definition of construction work in Clause 5 – Classification Structure and Definitions of this Award.

(b) Any dispute as to which of the aforesaid allowances applied to particular work shall be determined by the Board of Reference.

(c) Any allowance paid under this subclause includes any allowance otherwise payable under Clause 17 – Special Rates and Provisions of this Award.

(11) **Tool Allowance**

(a) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice, the employer shall pay a tool allowance of—

(i) $11.00 per week to such tradesperson; or

(ii) In the case of an apprentice a percentage which appears against the relevant year of apprenticeship in subclause (5) of this Schedule,

for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of work as a tradesperson or as an apprentice.

(b) Any tool allowance paid pursuant to paragraph (a) hereof shall be included in, and form part of, the ordinary weekly wage prescribed in this Schedule.

(c) An employer shall provide, for the use of tradespersons or apprentices, all necessary power tools, special purpose tools ad precision measuring instruments.

(d) A tradesperson or apprentice shall replace or pay for any tools supplied by the employer, if lost through the negligence of such employee.

(12) **Drilling Allowance**

A driller using a Herbert two-spindle sensitive machine to drill to a marked circumference shall be paid an additional **$1.80 per hour** whilst so engaged.

8. Fifth Schedule – Building Management Authority Wages and Conditions—

A. Delete subclause (5) of this schedule and insert in lieu the following—

(5) Wages—

(a) The wages for Building Management Authority employees as from the first pay period on or after the 11th December 2001 will be as follows—

Classification	On Engagement $	Safety Net Adjustment $	Total Rate Per Week $
Engineering Tradesperson—			
Level 4 - Group A	492.60	88.00	580.60
Group B	502.30	88.00	590.30
Group C	511.70	88.00	599.70
Level 3A	465.40	88.00	553.40
Level 3B	457.70	90.00	547.70
Level 2	442.00	90.00	532.00
Level 1	436.00	90.00	526.00
Engineering Employee			
Level 4 - Group A	406.20	88.00	494.20
Group B	392.70	88.00	480.70
Group C	384.20	88.00	472.20
Group D	381.70	88.00	469.70
Level 3	370.00	88.00	458.00
Level 2	363.00	88.00	451.00
Level 1	341.90	88.00	429.90
Engineering Tradesperson—			
Level 4 - Group A	498.60	88.00	586.60
Group B	508.30	88.00	596.30
Group C	517.70	86.00	603.70
Level 3A	471.10	88.00	559.10
Level 3B	462.60	88.00	550.60
Level 2	447.30	90.00	537.30
Level 1	441.20	90.00	531.20
Engineering Employee—			
Level 4 - Group A	411.10	88.00	499.10
Group B	397.10	88.00	485.10
Group C	388.20	88.00	476.20
Group D	383.90	88.00	471.90
Level 3	374.50	88.00	462.50
Level 2	367.10	88.00	455.10
Level 1	346.00	88.00	434.00
Engineering Tradesperson—	503.60	88.00	591.60
Level 4 - Group A	513.30	88.00	601.30
Group B	523.10	88.00	611.10
Group C			
Level 3A	475.50	88.00	563.50
Level 3B	467.30	88.00	555.30
Level 2	451.50	90.00	541.50
Level 1	445.60	90.00	535.60

Classification	On Engagement $	Safety Net Adjustment $	Total Rate Per Week $
Engineering Employee			
Level 4 - Group A	415.00	88.00	503.00
Group B	401.10	88.00	489.10
Group C	391.90	88.00	479.90
Group D	386.90	88.00	474.90
Level 3	378.00	88.00	466.00
Level 2	370.80	88.00	458.80
Level 1	349.10	88.00	437.10

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

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the award except where such absorption is contrary to the terms of an industrial agreement.

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

(b) Level Classifications—

(i) **"Engineering Tradesperson – Level 4"** includes the classifications of—

Electronics Tradesperson Groups A, B and C
Instrumentation and Controls Tradesperson Groups A, B and C

(ii) **"Engineering Tradesperson – Level 3"** includes the classifications of—

Electrician – Special Class
Mechanical Tradesperson – Special Class
Instrument Tradesperson – Complex Systems

(iii) **"Engineering Tradesperson – Level 2"** includes the classifications of—

Tradesperson with marking off responsibilities
Welder – Special Class
Electrician Tradesperson (Building Management Authority) – Licensed and required to person electrical installing and electrical fitting work

(iv) **"Engineering Tradesperson – Level 1"** includes the classifications of—

Electrical Fitter and/or Armature Winder
Electrical Installer
First Class Machinist
Fitter
Installer – low voltage equipment
Motor Mechanic
Refrigeration Fitter
Welder – First Class

(v) **"Engineering Employee – Level 4"** includes the classifications of—

Certified Rigger and Splicer or Scaffolder on ships and buildings
Tool Storeperson

(vi) **"Engineering Employee – Level 3"** includes the classifications of—

Welder – Second Class

(vii) **"Engineering Employee – Level 2"** includes the classifications of—

Trades Assistant
Welder – Fourth Class

(viii) **"Engineering Tradesperson – Level 1"** includes the classifications of—

Labourer

(c) In addition to the wage rates provided in paragraph (a) hereof, electricians employed by the Building Management Authority will receive an all purpose payment of $20.80 per week.

(d) In addition to the wage rates prescribed in paragraph (a) hereof, by agreement between the employer, the employee and the Union, evidenced in writing, a Mechanical Fitter and a Refrigeration Mechanic may receive 25% loading in lieu of overtime payments.

(e) Leading hand electricians who are required to perform duties over and above those normally required of leading hands shall be paid an all purpose allowance of $28.10 per week in addition to the relevant leading hand rate prescribed in Clause 7 of the First Schedule – Wages of this Award.

B. Delete subclause (7) of this schedule and insert in lieu the following—

(7) Computing Quantities—

An employee, other than a leading hand, who is required to compute or estimate quantities of materials in respect of work performed by others, shall be paid $2.99 per day, or part thereof, in addition to the rates otherwise prescribed in this award.

2001 WAIRC 04318

FOREMEN (BUILDING TRADES) AWARD 1991

No. A5 of 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	MASTER BUILDERS OF WESTERN AUSTRALIA & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	MONDAY, 3 DECEMBER 2001
FILE NO/S	APPLA 1832 OF 2001
CITATION NO.	2001 WAIRC 04318

Result	Award varied
Representation	
Applicant	Ms L Dowden and Ms J Harrison
Respondents	Mr K Richardson
	Mr K Dwyer

Order

HAVING HEARD Ms L Dowden on behalf of the Applicant and Mr K Richardson and Mr K Dwyer on behalf of the Respondents, and by consent, the Commission, being satisfied that the claim complies with the terms of the Wage Fixing Principles set out in the General Order of the Commission No. 752 of 2001, dated 25 July 2001, hereby, pursuant to the powers conferred on it under the Industrial Relations Act 1979, orders—

THAT the Foreman (Building Trades) Award 1991, No. A5 of 1987 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 3rd day of December 2001.

FURTHERMORE, the Commission by consent of the parties, records the following—

(a) The application is to be split into application 1832A of 2001 and application 1832B of 2001 to allow the issue regarding ordinary time earnings to be discussed between the parties.

(b) The calculations relating to the allowances varied in the attached Schedule have been effected as a result of figures supplied from ABS Catalogue 6401.0 (Table 2B), ABS Catalogue 6401.0 (Table 3A), ABS Catalogue 6401.00 (Table 7A), ABS Catalogue 6401.0 (Table 7G) and ABS Catalogue 6401.00 (Table 7I).

(c) Attached following the schedule is Exhibit 1, tendered at hearing, demonstrating the calculation schedule for the variations sought.

(Sgd.) W. S. COLEMAN,
[L.S.] Chief Commissioner.

SCHEDULE

1. Clause 14. - Distant Work

(a) Delete subclause (3)(b) of this clause and insert in lieu thereof the following—

(3) Entitlement—

(b) Pay an allowance of $308.50 per week of seven days but such allowance shall not be wages. In the case of broken parts of the week occurring at the beginning or ending of employment on a distant job the allowance shall be $44.10 per day.

Provided that the foregoing allowances shall be increased if the foreman satisfies the employer that he/she reasonably incurred a greater outlay than that prescribed. In the event of disagreement the matter may be referred to a Board of Reference for determination; or

(b) Delete subclause (4)(a)(iii) of this clause and insert in lieu thereof the following—

(4) Travelling Expenses—

(a) Forward Journey—

(iii) For any meals incurred while travelling at $9.30 per meal.

Provided that the employer may deduct the cost of the forward journey fare from a foreman who terminates or discontinues his/her employment within two weeks of commencing on the job and who does not forthwith return to his/her place of engagement.

(b) Delete subclause (4)(b) of this clause and insert in lieu thereof the following—

(4) (b) Return Journey—

A foreman shall, for the return journey receive the same time, fare and meal payments as provided in paragraph (a) of this subclause together with an amount of $16.10 to cover the cost of transporting himself/herself and his/her tools from the main public transport terminal to his/her usual place of residence.

Provided that the above return journey payments shall not be paid if the foreman terminates or discontinues his/her employment within two months of commencing on the job, or if he is dismissed for incompetence within one working week of commencing on the job, or is dismissed for misconduct.

(c) Delete subclause (6)(a) of this clause and insert in lieu thereof the following—

(6) (a) Weekend Return Home—

A foreman who works as required during the ordinary hours of work on the working day before and the working day after a weekend and who notifies the employer or his/her representative, no later than Tuesday of each week, of his/her intention to return to his/her usual place of residence at the weekend and who returns to his/her usual place of residence for the weekend, shall be paid an allowance of $27.10 for each occasion.

(d) Delete subclause (7)(b) of this clause and insert in lieu thereof the following—

(7) (b) Camping Allowance—

A foreman living in a construction camp where free messing is not provided shall receive a camping allowance of $127.80 for every complete week he/she is available for work. If required to be in camp for less than a complete week he/she shall be paid $18.40 per day including any Saturday or Sunday if he/she is in camp and available for work on the working days immediately preceding and succeeding each Saturday and Sunday. If a foreman is absent without the employer's approval on any day, the allowance shall not be payable for that day and if such unauthorised absence occurs on the working day immediately preceding or succeeding a Saturday or Sunday, the allowance shall not be payable for the Saturday or Sunday.

2. Clause 18. – Fares and Travelling Time

(a) Delete subclause (1)(a) of this clause and insert in lieu thereof the following—

(1) (a) On places of work within a 50 kilometres radius from the General Post Office, Perth, $13.30 per day.

(b) Delete subclause (1)(b) of this clause and insert in lieu thereof the following—

(1) (b) Where an employer's business or branch is situated outside the 50 kilometres radius referred to in (a) and a foreman is engaged for work from that establishment, and is required to report to a job within a 50 kilometres radius from the post office nearest the establishment, $13.30 per day.

(c) Delete subclause (1)(c)(i) of this clause and insert in lieu thereof the following—

(1) (c) Where a foreman travels daily from inside any radius referred to in (a) or (b) to a job outside that area that foreman shall be paid—

(i) $13.30 per day.

(d) Delete subclause (1)(c)(ii) of this clause and insert in lieu thereof the following—

(1) (ii) In respect of travel from the designated radius to the job and return to that radius 39 cents per kilometre and wages for the time spent in such travel.

(d) Delete subclause (1)(d) of this clause and insert in lieu thereof the following—

(1) (d) Where a foreman is transferred from one site to another during working hours, 73 cents per kilometre and wages for the time spent travelling.

2001 WAIRC 04408

GATE, FENCE AND FRAMES MANUFACTURING AWARD

No. 24 of 1971

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGIN & ELECT DIV, WA BRANCH, APPLICANT
	v.
	CAI FENCES AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DELIVERED	TUESDAY, 11 DECEMBER 2001
FILE NO.	APPLICATION 1879 OF 2001
CITATION NO.	2001 WAIRC 04408

Result Award Varied

Order

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

THAT the Gate, Fence and Frames Manufacturing Award be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period commencing on and from 11 December 2001.

(Sgd.) J. F. GREGOR,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 2. – Arrangement: Delete the title for No. 23 and insert in lieu the following—

23. Deleted

2. Clause 7. – Overtime: Delete paragraph (f) of subclause (3) of this clause and insert in lieu the following—

(f) Subject to the provisions of paragraph (h) of this subclause, an employee required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $7.70 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required he/she shall be supplied with such meal by the employer or paid $5.30 for each meal so required.

3. Clause 14. – Special Rates and Provisions: Delete this clause and insert in lieu the following—

(1) Dirt Money: An employee shall be paid an allowance of 39 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

(2) Confined Space: An employee shall be paid an allowance of 46 cents per hour when, because of the dimensions of the compartment or space in which the employee is working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.

(3) Protective Equipment

(a) An employer shall have available a sufficient supply of protective equipment (as, for example, goggles (including anti-flash goggles), glasses, gloves, mitts, aprons, sleeves, leggings, gumboots, ear protectors, helmets, or other efficient substitutes thereof) for use by the employee when engaged on work for which some protective equipment is reasonably necessary.

(b) An employee shall sign an acknowledgement when he or she receives any article of protective equipment and shall return that article to the employer when the employee has finished using it or on leaving the employment.

(c) An employee to whom an article of protective equipment has been issued shall not lend that article to another employee and if he or she does both employees shall be deemed guilty of wilful misconduct.

(d) An article of protective equipment which has been used by an employee shall not be issued by the employer to another employee until it has been effectively sterilised but this paragraph only applies where sterilisation of the article is practicable and is reasonably necessary.

(4) An employee, holding a Third Year First Aide Medallion of the St. John Ambulance Association appointed by the employer to perform first aid duties, shall be paid $7.62 per week in addition to the ordinary rate.

(5) Any dispute under this clause may be determined by the Board of Reference.

4. Clause 19. – Fares and Travelling Time: Delete subclause (2) of this clause and insert in lieu the following—

(2) An employee, to whom subclause (1) of this clause does not apply and who is engaged on construction work or regular repair service and/or maintenance work, shall be paid an allowance in accordance with the provisions of this subclause to compensate for excess fares and travelling time from the employee's home to the place of work and return—

(a) On places within a radius of 50 kilometres from the General Post Office, Perth - $12.60 per day.

(b) For each additional kilometre to a radius of 60 kilometres from the General Post Office, Perth – 62 cents per kilometre.

(c) Subject to the provisions of paragraph (d) of this subclause, work performed at places beyond a 60 kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees, with the consent of the Union, agree in any particular case that the travelling allowance of 62 cents per kilometre shall be paid for each kilometre in excess of 60 kilometres.

(d) In respect to work carried out from an employer's depot situated outside a radius of 60 kilometres from the General Post Office, Perth, the main Post Office in the town in which such depot is situated shall be the centre for the purpose of calculating the allowance to be paid.

(e) Where transport to and from the job is provided by the employer from and to the employer's depot, or such other place more convenient to the employee mutually agreed upon between the employer and the employee, half the above rates shall be paid: provided that the conveyance used for such transport is equipped with suitable seating and weatherproof covering.

5. Clause 20. – Distant Work: Delete subclauses (6) and (7) of this clause and insert in lieu the following—

(6) An employee to whom the provisions of subclause (1) of this clause apply shall be paid an allowance of $25.49 for any weekend the employee returns to the employee's home from the job, but only if—

(a) The employee advises the employer or the employer's agent of the employee's intention not later than the Tuesday immediately preceding the weekend in which the employee so returns;

(b) The employee is not required for work during that weekend;

(c) The employee returns to the job on the first working day following the weekend; and

(d) The employer does not provide, or offer to provide, suitable transport

(7) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of $11.23 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates, whether or not suitable transport is supplied by the employer.

6. Clause 23. – Supplementary Payment: Delete this clause and insert in lieu the following—

23. - DELETED

7. First Schedule – Wages—

A. Delete paragraph (a) of subclause (1) of this schedule and insert in lieu the following—

(a) Adult Employees—

	Rate Per Week	Supplementary Paymentt	Safety Net Adjustment Payment	Total Rate Per week
Machinist (Wire) "A"	333.30	23.30	88.00	444.60
Machinist (Wire) "B"	320.70	18.60	88.00	427.30
Machinist (Wire) Assistant	314.30	17.50	88.00	419.80
Framer "A"	333.30	23.30	88.00	444.60
Framer "B"	310.40	17.50	88.00	415.90
Process Employee	310.40	17.50	88.00	415.90
Wirer	310.40	17.50	88.00	415.90
Welder "A"	363.20	34.10	88.00	485.30
Welder "B"	316.10	18.60	88.00	422.70
Welder "C"	312.00	17.50	88.00	417.50
Painter of Iron Work	319.30	18.60	88.00	425.90
Erector	316.10	18.60	88.00	422.70
Erector's Assistant	310.40	17.50	88.00	415.90
Tool and Material Storeperson	323.10	20.10	88.00	431.20
Tradesperson	363.20	34.10	88.00	485.30
Mechanical Tradesperson - Special Class	386.90	39.00	90.00	515.90

B. Delete subclause (2) of this schedule and insert in lieu the following—

(2) **Leading Hand:** In addition to the appropriate rate prescribed in subclause (1) of this clause, a leading hand shall be paid—

		$
(a)	If placed in charge of not less than three and not more than 10 other employees	20.39
(b)	If placed in charge of more than 10 and not more than 20 other employees	31.20
(c)	If placed in charge of more than 30 other employees	40.17

C. Delete paragraph (a) of subclause (6) of this schedule and insert in lieu the following—

(a) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of their work as a tradesperson or as an apprentice, the employer shall pay a tool allowance of—

(i) $11.30 per week to such tradesperson, or

(ii) In the case of an apprentice a percentage of $11.30 being the percentage which appears against the year of apprenticeship in subclause (a) of subclause (3) of this Schedule.

For the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of their work as a tradesperson or apprentice.

2001 WAIRC 04315

INDUSTRIAL SPRAYPAINTING AND SANDBLASTING AWARD 1991

No. A33 of 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE WESTERN AUSTRALIAN BUILDERS' LABOURERS, PAINTERS & PLASTERERS UNION OF WORKERS, APPLICANT

v.

ABRASIVE BLASTING SERVICES PTY LTD & OTHERS, RESPONDENTS

CORAM CHIEF COMMISSIONER W S COLEMAN

DELIVERED MONDAY, 3 DECEMBER 2001

FILE NO/S	APPLA 1779 OF 2001
CITATION NO.	2001 WAIRC 04315

Result	Award varied
Representation	
Applicant	Ms L Dowden and Ms J Harrison
Respondents	Mr K Dwyer

Order

HAVING HEARD Ms L Dowden on behalf of the Applicant and Mr K Dwyer on behalf of the Respondents, and by consent, the Commission, being satisfied that the claim complies with the terms of the Wage Fixing Principles set out in the General Order of the Commission No. 752 of 2001, dated 25 July 2001, hereby, pursuant to the powers conferred on it under the Industrial Relations Act 1979, orders—

THAT the Industrial Spraypainting and Sandblasting Award 1991, be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 3rd day of December 2001.

FURTHERMORE, the Commission by consent of the parties, records the following—

(a) The application is to be split into application 1779A of 2001 and application 1779B of 2001 to allow the issue regarding ordinary time earnings to be discussed between the parties.

(b) The calculations relating to the allowances varied in the attached Schedule have been effected as a result of figures supplied from ABS Catalogue 6401.0 (Table 2B), ABS Catalogue 6401.0 (Table 3A), ABS Catalogue 6401.00 (Table 7A), ABS Catalogue 6401.0 (Table 7G) and ABS Catalogue 6401.00 (Table 7I).

(c) Attached following the schedule is Exhibit 1, tendered at hearing, demonstrating the calculation schedule for the variations sought.

(Sgd.) W. S. COLEMAN,
[L.S.] Chief Commissioner.

SCHEDULE

1. Clause 17. – Meal Allowance: Delete this clause and insert in lieu thereof the following—

17. - MEAL ALLOWANCE

An employee required to work overtime for at least one and a half hours after working ordinary hours inclusive of any time worked for accrual purposes as prescribed in Clauses 11(1) or 16(4) shall be paid by his/her employer an amount of $9.30 to meet the cost of a meal.

Provided that this clause shall not apply to an employee who is provided with reasonable board and lodging or who is receiving a distant work allowance in lieu thereof as provided for in subclause (3) of Clause 18. - Living Away From Home - Distant Work and is provided with a suitable meal.

2. Clause 18. – Living Away From Home – Distance Work

(a) Delete subclause (3)(b) of this clause and insert in lieu thereof the following—

(3) Entitlement

(b) Pay an allowance of $308.50 per week of seven days but such allowance shall not be wages. In the case of broken parts of the week occurring at the beginning or ending of employment on a distant job the allowance shall be $44.10 per day.

Provided that the foregoing allowances shall be increased if the employee satisfies the employer that he/she reasonably incurred a greater outlay than that prescribed. In the event of disagreement the matter may be referred to a Board of Reference for determination; or

(b) Delete subclause (4)(a)(iii) of this clause and insert in lieu thereof the following—

(4) (a) Forward Journey—

(iii) For any meals incurred while travelling at $9.30 per meal.

Provided that the employer may deduct the cost of the forward journey fare from an employee who terminates or discontinues his/her employment within two weeks of commencing on the job and who does not forthwith return to his/her place of engagement.

(c) Delete subclause (4)(b) of this clause and insert in lieu thereof the following—

(4) (b) Return Journey: An employee shall, for the return journey receive the same time, fare and meal

payments as provided in paragraph (a) of this subclause together with an amount of $16.10 to cover the cost of transporting himself/herself and his/her tools from the main public transport terminal to his/her usual place of residence.

Provided that the above return journey payments shall not be paid if the employee terminates or discontinues his/her employment within two months of commencing on the job, or is dismissed for misconduct.

(d) Delete subclause (6)(a) of this clause and insert in lieu thereof the following—

(6) (a) Weekend Return Home: An employee who works as required during the ordinary hours of work on the working day before and the working day after a weekend and who notifies the employer or his/her representative, no later than Tuesday of each week, of his/her intention to return to his/her usual place of residence at the weekend and who returns to his/her usual place of residence for the weekend, shall be paid an allowance of $27.10 for each occasion.

(e) Delete subclause (7)(b) of this clause and insert in lieu thereof the following—

(7) (b) Camping Allowance: An employee living in a construction camp where free messing is not provided shall receive a camping allowance of $127.80 for every complete week he is available for work. If required to be in camp for less than a complete week he/she shall be paid $18.40 per day including any Saturday or Sunday if he/she is in camp and available for work on the working days immediately preceding and succeeding each Saturday and Sunday. If an employee is absent without the employer's approval on any day, the allowance shall not be payable for that day and if such unauthorised absence occurs on the working day immediately preceding or succeeding a Saturday or Sunday, the allowance shall not be payable for the Saturday or Sunday.

3. Clause 31. – Compensation for Clothes and Tools: Delete subclause (2)(a) of this clause and insert in lieu thereof the following—

(2) (a) An employee shall be reimbursed by his/her employer to a maximum of $1,215.00 for loss of tools or clothes by fire or breaking and entering whilst securely stored at the employer's direction in a room or building on the employer's premises, job or workshop or in a lock-up as provided in this award or if the tools are lost or stolen during an employee's absence after leaving the job because of injury or illness.

Provided that an employee transporting his/her own tools shall take all reasonable care to protect those tools and prevent theft or loss.

4. Clause 47. – Fares and Travel

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

(2) Perth Metropolitan Radial Area

When employed on work located within a radius of 50 kilometres from the G.P.O. Perth, including work at the premises of the employer, $13.30 per day.

(b) Delete subclause (5) of this clause and insert in lieu thereof the following—

(5) Travelling Outside Radial Areas

Where an employee travels daily from inside any radial area mentioned in subclauses (2), (3) or (4) of this clause to a job outside that area, he/she shall be paid:-

(a) the allowance prescribed in subclause (2) of this clause;

(b) in respect of travel from the designated radius to the job and return to that radius—

(i) the time outside ordinary working hours reasonably spent in such travel calculated at ordinary hourly "on site" rates to the next quarter of an hour with a minimum payment of one-half an hour per day for each return journey;

(ii) any expenses necessarily incurred in such travel, which shall be 39 cents per kilometre where the employee uses his/her own vehicle.

(c) Delete subclause (10) of this clause and insert in lieu thereof the following—

(10) Transfer During Working Hours

An employee transferred from one site to another during working hours shall be paid for the time occupied in travelling and, unless transported by the employer, shall be paid reasonable cost of fares by most convenient public transport between such sites.

Where an employer requests an employee to use his/her own vehicle to effect such a transfer and the employee agrees to do so the employee shall be paid an allowance at the rate of 73 cents per kilometre.

2001 WAIRC 04316

PLASTER, PLASTERGLASS AND CEMENT WORKERS' AWARD

No. A29 of 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE WESTERN AUSTRALIAN BUILDERS' LABOURERS, PAINTERS & PLASTERERS UNION OF WORKERS, APPLICANT
	v.
	BELMONT CONCRETE CO & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	MONDAY, 3 DECEMBER 2001
FILE NO/S	APPLA 1780 OF 2001
CITATION NO.	2001 WAIRC 04316

Result	Award varied
Representation	
Applicant	Ms L Dowden and Ms J Harrison
Respondents	Mr K Dwyer

Order

HAVING HEARD Ms L Dowden on behalf of the Applicant and Mr K Dwyer on behalf of the Respondents, and by consent, the Commission, being satisfied that the claim complies with the terms of the Wage Fixing Principles set out in the General Order of

the Commission No. 752 of 2001, dated 25 July 2001, hereby, pursuant to the powers conferred on it under the Industrial Relations Act 1979, orders—

THAT the Plaster, Plasterglass and Cement Workers Award, No. A29 of 1989 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 3rd day of December 2001.

FURTHERMORE, the Commission by consent of the parties, records the following—

(a) The application is to be split into application 1780A of 2001 and application 1780B of 2001 to allow the issue regarding ordinary time earnings to be discussed between the parties.

(b) The calculations relating to the allowances varied in the attached Schedule have been effected as a result of figures supplied from ABS Catalogue 6401.0 (Table 2B), ABS Catalogue 6401.0 (Table 3A), ABS Catalogue 6401.00 (Table 7A), ABS Catalogue 6401.0 (Table 7G) and ABS Catalogue 6401.00 (Table 7I).

(c) Attached following the schedule is Exhibit 1, tendered at hearing, demonstrating the calculation schedule for the variations sought.

(Sgd.) W. S. COLEMAN,
[L.S.] Chief Commissioner.

SCHEDULE

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

(2) Any employee who is called upon to continue working for more than two hours beyond his/her usual ceasing time shall be provided with any meal required or shall be paid an allowance of $6.90 in lieu thereof.

Provided that this subclause shall not apply to any employee who was advised on the previous day that he/she would be required to work such overtime, nor to any employee who can conveniently return home for a meal.

2. Clause 13. – Wages: Delete subclause (2) of this clause and insert in lieu thereof the following—

			Wage Per Week $	Arbitrated Safety Net $	Total Wage Per Week $
(1)	(a)	Modeller	408.90	88.00	496.90
		Tool Allowance			1.36

AWARDS/AGREEMENTS—Application for variation of— No variation resulting—

2001 WAIRC 04456

ENGINE DRIVERS' (BUILDING AND CONSTRUCTION) AWARD.

No. 20 of 1973

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA - WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	MASTER BUILDERS' ASSOCIATION OF WESTERN AUSTRALIA (UNION OF EMPLOYERS), CIVIL AND CIVIC PTY LTD, TRANSFIELD WA PTY LTD, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DELIVERED	WEDNESDAY, 19 DECEMBER 2001
FILE NO.	APPLB 1140 OF 2000
CITATION NO.	2001 WAIRC 04465

Result Discontinued

Order

WHEREAS on 24 July 2000 The Construction, Mining, Energy, Timberyards, Sawmills & Woodworkers Union of Australia, West Australian Branch applied to the Commission for orders pursuant to the *Industrial Relations Act, 1979;* and

WHEREAS on 26 November 2001 the Commission convened a for mention hearing between the parties for 19 December 2001; and

WHEREAS on 19 December 2001 the Applicant Union sought leave to discontinue the matter and leave was granted.

NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act, 1979,* the Commission, hereby orders—

THAT the application be, and is hereby, discontinued.

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

AWARDS/AGREEMENTS—Interpretation of—

2001 WAIRC 04423

VAUGHAN CASTINGS ENTERPRISE AGREEMENT 2000

NO. AG 189 OF 2000

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS' UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, W.A. BRANCH, APPLICANT
	v.
	WALKERS LIMITED, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DELIVERED	FRIDAY, 14 DECEMBER 2001
FILE NO.	APPLICATION 1225 OF 2001
CITATION NO.	2001 WAIRC 04423

Result Application of interpretation agreement dismissed

Order

WHEREAS this is an application pursuant to Section 46 of the Industrial Relations Act 1979; and

WHEREAS on the 6th day of September 2001 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the respondent sought time to consider its position; and

WHEREAS by a facsimile dated the 13th day of December 2001 the Applicant advised the Commission that the parties had reached a mutual agreement to settle the matter;

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,
Commissioner.

[L.S.]

PUBLIC SERVICE ARBITRATOR—Matters Dealt With—

2001 WAIRC 04477

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MINISTER FOR HEALTH, APPLICANT
	v.
	AUSTRALIAN MEDICAL ASSOCIATION (WESTERN AUSTRALIAN BRANCH), RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	THURSDAY, 20 DECEMBER 2001
FILE NO/S.	P 42 OF 2001
CITATION NO.	2001 WAIRC 04477

Result Recommendation issued

Recommendation

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

WHEREAS on the 20th day of December 2001 the Public Service Arbitrator convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the Public Service Arbitrator issued Recommendations in respect of the matter;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby recommends—

1. That the parties meet with a view to discussing the applicant's salary proposal of the 14th day of September 2001 and the respondent's consolidated proposal, which is to be provided to the applicant by 12 noon on the 21st day of December 2001.

2. That the parties base those discussions on resolving salary rates, which are equitable and appropriate, and to be delivered within appropriate time frames. These discussions may require the parties to move away from the restrictions of their previous positions and consider compromise to resolve appropriate and equitable salaries.

3. That the parties use their best endeavours to resolve the matter in a timely fashion.

(Sgd.) P. E. SCOTT,
[L.S.] Commissioner.
Public Service Arbitrator.

2001 WAIRC 04501

RESTRUCTURING ACTIVITIES BEING IMPLEMENTED BY THE POLICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	COMMISSIONER OF POLICE, WESTERN AUSTRALIAN POLICE SERVICE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	THURSDAY, 27 DECEMBER 2001
FILE NO.	PSAC 21 OF 2001
CITATION NO.	2001 WAIRC 04501

Result Recommendation issued

Recommendation

WHEREAS this is an application pursuant to Sections 44 and 80E of the Industrial Relations Act 1979; and

WHEREAS conferences were convened on the 19th and 21st days of December 2001 for the purposes of conciliating between the parties; and

WHEREAS at the conclusion of the conference on the 21st day of December 2001 the Public Service Arbitrator issued Recommendations;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby recommends—

1. THAT in respect of the Administrative Functions Review ("AFR") undertaken by the respondent, the respondent provide to the applicant reports and endorsed recommendations as they become available. The provision of such reports and endorsed recommendations shall be for the purpose of enabling the applicant to consult its members about the subject matter of those reports and endorsed recommendations and consulting with the respondent about such matters, and for no other purpose. Should the applicant or its members wish to use those reports and endorsed recommendations for any other purpose/s, it shall first seek the respondent's agreement

2. THAT the applicant raise with the respondent particularised concerns or issues in response to those reports and endorsed recommendations within two weeks of receipt of such documents. Provided that in respect of reports and endorsed recommendations provided to the applicant on or before 6 January 2002, such two week period shall commence on 7 January 2002.

3. THAT upon the applicant identifying and particularising those issues and concerns referred to in Recommendation 2 the respondent shall pause the implementation process for the review in respect of those particularised concerns for a period of up to two months provided that where the issues are resolved earlier implementation may proceed upon resolution. Such pause is for the purpose of consultation between the applicant and the respondent in respect to—

   (a) endorsed recommendations which have the effect of abolishing positions and/or downwardly classifying positions;

   (b) comparative arrangements in regional areas; and

   (c) the notification of change process.

   Provided that the parties shall make all reasonable efforts to resolve particularised concerns in a timely manner.

4. That where, following consultation between the parties and prior to the expiration of the two month period referred to in Recommendation 3, it is clear that a particularised concern will not be resolved between the parties, the implementation of the process in respect of that particularised concern may proceed.

5. THAT the respondent provide to all administrative and clerical employees communication as to the AFR process undertaken to date with a view to correcting any misapprehensions and alleviating concerns which have been raised by the applicant.

6. THAT no adverse consequences arise for individuals or groups due to concerns raised by the applicant in respect of any of the matters identified in Recommendations 2 and 3.

(Sgd.) P. E. SCOTT,
[L.S.] Commissioner.
Public Service Arbitrator.

2002 WAIRC 04507

CONTINUING EMPLOYMENT OF MS P BINGHAM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE (FORMERLY KNOWN AS MINISTRY OF JUSTICE), RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	THURSDAY, 3 JANUARY 2002
FILE NO.	PSAC 23 OF 2001
CITATION NO.	2002 WAIRC 04507

Result Recommendation issued

Recommendation

WHEREAS this is an application pursuant to Section 44 of the Industrial Relations Act 1979; and

WHEREAS on the 3rd day of January 2002 the Public Service Arbitrator convened a conference for the purpose of conciliating between the parties; and

WHEREAS during the conference the Public Service Arbitrator was advised by the Applicant that—

1. Ms Bingham had occupied a position with the Respondent for approximately 3 years and 8 months, the last period of which being in the absence of her job share partner;
2. in December 2001 the Respondent instigated a disciplinary process against Ms Bingham and suspended her without pay on account of that process;
3. on the 31st day of December 2001 Ms Bingham's fixed term contract came to an end; and
4. the work of the position previously occupied by Ms Bingham is now being performed by another employee of the Respondent; and

WHEREAS during the conference the Respondent advised the Commission that it agreed with the facts noted by the applicant and also noted that the position which Ms Bingham filled on a fixed term contract basis is to be advertised and filled substantively and that if there had been no issue regarding a disciplinary process, in all probability, the Respondent would have extended Ms Bingham's contract of employment to cover the period until the position was substantively filled; and

WHEREAS at the conclusion of the conference the Public Service Arbitrator issued a Recommendation;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby recommends—

1. THAT the Respondent extend Ms Bingham's contract of employment at least until the position previously occupied by her has been through the process of advertising, selection and being substantively filled. This is without prejudice to any future prospects Ms Bingham may have in being permanently appointed to the position arising from any determination which may be made in relation the application P 9 of 2000.
2. THAT should the Respondent decide to continue with the suspension of Ms Bingham's employment without pay in the circumstances of the disciplinary process, then that is a matter for the Respondent subject to the appropriate consideration.

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

[L.S.]

2002 WAIRC 04515

EXTENSION/RENEWAL OF EMPLOYMENT CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE (FORMERLY KNOWN AS MINISTRY OF JUSTICE), RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	P 40 OF 2001
CITATION NO.	2002 WAIRC 04515

Result Application pursuant to s.80E dismissed

Order

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

WHEREAS on the 17th day of December 2001 the Public Service Arbitrator convened a conference for the purpose of conciliating between the parties; and

WHEREAS the conference was adjourned on the basis that the parties required further information; and

WHEREAS on the 24th day of December 2001 the Applicant's representative advised the Public Service Arbitrator that the application would not be pursued; and

WHEREAS on the 7th day of January 2002 the Applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders—

THAT this application be, and is hereby dismissed.

[L.S.]

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

2001 WAIRC 04470

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
DELIVERED	WEDNESDAY, 19 DECEMBER 2001
FILE NO.	P 27 OF 2001
CITATION NO.	2001 WAIRC 04470

Result	Jurisdiction found
Representation	
Applicant	Ms M in de Braekt
Respondent	Mr R Andretich (of Counsel)

Reasons for Decision

1 The applicant has applied to the Public Service Arbitrator, in the following terms—

> "… under sections 80E and 80F of the Industrial Relations Act 1979 (WA)
>
> For actions and/or decision, and/or any related matter or thing of the respondent, specifically in relation to the respondent's decision not to provide Messrs John MacColl, James Fisher and Deans McClue with a report produced for and on behalf of the respondent by Mr Frank Hedges, in response to their concerns about the respondent's conduct in disciplinary proceedings taken against them, the respondent's failure to provide an adequate explanation as to why disciplinary proceedings were ceased by the respondent, and the respondent's failure to provide a written apology to the employees for the detriment they suffered as a result of the discontinued disciplinary proceedings, to be reviewed, nullified, modified or varied, as the Public Service Arbitrator in his/her jurisdiction determines upon the hearing of the matter."

2 Attached to the Notice of Application is a schedule which contains 33 grounds on which the application relies, 30 Particulars, and 4 Orders Sought. Of the Particulars, the first 15 set out the background to this matter. They are—

> "1. Mr John MacColl, Mr James Fisher and Mr Deans McClue ("the employees") are public servants employed by the respondent, and were employed by the respondent in January 1995 as A/Director Prison Operations, Prison Superintendent and Deputy Prison Superintendent respectively.
>
> 2. Mr MacColl has been a public servant continuously for 27 years and has an exemplary record.
>
> 3. Mr Fisher has been a public servant continuously for 28.5 years and has an exemplary record with commendations.
>
> 4. Mr McClue has been a public servant continuously for 28.5 years and has an exemplary record.
>
> 5. In January 1995, Mr James Fisher and Mr Deans McClue were charged with various criminal offences, including attempting to pervert the course of justice.
>
> 6. Mr Fisher and Mr McClue were suspended pending the outcome of the criminal trials and misconduct allegations under the Public Sector Management Act 1994, while Mr MacColl was forcibly and invalidly transferred to the Education Department pending the outcome of misconduct allegations under the Public Sector Management Act 1994.
>
> 7. In December 1996, Mr Fisher and Mr McClue were acquitted of all of the charges laid against them, and all of the remaining charges are (sic) withdrawn.
>
> 8. In December 1996, Mr Fisher and Mr McClue returned to work and all of the misconduct allegations against them and Mr MacColl were discontinued by the respondent, following the lodgement of a writ of certiorari in the Supreme Court.
>
> 9. In January 1997, the employees submitted their written concerns to the respondent in relation to the treatment they had received from the respondent associated with allegations of criminal offences and misconduct having been committed.
>
> 10. In June 1997, the employees received correspondence from the respondent stating that it would not pursue the grievances and that the employees: "*should put the matter behind you and get on your (sic) with your lives*."
>
> 11. The employees submitted a complaint to the Anti Corruption Commission (ACC) in relation to the respondent's approach to the disciplinary matters.

12. The respondent was ultimately unable to avoid its obligation to inquire into the employees' concerns about the respondent's conduct in relation to the disciplinary matters.

13. Mr Frank Hedges was subsequently appointed to examine the employees' concerns and to provide a report containing the products of the examination.

14. The employees participated in Mr Hedges (sic) examination of their concerns, in good faith and with the legitimate expectation that they would be given an opportunity to respond to the report in draft form and would be provided with a complete and unedited copy of the final report and related documents.

15. The respondent informed the employees that it was in receipt of the report completed by Mr Hedges ("Hedges Report") in relation to their concerns, but that it was not going to take any action in response to the report, but the respondent failed to provide any accompanying adequate reasons."

3 The remainder of the Particulars do not deal with matters which are relevant for the purposes of determination of jurisdiction as they relate to matters of merit.

4 The Orders sought by the application are—

"1. The decision of the respondent to deny Messrs MacColl, 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 MacColl, Fisher and McClue, complete and unedited copies of the Hedges Report and all related documents, within 7 calendar days of the date of this 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.

4. The respondent is to pay Messrs MacColl, Fisher and McClue damages (insert specific amount)* within 7 days of the date of this order, for breaching its obligation to maintain faith and confidence in the employment relationship, by failing to provide them with a copy of the Hedges Report.

* The applicant respectfully reserves the right to address the PSA 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 then need to be inserted."

5 Of the grounds, other than those dealing with the Arbitrator's powers and administrative law, almost all relate to the respondent's decision not to release the Hedges Report to the officers. Others relate to a claimed entitlement on the part of the officers to adequately detailed reasons for decisions in response to concerns expressed. Other grounds relate to the respondent's failure to explain its decision to discontinue disciplinary proceedings against the person the subject of the officers' complaints which resulted in the Hedges Report. Ground 32 asserts that the officers have a "procedural and substantive legitimate expectation to be provided with a written apology from the respondent for any detriment (the officers) suffered as a result of the commencement of the disciplinary proceedings which were later discontinued without explanation."

6 The Particulars, apart from setting out the background to the Hedges Report, deal with the respondent's failure to provide any reasons for failing to take any action in response to the Hedges Report and the respondent's failure to provide the officers with a copy of the Hedges Report and related documents. It is asserted that the respondent's failure to provide the Hedges Report to the officers has left the "employees burdened with a stigma which has adversely affected their career progression and personal lives", and "has prevented the resolution of and finalisation of the matter which has detrimentally affected, and continues to detrimentally affect industrial relations in the workplace".

7 At Particular 24 it is asserted that the respondent has failed to apologise to the officers "for any detriment caused to them as a result of the respondent pursuing the misconduct allegations (against them), nor has the respondent ever offered any explanation to the employees as to why it ceased the disciplinary matter".

8 Particulars 25, 27, 28, 29 and 30 speculate about the contents of the Hedges Report and related documents and their impact on the officers and on industrial relations in the workplace.

9 I note in passing, that the Commission is a tribunal which is directed to exercise its jurisdiction according to equity, good conscience and the substantial merits of that case without regard to technicalities or legal forms. Yet, the application as filed is overly legalistic, convoluted, unnecessarily complicated and repetitious. The expression and format of the schedule add confusion and complexity to attempting to identify the issues for consideration. A far less complex, more straightforward approach would be both appropriate and helpful.

10 In its Notice of Answer and Counter Proposal, filed on 14 September 2001, the respondent challenges the Arbitrator's jurisdiction to deal with this matter.

11 On the basis of the requirements that jurisdiction be determined prior to a matter proceeding, in accordance with the decision in *Springdale Comfort Pty Ltd v Building Trades Association* 67 WAIG 324, the Public Service Arbitrator convened for the purpose of enabling the parties to address written submissions in respect of the issue of jurisdiction. The parties have spent a good deal of their written submissions dealing with the applicant's assertion that the Commission is "a tribunal of equitable jurisdiction." It is not my intention to address that matter in particular but merely to note that the Commission is a creature of statute. Its jurisdiction is set out in the Industrial Relations Act 1979 and in dealing with any matter, the Commission is required to act according to equity, good conscience and substantial merits of the case. However, the requirement to act in that manner is subject to the Commission having jurisdiction to deal with the matter before it.

12 The Commission's jurisdiction is set out in s.23 of the Industrial Relations Act 1979 and it is, subject to the Act, to enquire into and deal with any industrial matter.

13 The jurisdiction of the Public Service Arbitrator is set out in s.80E and it is that—

80E. Jurisdiction of Arbitrator

(1) Subject to Division 3 of Part II and subsections (6) and (7), an Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a Government officer, a group of Government officers or Government officers generally.

(2) Without limiting the generality of subsection (1) the jurisdiction conferred by that subsection includes jurisdiction to deal with —

(a) a claim in respect of the salary, range of salary or title allocated to the office occupied by a Government officer and, where a range of salary was allocated to the office occupied by him, in respect of the particular salary within that range of salary allocated to him; and

(b) a claim in respect of a decision of an employer to downgrade any office that is vacant."

14 The Public Service Arbitrator's jurisdiction is, as noted in subsection (1) subject to Division 3 of Part II and to subsections (6) and (7). Subsections (6) and (7) provide for the Arbitrator to refer matters to the Commission in Court Session or to the Full Bench for consideration, and deals with the limitations on such referral pursuant to s.97(1)(a) of the Public Sector Management Act 1994. Therefore, subsections (6) and (7) are not relevant in this consideration.

15 Division 3 of Part II of the Act is that Division which deals with power of the Commission to make General Orders, and is also not relevant to this matter.

16 Accordingly, the jurisdiction of the Arbitrator for the purposes of this matter is an exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer, a group of government officers or government officers generally. It is not a jurisdiction which goes beyond that. Section 80F provides for referral of matters by a number of bodies including organisations or associations, and the applicant is such a body.

17 The applicant says that there is no inhibition on the Arbitrator giving pure declaratory relief but in any event says that what is sought by this application is not pure declaratory relief.

18 The applicant also refers to s.80E(5) of the Industrial Relations Act 1979 which says that:

> " … any act, matter or thing done by an employer in relation to any such matter is liable to be reviewed, nullified, modified or varied by an Arbitrator in the course of the exercise by him of his jurisdiction in respect of that matter under this Division."

19 This provision does not extend the jurisdiction of the Arbitrator but merely provides what the Arbitrator may do in respect of any industrial matter before it. That does not mean that any action or decision of the employer may be reviewed, nullified, modified or varied by the Arbitrator. Such would be the case only in respect of those matters which fall within the jurisdiction of the Arbitrator, being industrial matters.

20 The question then arises as to whether the application deals with an industrial matter.

21 The respondent says that no industrial matter arises. The respondent also says that "not every matter that arises between employer and employee … constitutes an industrial matter" and refers to the decision of Gibbs CJ in *Federated Clerks Union v Victorian Employer's Federation* 154 CLR 472 at 480. In this decision, His Honour noted that the matter must directly involve the relationship of employer and employee or arise out of that relationship. There must be a relevant connection between what is demanded and the relationship of employer and employee.

22 The respondent says that the connection between the Hedges Report and the officers represented by the applicant is not direct in the sense required to come within the ambit of an industrial matter. It says that the release of the Report does not relate to the work or duties of those officers, nor is it a privilege or right normally accorded to officers of the Ministry. The respondent says that "it is only in an incidental sense that it concerns the officers, not in the sense which would constitute the issue an industrial matter."

23 The respondent then goes on to challenge the Arbitrator's jurisdiction to grant damages for breach of contract and refers to the obligation of the employee to bring the contract to an end where such a breach arises, or to be seen to waive any objection where the breach does not lead to termination.

24 In respect of the claim for an apology, the respondent says that this brings with it the implication that the disciplinary proceedings brought were improperly commenced and maintained and this would appear to be a matter of merit. The respondent says that an order requiring the relief sought would be of an injunctive nature which the Commission can only make for the purpose of assisting in conciliation.

25 In the decision in the *Minister for Police and the Commissioner of Police v Western Australian Police Union of Workers 1995* 75 WAIG 1504 Kennedy J., with whom the other members of the Industrial Appeal Court agreed, dealt with the definition of industrial matters in the context of the Industrial Relations Act 1979 and distinguished that definition from the definition contained in the Commonwealth Act. His Honour said—

> "In my opinion, the general words of the definition "industrial matter" in s 7 of the Act provide a definition considerably wider in its coverage than that of "industrial matters" in the Commonwealth Act. Unlike the Commonwealth definition, its terms are not directed initially to the question whether the matter in issue "pertains" (ie belongs to or is within the sphere of) the relations of employers and employees as such. Rather, it is directed to the question whether the matter in issue affects or relates to the work, privileges, rights or duties of employers or employees or an employer or employee in any industry. It seems to me that this requires initial identification of what it is, within the description of "work, privilege, rights or duties" of the employer or employee or employers or employees (as the case may require), that is said to be affected by or related to the claimed industrial matter. If that cannot be identified, then the issue does not concern an industrial matter. If, however, it can be identified, then the inquiry is next directed to establishing whether the matter in issue does, as a matter of fact, affect or relate to the identified "work, privilege, right or duty". Only if it can be found so to do can it be an "industrial matter" within the meaning of the Act. In my opinion, to approach the question in reliance on authorities based on the definition in the Commonwealth Act is to distract from the true question. Whilst it is implicit in the wording of the definition in s 7 that the "matter" must be connected with the relationship between the employer and employee in their respective capacities as such, to determine the issue on the further requirement expressed in the *Manufacturing Grocers Employees* case that the matter must not only be so connected, but must also be "direct and not merely consequential", diverts from the necessity of determining whether the matter in fact affects or relates to the identified work, privilege, right or duty. The test in the *Manufacturing Grocers Employees* case concentrates on the nature and degree of the "connection" between the "matter" and the employer and employee relationship rather than the test provided for by the definition in s 7."

26 The question is then, does the application raise a matter of the work, privilege, rights or duties, and, as His Honour noted, is it in the relationship of employer and employee in their respective capacities as such?

27 The application raises most clearly a claim for the provision of a report, the Hedges Report. That Report arises from an investigation into the conduct of the respondent in dealing with the officers regarding disciplinary matters and charges made against them. Those disciplinary matters were later ceased and the charges dropped. Those disciplinary matters and charges related to the officers' conduct in their employment. This claim for the provision of the Hedges Report is that dealt with by the bulk of the Grounds and by Orders Sought numbered 1, 2 and 4. However, that is not the limit of the application. It also seeks an order that the respondent provide a written apology to the officers for any detriment they suffered as a result of the disciplinary proceedings taken against them and subsequently discontinued (Orders Sought Number 3). The Grounds and Particulars also allege detriment to the officers in their career progression. It seems to be assumed in the framing of the application that either the Hedges Report will identify for the officers that they have suffered detriment, or they seek to demonstrate to the Arbitrator that such detriment has occurred.

28 The Public Sector Management Act 1994 and the Industrial Relations Act 1979 make provision for disciplinary matters to be dealt with by the Arbitrator. Such a matter relates to the conduct or performance of an employee in the course of his or her employment. The complaints raised by the officers the subject of this matter as to their treatment by their employer in the disciplinary process was at least one of the causes for Mr Hedges undertaking an investigation and providing a report. If the question before the Arbitrator relates to the treatment of the officers by the employer in their respective capacities as employees and employer then it is certainly an industrial matter. The third order sought clearly indicates an issue of detriment to the officers as a consequence to disciplinary proceedings taken against them by their employer in their capacities as employees. In this regard an industrial matter arises.

29 As to the provision of the Hedges Report which deals with the employer's conduct towards the officers, this is merely consequential upon that other matter of the employer's treatment of the officers in their disciplinary proceedings. Whether the officers have a right or a privilege of being provided with a copy of the Report is to be determined.

30 Accordingly, I find that insofar as the application seeks that the Arbitrator inquire into and determine whether the respondent has caused detriment to the officers as a result of disciplinary proceedings, an industrial matter arises. Insofar as the application seeks as its primary remedy a copy of the Hedges Report, I find that the application deals with a matter which is consequential on an industrial matter. As Kennedy J. concluded in the *Hon Minister for Police and Commissioner of Police v Western Australian Police Union of Workers* (supra) for the purposes of the definition of industrial matter in the Industrial Relations Act 1979 as compared with the definition in the Commonwealth Act, that a matter is not direct and merely consequential should not divert "from the necessity of determining whether the matter in fact affects or relates to the identified work, privilege, right or duty." I find that the application raises a matter affecting or relating to work, and to a dispute as to whether the provision of the Hedges Report is a privilege or right. As such an industrial matter arises and is to proceed to hearing as to the merits.

31 As to the issue of the jurisdiction to order the damages raised in the fourth Order sought, I note that the applicant has referred to the decision of the Full Bench in *Terence Hurley Johnson v State Government Insurance Commission*. In this matter, the majority of the Full Bench answered the question of law referred by the Public Service Appeal Board as to whether "the Public Service Appeal Board had jurisdiction to award compensation in a claim of unlawful or unfair dismissal where there is no existing or prospective continuing relationship of employer or employee", - "yes". However, the Full Bench decision was the subject of an appeal to the Industrial Appeal Court which overturned the Full Bench decision. Its reasons related to the powers of the Public Service Appeal Board to "adjust" the decision of the employer as contained within s.80I of the Industrial Relations Act 1979. The Industrial Appeal Court found that there was no power to award compensation in that regard. (77 WAIG 2169)

32 This matter comes to the Arbitrator via s.80E. The Commission's powers contained within s.23 of the Industrial Relations Act 1979 apply to the Arbitrator and particular remedies are not prescribed. The Arbitrator is empowered by s.80E to enquire into and deal with an industrial matter. Section 80E(5) provides that "any act, matter or thing done by an employer in relation to any (matter within the jurisdiction of the Arbitrator) is liable to be reviewed, nullified, modified or varied …" Does the awarding of damages come within either the power to enquire into and deal with or to review, nullify, modify or vary? The Macquarie Dictionary defines each of the last four terms. Set out below are relevant aspects of those definitions.

> **"review,** *n* ... **3.** a viewing again; a second or repeated view of something. … **5.** a viewing of the past; contemplation or consideration of past events, circumstances, or facts. **6.** a general survey of something, esp. in words; a report or account of something. **7.** a judicial re-examination, as by a higher court, of the decision or proceedings in a case. [F *revue*, orig. pp. fem. of *revoir* see again, from L *revidere*] -*v.t.* **8.** to view, look at, or look over again. **9.** to inspect, esp. formally or officially. **10.** to look back upon; view retrospectively. ... **14.** *Law*. to re-examine judicially.
>
> **nullify, 1.** to make ineffective, futile, or of no consequence. **2.** to render or declare legally void or inoperative: *to nullify a contract*.
>
> **modify,** -*v.t.* **1.** to change somewhat the form or qualities of; alter somewhat. ... **5.** to reduce in degree; moderate; qualify. –*v.i.* **6.** to change; to become changed.
>
> **vary,** -*v.t.* **1.** to change or alter, as in form, appearance, character, substance, degree, etc. **2.** to cause to be different, one from another. **3.** to diversify (something); relieve from uniformity or monotony. … **5.** to be different, or show diversity. **6.** to undergo change in form, appearance, character, substance, degree, etc. … **9.** to diverge; deviate (usu. fol. by *from*)."

33 These definitions, then, provide for the Arbitrator, in respect of any decision of an employer in relation to a matter within jurisdiction, to re-examine, considering the past events and circumstances or facts; to make that decision of the employer ineffective or render or declare it legally void or inoperative; to change the decision somewhat, to reduce in degree, or moderate or qualify it; to change, alter, or cause it to be different. There is no provision for the Arbitrator to compensate an employee for any injury associated with a decision of the employer which it has reviewed, nullified, modified or varied. None of the terms "reviewed", "nullified", "modified", or "varied" encompasses the payment of damages.

34 Further the general powers of the Commission do not envisage the awarding of damages. The concept of damages is not encompassed by the Industrial Relations Act 1979. The Commission's only powers to award anything touching on similar matters is the awarding of compensation for loss or injury associated with an unfair dismissal as prescribed by s.23A. Section 23A sets out clear powers in that regard. I find that there is no power to award Order 4 as sought.

35 Accordingly, the merits of the application can proceed to hearing and determination.

2001 WAIRC 04502

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	FRIDAY, 28 DECEMBER 2001

FILE NO.	P 27 OF 2001
CITATION NO.	2001 WAIRC 04502

Result	Declaration issued
Representation	
Applicant	Ms M in de Braekt
Respondent	Mr R Andretich (of Counsel)

Declaration

HAVING heard Ms M in de Braekt on behalf of the Applicant and Mr R Andretich, of counsel, on behalf of the Respondent;
NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred by the Industrial Relations Act, 1979 hereby declares —

THAT the Public Service Arbitrator has jurisdiction to deal with the application.

[L.S.]

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

2002 WAIRC 04514

FAILURE TO CONVERT EMPLOYEE TO PERMANENT STATUS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	MANAGING DIRECTOR, CENTRAL WEST COLLEGE OF TAFE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	P 54 OF 2001
CITATION NO.	2002 WAIRC 04514

Result	Application pursuant to s.80 E withdrawn by leave

Order

WHEREAS this is an application pursuant to Section 80E of the Industrial Relations Act 1979; and
WHEREAS on the 7th day of January 2002 the Applicant filed a Notice of Discontinuance in respect of the application;
NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders—

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

[L.S.]

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

2001 WAIRC 04489

TO VARY WAGES AND CONDITIONS OF MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	THE MANAGING DIRECTOR, MINISTRY OF HOUSING, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	FRIDAY, 21 DECEMBER 2001
FILE NO.	P 37 OF 2000
CITATION NO.	2001 WAIRC 04489

Result	Application to the Public Service Arbitrator dismissed

Order

WHEREAS this is an application pursuant to the Industrial Relations Act 1979; and
WHEREAS on the 11th 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 Applicant sought further particulars from the Respondent and time to consider its position; and

WHEREAS by an e-mail to the Commission dated the 20th day of December 2001 the Applicant sought to withdraw 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,
Commissioner.
Public Service Arbitrator.

[L.S.]

2001 WAIRC 04454

DISPUTE REGARDING ALLEGED BREACH OF PROMOTION PROCEDURES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE WESTERN AUSTRALIAN POLICE UNION OF WORKERS, APPLICANT
	v.
	COMMISSIONER OF POLICE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	TUESDAY, 18 DECEMBER 2001
FILE NO.	PSAC 20 OF 2001
CITATION NO.	2001 WAIRC 04454

Result Recommendation issued

Recommendation

WHEREAS this is an application pursuant to Section 44 of the Industrial Relations Act 1979 regarding the process of selection for promotions of 12 Senior Sergeant positions advertised in the Police Gazette on 20 September 2001; and

WHEREAS on the 14th and 18th days of December 2001 the Public Service Arbitrator convened conferences for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of the conference on the 18th day of December 2001 the Public Service Arbitrator issued a Recommendation;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby recommends—

1. THAT the process for the selection for promotions of 12 Senior Sergeant positions advertised in the Police Gazette on 20 September 2001 be ceased forthwith.
2. THAT the Respondent review its selection process and procedures.
3. THAT the 12 Senior Sergeant promotion positions be readvertised and a new panel be established for the purposes of undertaking the procedures in relation to those positions.

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

[L.S.]

INDUSTRIAL MAGISTRATE—Complaints before—

IN THE INDUSTRIAL MAGISTRATES' COURT OF WESTERN AUSTRALIA HELD AT PERTH

Complaint No. 240 of 2000

Date Heard: 7 December 2000

Date Delivered : 11 January 2001

BEFORE: Mr G. Cicchini I.M.

Between—

Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers' Union of Australia – Western Australian Branch

Complainant

and

Reginald Leslie Kernaghan and Margreta Aline Kernaghan trading as Kernaghan's Joinery and Cabinet Makers

Defendants

Appearances—

Ms J. Harrison of the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers' Union of Australia – Western Australian Branch appeared on behalf of the Complainant.

Mr G. McCorry of Labourline- The Employment Law Specialists appeared as agent on behalf of the Defendants.

Reasons for Decision

The Parties

The Complainant union is an industrial organisation registered pursuant to the provisions of the Industrial Relation Act 1979 as amended. The Defendants are partners in a firm, which at the material time traded as Kernaghan's Joinery and Cabinet Makers.

The Complaint and Issues

The Complainant alleges that on 13 August 2000 at Perth the Defendants failed contrary to clause 28(6) of the *Building Trades (Construction) Award 1987, No. R14 of 1978* (the award) to make available copies of the time and wage records relating to their employee Giuseppe Caruso. It is alleged that Mr Caruso was employed in the building construction industry as a carpenter and joiner being one of the callings set out in clause 8 of the award.

The Defendants say that Mr Caruso was not employed on construction work as defined in the award and say further that he was not employed in any of the callings set out in clause 8 of the award. The Defendants maintain that at all material times Mr Caruso was employed as and performed the work of a cabinet-maker and was therefore subject to the provisions of the *Furniture Trades Industry Award No. A6 of 1984.* The Defendants also take the view that Mr Caruso was eligible to be a member of The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, W.A. and therefore not eligible to be a member of the Complainant organisation.

On 10 August 2000 the Complainant requested pursuant to clause 28(6) of the award that time and wage records relating to Mr Caruso be made available to the Complainant for inspection. On 13 August 2000 Graham McCorry on behalf of the Defendants declined to comply with the Complainant's request. The Defendants' refusal to comply with the request stemmed from their view that Mr Caruso was not covered by the award and that they therefore were not obliged to provide or make available to the Complainant any records relating to the employment of Mr Caruso.

Alternatively the Defendants argue that they were not obliged to provide or make available their records relating to the employment of Mr Caruso because the person who on 10 August 2000 made the request for the provision of the records was not a duly accredited official under the rules of the organisation of employees bound by the award. The Defendants suggest that the condition precedent enabling the operation of clauses 28(5) and 28(6) (in the pleading (8)) of the Award was not therefore satisfied.

Witnesses

The Complainant called Giuseppe Caruso the subject of the complaint to give evidence. Mr Caruso testified that he was trained in Italy in the trade of cabinet making and joinery. He immigrated to Australia in 1965. Since his arrival in Australia he has worked in differing capacities. He has in the past worked variously as a furniture maker, cabinet-maker and joiner. However the issue to be determined in this matter is the nature of the calling carried out by Mr Caruso over the last 6 years whilst employed by the Defendants.

The Complainant also called Mr David Simpson. Mr Simpson is a qualified carpenter and joiner. He has worked in that calling within the building construction industry over the last 18 years. He is a former organiser of the Complainant and is currently employed as a carpenter with Walter Constructions at Canning Dam. He holds the position of shop steward on that job. Construction Training of Australia also employs him as a Skills Assessor. His function in that capacity is to assess the competency of those persons seeking trade certificate accreditation. Mr Simpson was called as an expert witness to testify on the issue inter alia of whether the work carried out by Mr Caruso during the material time was that of a carpenter and joiner engaged within the building construction industry.

The other witness called by the Complainant was Paul Joyce. He is an Industrial Officer with the Complainant union and other unions. It was Mr Joyce who on 10 August 2000 requested the Defendants to provide their time and wage records pursuant to clause 28(6) of the Award.

The Defendants called two witnesses. They were the male Defendant namely Reginald Kernaghan and the Defendants' former employee namely Peter Gersmanis. Mr Gersmanis' company took over the Defendants' business when they ceased trading on 3 August 2000. The Defendants' business name of Kernaghan's Joinery and Cabinet Makers was deregistered on that day pursuant to section 19(1)(a) of the *Business Names Act*. The Defendants' business was taken over by Kernaghan's Serene Interiors Pty Ltd of which Mr Gersmanis is a director. The Defendants had employed Mr Gersmanis in the capacity of apprentice cabinet-maker until he ultimately qualified as a tradesman in December of 1999. Thereafter he worked for the Defendants as a tradesman until August 2000. Whilst apprenticed to Mr Kernaghan, Mr Gersmanis was assigned to assist Mr Caruso in his duties. He considered Mr Caruso to be his supervisor.

The Evidence

The Defendants operated a joinery and cabinet making business. The business carried out work in manufacturing and installing kitchen cupboards, built in robes, bathroom units, wardrobes, office furniture and retail furniture. In the last ten years the Defendants also carried out what has been described as "maintenance work" for a major client namely Woolworths.

Mr Caruso's involvement with the Defendants commenced in about 1972 when Mr Kernaghan bought some of Mr Caruso's machinery following his decision to cease operating as a self employed cabinet-maker and joiner. At that time Mr Kernaghan offered Mr Caruso employment as a cabinet-maker. That offer was accepted and thereafter Mr Caruso worked for the Defendants in that capacity. Notwithstanding that he was employed as a cabinet-maker Mr Caruso worked from time to time within the Defendants joinery shop. It is clear that Mr Caruso's involvement in the joinery section of the Defendants' business was minor. In the main Mr Caruso's employment with the Defendants leading up to the Woolworths work was that of cabinet making. Indeed even in the early stages of the Woolworths engagement Mr Caruso was involved in the manufacture and installation of checkout counters. In that regard he was clearly engaged in cabinet making.

Soon after obtaining the Woolworths work it became apparent that the Defendants could not cope with the demands made by Woolworths. Woolworths required the Defendants to manufacture up to nineteen checkout counters a week and then install them out of trade hours. In view of the Defendants' inability to meet such demand it was arranged that checkout counters be manufactured in the eastern states and transported to Western Australia. The pre-packaged checkout counters from the eastern states were unpacked, assembled and fixed in Woolworth stores by the Defendants. If any damage were done to the checkout counters in the course of transportation then the Defendants would repair such damage. The Defendants also carried out any necessary modifications. The Defendants also provided Woolworths with "one off" pieces of furniture whether it be office or retail. In addition the Defendants were engaged to carry out "maintenance work" for Woolworths. Such work was varied and was of course dependent upon the needs of their client. As part of their duties the Defendants fixed jammed cash draws, fixed doors, hung signs, put up railings and did all work of a carpentry nature that was required by Woolworths. The Defendants also assembled and installed metal shelving in Woolworths Liquor Stores. The various aspects of the Woolworths work could take anything between a few minutes to a few hours or could take days. The Defendants in the main provided their services to Woolworth's metropolitan

stores and its head office. There was from time to time some country work but the mainstay of the Defendants' work for Woolworths remained within the metropolitan area.

Mr Kernaghan testified that a few years ago Mr Caruso advised him that his eyesight was failing and that he accordingly found it difficult to work with cupboard plans and to mark out cupboards for manufacture. Mr Caruso told Mr Kernaghan that he preferred to work installing cabinets rather than manufacturing them. In consequence Mr Caruso's duties changed. Thereafter his involvement in cabinet manufacturing reduced. In the mornings he would turn up to the workshop and take the loaded truck out on the road and attend to the installation of cabinets. On some occasions if the truck was not ready he would assist in the loading of the truck. Following the installation of the cabinets Mr Caruso would return to the workshop and assist in the cabinet making. In some instances he would help out in the joinery shop. Mr Caruso also carried out all the Woolworths maintenance work. Mr Kernaghan conceded that during the last four years of his employment Mr Caruso, by reason of his failing eyesight, spent much more of his time on site. He went on to say that Mr Caruso could be on site three and half to four days a week. He would arrive at the factory in the morning and if the job was not ready to go out at 7.00 a.m. he would assist in getting the job ready to go out. Thereafter with the assistance of an apprentice he would go out and install cabinets or do maintenance work. If he arrived back at the factory at two or three in the afternoon following installation or maintenance work he would join in and help the cabinet-makers in their work. Mr Kernaghan conceded that the maintenance component of the Woolworths work amounted to about eighty percent of the entire Woolworths contract and that he considered such maintenance to be a subset of the cabinet making division of his business. He told the Court that the cabinet making division of his business generates about seventy five percent of the business' revenue.

Mr Caruso's evidence concerning the work that he performed for the Defendants is not dissimilar to Mr Kernaghan's evidence. Mr Caruso testified that the Woolworths work formed the main part of his duties and indeed accounted for a major part of the Defendants' work. Mr Caruso said that there were a total of fifty-four Woolworths shops in respect to which the Defendants provided maintenance services. He explained that other than the task of installing new checkout counters, his duties included replacing doors, fixing hinges, constructing shelves, hanging signs, erecting prefabricated aluminium "fencing" and sometimes building timber walls. Apart from the Woolworths work he installed furniture at schools. Such furniture sometimes consisted of kitchen furniture, cupboards and/or shelving for libraries and the like. He also installed cupboards and built shelves at Brightwater Retirement Homes. Mr Caruso testified that given the nature of the work he carried out, only short periods of his workday was usually spent in the factory. He spent a whole day in the factory only once in a blue moon.

Mr Gersmanis' evidence concerning how much time Mr Caruso worked on site varied considerably. Indeed he was reluctant to be drawn precisely on the issue claiming that it was difficult to assess and remember. He maintained that Mr Caruso worked considerable periods within the factory premises. He maintained that he could recall building a kitchen with Mr Caruso and that took a week. I gained the impression that for reasons best known to Mr Gersmanis that he down played the extent to which Mr Caruso worked on site. In other respects Mr Gersmanis' evidence corroborates that of Mr Caruso. In particular he confirmed that Mr Caruso measured up jobs, read plans for installations and that he carried out maintenance duties as described by Mr Caruso.

Accordingly on the testimony of Mr Caruso, Mr Gersmanis and Mr Kernaghan it is possible to conclude, and I do conclude, that over the last few years and in particular in the last four years of his employment with the Defendants Mr Caruso worked mainly on site. He would rarely spend a whole day working in the capacity of cabinet-maker in the Defendants' factory. Mr Caruso's attendances at the factory were only for a few hours on any given day. On the limited occasions he was at the Defendants' factory he carried out cabinet making and assisted others in that regard. Such factory work when added together amounted only to a total of about one to one and half days work per week. I find that the rest of the time was spent on site. Whilst on site Mr Caruso fixed cabinets be they kitchen cupboards or other cabinets manufactured by the Defendants. He also assembled and fixed checkout counters manufactured in the Eastern States for Woolworths. I find that Mr Kernaghan generally set out the counters when a whole bank of counters had to be installed. On other occasions Mr Caruso read the plans and installed furniture with the assistance of another or other employees.

I further find that in the course of carrying out maintenance work Mr Caruso was engaged in repairing and fixing doors, erecting signs, erecting balustrading (which Mr Caruso called "fences"), erecting metal shelving and even on the odd occasion building walls. He also installed one-off pieces of furniture for Woolworths whether it be office or retail. Furthermore he installed cupboards at Brightwater and at schools.

Much of the evidence given by Mr Caruso and Mr Kernaghan concerning Mr Caruso's duties is not in dispute. The greatest aspect of dispute arises in the evidence of Mr Gersmanis. Where there is a conflict between the evidence of Mr Germanis and that of Mr Caruso I prefer the evidence of Mr Caruso.

I now turn to consider the evidence of the other witnesses. I deal firstly with Mr Joyce's evidence. I can be satisfied on his testimony that he was at the material time a duly accredited representative of the Complainant. Mr Joyce's evidence is otherwise unremarkable and I find no difficulty with it. I need not comment further with respect to his evidence.

Mr Simpson's evidence was of some but limited use. He made an assessment of Mr Caruso's calling by listening to Mr Caruso's evidence and then relating that to competency check list he uses for evaluating competency for those seeking a trade certificate in General Construction (Carpentry–Framework/Formwork/Finishing). There can be no doubt that such an assessment was cursory at best. Furthermore it was obvious that on Mr Simpson's evaluation Mr Caruso did not meet a number of competency standard criteria. Mr Simpson said that was not critical in itself because although a person may not meet the certification criteria that of itself does not mean that such a person is not a carpenter and joiner.

Mr Simpson gave evidence concerning the work he carried out whilst working at Myers at the Morley Galleria Shopping Centre. The work he carried out at that place was the same as or similar to the type of work carried out by Caruso. Nevertheless it was evident from his testimony that such work carried out by him comprised only a relatively small portion of his work. Accordingly such evidence although limited is useful in its application in establishing that Mr Caruso worked in the building construction industry in the calling of carpenter and joiner.

Finally Mr Simpson's evidence concerning the type of work carried out by certain named respondents to the award was not from his own knowledge but rather based on hearsay. It is accordingly obvious that such evidence is of very little assistance (if any).

Does the Building Trades (Construction) Award bind the Defendants?

The critical issue in this case is whether the Defendants, not being a named party to the award, are bound by it and so subject to penalty for non-compliance with its provisions. Having regard to section 37 of the *Industrial Relations Act 1979* (the Act) that issue is to be decided by determining whether on its proper construction Mr Caruso was, at the relevant time, one to whom the "scope" clause of the award applies. Relevantly clause 3(1) provides—

"3. - SCOPE

This award shall apply—

(1) to all employees usually employed on or employed as casual employees on construction work as defined in Clause 7. - Definitions of this award in any of the callings set out in Clause 8. - Rates of Pay of this award and who are employed in the building construction industry; and"

"Construction Work" is defined in clause 7(3) of the award.

> "(3) 'Construction Work' means—
>
> (a) all work 'on-site' in connection with the erection, repair, renovation, maintenance, ornamentation or demolition of buildings or other structures of any kind whatsoever; or
>
> (b) all work which the union and the employer concerned agree is construction work but only if the agreement is approved by the Board of Reference; or
>
> (c) all work which, in default of an agreement as aforesaid, is declared by the Board of Reference to be construction work."

The callings set out in clause 8 of the award include at clause 8 (2)(a)(i) "carpenters" and "joiners". The meaning of "Carpenter and Joiner" is defined in clause 7(8)(a) of the award under the heading "Carpentry and Joinery". The term is defined as follows—

> "(8) Carpentry and Joinery
>
> (a) 'Carpenter and Joiner' means an employee engaged upon work ordinarily performed by a carpenter and joiner in any workshop establishment, yard or depot, or on site (including dams, bridges, jetties or wharves).
>
> Without limiting the generality of the foregoing, such work may include—
>
> (i) The erection and/or fixing work in metal.
>
> (ii) (aa) The marking out, lining, plumbing and levelling of prefabricated form work and supports thereto;
>
> (bb) The erection and dismantling of such form work but without preventing builders' labourers from being employed on such work.
>
> (iii) the fixing of asbestos products, dry fixing of fibre plaster materials and the fixing of building panels, wall board and plastic material;
>
> (iv) the erection of curtain walling;
>
> (v) the setting out and laying of wood blocks or parquetry or wooden mosaic flooring; and
>
> (vi) the erecting of prefabricated buildings or section of buildings constructed in wood, prepared in factories, yards or on site.
>
> (b) 'Detail Employee' means a carpenter and joiner who sets out and works upon staircases, bar, kitchen or office fittings or any similar detail work from architects plans or blue prints."

Section 37(1) of the Act provides—

> "37. (1) An award has effect according to its terms, but unless and to the extent that those terms expressly provide otherwise it shall, subject to this section—
>
> (a) extend to and bind—
>
> (i) all employees employed in any calling mentioned therein in the industry or industries to which the award applies; and
>
> (ii) all employers employing those employees
>
> and
>
> (b) operate throughout the State, other than in the areas to which section 3(1) applies."

In order to establish award coverage the Complainant must prove the following—

1. The existence of an award;
2. That the award binds the employer. This may be proved by establishing that the employer was operating a business or undertaking in the relevant industry at the time of the alleged breach;
3. That the person in relation to whom the complaint is made was employed in a classification under the award; and
4. That the person in relation to whom the complainant is made is an employee within the definition in s.7 (1) of the Act.

The matters outlined in 1 and 4 above are not in dispute. However the Complainant is put to the proof in establishing that the Defendants were operating a business or undertaking in the relevant industry at the relevant time. Also in issue is whether Mr Caruso was employed in a classification under the award.

It has long been held that the award has effect "according to its terms". The scope clause must be carefully scrutinised in order to discover who is covered by it. In ***The Western Australian Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union of Workers v. Terry Glover Pty Ltd,*** 50 WAIG 704 Burt J (as he then was) said at 705—

> "Each and every award must relate to an industry and what the industry is, is in every case primarily a question of construction of the particular award. It may be that the question is not only primarily but finally a question of construction, and it may be that the award as a matter of construction fails to give the final answer and requires for that purpose that findings of fact be made.
>
> An award if made in terms "to relate to the ship building industry" would be of the first-mentioned kind. An award expressed to relate, as the one under construction here is expressed to relate, to "the industries carried on by the respondents set out in the schedule attached (sic) to this award" is of the other kind. In such a case the industry to which the award relates cannot be made known without definition of the industries carried on by the respondents. And this is necessarily a question of fact."

The industry to which the award applies may be clearly specified. In other cases there are three well-known tests which have been used to identify an industry. They are the tests in **Parker's** case, **W. *Parker and Son v. Amalgamated Society of Engineers*** (1927) 6 WAIG 377, **Glover's** case (supra), and **Donovan's** case, ***RJ Donovan and Associates Pty Ltd v. Federated Clerks Union of Australia WA Branch*** (1977) 57 WAIG 1317.

In considering the scope clause the ordinary meaning of the words of the award must be used (See ***Norwest Beef Industries Limited v. WA Branch Australian Meat Industries Employees' Union*** (1984) 64 WAIG 2124 at 2129). The award applies to all employees specified in clause 8 usually employed in construction work defined to mean inter alia—

> "all work 'on site' in connection with the erection repair, renovation, maintenance, ornamentation or demolition of buildings or other structures of any kind whatsoever;"

Accordingly a fact-finding exercise is not necessary to determine the industry. However a fact-finding exercise is necessary in order to resolve the issues as to whether the Defendants operated within the industry as defined and if so whether Mr Caruso was employed within the calling of carpenter and joiner as defined by clause 7 of the award.

In determining the issues it must be recognised that the nature of Mr Caruso's work was of such a nature that on occasions he performed the work of a cabinet-maker and that on other occasions he performed the type of work that would bring him within a classification contained in the award. The fact that Mr Kernaghan originally employed Mr Caruso as a cabinet-maker is, in my view, only of limited importance. I say that because it is obvious from the evidence that the nature of his work changed over the years. It changed to a large extent by reason of the dynamics of commercial reality in needing to provide a service to the Defendants' main client namely Woolworths. The service provided was not that which would normally be provided by a cabinet-maker but rather encompassed the type of service which would have normally been performed by a carpenter. Mr Simpson's evidence is indicative of the fact that carpenters in the construction industry carry out the type of work carried out by Mr Caruso. It is obvious that certain work performed by Mr Caruso when providing a service to Woolworths was not that of a cabinet-maker but rather that which is usually provided by a carpenter, such as Mr Simpson, working in the construction industry. In that regard there is evidence before the Court to establish that Mr Caruso was engaged in the repairing and hanging of doors, the erection of signs, the erection of metal shelving, the erection of wooden shelves, the erection of prefabricated aluminium fence (which I take to be balustrading) such work being the type of work carried out by a carpenter and joiner covered by the award. Such maintenance work which on Mr Kernaghan's admission consisted of eighty percent of the Woolworths contract was clearly on site work in the nature of work ordinarily performed by a carpenter and joiner. In my view the evidence dictates that the Defendants operated within the building and construction industry by performing such work in connection with the erection, repair, renovation and maintenance of retail premises. The evidence also dictates that Mr Caruso read plans in the installation of cabinets and that to such extent it could be said that he was engaged in "detail work" as defined by the award.

Having determined that Mr Caruso performed some work that falls into the classification of carpenter and joiner as defined by the award it is nevertheless the case that the evidence dictates that he was also engaged in cabinet making. It is clear that Mr Caruso, when at the factory, involved himself with and carried out work in the manufacture of cabinets. Furthermore he, as part of his on-site work, installed kitchens and other furniture manufactured by the Defendants at their factory workshop. In that regard the work carried out by Mr Caruso on those occasions was of the type performed by employees working for employers bound by the *Furniture Trades Industry Award*. There can be no doubt that the fitting within buildings of furniture manufactured by cabinet-makers as the final process of their operation does not of itself make cabinet-makers into carpenters and joiners. In ***United Furniture Trades Industrial Union of Workers W.A. v. Western Australian Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union of Workers*** (1985) 65 WAIG 2300 Salmon C. said at 2305—

> "Having regard for all of the foregoing it is my decision that persons whose major and substantial employment is cabinet-maker do not become joiners by reason of the fact that they do some work on building sites, for example wall panelling, which is, technically speaking, joiners' work. Such work is done by these persons precisely because they are cabinet-makers. Furthermore, I do not think it can be seriously argued that cabinet-makers who are engaged in the work of their trade in the final stage of furniture manufacture by fitting furniture in buildings are joiners merely because joiners also fit furniture in buildings. To hold that cabinet-makers become joiners in these circumstances and to further hold that they are employed as joiners in factories for similar reasons would be to ignore the history of separate development of the two trades and the reasons for it. I have nothing before me of such cogency as would permit me to do that and I accept the applicant's qualitative difference argument as sound."

As stated previously it appears to me that there is no doubt that Mr Caruso did the work of a cabinet-maker as part of his employment with the Defendants and that for the other part he carried out the work of a carpenter and joiner. Accordingly in the light of such findings I must move to consider whether Mr Caruso's major and substantial employment was that of cabinet-maker or whether it was that of a carpenter and joiner. In that regard it is important to reflect on what Burt J. (as he then was) said, in ***Federated Clerks' Union of Australia, WA Branch v. Cary*** (1977) 57 WAIG 585 at 586, in relation to the issue of whether an employee was a "clerk" for the purpose of the particular award under consideration—

> "… one judges the question as it may arise in any particular case simply by finding as a fact what it is that the worker was employed to do and then deciding whether upon the facts so found he was employed to 'make written entries, keep accounts' and other work of that character. Of course one has regard to the substantial nature of the employment in terms of the purpose to be achieved by it, the question being, I think, very much controlled by the difference, which is not always accepted by philosophers but which serves the purpose of practical men, between ends and means. If in substance the worker's job is to write and the job is done when the writing has been done he is a clerk, but if in substance the writing done by the worker is but a step taken in doing by him of something extending beyond it then he is not. The 'substance' of the work identifies the question as being one of degree and it indicates the answer to it will be, or may be, very much the product of a value judgment."

In ***Doropoulos v. Transport Workers' Union of Australia, WA Branch*** (1989) 69 WAIG 1290 the Full Bench referred to the test of "major and substantial employment" and the history of the test. At page 1293 it summarised the elements enunciated in **Cary's** case as follows—

> "Thus, incorporated in the consideration of major and substantial employment on that authority, are questions of substantial nature of the employment, the substance of it, and the purpose to be achieved by it. One has to look at the contract or evidence of it, and obtain a comprehensive picture of the whole of the employment to enable one to apply Burt J's test."

Where in a case such as this an employee is covered by dual awards the question becomes which one applies. In that regard the most important factor is that of the work done by the employee rather than a consideration of the operation of the Defendants. In ***Harrison v. Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch*** (1983) 63 WAIG 1399 His Honour the President, in delivering a joint decision with the Senior Commissioner, said that the doctrine of major or substantial employment was well established, although it had not so far attracted the attention of the Industrial Appeal Court. His Honour referred to a decision of the President of the Court of Arbitration in the matter of an interpretation of the Ticket Writers' Award in ***John Wills & Co Ltd v. Operative Painters and Decorators' Industrial Union*** (1940) 19 WAIG 500 (and the authorities therein). Fielding C (as he then was) explained that where two or more awards prima facie apply to the work of an employee, it is well established that the nature of the major and substantial part of the work done by the employee is the key factor in determining which award governs the work in question. It thus becomes necessary to examine the nature of the major and substantial part of the employee's work rather than the total operation of the employer's business.

The evidence given by Mr Caruso was that the major and substantial part of his employment was that of carrying out maintenance for Woolworths. I accept Mr Caruso's evidence. To some extent Mr Kernaghan's own testimony confirms Mr Caruso's evidence in that regard. I am satisfied that Mr Caruso only spent minimal periods within the factory manufacturing cabinets for the six years leading to August of 2000. Furthermore I am satisfied that whilst on site the substantial part of Mr Caruso's work did not involve

the installation of cabinets or other furniture manufactured by the Defendants. I am satisfied that by far the greater portion of the work carried out by him during the relevant period was that of a carpenter and joiner. His duties were the same as those carried out by Mr Simpson in his calling. Mr Gersmanis' evidence to the contrary is rejected. As stated previously I found Mr Gersmanis' evidence to be quite unsatisfactory particularly when subjected to cross-examination.

Accordingly it follows that I find that the award binds the Defendants. Having so found I now turn to consider whether there has been a breach of the award as alleged.

The elements to be satisfied in proving a failure to make available time and wage records.

There is no contest in the fact that the Defendants failed to make available to the Complainant copies of the time and wage records appertaining to Mr Caruso. The request to make available the time and wage records was initially refused ostensibly on the basis that Mr Caruso was a cabinet-maker and accordingly not subject to the provisions of the award. The Defendants in resisting the complaint now also argue other grounds, which are referred to below.

In order to prove its case the Complainant must establish the following elements on the balance of probabilities—

1. That the relationship of employer-employee existed between the Defendants and an employee covered by the award;
2. That the official of the organization suspected a breach of the award had been committed before a demand was made that the records be supplied; and
3. that the records requested pursuant to clause 28(6) of the Award were not made available and supplied within 48 hours of the demand having been made.

For the reasons previously given it is apparent that the first element referred to above has been established. I need say no more about that element. The evidence of Mr Joyce enables the second element to be proved. There can be no doubt on his evidence that an official of the Complainant suspected a breach. In consequence of the suspected breach the Complainant sought pursuant to clause 28(6) the Defendants' time and wage records appertaining to Mr Caruso.

The third element to be proved requires careful consideration in the light of submissions made by the Defendants. They submit that for the third element to be satisfied there must be evidence before this Court to establish that Mr Joyce was authorized to make the demand that he made. Mr McCorry for the defendants argues that Section 49B(1)(b) of the Act prohibits the Industrial Relations Commission from making an award which empowers a representative of an organisation of employees to inspect the time and wages records of an employee or former employee unless the award provides inter alia that—

> "(b) the power of inspection may only be exercised by a representative of an organization of employees authorized for the purpose in accordance with the rules of the organization;"

There is no doubt that such a provision is contained within the award. Notwithstanding that, the Defendants submit that there is a requirement for the rules of the Complainant to expressly provide for the authorization of a person or persons to inspect time and wages records. The Defendants argue that a general power as contained within the Complainant's rules to do lawful things or authorize lawful things is not sufficient to satisfy section 49B(1)(b) of the Act.

Clause 17 of the Complainant's rules (Exhibit 2) headed General Secretary provides inter alia—

> "He/she shall ensure that the Union complies with such legislation as exists from time to time in relation to industrial relations."

Mr McCorry argues that the abovementioned provision does not and did not enable Mr McDonald, the Complainant's Secretary, to authorise Mr Joyce to make the demand for the supply of the time and wage records. With all due respect for Mr McCorry I find no force in his argument. I say that because clause 28(5) of the award is aimed at inspection by a duly accredited official under the rules. However the request that was made to the Defendants on 10 August 2000 was not seeking an inspection of the records by Mr Joyce but rather a making available and supply to the Complainant of the Defendants' records concerning Mr Caruso. The letter written by Mr Joyce was written on behalf of the Complainant seeking the supply of copies of the record pursuant to clause 28(6). It was not written for the purpose of inspecting the records pursuant to clause 28(5). There is an obvious distinction between the two provisions. The distinction although subtle is there. For the sake of completeness I set out the relevant subclauses of clause 28 of the award.

> "(5) Subject to subclause (6) of this clause, all records and documentation referred to in subclause (1), (2) and (3), or copies thereof, shall be available for inspection by a duly accredited official under the rules of an organisation of employees bound by this Award during the usual office hours, at the employer's office or other convenient place. This is subject to reasonable notice of not less than 24 hours of the intention to inspect the records being given to the employer by the union or duly accredited union official.
>
> (6) Subject to subclause (7) of this clause, and upon request, the employer shall make copies available to the union of the record maintained under subclause (1) of this clause, if the Secretary of the Union reasonably suspects that a breach of the Award has been committed. Copies of the records shall be supplied within 48 hours.
>
> (7) The employer may refuse the representative access to the records if the employer—
>
> (a) is of the opinion that access to the records by a duly accredited official of the organisation of employees would infringe the privacy of persons who are not members of the union;
>
> (b) undertakes to produce the records to an industrial inspector within 48 hours of being notified of the requirements to inspect by the Union official; and
>
> (c) complies with the undertaking to produce the records to an industrial inspector."
>
> (See exhibit 4)

A perusal of the relevant subclauses makes it apparent, in my view, that Mr McCorry's argument can only be relevant in so far as the allegation is in respect to a breach of clause 28(5) of the award. In this instance the allegation is one in respect to a breach of clause 28(6) of the award. Accordingly the argument has no application in this matter and must therefore fail. Even if I am wrong in that approach I take the view that I cannot go behind the award.

Conclusion

For the reasons enunciated above I am satisfied that the Defendants failed to make available to the Complainant copies of the time and wage records relating to their employee Giuseppe Caruso contrary to clause 28(6) of the *Building Trades (Construction) Award 1987* being an award by which they were bound.

G. CICCHINI,
Industrial Magistrate.

IN THE INDUSTRIAL MAGISTRATE'S COURT HELD AT PERTH WESTERN AUSTRALIA

Complaint No. 263 of 1998

Date Heard : 15, 16 & 17 December 1999

19, 20 & 26 April 2000

10 May 2000 & 15 June 2000

Date Decision Delivered: 2 August 2000

BEFORE: Mr G. Cicchini I.M.

Between—

SEAN KENNEDY

Complainant

and

D.P.H. NOMINEES PTY LTD t/as AUSMIC ENVIRONMENTAL INDUSTRIES W.A.

Defendant

Appearances—

Ms Y.D. Henderson instructed by Messrs Gibson & Gibson Solicitors appeared for the Complainant.

Mr M.D. Evans instructed by Messrs Corsers Barristers and Solicitors appeared for the Defendant.

Reasons for Decision

The Claim and Counterclaim

The Complainant has brought an action pursuant to Section 83 of the *Industrial Relations Act 1979* (the Act) claiming that the defendant has committed 127 breaches of the *Pest Control Industry Award 1982* ("the award"). The complainant further claims that he has been underpaid a total amount of $14,775.92 as a result of those breaches. The defendant denies it committed the alleged breaches and accordingly maintains that there was no underpayment. The defendant counterclaims the amount of $13,036.33, which it says was overpaid to the complainant. The defendant maintains that the overpayment arose as a consequence of the complainant's breach of duty of fidelity and good faith to the defendant.

Jurisdiction

There can be no doubt that Section 83 of the Act enables the complainant to bring the action that he has brought with respect to each of the alleged breaches. The issue is whether the defendant is entitled to bring a counterclaim. The issue was not the subject of any discussion, comment or argument at the trial. It is obvious that both parties proceeded on the basis that the defendant's counterclaim is both permissible and justiciable by this Court. However in order to remove any doubt that may arise from the Act's silence with respect to counterclaims it is appropriate that I examine the issue at this point as a preliminary issue going to jurisdiction.

Relevantly Section 81CA of the Act provides—

> *"**Procedure, enforcement etc.***
>
> ***81CA**. (1) In this section—*
>
> ***'general jurisdiction'** means the jurisdiction of an industrial magistrate's court under—*
>
> *(a) section 77, 80 (1) and (2), 83, 84K, 96J, 97U, 110, 111 or 112;*
>
> *(b) Part IV of the Long Service Leave Act 1958; or*
>
> *(c) Division 1 of Part 5 of the Workplace Agreements Act 1993;*
>
> *'**prosection jurisdiction**' means …*
>
> *(2) Except as otherwise prescribed by or under this Act or another law—*
>
> *(a) the powers of an industrial magistrate's court; and*
>
> *(b) the practice and procedure to be observed by an industrial magistrate's court,*
>
> *when exercising general jurisdiction are those provided for by the Local Courts Act 1904 as if the proceedings were an action within the meaning of that Act.*
>
> *(3) …*
>
> *(4) …*
>
> *(5) …*
>
> *(6) …*
>
> *(7) …*
>
> *(8) …"*

There is no doubt that the *Local Courts Act 1904* and the *Local Courts Rules 1961* contain the powers and the practice and procedures which enable and facilitate the making of a counterclaim in the Local Courts. Accordingly the issue to be resolved is whether this Court is seized with the same jurisdiction by virtue of the application of Section 81CA (2) or whether this Court's jurisdiction is constrained by Regulation 3 (1) of the *Industrial Relations (Industrial Magistrate's Courts) Regulations 1980*. The issue has been the subject of recent judicial consideration and comment by the Federal Court of Australia in ***Metropolitan Health Services Board v. Australian Nursing Federation [1999] FCA 1513*** delivered on 2 November 1999. His Honour Lee J. said commencing at paragraph 9—

> "9 Under s.81CA (1) of the State Act, the jurisdiction of the court is defined as being either "general jurisdiction" or "prosecution jurisdiction". Part of the "general jurisdiction" of the court is that conferred by s.83 of the State Act in respect of the enforcement of an award made under the State Act. For the purposes of the present analysis, the rights created and made enforceable under s.83 of the State Act, although distinguishable, are not far removed from like provisions in s178 of the Act.

10 Under s.81CA (2) of the State Act, the powers of the court, and the practice and procedure to be observed by the court when exercising "general jurisdiction", are those provided for by the *Local Courts Act 1904* (WA) ("Local Courts Act") as if the proceedings were an "action" within the meaning of that Act. The appropriate initiating process in respect of the enforcement of an award under s83 of the State Act may be, therefore, a "plaint" rather than a "complaint". Section 81CA (3) further provides that regulations may extend the circumstances in which the court exercising general jurisdiction may hear and determine an action under the Local Courts Act for "small debts".

11 Section 81CA (5) provides that when exercising "prosecution jurisdiction", the court constitutes "a court of summary jurisdiction". That term is defined in s5 of the *Interpretation Act 1984* (WA) ("State Interpretation Act"), which reads as follows—

> *"**court of summary jurisdiction**" ... means any justice or magistrate to whom jurisdiction is given by, or who is authorised to act under, the Justices Act 1902, and whether acting thereunder, or under any other Act, or by virtue of his commission, or under the common law;"*

Part of the "prosecution jurisdiction" includes jurisdiction under s83A of the State Act to hear and determine complaints for any contravention or failure to comply with the State Act that constitutes an offence. Section 83A (1) of the State Act provides that the Court has "jurisdiction under the *Justices Act 1902"* to hear and determine such complaints. Sections 81CA and 83A were inserted in the State Act by amendments which took effect on 16 January 1996.

12 The respondent submitted that regulations made under the State Act show that the Industrial Magistrate's Court sits as a court of summary jurisdiction. In particular the respondent relies on reg 3 (1) of the *Industrial Relations (Industrial Magistrates' Courts) Regulations* 1980 which reads as follows—

> ***3 (1) [Justices Act, 1902-1979]** "Subject to the Act and to these regulations, proceedings before an industrial magistrate's court and in particular the making of a complaint, the issue of a summons, the summoning of witnesses, the fees to be paid relating to any matter, the taking of evidence, the hearing and determination of a complaint and the costs and allowances to parties and witnesses shall be, with such modifications as circumstances require, those prescribed by the Justices Act, 1902-1979, in respect of proceedings before justices for a simple offence."*

The Regulation goes on to provide that proceedings are to be commenced by complaint and a summons directed to a defendant requiring that party to appear before the Court. The Regulation came into force in 1980 and was last amended in 1992. Plainly, the Regulation has been overtaken by the amendments to the State Act which inserted, inter alia, s81CA. In any event in its terms the Regulation is subject to the State Act and gives way to the provisions of s81CA where there is inconsistency. Obviously the practice and procedure to be observed by the court in the exercise of "general jurisdiction" is governed by s81CA and not reg 3."

The aforementioned decision of the Federal Court binds this Court by virtue of the fact that this Court exercises federal jurisdiction. Accordingly, the powers, the practice and procedure as provided for by the *Local Courts Act 1904* are to be adopted by the Industrial Magistrate's Court in its exercise of general jurisdiction. It follows that this Court has jurisdiction to consider and determine the counterclaim made in this matter.

Pleaded Issues

By his complaint and particulars of claim filed 6 April 1999, the complainant alleges that the defendant has committed 127 separate breaches of the award. In general, the breaches alleged are a repeated failure by the defendant to pay overtime entitlements due to the complainant under the award. It is alleged that in each instance clauses 5 and 6 of the award have been breached.

By the amended defence and counterclaim filed on behalf of the defendant in August 1999, it is pleaded that:—

(a) the defendant has not committed any of the alleged breaches of the award (paragraph 4);

(b) the complainant has in fact been paid the base rate to which he is entitled under the award, together with bonuses pursuant to the first and second contracts which in fact exceeded overtime entitlements under the award (paragraph 5);

(c) the complainant failed to accurately record starting times on the work cards and opening times of the defendant's premises (paragraphs 8 and 9);

(d) the complainant owed the defendant a duty of fidelity and good faith, which the complainant breached in failing to accurately record starting times and related information on the job cards, resulting in the defendant suffering loss and damage (paragraphs 10, 11, 13 and 15).

By his reply to defence and counterclaim filed on 6 October 1999, the complainant—

(a) denies that any contracts of employment contracted out of the conditions of the award (paragraph 3);

(b) denies that the complainant was overpaid (paragraph 5);

(c) alleges that the complainant was instructed not to take lunch breaks (paragraph 6);

(d) admits that the complainant was required to keep records of work done in the job cards (paragraph 8); and

(e) denies that there are any discrepancies recorded by the complainant in the job cards (paragraph 9).

Issues Not in Dispute

It is not in dispute that:—

- The complainant is an "employee" within the meaning of sub-section 7 (1) of the Act, during the periods in dispute between 4 July 1994 and 27 October 1998 ("the relevant period").
- The defendant was an "employer" within the meaning of sub-section 7 (1) of the Act, during the relevant period.
- The award applied to the employment of the complainant by the defendant during the relevant period.
- The respondent paid the complainant the base rate prescribed by the award during the whole of the relevant period, and additionally paid amounts for overtime, as well as bonuses and incentive payments in respect of work done by the complainant, throughout the whole of the relevant period.

Primary Issues in Dispute

The primary issues in dispute are—

(a) The amount of overtime actually worked by the complainant and whether or not the complainant was paid overtime award entitlements in respect of overtime work allegedly carried out. In that regard the complainant alleges that the defendant failed to pay overtime for—

- Lunch hours worked by the Complainant;
- Travelling times to and from jobs; and
- Additional overtime worked.

(b) Whether the complainant breached his duty of fidelity and good faith to the defendant resulting in the defendant suffering loss and damage. In that regard the defendant alleges that the complainant failed to accurately record starting times and other details on job cards that he was required to complete in the course of his employment.

The Award

Relevantly clauses 5 and 6 of the award provide—

"5. – HOURS

(1) The ordinary working hours shall not exceed forty in any one week and shall not exceed eight hours in any one day Monday to Friday inclusive, to be worked between the hours of 6.00 a.m. and 6.00 p.m.

(2) The meal interval shall not exceed one hour.

6. – OVERTIME

(1) Except as hereinafter mentioned, all work performed in excess of or outside the ordinary daily working hours Monday to Friday inclusive shall be paid for at the rate of time and a half for the first two hours and double time thereafter. Provided that all work performed after noon on Saturday shall be paid for at the rate of double time. Work done on Saturday prior to 12 noon shall be paid for at the rate of time and a half for the first two hours and double time thereafter.

(2) All work performed on Sundays shall be paid for at the rate of double time with a minimum payment as for three hours.

(3) All work performed on any of the holidays prescribed in subclause (1) of Clause 8 hereof shall be paid for at the rate of double time and a half with a minimum payment as for three hours.

(4) When an employee without being notified on the previous day or earlier is required to continue working after his usual knock off time for more than two hours he shall be provided with any meal required or be paid three dollars in lieu thereof. Provided that such payment need not be made to employees living in the same locality as their place of employment who can reasonably return home for a meal.

(5) An employee shall not be compelled to work for more than five hours without a break for a meal.

(6) (a) When an employee is recalled to work after leaving the job he shall be paid for at least three hours at overtime rates.

(b) Time reasonably spent in getting to and from the job shall be counted as worked."

The Evidence

Sean Kennedy

The complainant Sean Kennedy worked for the defendant during two periods from 1992 until 27 October 1998. In fact he worked for the defendant for the entirety of the abovementioned total period except for two weeks in about August/September of 1996. The brief interlude in 1996 came about as a result of a dispute between the parties over payment of wages. Mr Kennedy was at all material times employed as a "Pest Control Operator" otherwise referred to by those within the industry as a technician.

During the material periods the complainant and the defendant were parties to written employment agreements. The agreements, which were substantially in the form of exhibits 5 and 6, were entitled *"Employment Agreement and Conditions of Employment for Pest Management Technicians"*. The agreements provided for over award incentive payments to be made to the complainant. There were a number of different incentive payments provided for in the agreements. One of those incentive payments was a "production bonus". The production bonus was payable to the complainant at the rate of 5% of the gross value of the jobs carried out by him after having reached a $450 daily threshold. The production bonus was calculated weekly for all work performed from 7.00 am to 4.00 pm on any normal working day (Mondays through to Fridays). The accounting period for the calculation of production bonuses and the wages pay period were offset. The two periods did not coincide resulting in the potential confusion.

It is axiomatic that there was an incentive for all workers subject to such agreements including the complainant to carry out as many jobs as possible in any given day. It follows that the longer the technician worked during normal working hours (7.00am to 4 pm) on any given day the more likely it would be that the production bonus component of their wage would be higher. Furthermore the evidence from all the witnesses who have worked or do work as technicians for the defendant under such an arrangement dictate that the achievement of a production bonus entitlement and the quantum thereof was and is very much foremost in their respective minds. It appears that the production bonus forms a very substantial component of the technician's weekly wage.

Although the complainant was employed to carry out a number of different tasks his primary function was to carry out pre-treatment work. Pre-treatment work entailed the spraying of chemicals onto house pads prior to concrete pours, follow up perimeter spray treatment and the curing of concrete. In the main such work was carried out on building sites in newly developed estates. Over above the pre-treatment work the complainant also carried out other types of duties common within the pest control industry. He was however, the defendant's main pre-treatment technician. Accordingly his duties, work situation, and method of work differed markedly from other technicians employed by the defendant.

The complainant was allocated a truck with a 2500 litre capacity tank on board to enable him to carry out his duties. The truck usually carried a tank full of emulsion, up to ten drums of chemicals, bags of granite, tools and other necessary equipment. The vehicle used by the complainant was the largest in the fleet of vehicles operated by the defendant. It was the heaviest vehicle with the largest spraying capacity. It was obviously designed to cater for pre-treatment work.

The complainant testified that although his official start time for work was 7.00 am he was nevertheless required to be at the defendant's Spearwood yard well prior to that time. In fact he received instructions to be at the yard early to prepare for the day's activities. He was generally at the yard by 6.30 am. He said that the yard sometimes opened as early as 6.00am. He would arrive at the yard at any time between 6.00 am and 7.00 am dependant upon the allocated duties for that day. Whilst at the yard he would generally hand over paperwork and any money he had received from customers the previous day. He would load up chemicals and all necessary equipment needed for the day. He sometimes took on water. He would repair any faulty equipment. He would also use the time to maintain the vehicle. He would also generally pick up a run sheet detailing the jobs that had been booked for the day. The jobs allocated on the run sheet did not represent all of the work to be carried out during the day. Over and above that he would usually during the course of the day be allocated other jobs in addition to those shown on the run sheet by the defendant's two-way radio operator.

The pre-treatment work commenced early in the day particularly in summer. During the summer the complainant attended building sites as early as 5.30 am in order to spray pads prior to concrete pours. In summer grano workers usually got off to a very early start

in order to avoid the midday heat and the complainant necessarily had to start early to work in with their requirements. In those situations the complainant would travel directly to site and only return to the yard later in the day when circumstances permitted.

The complainant needed to travel from site to site to carry out his work. In some instances the distance travelled between sites was significant. In other cases the complainant only travelled relatively short distances. The complainant was required to record his duties and travels on a daily job card. The card used by the defendant inter alia to assess the work carried out by the complainant and to calculate payment of wages and production bonuses.

The complainant usually commenced worked on any given workday sometime between 6.30am and 6.45 am. He usually completed his duties at 4.00 pm. However given the nature of his job both the start and finish times varied according to circumstance. Notwithstanding that he was paid on the basis that he commenced work at 7.00 am and finished at 4.00 pm. The complainant testified that his daily work schedule was so heavily booked that he did not have the opportunity to take a lunch break. Although the complainant was routinely not able to take an hour's lunch break the defendant, through its director Tanya Harrison, nevertheless deducted an hour each day on account of lunch. Therefore on the defendant's account the complainant worked from 7.00 am to 4.00 pm each day comprising a total of 9 hours however he was only paid for 8 hours work with 1 hour routinely deducted on account of lunch.

The complainant told the Court that the issue of his inability to take a lunch break was matter of ongoing concern to him. He regularly complained about to it to his superiors namely Barry Hayden and Peter Arnold. His complaints were sustained over a long period. Barry Hayden's response to his complaints was that given that the complainant was paid a production bonus for work carried out during the lunch period he was expected to work during such period. Peter Arnold's response was that the complainant would be paid a production bonus instead of a lunch break. The complainant testified that he some times ate lunch and sometimes did not. When he did eat lunch it was usually on the run such as eating whilst driving between jobs. The complainant alleges that the issue of the lunch break was one of the main issues leading to his resignation. He says that he was labelled a *"trouble maker"* because of his persistence about the issue. He told Barry Hayden in no uncertain terms that he objected to not being given a lunch break and then having an hour deducted from his pay on account of lunch. According to the complainant Barry Hayden's response was that if he did not stop creating waves and insisting on a lunch break the business would be restructured so as to do away with his job. In the alternative he threatened the issue of warning letters to manufacture the complainant's removal. Mr Hayden told the complainant that if that happened it was up to the complainant to prove that Hayden was lying about the matters giving rise to the warnings. The complainant resigned the next day.

When cross-examined the complainant was taken to the job cards completed by him. His attention was drawn to perceived discrepancies on the face of the job cards. There can be no doubt that quite a number of the job cards which comprise exhibit 1 show on their face apparent discrepancies particularly relating to odometer reading entries. The complainant explained those away by conceding that in some instances his recording was inaccurate on account of his vision disability. In other instances the inaccuracy of the record was on account of his failure to contemporaneously record the information leading to guess work in the recording process. In some instances the inaccuracies were explained away by virtue of the fact that very nature of the complainant's duties and the systems employed by the defendant made it impossible to record every task undertaken. By way of example the complainant testified that he often had to detour between jobs to pick up chemicals, to pick up payments, to deliver tools to other technicians and so forth. Those deviations were not accounted for nor recorded on the job cards as to time taken or distance travelled.

The complainant was not at all phased when cross-examined. He was, in my view, genuinely able to explain away most of the discrepancies on the face of the job card. There was some suggestion on the part of counsel for the defendant that the complainant *"fudged the figures"* on his job cards. I do not accept that at all. Undeniably there are some inaccuracies on the job cards but that is all they are. Indeed an examination of the pre-treatment booking sheet (exhibit 14) and the job cards (exhibit 1) reveal a high degree of consistency. Clearly the complainant was subject to error. Furthermore some inaccuracies arose from his failure to contemporaneously record his travels and duties, however there was no "fudging of figures". Indeed the complainant's job cards were reviewed weekly by his supervisors and the defendant's director Ms Harrison. No problem was ever found with them at the relevant time. No complaint was ever made about his work, conduct or recording. It is only now in the light of these proceedings that the defendant through Ms Harrison and Mr Hayden has carried out what can only be described as an intensive painstaking methodical review of the job cards. The review of the job cards has clearly been aimed at the discovery of anomalies to discredit the complainant and to give rise to some form of counterclaim. The process embarked upon by the defendant did not in fact work to discredit the complainant but rather demonstrated his genuine approach. The errors made by him were of a minor nature and have been of no consequence to the defendant. Given the amount of control exercised by the defendant over its employees there can be no doubt that had any significant error would have come to the attention of the defendant well before it did. Furthermore the discrepancies appear on the face of the job cards. The defendant had the opportunity at the material time to check the cards and raise any concerns there and then. However it did not do so. Its officers checked and accepted the record contained in the job cards. If the apparent errors were of any significance they would have obviously been the subject of comment or reprimand. There was no comment or reprimand of the complainant with respect to those apparent anomalies. It follows that at the material times the defendant must have accepted the anomalies to be what they are, that is simple errors or inaccuracies of little or no significance. There is no doubt that the complainant has human frailties as we all do. Further given his workload and work practices that he was subject to error. However those frailties do not give rise to any apprehension of lack of credibility. Indeed I accept Mr Kennedy's evidence.

Peter Arnold

Peter Arnold is a former employee of the defendant. He was initially employed by the defendant to perform the duties of technician including the carrying out of pre-treatment work. Overtime he was promoted and became the complainant's supervisor. Mr Arnold testified that when he first commenced work as a technician for the defendant Barry Hayden told him that it was expected that he work during the period normally taken as a lunch break. He was told that he would not be paid for that time because he would earn a production bonus instead. He told the Court that the technicians did not usually take a "lunch hour". That was because the taking of a lunch hour was simply not built into the system. He said that he participated in the drawing up of technicians' daily work schedules. They simply did not facilitate the taking of a lunch hour break. He said the defendant attempted to get as much work out of each technician as it could and that jobs were allocated according to that philosophy.

Mr Arnold testified that he usually arrived at the defendant's Spearwood yard at about 6.15 am. He said that the complainant was often there at that time taking on chemicals, filling up his tank with water and attending to paper work. The complainant was described by Mr Arnold as being a very good, reliable and contentious worker who did the right thing by the company and the client. In fact in one year he was presented with an award for being the employee of the year. Mr Arnold said that was the defendant's way of publicly acknowledging the complainant's efforts. He described the complainant as being honest in his accounts of how long he spent on particular jobs.

Mr Arnold testified as to his experience as a technician particularly involved in pre-treatment work. He told the Court that there is no rule of thumb in relation to how long each job will take. Each job is different. When pre-treating you work alongside grano

workers and plumbers. Those trades sometime cause difficulty or delay. A small job can sometimes take a great deal of time indeed longer than expected. Larger jobs sometimes take less time. The length of time taken with respect to each job will very much be dependent on the particular circumstances of the job.

When cross-examined on the issue of the taking of a lunch break Mr Arnold forcefully maintained that the taking of a formal lunch break was not allowed and indeed was positively discouraged. That was on the basis that payment of a production bonus would be received for work carried during such period that the luncheon break would have been taken.

Mr Arnold was questioned about the compilation of job assessment sheets. He said that the assessments were prepared with a view to the quality certification of the defendant. He admitted having fabricated at least one such document but explained that was done at the behest of one of the defendant's officers. He testified that the defendant engaged in inappropriate if not dishonest commercial practices with respect to its operations. Mr Arnold also told the Court that he was approached by Mr Hayden concerning his prospective testimony. He informed Mr Hayden that he was going to tell the Court exactly what happened and that he was not going to lie for any one.

There can be no doubt that Mr Arnold corroborated the complainant's evidence in every material particular of which he had knowledge. I found Mr Arnold to be a credible witness. His admission against interest concerning the fabrication of the job assessment sheet enhances his credibility rather than impugns it. I was extremely impressed by Mr Arnold's demeanour in the witness box. I have no doubt that he gave forthright and honest testimony.

John Taylor

John Taylor a former employee of the defendant also testified on behalf of the complainant. He described the complainant as being conscientious and competent in his duties. Importantly his evidence on some of the evidentiary matters in dispute clearly corroborates the complainant's evidence. By way of example, he supported the complainant's contention that the yard opened early and that technicians were directed to be at the yard by 6.45am. He also confirmed that the completed job cards did not reflect every task undertaken or journey undertaken. Furthermore, he confirmed he did not receive a lunch break and that he was expected to work right through what would normally be the luncheon break. He said the defendant constantly put him under pressure to move from one job to the next. He described the situation as "always chasing your tail". Over and above the scheduled jobs allocated for the day other jobs were also routinely parachuted into his daily work obligations.

Mr Taylor testified that he complained on two occasions about the fact that he was not receiving a lunch break. When he complained to Peter Arnold about it, Mr Arnold told him that it was part of the job and that he was paid bonuses for working during the lunch break. When he complained to Barry Hayden about it he was told "lump it or leave it". When cross-examined on the issue Mr Taylor reaffirmed and quite strongly so that lunch breaks were not permitted and that there were serious consequences for insisting on a lunch break.

By reason of the constant pressure on him and the lack of reward for his efforts he found alternative employment.

Mr Taylor's evidence is accepted. He was a forthright witness whose mode of delivery was unremarkable. His evidence is supportive of the complainant's claim and supports the evidentiary matters raised by him.

Gerald Olsen

The complainant also called Gerald Olsen. He continues to work for the defendant. He told the Court that from his dealings with the complainant that the complainant was second to none so far as his honesty and trustworthiness were concerned.

Mr.Olsen testified that he is generally allocated jobs to fill his work day. He has his lunch when he gets an opportunity to take a break between jobs. He always notifies the two-way radio operator of his intention to take lunch prior to doing so. He said that on one occasion that he complained to Peter Arnold about not getting a lunch break and was told "to eat on the run". He said that his lunch breaks were generally of short duration. By not taking lunch hour breaks production bonuses accrued.

Mr Olsen came across as being an unassuming compliant worker who simply acquiesced to anything required of him by his employer. He accepted his lot. He worked and was paid trusting his employer to do the right thing as to the calculation of his pay. He rarely complained about anything at work.

Mr Olsen was an honest witness.

Rachel Cosentino

She gave evidence of her inspection of the primary source documents held by the defendant, which gave rise to her calculation of the complainant's under-payment. It suffices to say that I am satisfied with her evidence. I am also satisfied that the calculations she has made are accurate. Indeed her testimony is unchallenged in that regard.

Tania Harrison

Ms Harrison is a director of the defendant. She testified that she first became involved in the defendant's business in 1987. She at that stage carried out general office duties. Later she progressed looking after wages. She and her husband through the defendant eventually took over the business. The business carries out pest and weed control. The complainant was engaged by the defendant to carry out pest control work under various contracts of employment. Pursuant to the terms of those contracts the complainant was employed as a technician and paid a base wage rate plus incentive bonuses, which included an increased overtime rate. Ms Harrison explained that because the award rate was so low it was difficult to find people to work within the industry unless over award payments were made.

She explained that payments of wages to employees were calculated on the basis of information contained on the job cards (in the form of exhibit 1) which were completed by employees. Employees were expected to complete details about the job undertaken, the journeys undertaken, odometer readings, money collected and the like. The cards when handed in were initially checked by the supervisor and subsequently processed by Ms Harrison. Any overtime or production bonus payable was calculated from the information contained on the job cards.

Ms Harrison told the Court that the complainant was engaged to work from 7am to 4pm with a one-hour lunch break. She said that he understood that. She went on to say that the complainant simply failed to record the lunch breaks taken. Indeed he made many mistakes in the completion of his paperwork. He sometimes neglected to hand in his job cards. Ms Harrison also told the Court that the complainant was very intimidating in his approach to the office staff. He was very argumentative and she did not like dealing with him as a result of that. When cross-examined Ms Harrison avoided answering the question as to why no verbal or written warnings were given to the complainant on account of his poor behaviour.

Ms Harrison testified that employees were informed that lunch breaks were to be taken. They could and did take breaks at their own discretion. Some employees consciously decided not to take lunch because they could earn a greater production bonus. Ms Harrison testified that the complainant was always seeking to maximise the production bonuses paid. For that purpose he was often in the office checking on documents to see if he could create extra work for himself leading to greater production bonus payments. He would often arrange his own jobs to boost production.

Ms Harrison testified that subsequent to the initiation of the proceedings she and Barry Hayden had gone through the complainant's job cards for the relevant period. She explained that a perusal of the cards revealed numerous discrepancies on the face of the record. Ms Harrison painstakingly took the Court through the discrepancies that appeared on the face of the record. The discrepancies related to the time of arrival at the yard, the time of commencement of the job, the time taken to do the job, the distance travelled between places, the time taken to travel distances and so on. What I have just referred to is not an exhaustive list of the discrepancies but rather a mere example of the types of discrepancies. Ms Harrison highlighted entries on the job card showing the complainant's very early arrivals at the defendant's yard. Arrivals as early as 4.30am were noted. Also noted were one-minute attendances at the yard. By reference to such matters the defendant through Ms Harrison and Mr Hayden attempted to paint a very dim picture of the complainant. In effect they attempted to portray him as being dishonest, unreliable and untrustworthy. Indeed counsel for the defendant suggested that based on the evidence given by Ms Harrison and others that this Court could form the view that the complainant had *"fudged the figures."*

Ms Harrison said that in 1998 the company decided on a change of direction given the lack of profitability of the pre-treatment work carried out. Accordingly the complainant was removed from pre-treatments and placed into the domestic pest control area. That she says that caused him to resign his position.

When subjected to cross-examination Ms Harrison revealed that much of the evidence she had given concerning, for example, the yard opening times were not from her direct observations but rather from what she had been told by others. Furthermore Ms Harrison conceded that she had no knowledge of the particular jobs recorded on the job cards and accordingly could not dispute the complainant's evidence relating to reasons for the discrepancies apparent on the cards. She was not, for example, able to contradict the complainant's assertion that many jobs took longer than usual or anticipated on account of "waiting time".

When questioned about the daily job allocation (run) sheets Ms Harrison conceded that the sheets did not show a lunch break. She maintained however that although the sheets did not show the same, there was always time for lunch to be taken. When cross-examined on that issue she avoided answering the question or alternatively did not answer the questions directly. It was only the persistence of Ms Henderson in that regard which caused the concession. Another concession made by Ms Harrison was that she routinely deducted one hour's pay on account of lunch for each day worked by the complainant. She insisted that she knew *"damn well that he took a lunch break*". The reality is however that she did not know and was not in a position to know whether or not the complainant took a lunch hour break. She might have been aware through her contact with him on the two-way radio that he may have had lunch. However that is to be distinguished from taking a lunch hour break. She said that she automatically deducted an hour each day on account of a lunch break because *"the card was more than likely wrong"*. If he was wrong in recording his job card relating to the lunch hour break issue one wonders why the rest of the entries were accepted.

I take the view that Ms Harrison did not give her evidence objectively. She was not forthright in answering questions under cross-examination. She avoided answering some questions and prevaricated in some situations. Much of her evidence was opinion evidence without foundation. She speculated on a wide variety of issues. All in all her testimony lacked substance and was unconvincing.

Ms Harrison's action of going through the job cards one by one in a nit picking exercise was clearly aimed at frustrating the complainant and obfuscating the material facts in issue. Quite frankly I formed the view that the bringing of the counter-claim has been a tit for tat exercise poorly considered and without foundation. Indeed the particulars expressed in the counter claim relating to discrepencies on the job cards bear no connection to the quantum of overpayment sought to be recovered. The quantified amount sought to be recovered represents the sum of the over award payments made in excess of the award rate for overtime payable with respect to those payments. It seems that Ms Harrison has taken the view that by reason of the complainant's action that the defendant ought to recover all over-award overtime payments made by the defendant to the complainant. There is simply no basis for claiming the repayment of such over-award payments already made. The complainant was clearly entitled to such payments in accordance with his contracts of employment. The defendant through Ms Harrison is attempting to retrospectively change the terms of the contracts of employment.

Barry Hayden

Mr Hayden is the General Manager of the defendant and has worked for it since 1989. He was initially engaged as a technician and worked his way up to his present position.

Mr Hayden told the Court that the complainant was mainly involved in pre-treatment work. He did however carry out some hygiene work. He was allocated a 3 tonne truck with a two or three thousand litre tank on it to facilitate the carrying of out such work.

Mr Hayden testified that the defendant's Spearwood yard officially opened at 6.30.am. In practice however it opens any time between 6.00am and 6.30.am. He told the Court that all work carried out by the defendant is pre-booked into the system and the two-way radio operator allocates that work to individual technicians. Employees are required to follow the two-way operator's specific instructions. Each technician is required to record an entry on a job card after every job is completed. Thereafter he is required to report back to the two-way operator following completion of the entry and seek instructions as to further duties. He said that the job cards in the form of exhibit 1 were used to calculate productivity bonuses payable to technicians.

He said he was involved in the employment of most employees. He said that he never informed any employee not to take lunch. *"People were allowed their lunch breaks;"* he said. To reinforce the fact that the taking of lunch breaks was something that the defendant wanted its employees to do, Mr Hayden pointed to exhibit 15 being the minutes of a meeting conducted by the defendant on operational matters held on 11 July 1995. The minutes record *"Designated lunch and afternoon tea breaks have to be adhered to"*. In my view however that gives little support to Mr Hayden's contention. I say that because the objective evidence does not support the rhetoric. Indeed the evidence overwhelmingly dictates that there were no "designated" lunch breaks or tea breaks allocated to technicians. There was no provision for lunch in the scheduling process. It appears that exhibit 15 may have appertained only to office staff.

Mr Hayden testified that he and Ms Harrison went through the complainant's job cards and discovered numerous discrepancies. He explained that the process revealed that $13,036.53 was *"overpaid to the complainant by way of productivity bonuses"*. He added that there could be *"thousands more"* owing by the complainant to the defendant.

Mr Hayden went on to testify of his experiences as a technician. He gave evidence of the time required to carry out certain jobs, the time taken to travel certain distances, the distances between certain suburbs and the general work routine of a technician carrying out pre-treatment work. By his evidence he sought to demonstrate that the complainant's job cards were either "fudged" or alternatively did not represent the true position.

Mr Hayden said that Mr Kennedy left on account of not being happy with the defendant's change of direction in not continuing to do pre-treatment work and had nothing to do with the issue of a lunch break.

When cross-examined Mr Hayden confirmed that he together with Ms Harrison had spent hours and hours going through the complainant's job cards. He said that the cards were falsified to claim overtime. He said that the $13,036 counterclaimed related to overtime overpaid. When pressed on the issue he appeared to be confused as to the basis of the amount claimed in the counterclaim. Significantly he later explained whilst subjected to cross examination that the amount quantified in the counter-claim represented

the difference between what Mr Kennedy was paid for overtime at the over-award rate as against the amount he would have received had he been paid at the award rate for overtime.

The issues of the taking of a lunch hour break and the payment of productivity bonuses in lieu of lunch was also the subject of extensive cross-examination. Mr Hayden said on the issue *"people had a choice between productivity or a lunch break."* Technicians could either take their break or choose productivity bonuses instead. He said that he had no knowledge that an hour was routinely deducted on account of lunch. He said that technicians had a number of breaks during the day during which time they could have lunch. He said that from his own experience that technicians had numerous breaks during the day and often took time off to attend to private matters such as going to the bank during such breaks.

Mr Hayden said that he could not recall any meeting held with the complainant regarding the issue of lunch breaks. Mr Hayden was not direct in his responses to questions put to him on that issue. I simply do not accept his evidence in that regard.

Bradley Samuelson

Mr Samuelson is the defendant's operations manager. He has worked as a technician for the defendant. He has worked for the defendant in two stints for a total of 6 or 7 years. He told the Court that he was able to take lunch when he wanted to. If he worked through lunch he received production bonuses payments. Much of the evidence given by Mr Samuelson was supportive of the evidentiary matters raised by the complainant.

When cross-examined Mr Samuelson said that the run sheets given to him allocating jobs did not contain provision for a lunch break. When he wanted lunch he would radio in and seek permission to take lunch. Lunch could then be taken over 15 to 45 minute period. It would not be noted on the job card. Other short diversions from work, which were taken, were not noted on the job card but would nonetheless be paid for.

Mr Samuelson's evidence was otherwise unremarkable. In my view his evidence tended to corroborate Mr Kennedy's testimony on issues in dispute.

David Schumacher

Mr Schumacher is the defendant's Industrial Facilities Manager. The defendant has employed him over various periods, the last of which commenced in October 1997.

He testified that as part of his duties he conducted the two-way radio operations in the absence of Toni Di Mario the permanent operator. He usually relieved her during luncheon breaks. Whilst undertaking such duties he liaised with technicians as to scheduling and other operational matters. When circumstances required he took out chemicals to technicians in order to facilitate efficiency in the performance of the technician's duties.

He told the Court that on one occasion when he went out on site to take chemicals he found the complainant sitting with grano workers having his lunch. On the general issue of lunch breaks, he said that technicians took lunch when time permitted. There were no hard and fast rules concerning the same and those jobs were booked in such a way to facilitate the taking of lunch. He said that about 60-70% of technicians took lunch breaks whilst the rest did not because they were paid on production instead.

When cross-examined he conceded that neither the "sheets" nor the computer screens upon which the jobs were scheduled showed an allocated lunch break.

Billy Cooper-King

Mr Cooper-King works for the defendant as a technician.

He told the Court that he does not take lunch by choice. He eats between jobs. He gets paid a production bonus for working through lunch. He said that he is at work between 7.am and 4.pm a total of 9 hours but is paid for a total of 8 hours plus production bonuses. He has never been told not to take lunch.

He confirmed also that he entered the defendant's yard as early as 6.am in the morning.

When cross-examined Mr Cooper-King re-confirmed that there was no expectation that all details of deviation or breaks be recorded on the job cards.

Robert Davies

Mr Davies is a franchisee of the defendant operating from Bunbury. He has had a lengthy association with the defendant initially as its employee and more recently as franchisee.

Mr Davies was at all material times engaged in pre-treatment work. The details he gave concerning his duties and how he carried out those duties were not too dissimilar to the complainant's description of his own duties.

Mr Davies testified concerning the taking of lunch. He said that he did not find it at all difficult to achieve a break of about twenty to thirty minutes in order to have lunch if that was what he desired to do. He had never heard of anyone not being permitted their lunch break. He said that if he chose to work through his lunch break he would be "paid productivity". He usually worked through lunch in order to achieve increased productivity payments. Under cross-examination he conceded that he ate lunch between jobs. He also conceded that his job cards were not an entirely accurate reflection of what he did on any given day.

Mr Davies' evidence about how he approached and carried out his own job inferred that the complainant was either slow and/or inefficient in what he did. Furthermore there was an inference by what he said that the complainant failed to properly record information on the job cards. Mr Davies testified that he frequently saw Mr Kennedy at the yard filling out his previous day's job cards. He usually observed that within the training room. On one occasion Mr Kennedy told him that he was keeping a copy of the job cards *"to get these people back later"*.

When cross-examined Mr Davies confirmed that he believed that he had a choice between overtime and productivity. He did not believe that he was entitled to both. He told the Court that each day an hour was deducted from the time he worked on account of lunch. He considered that to be fair and reasonable because of all the breaks that he had during the day. An example of such a break was the time spent waiting for the truck to fill. The totality of such breaks amounted to more than an hour each day.

Mr Davies conceded that the time that he was working for the defendant he was not the only one carrying out pre-treatment work. Indeed there were four of them doing it at the time. He also conceded that it might have been different for the complainant by virtue of the fact that he was the only one carrying out those duties.

When re-examined Mr Davies confirmed that he elected to receive a productivity bonus for working through lunch. He was paid 10% production bonus, which was far better than being paid overtime.

Toni Di Mario

Ms Di Mario was the last witness called by the defendant. She has worked for the defendant at its head quarters since 1995. She is an operations clerk. Her duties include the operation of the two-way radio system.

She told the Court that she usually prints out a work sheet for technicians. That is given to them each morning. The sheet details the jobs allocated for the day. Technicians are required to report into her after every job. She keeps track of how each technician is going. If the technicians need extra chemicals or tools the technician is required to report that to her and she organises the provision of the same or otherwise gives other instructions. She is effectively the nerve centre of the operations. If a technician wants to take lunch he reports into her and she will either approve the immediate taking of lunch or ask the technician to hold off if necessary. Ms Di Mario said that no one had ever told technicians not to take a lunch break. When cross-examined on that issue Ms Di Mario denied ever having told Mr Kennedy not to take a lunch breaks.

Ms Di Mario testified that she had seen Mr Kennedy having lunch. She had also seen his truck parked outside a lunch bar and also outside his own home at lunch times. She testified that Mr Kennedy's scheduling was quite open enabling him to take lunch breaks if he wanted.

Ms Di Mario testified that the complainant was always in the yard photocopying work sheets and job cards. He would go through the pre-treatment sheets and old pre treatment sheets. He would set about following up pre-treatment jobs in order to create extra work for himself. He in fact followed up perimeter treatments even when they had not been ordered. That was done in order to generate work *"because he had not enough work to do"*.

When cross-examined Ms Di Mario was reticent. She often stated that she did not understand the question when in fact the question was, to my mind in each instance, perfectly straightforward. She gave me the impression that she was holding back in order not to give responses that may have been detrimental to the defendant.

There can be no doubt that she is a loyal and trusted employee of the defendant. There is also no doubt that she has a close working relationship with Ms Harrison. I fear her loyalty to them may have clouded her responses under cross-examination.

Ms Di Mario said under cross examination she could "not recall" a specific incident on 22 October 1998 when Mr Kennedy allegedly took issue with her concerning the refusal to allow him a lunch break. Furthermore she said that she did *"not recall'* Mr Hayden's intervention with the complainant on 23 October 1998 concerning the issue of lunch.

Assessment of Witnesses

I have no difficulty in accepting the evidence given by Mr Kennedy. He came across as being a truthful witness who was able to explain away the perceived inconsistencies on his job cards.

Mr Arnold and Mr Taylor were also truthful witnesses. Both Mr Arnold and Mr Taylor were particularly impressive witnesses. Mr Arnold made admissions against his own interests in pursuance of his truthful account of what occurred. Mr Olsen's evidence and that of Ms Cosentino is also acceptable and is accepted.

I now move to deal with the witnesses called by the defendant.

Firstly I deal with the evidence of Ms Harrison, Mr Hayden and Ms Di Mario. Each of them in my view was not direct in answering questions put to them in cross-examination. Each of them prevaricated. I was left with the firm view that they were not forthright and they attempted by their testimony to protect the defendant's position. The manner in which they gave their evidence caused me concern as to their veracity. I prefer the complainant's evidence and that of his witnesses to that of each of the aforementioned defence witnesses on issues in conflict.

With respect of each of the other defence witnesses namely Bradley Samuelson, David Schumacher, Billy Cooper-King and Robert Davies it simply suffices to say that their evidence is of limited benefit. With respect to each witness there are some aspects of their evidence, which supports the defendant's case while there are other aspects, which support the complainant's case. Furthermore, their evidence is limited in application because each of them invariably worked at a different time place and circumstance to the complainant.

Findings on the substantive issues in dispute

Lunch Hour Breaks

The defendant contends that there was no coercion used to force employees not to take lunch breaks and further that the decision as to whether or not lunch breaks were taken was left up to the individual employee. It is submitted that it is inconceivable that the complainant only took four lunch breaks though the material period. The defendant says that if the complainant worked through lunch hours he did so voluntarily in order to be paid a bonus for work actually done during the lunch hour.

The evidence before the Court forcefully dictates that the complainant did not take an hourly lunch break. There can be no denying that on some days he ate his lunch during short interludes between jobs. However that does not constitute the taking of a lunch hour break. I find that the taking of a formalised lunch break was discouraged. It was discouraged by virtue of the way in which jobs were scheduled and allocated so as to make it almost impossible for employees and in this instance Mr Kennedy to take a lunch break. The jobs for him were booked in such a way that there was no opportunity for him to take a structured lunch break. If he wanted lunch, he had to eat it on the run or during some short interlude between jobs or within a job.

I reject the evidence of Mr Hayden, Ms Di Mario and Ms Harrison concerning the opportunity of the complainant to have formalised structured lunch break. I prefer the evidence of Mr Arnold, Mr Taylor and Mr Olsen in that regard. Indeed their evidence goes further and supports the complainant's testimony that the defendant through its officers overtly discouraged and denied technicians the opportunity to take lunch. The defendant's conduct was inconsistent with its purported recognition of the right to have a lunch break as contained in exhibit 15. Furthermore an examination of the job cards (exhibit 1) and the pre treatment sheets (exhibit 14) reflect that the work was structured in such ways that lunch breaks were not catered for.

Accordingly it follows that the routine deduction each week for a daily lunch hour taken was wholly without foundation. By making such deductions the defendant failed to properly account for the time the complainant actually worked each day. Consequently the complainant's wages were not properly calculated at first instance and accordingly, it is possible to conclude that he was underpaid.

Job Cards

The defendant suggests that the job cards completed by the complainant (exhibit 1) and retained as part of its own record should not be used as evidence against it on account their lack of accuracy making them unreliable.

Although there can be no denying that the job cards in a few instances demonstrate inaccuracies they are nevertheless in the main a true record of the complainant's daily work history. The inaccuracies relate mainly to the record of the odometer readings. The majority of the record is accurate. I am satisfied that the start and finishing times are accurately recorded. I am also satisfied that the very early start times represent the complainant's departure from the front of the yard to country work locations or other designated jobs and that the one minute attendances at the yard in the early hours of the morning simply reflect a reference time for significant journey's undertaken. The complainant's explanations with respect to such matters are entirely plausible. They are accepted.

The defendant has in the defence of these matters and in furtherance of its counterclaim embarked upon an extremely detailed analysis of the job cards in what can only be described as a nit picking exercise aimed at discrediting the complainant. It is

interesting to note that the defendant's problems with the complainant's performance arose only after the institution of these proceedings. Whilst working for the defendant the complainant was never cautioned nor spoken to about his start or finish times, the odometer readings or other details on the job cards. The early start times for example were manifest on the face of the record, yet the defendant never objected to that record. It had the opportunity to take the complainant to task with respect to his job cards if they were in any way inaccurate. I take the view that the defendant through its officers did not do that because by en large the job cards accurately reflected the true work history of the complainant. The defendant accepted the record and made no complaint about it at the time. The fact that the record was checked is not disputed. Indeed each of the cards bears a big tick across the front of it inferentially indicating acceptance. The defendant accepted the complainant's job cards as being accurate. The cards were accepted after checking.

The defendant in reality had no difficulty with the way in which the complainant carried out his duties, the times that he started and finished and the record kept by him. Indeed so pleased was it with his performance that the complainant was at one stage awarded "employee of the year". Furthermore the complainant and other technicians were extensively monitored. Given the stringent monitoring particularly through the two-way radio operations I find it difficult to accept that any departure from appropriate standards in carrying out his duties by the complainant would have gone unnoticed. The defendant accepted the complainant's job card as being accurate in the light of its knowledge of his duties and functions. If there were any such problems with the complainant's conduct it would have come to the fore well before the institution of the counterclaim. I fear that the review of the complainant's job cards in microscopic detail well after the event is aimed at obfuscating the complainant's claim. I am fortified in that view because the alleged discrepancies set out in the counterclaim bears no apparent relationship to the amount sought to be recovered by the defendant. Mr Hayden testified that the amount claimed in the counterclaim represents the amount Mr Kennedy was paid for overtime at over-award rates less the amount he would have received had he been paid at the award rate of overtime. Quite frankly the whole basis of the counter-claim is non-sensical given that it is not disputed that Mr Kennedy was entitled to be paid for his overtime at the over-award rate.

If the defendant relies on the particularised discrepancies to give rise to its counterclaim, then it is difficult if not impossible to work out how such discrepancies relate to the quantified amount sought as set out in the defence and counterclaim. In any event I am not at all satisfied that the alleged discrepancies are in each instance discrepancies in any event. Much of the allegations relating to the discrepancies are a product of supposition and guesswork on the part of Mr Hayden and Ms Harrison. Their evidence is entirely speculative in that regard. There may have been legitimate reasons for the entries made. It is impossible for each of them without knowledge of the actual job on a simple viewing of the cards to arrive at conclusions based on what is in the main based on a factual vacuum. The experiences of Mr Hayden, Ms Harrison and Mr Davies with respect to travelling between various suburbs do not on their own go to prove anything. Simply put neither they nor the Court can know of any particular circumstances experienced by the complainant with traffic on any given day. In any event even if the complainant got it wrong, rounded off figures or was inaccurate in some aspects of his recording that of itself does not lead to the conclusion that the complainant was overpaid. All it means is that in some instances his job cards were wrong.

Given the meticulous monitoring that existed by way of the-two way radio operations, and furthermore given the meticulous approach of Mr Hayden and Ms Harrison I find it impossible to accept that they would have allowed Mr Kennedy to get away with cheating the defendant as is alleged he did. If any "real" problem existed I am sure it would have come to their attention well before the institution of proceedings.

Although the defendant submits that its job cards should not be held against it I take the view there is no reason to depart from the approach taken by the Full Bench in ***FMWA v. Arpad Agency Pty Ltd*** ***69 WAIG 1899 at 1903*** that—

> *"This was the respondent's own record produced from its custody , maintained by it as a duty under the award and complied within its own knowledge. Indeed, the employer, having produced the records from his custody, prepared and maintained the time and wages record as was his duty. The record is evidence against the employer in the absence of evidence to the contrary as to the entries therein… as to the hours worked. Put in another way, it is evidence of the statements contained therein."*

The job cards are evidence of the hours worked by the complainant. The cards represent part of the defendant's time and wages record. The job cards were reviewed, checked and accepted by the defendant at the material times. The defendant's subsequent speculative review of those cards does not vitiate such evidence, which is evidence against the defendant.

Production Bonuses

The employment agreements between the parties provided for the payment of a production bonus in addition to the award wage. The agreements provided for a percentage value of 5% to be " *paid on every dollar production completed in excess of $450 on any normal working day between first start in the morning (7.00 am) through to the completed day finishing at 4.00pm."* (see item 6 of the agreements - exhibits 5,6 and 7).

Mr Hayden through his evidence clearly demonstrated that it was his view that technicians basically had a choice between working through their lunch hour breaks and receiving production money for doing that or alternatively claiming overtime but they were not entitled to both. He repeatedly referred to employees choosing between production bonuses and overtime. It is clear that his view has permeated amongst technicians who it appears have accepted that was and continues to be the situation. Mr Hayden's evidence reveals that he took the view that technicians had the opportunity of working through their lunch breaks if they wanted to in order to earn production bonuses. That is what most of the technicians chose to do.

In my view Mr Hayden and the defendant misconstrued the effect of the production bonus clause in the employment agreements. Mr Kennedy's contract of employment provided that Mr Kennedy works and is paid in accordance with the award. Over and above that it provided for opportunities to earn other income beyond that provided by the award. There was in fact an opportunity to earn extra income being the production bonus. However the opportunity to earn production money for work performed during the time that the lunch hour break would have been taken did not remove the complainant's entitlement under the award to be paid for that hour worked when he otherwise would have been at lunch. The payment of the production bonus under the agreement was a payment to be made in addition to the award entitlement and not instead of it. It was never a situation were employees were entitled to either one or the other but not both as Mr Hayden perceived it to be. The defendant claims that any production bonuses paid for that lunch hour worked should be set off against any entitlement that the complainant may have for overtime. However in view of what I have said above it follows that the production bonuses paid cannot be set off against award entitlements that the complainant is entitled to. The defendant's submissions in that regard is therefore rejected

Mr Kennedy worked a 9-hour day each regular working day but had one hour deducted on account of lunch. However he did not take an hour lunch break. That routine deduction was therefore inappropriate. He was accordingly paid for 8 hours when he should have been paid for a 9-hour day. By reason of that he routinely worked at least one hour overtime each day.

Conclusion

By virtue of the aforementioned reasons I am satisfied that the defendant has breached the award as alleged in the complaint by failing to pay the complainant for all overtime worked. As a consequence the defendant has regularly and consistently breached the

award over the periods set out in the complaints. Furthermore I am satisfied that the calculations contained in exhibit 8 accurately reflect the underpayments. I find that as a result of the breaches the complainant suffered a total underpayment of $14,775.92.

As to the defendant's counterclaim I must say that I find it to be without merit. The amount of $13,036.33 quantified as overpaid bears no relationship to the particularised alleged discrepancies found in the defendant's defence and counterclaim. The basis upon which the counterclaim is brought appears to be most confused to say the least. The figure is calculated on the basis that it represents the difference between the over-award overtime payments made to the complainant and what he would have received had he been paid at the award overttime rate. The fact is that the complainant was entitled under his employment agreements to be paid overtime at the over award rate. I find that each of the alleged breaches in the complaint are proved and that the counterclaim is not proved.

I will now invite the parties to address me on consequential orders to be made as a result of my findings.

G. CICCHINI,

IN THE INDUSTRIAL MAGISTRATE'S COURT OF WESTERN AUSTRALIA HELD AT PERTH

Complaints Nos 129 and 251 of 2000

Dates Heard: 4 October 2001; and 27 November 2001

Date Delivered: 13 December 2001

BEFORE: WG.Tarr I.M.

B E T W E E N —

Naomi Lynette Medwid

Complainant

and

Central Metropolitan College of T.A.F.E.

Defendant

Appearances—

Mr RW Clohessy of *Union Industrial Advisory Services* appeared as agent for the Complainant.

Mr D Matthews of the *Crown Solicitors Office* appeared as Counsel for the Defendant.

Reasons for Decision.

The Complainant in these proceedings, Naomi Medwid (Rewell), has brought two actions by way of complaint against the Defendant, the Central Metropolitan College of T.A.F.E.

Firstly, she claims that she was unfairly dismissed from her employment with the Defendant, *inter alia*, because at the time of termination she was on sick leave.

In that action she is seeking a finding that the termination was in breach of a workplace agreement between the parties and in contravention of the provisions of the *Workplace Agreements Act 1993* (the Act). She also seeks an order for reinstatement without loss of benefits.

The second complaint alleges that the Defendant has failed to pay her sick leave from 10 April 2000 in accordance with its obligation pursuant to the workplace agreement.

There is no dispute that she and the Defendant were parties to a Government workplace agreement (the Agreement) signed by her on 29 December 1997 and registered pursuant to the Act.

Relevantly, the Act provides:—

> **18. Implied provision as to unfair dismissal**
>
> (1) There is implied in every workplace agreement a provision that the employer must not unfairly, harshly or oppressively dismiss from employment any employee who is a party to the agreement.
>
> (2) The provision described in subsection (1) is enforceable under section 51 of this Act or under section 7G of the *Industrial Relations Act 1979*, as the case may be, and not otherwise.
>
> (3) A workplace agreement must not exclude the operation of subsection (1) and to the extent that it purports to do so it is of no effect.

It is accepted by the parties that the Complainant was employed pursuant to the agreement that took effect on 1 January 1998. She was employed as a Level 3, Human Resource Adviser in the Human Resources Branch of the Defendant.

Some time in March 1999, the Complainant commenced a period of leave, which included accrued days off, annual leave and long service leave on half pay. She was to return to work early in January 2000 having exhausted all of her recreational leave.

During the early part of her leave she engaged in some external employment firstly with the West Coast College and then with the Ministry of Justice, as it was then called.

While on leave the Complainant became the proprietor of a florist shop trading under the name of Millennium Florist. That business name was registered on 14 May 1999 and the Business Names Extract (exhibit U) indicates that the business commenced on the same day, although the evidence before me is that the florist opened for business on 17 June 1999. It also shows the Complainant as the person carrying on the business at the address of 79A Wanneroo Road, Tuart Hill.

The Complainant gave evidence that she had been involved in a florist course, part-time, over a ten year period and had nearly completed the course when, by chance, she had an opportunity to open a business. She had been advised that her study had given her enough qualifications to do so. It is also her evidence that she was involved in negotiations regarding the business for one or two weeks prior to its registration. As I understand the evidence she has continued in the business as proprietor.

While the Complainant has attempted to demonstrate that her involvement in the business was less than full time and of a managerial or supervisory nature, there is an irresistible inference on the evidence that she was involved on a full time basis as the primary functionary in the business.

It was she who had spent ten years studying to be a florist and who had the skills and qualifications required to run a florist business the size of the Millennium Florist.

Her husband gave evidence of his involvement, which included, as he said, 99.9% of the deliveries. He was also involved in customer services and ordering. He said that the Complainant's duties in 1999 were "more of an overseeing capacity effectively … supervisory work". That evidence is not credible. Mr Rewell was, at the time, running his own business, did not have the skills or experience to perform the duties of a qualified florist as they related to the actual flower products and the evidence shows that the other staff employed were juniors, two of which worked for very short periods.

These actions have arisen because of the course of events that followed a letter sent to the Complainant by Mr Steven David Musson, the Director of Human Resources, outlining a number of performance issues involving the Complainant. The letter (exhibit B) was dated 27 July 1999 and was received by the Complainant while she was on long service leave.

Her response dated 9 August 1999 (exhibit C) caused Mr Musson some dissatisfaction. As he said in his evidence, he was disappointed by the tone of the letter and the accuracy of some of the responses. In his view, while he accepted she might have been upset at receiving the letter while on leave, he believed he had put the matters to her fairly, politely and professionally and he expected an equally professional response.

Mr Musson responded with a letter dated 6 September 1999 (exhibit X) setting out his continued concerns and what he saw as inadequacies in her responses to the issues raised by him.

He maintained that there were still outstanding issues in the way she performed her role and that there were issues which would have to be dealt with on her return, which would be facilitated by the College providing support in the way of mentoring, coaching and formal training. The Complainant's view was that apart from one of the complaints against her she had done nothing wrong and Mr Musson's concerns were unjustified and, as she described the situation in her letter of 16 September 1999, the matter was a "totally unnecessarily pathetic affair".

Some attempts were made to resolve the situation that had developed and a grievance panel was constituted. It was the Complainant's view, as expressed in the statement prepared for the grievance panel (exhibit Y), that her grievance with Mr Musson was "based around the unprofessional, intimidating and vindictive manner in which he has handled this entire matter from the start".

There is no doubt, on the evidence, that the relationship between the Complainant and Mr Musson had deteriorated and there were outstanding issues that needed to be resolved. However, the evidence would suggest that Mr Musson maintained a professional approach in his dealings with the Complainant and involved others, including Mr Mastrolembo and Mr Fitzgerald in an effort to resolve the matter. He maintained however that he had a legitimate right to raise his concerns with the Complainant but admits, as I have said, that it was unfortunate that those concerns were raised while she was on long service leave. He explained his reasons for doing so.

Mr Gary Wayne Fitzgerald, the General Manager, Information and Resources at Central T.A.F.E. gave evidence that he chaired a grievance panel set up to review the formal grievance lodged by the Complainant after he gave her advice about the procedure. He explained that he suggested to the Complainant that she make contact with Mr Musson so that there could be an attempt to resolve the issues "face to face". That, he said, was part of the college's normal grievance resolution process and if that were not successful than he would move on to the formal part of the process. That meeting did not take place and, although at times after the first and second meetings of the grievance panel with the Complainant, Mr Fitzgerald thought they were heading towards a resolution, it did not eventuate.

There is strong support for the view that there could be no resolution until the parties got together and that would necessitate the Complainant returning to work. The evidence before me leads me to conclude that was something the Complainant did not want to do.

I find it difficult to accept that it was just by chance that she opened a florist shop while on leave. She had arranged, after all but completing her florist's course, to take the longest amount of leave she could, which included long service leave on half pay. In fact, leave from March 1999 to 5 January 2000.

She became involved in the purchase of the florist shop probably as early as April 1999 and, as I have found, was the primary person involved in the running of the business. It follows, I believe, that it was not in the interest of the business for the Complainant to return to the college on 5 January 2000 and that is why she made the applications she did.

The first was a request for a severance payment made in her submission to the grievance panel. She next applied for reinstatement of four months long service leave because of the interruption to her long service leave caused by those matters that led to these proceedings. As a result her leave was extended by one month to 7 February 2000.

On 21 January 2000, two weeks before she was to return, she applied for six months leave without pay "so she could take a holiday". That application was refused and she was instructed to return to work on 7 February 2000.

It would appear that around this time she had made contact with her industrial agent who wrote to the Defendant on 31 January 2000, which resulted in the response (exhibit H) confirming she had to return to work on 7 February 2000.

On 2 February 2000 the Complainant obtained a medical certificate from Dr Caroline Chin indicating that she was unfit for work for two weeks from 7 February 2000. This certificate was followed by another for a further two weeks from 22 February 2000 to 7 March 2000.

One could be forgiven for suspecting that the Complainant applied for sick leave so as to avoid returning to work and, as a result, continue to run the florist business.

Dr Chin's evidence was that the certificates were based mainly on what the Complainant had told her. She said she was relying on what the Complainant had told her. There was no mention of stress by the Complainant when Dr Chin saw her in November or December 1999.

The Complainant had seen Dr Terace, a consulting psychiatrist, in relation to a workers compensation claim in July 1999. His report and evidence was that the Complainant was distressed, upset, angry, frustrated and demoralized, but concluded that these were all in the realms of normal mental experiences and that the Complainant was fit to return to work.

Dr Chin did not give evidence that she was aware of Dr Terace's report, but conceded she would probably heed the advice she received from a consulting psychiatrist.

While it is usual to accept a medical practitioner's certificate as being sufficient evidence that a person is not fit to work, I am, in this case, not convinced that Dr Chin's certificates can be relied upon, particularly when the Complainant was, in fact, working full time at the time she was on sick leave from the college.

I do not find the Complainant to be a reliable witness generally. She claims that she was open about her involvement in the florist shop. Her evidence in regard to her dealings with Ms Susan Julie Egerton was not supported by Ms Egerton whose evidence was believable.

The Complainant was a human resources adviser and was well aware of her obligations in regard to applying for approval to undertake external employment. She failed to make application until almost forced to on 6 December 1999. The description of her duties as managerial was misleading. As I have found she was the hands-on florist at Millennium Florist. Her interpretation that the approval was until further notice and not only while she was on long service leave has no basis. She could not be that naive as to think she would get approval to engage in external employment while on sick leave.

The Defendant maintains that the Complainant repudiated the contract of employment and that its acceptance of that repudiation on 10 April 2000 terminated the employment.

There can be no doubt that a contract of employment requires both parties to fulfill their part of the contract. The workplace agreement between the parties sets out the general terms and conditions applying to both parties. It is a fundamental condition applying to the employee that she will perform those duties allocated to her and she could only do that if she attended at her place of work. There are, of course, circumstances where she may be excused from attending, such as when on approved recreational leave, approved sick leave or workers compensation.

The Complainant's workers compensation claim failed and she had exhausted all her recreational leave. She had been requested to return to work on several occasions but failed to do so, claiming to be unfit for duties due to illness.

In my view the Defendant was justified, in all the circumstances, in coming to a decision that the Complainant did not intend returning to work in the foreseeable future to perform her duties as required, and her claim to be unfit to do so was not sustainable. It was also justified in concluding that the Complainant had repudiated the contract of employment and that led to her lawful termination.

It follows therefore that both her claim of unfair dismissal and for unpaid sick leave from 10 April 2000 must fail.

Accordingly, both actions will be dismissed.

W. G. TARR,
Industrial Magistrate.

WORKPLACE AGREEMENTS—Matters pertaining to—

2001 WAIRC 04353

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MAUREEN PATRICIA WOODS, APPLICANT
	v.
	HOME BUILDING SOCIETY LTD, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	FRIDAY, 7 DECEMBER 2001
FILE NO.	WAG 3 OF 2001
CITATION NO.	2001 WAIRC 04353

Result	Application pursuant to section 7F discontinued.
Representation	
Applicant	Ms M. Woods
Respondent	Ms Z. Bafile

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 this matter was listed on 21 June 2001 to determine the facts leading to the making of the application and whether the application brought before the Commission was properly founded for the purposes of section 7F of the *Industrial Relations Act 1979*;

AND WHEREAS the applicant subsequently filed a Notice of Discontinuance in the Commission;

AND HAVING HEARD Ms M. Woods on behalf of herself as the applicant and Ms Z. Bafile 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.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2001 WAIRC 04485

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	SUSAN ELIZABETH ANDERSON, APPLICANT
	v.
	EASTERN GOLDFIELDS MEDICAL DIVISION OF GENERAL PRACTICE, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	FRIDAY, 21 DECEMBER 2001
FILE NO.	APPLICATION 958 OF 2001
CITATION NO.	2001 WAIRC 04485

Result	Application alleging unfair dismissal granted.
Representation	
Applicant	Mr A. Dungey (of counsel)
Respondent	Mrs L. Ellery (of counsel)

Reasons for Decision

1 Ms Anderson was employed as office co-ordinator for the respondent from 8 January 2001 until her dismissal on 17 May 2001. The reason for her dismissal, taken from the letter of dismissal, was an inability to adjust to the organisation's needs where it required an open flow of communication between her position and that of the CEO, Ms Duggin. It identified the main problems as an unwillingness to communicate, lack of initiative and a manner seen as abrupt. It described her attitude as defiant and recalcitrant when counselled leaving the respondent no alternative but to dismiss her. She was dismissed effective immediately with payment of four weeks' wages in lieu of notice.

2 Ms Anderson claims her dismissal was unfair because she was not provided with definitive reasons why the respondent was unhappy with her performance, was given no opportunity to rectify the situation, Ms Duggin's instructions were unclear and erratic and she had no idea she would be dismissed.

3 Evidence of Ms Anderson's performance was principally given by her and Ms Duggin. The respondent also called evidence from Ms Brown, the respondent's Health Programme Manager and from Ms Harrison, who works in clerical and administrative position for the respondent.

4 Ms Anderson's evidence is of an extensive and satisfactory history of work in clerical, secretarial and personal assistant occupations. She was employed to work closely with Ms Duggin and that Ms Duggin has a tendency to do things herself. When Ms Duggin stated that she needed her to come in to her office more regularly, Ms Anderson suggested regular morning meetings. Her evidence is that she loved her work, found the people at work friendly and found the work easy. She believed she got on well with the staff and was happy at least until the car-cleaning incident.

5 Ms Duggin sent an email to her on April 30 (exhibit A6) requesting that Ms Anderson arrange to have the respondent's car to be cleaned inside and out and filled with petrol. She rang two car detailers and got quotes of $144 and $33 respectively. She used the $33 detailers. Later, when Ms Duggin asked where Amanda was, Ms Anderson informed her that she had taken the car to the car detailers. Ms Duggin said words to the effect that "we are a hands-on organisation". Ms Anderson later asked Ms Duggin what she had meant and whether she had meant that Ms Anderson was to have cleaned the car herself. Ms Anderson states that she did not receive a direct answer but that Ms Duggin stated that she was "always spending money". Ms Anderson disagreed. She felt as though she had done something wrong, yet she had not.

6 Ms Anderson's evidence was that she was shocked when later Ms Duggin told her that complaints had been received that she had been "rude" to doctors on the telephone. On another occasion Ms Duggin had asked her to "nip out" and get some sandwiches to be cut up for 3 people for a working lunch. Ms Anderson knew that for Board meetings sandwiches were usually obtained from a place which had gourmet fillings. Ms Duggin had stated in the past that she had liked them so she rang up and had sandwiches delivered.

7 Towards the end of her employment, however, she felt she lacked Ms Duggin's support and things "did not quite return to normal" for her. She was very upset at the verbal warning given to her by Ms Duggin on Friday 11 May. The following Monday Ms Duggin's door was shut and she waited for the verbal warning to be given in writing. This did not occur and she took the following two days off on medical advice (providing the appropriate certificates) and returned to work on the Thursday, when she was dismissed. Ms Anderson says she was horrified at being dismissed and that in all her work history, nothing like it had occurred to her before.

8 Ms Anderson refutes the grounds for her dismissal as given in the letter, and as contained in the respondent's Notice of Answer. She says she took a number of initiatives. She re-organised the stationery cupboard, arranged for a particular rubber stamp to be made, purchased a windscreen reflector, arranged cleaning the outside of the building and stopped the use of a high-pressure hose for the purpose, she built upon Ms Duggins' idea of vouchers for student packs and she shopped around to have computer carry cases included in the supply price of computer notebooks. She says she was conscious of the need to be careful with the respondent's money. Ms Duggin signed off on all stationery orders prior to purchase and she was never told she had bought excess stationery . She set up an account with an alternate supplier, but it was not competitive. She arranged an account for petrol, without an account fee, in place of petty cash.

9 She states that she cleaned dishes in the kitchen and tidied up. She did not refuse to clean the archive shed, but it was "creepy" with spider eggs and she has a problem with spiders. She had never been told that there was to be a bush-weekend retreat she would have to attend, but she would have had no problem as long as there were no spiders. In any event, there was no such weekend for 2001. She genuinely forgot when she was employed to advise that she had already arranged for a holiday in June on a non-refundable ticket and was not being dishonest.

10 Ms Anderson was extensively cross-examined on her evidence and I refer later to some of the evidence which arose out of that cross-examination.

11 Ms Duggin's evidence is that Ms Anderson started her employment well and seemed interested in the job. However, Ms Anderson's attitude declined. She preferred some tasks over others and delegated things she did not like doing. Ms Duggin informed Ms Anderson that she wanted greater support and assistance from her but states that Ms Anderson replied that she would not have accepted the job if she had known it was to be a personal assistant role. Ms Duggin says that she regularly stated she wanted a more open flow of communication between them. Ms Duggin explained that she made Ms Anderson permanent after 3 months because the job in her job description was being done. However, Ms Anderson's attitude seemed to change after a receptionist was appointed in late March. Ms Duggin concedes she did not put anything in writing to Ms Anderson but hoped that things would improve by talking to her. Her evidence is that it did not seem to work.

12 Ms Duggin was also extensively cross-examined on her evidence and I refer later, where necessary, to that evidence.

13 Although I advised the parties when the matter was heard in Kalgoorlie that I would endeavour to issue the decision in this matter after considering it overnight, I have preferred to reserve my decision in this matter for a longer period to more fully reflect upon the evidence.

14 I have reached the conclusion that in general, where the evidence of Ms Anderson and Ms Duggin conflict, I prefer the evidence of Ms Duggin. I do so for these reasons. Ms Duggin's evidence that Ms Anderson started well but that as time passed her attitude changed, that she liked doing some tasks and not others and tended to give a lot of things to Amanda, was supported by the evidence of Ms Brown. I have no difficulty accepting the evidence of Ms Brown and thus her evidence that Ms Anderson became reluctant to do tasks, saying some things were not her area and that Ms Anderson's tone made her stand back, including her shock at hearing a comment made about Ms Duggin by Ms Anderson which was derogatory of Ms Duggin, is quite significant.

15 Ms Duggin's evidence that Ms Anderson changed after the receptionist commenced and that she gave the receptionist a lot of tasks is also supported by Ms Harrison's evidence. Ms Harrison also stated that she had been told by at least Ms Duggin and Ms Brown that Ms Anderson had been hard to get along with, which supports the evidence of Ms Duggin and Ms Brown. I found significant Ms Harrison's evidence that while she herself did not have a problem with Ms Anderson, that was because she "has a stronger personality".

16 Therefore, while I accept Ms Anderson's evidence that she showed initiative in some areas, such as the stamp, windscreen reflector, cleaning the outside of the building, having computer carry cases included in the supply price, and the morning meetings with Ms Duggin, I have not been persuaded by Ms Anderson's evidence that there is no substance to Ms Duggin's evidence. While I accept that the suggestion of the morning meetings was positive, I find their frequency dropped off to only one or two a week. I find the reduced frequency is consistent with the evidence that Ms Anderson's interest in the position seemed to lessen in the latter part of her employment and that she had said she would not have accepted the position if she had known it was a personal assistant role to Ms Duggin.

17 I find the evidence that Ms Anderson's interest in the position seemed to lessen in the latter part of her employment to be made out also from her own evidence and from the emails (exhibit R2). In particular, I consider Ms Anderson's evidence that she was looking for alternative positions, because she was still looking for the ideal job, to be significant. Her comment made in an email that she finds her job "very cruisey" is dated 19 April 2001, and the comment that it is "very cruisey and sometimes very boring", a comment that I find is quite consistent with a growing lack of interest, is dated 20 April 2001. As she herself said, she found the work enjoyable but boring and was looking for something more stimulating or intellectually challenging. In that context, her comments in the email about "striking a blow for the government", which in some circumstances might be an example of levity, and also for which she now apologises, in these circumstances support the respondent's evidence that in the latter part of her employment her attitude and her regard for the respondent left a great deal to be desired.

18 I find therefore that the evidence of Ms Duggin that there was not the open flow of communication and that there seemed a fall off in Ms Anderson's attitude, is made out over the evidence of Ms Anderson to the contrary.

19 I also find that Ms Duggin did raise her reservations about the open flow of communication with Ms Anderson on a number of occasions. However, while Ms Duggin expected Ms Anderson to show initiative in this regard, Ms Anderson believed she was showing initiative and expected Ms Duggin to tell her what Ms Duggin wanted, which is the very thing that Ms Duggin did not expect to have to do. I also find that towards the end of her time there, Ms Anderson was not receptive to initiating any changes. I do so because of the evidence that the frequency of morning meetings fell away, that she delegated work and that her response to criticism was to become indignant and to say, in Ms Duggin's evidence, "that cannot be right" and asking who it was that complained about her. While I quite accept Ms Anderson's evidence that she was very shocked at the suggestion, it did not prompt her to change anything about her attitude or manner. Ms Anderson admits that she "discounted" matters that were raised with her although she states that it was because she did not know what she was doing that was wrong. On the evidence, I find that this tends to support the respondent's position that Ms Anderson did not accept criticism well.

20 Ms Anderson claims that Ms Duggin did not specifically tell Ms Anderson what she wanted done and for that reason her dismissal was unfair. For example, what should or should not be delegated and the manner of cleaning the car inside and out was left to Ms Anderson. I find that this is made out. Ms Duggin did leave things to Ms Anderson to be done but I have found the strength of the issue Ms Duggin's raises goes more to Ms Anderson's approach overall towards the end of her employment.

21 I turn to consider the fairness of the dismissal which occurred. It is significant in my view that Ms Anderson had been on probation for 3 months to 9 April 2001 and had then been confirmed as permanent in a letter that states she is confirmed with pleasure on the part of Ms Duggin, and with congratulations by Ms Duggin on Ms Anderson's professionalism and quality of work undertaken already (exhibit A5). While that may be surprising, as Ms Brown stated, it nevertheless can only have been confirmation to Ms Anderson that how she had performed to date was most acceptable. As Ms Duggin stated in her evidence, Ms Anderson was doing the job in her job description. I therefore accept Ms Anderson's evidence that before the warning of 11 May 2001 she had no idea she might be dismissed, and possibly no idea even on the day of dismissal.

22 For the dismissal of an employee for poor performance to be fair, the employee should, so far as practicable, be given a warning that their employment is in jeopardy and an opportunity to improve. Failure to warn, where appropriate (see *Sewards v Canon Copiers Australia Pty Ltd* (1983) 5 IR 227 at 232 and *Willis v Western Motor Company Pty Ltd* (1985) 10 IR 203) is relevant to the question of whether the employee has had "a fair go all round"; no injustice will result if the employee could be justifiably dismissed without appropriate warning, or without explanation, or if the explanation would not have made any difference (see *Hocking v Public Service Association of South Australia Incorporated* (1978) 45 SAIR 637 at 658, as cited in *FMWU v Cat Welfare Society Incorporated* (1991) 71 WAIG 2014 at 2022). In such a case it is appropriate to ask whether, if Ms Anderson had been given an opportunity to respond and an opportunity to show a change in her attitude, it could have made a difference to the outcome: see *Stead v SGIO* (1986) 161 CLR 141 at 145-6; 67 ALR 21 at 23.

23 It is agreed that on Friday, 11 May 2001, Ms Duggin warned Ms Anderson about at least poor communication skills and that Ms Duggin was not getting enough from Ms Anderson. I find for the reasons set out above that the warning was justified. It was given orally but it is not argued that Ms Anderson's contract of employment required warnings to be given in writing and

therefore the oral warning was perfectly valid. However, Ms Anderson was given no practical opportunity to respond to the warning and no opportunity to improve. Although, as I find, Ms Duggin had told Ms Anderson that the warning would be confirmed in writing and she would be given an opportunity to respond to it, she changed her mind on Monday, 14 May 2001 and decided that the situation warranted Ms Anderson's dismissal. I accept Ms Duggin's evidence that for her things had become so untenable.

24 However, I am not persuaded that Ms Anderson's performance and attitude had deteriorated to such an extent that it warranted what was, in effect, a dismissal without warning when on 9 April 2001, five weeks earlier, Ms Anderson had been confirmed in her position and congratulated on her professionalism and quality of her work. For the respondent to fairly dismiss her without warning, Ms Anderson's work performance would need to have deteriorated so markedly as to show that the warning could have made no difference. There is too much of a gap between professionalism and quality of work on 9 April 2001 and such poor performance as to warrant a decision to dismiss on 14 May 2001.

What is the evidence for that change from 9 April 2001?

25 There is no evidence that Ms Anderson did not attend for work during the period. She may have been punctual in attending and leaving, and in taking her lunch period, but I cannot see valid criticism for that unless it is clear that in doing so, work which needed to be done was not done. The Esperance example occurred in early February, not in this period. The car cleaning incident is not, on the evidence, an example of poor work; Ms Anderson did exactly as she was asked to do: arrange cleaning inside and out. Even if I accept that Ms Anderson did not do what she was asked to do when asked to get some sandwiches herself, the issue is trifling overall. Indeed, I find the issue of the sandwiches to be a small issue, as I suspect Ms Harrison believes it to be, and there is no evidence of Ms Anderson lying about it as suggested in the Notice of Answer and Counter Proposal.

26 The discussion between Ms Anderson and Ms Duggin regarding complaints received about her attitude being not friendly, perhaps even rude, towards doctors were after 9 April 2001 and on the evidence Ms Anderson showed no inclination to accept criticism, but I query whether that of itself can justify her dismissal. Similarly, I have not lost sight of the mixing up of the doctor and specialist for the media presentation and the issue of spiders in the archives, nor the comment about future attendance at the bush weekend. However, the evidence does not suggest that Ms Anderson's work was not otherwise being done and I find it difficult to conclude that fairness towards Ms Anderson does not include the opportunity to improve after the warning which was given.

27 I note Ms Duggin's evidence that she did not think there would be any change. I have given thought to the submission from the respondent that Ms Anderson was spoken to, perhaps counselled, on many occasions yet did not show any tendency to improve towards the end of her employment. Ms Anderson admits she did discount the comments made to her. However, the very purpose of a warning is to put the employee on formal notice that unless there is some change, the employee's employment is in jeopardy. If there is then no improvement, then it is difficult to see how the dismissal can be claimed to be unfair. I am unable to say that if Ms Anderson had been given a chance to improve after the warning had been given, it could have made no difference to the outcome.

28 The procedure followed by an employer is only one factor to be taken into account by the Commission when it assesses whether or not a dismissal is unfair. In some circumstances, the procedural steps may be an important factor. Those steps will be important if the evidence is that if the procedures had been followed it could have made a difference to the outcome.

29 I find that, if Ms Anderson had been given some time after the warning to improve, it could have made a difference to the outcome and that her dismissal on 17 May 2001 was unfair but only for that reason.

30 Having found the dismissal to be unfair, I turn to consider the remedy sought by Ms Anderson. She seeks reinstatement. It is opposed strongly by the respondent and, in my view, with good reason. I found the evidence of the altercation which ensued when Ms Duggin dismissed Ms Anderson is clear. I have no difficulty in concluding that Ms Anderson pushed Ms Duggin aside in a manner which broke Ms Duggin's neck chain, left a mark on her neck as a result and stretched the collar of her top. I find Ms Duggin stumbled and bruised her leg as a result. Ms Duggin's evidence is corroborated by that of Ms Harrison who was in the vicinity at the time and who assisted Ms Duggin. The photograph of the broken neck chain (exhibit R1) is compelling. Ms Anderson's evidence that she did not grab Ms Duggin's collar and that she did not know how the neck chain could have come to be broken is rejected.

31 While I find that both Ms Duggin and Ms Anderson found the situation stressful, Ms Anderson's action was not warranted and I cannot see that it might be possible to reinstate the employment relationship.

32 Further, Ms Duggin's accusation that Ms Anderson was attempting to steal the respondent's property by putting her daily workbook, a spiral-backed writing book, in her bag shows the breakdown in the relationship was complete. Ms Anderson did put the book in her bag, although I suspect that was more due to habit than a deliberate act following her dismissal. The Commission has not been informed that there was anything written in the workbook which might have warranted it being removed by Ms Anderson, and I regard the incident as minor other than as a demonstration of the tension of the event.

33 Compensation for the unfair dismissal is for the loss and injury caused by the dismissal. I am persuaded that the only loss to Ms Anderson caused by the dismissal is the loss of an opportunity to have improved following the warning. In assessing that period of time I take into account the relatively short period of Ms Anderson's service and that in the small office environment, any improvement would have been apparent soon. In my view, a period of two weeks is a reasonable period and Ms Anderson's loss is measured by the wages she would have earned in a further two weeks of employment. While I have had regard to the submission that loss may encompass issues other than economic loss, I am not persuaded that the facts of this matter establish further loss. Indeed, I cannot be confident that, even if two weeks of further employment could have made a difference, Ms Anderson's employment would have continued past that time.

34 Ms Anderson also claimed that it was a benefit under her contract that she should be paid for the unexpired portion of a fixed term of employment. However, the evidence does not show that Ms Anderson was a fixed term employee. In fact, I find she was a permanent employee and in any event, even if it could be said that the letter confirming her employment (exhibit A5) provided an end date for her employment, the balance of the contract of employment would permit a term of reasonable notice to be provided for its termination. A contract which can be terminated within its term is not a fixed term contract (*Anderson v Umbakamba Community Council* (1994) 1 IRCR 457 and *Cooper v Darwin Rugby League* (1994) 57 IR 238; and see too *ALHMWU v Royal Perth Hospital* (FB) (1994) 74 WAIG 1878).

35 A Minute of Proposed Order now issues.

———

2002 WAIRC 04509

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SUSAN ELIZABETH ANDERSON, APPLICANT
	v.
	EASTERN GOLDFIELDS MEDICAL DIVISION OF GENERAL PRACTICE, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	MONDAY, 7 JANUARY 2002
FILE NO.	APPLICATION 958 OF 2001
CITATION NO.	2002 WAIRC 04509

Result	Application alleging unfair dismissal granted.
Representation	
Applicant	Mr A. Dungey (of counsel)
Respondent	Mrs L. Ellery (of counsel)

Order

HAVING HEARD Mr A. Dungey (of counsel) on behalf of the applicant and Mrs L. Ellery (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 dismissal of Susan Elizabeth Anderson on 17 May 2001 by Eastern Goldfields Medical Division of General Practice was unfair by reason of the lack of proper warning.

(2) DECLARES that reinstatement is impracticable;

(3) ORDERS that Eastern Goldfields Medical Division of General Practice forthwith pay to Susan Elizabeth Anderson a sum equivalent to 2 weeks' wages as compensation for the dismissal which occurred.

(4) ORDERS that the claim for a denied contractual benefit be dismissed.

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

2001 WAIRC 04348

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIANNE CHURCHILL, APPLICANT
	v.
	PHARMACIA AND UPJOHN (PERTH) PTY LIMITED, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	THURSDAY, 6 DECEMBER 2001
FILE NO.	APPLICATION 2077 OF 2000
CITATION NO.	2001 WAIRC 04348

Result	Applicant unfairly dismissed. Order made that the Respondent pay the Applicant compensation of one month's pay of $2,804.21.
Representation	
Applicant	Mr B L Nugawela of counsel
Respondent	Mr J H Brits of counsel

Reasons for Decision

1 The Applicant, Dianne Elizabeth Churchill ("the Applicant") has made an application under s.29(1)(b)(i) & (ii) of the *Industrial Relations Act 1979* ("the Act"). The Applicant claims that she was harshly, oppressively or unfairly dismissed by Pharmacia and Upjohn (Perth) Pty Limited ("the Respondent") on 1 December 2000. The claim under s.29(1)(b)(ii) was not pursued at the hearing.

2 The Applicant was employed by the Respondent as a Pharmaceutical Operator which required her to operate machinery that filled, processed and packaged various drugs, including drugs covered by Schedule 8 of the *Poisons Act 1964*. Drugs manufactured by the Respondent include Lignocaine, Chlorhexidine and Morphine. Because of the nature of the drugs manufactured by the Respondent, the Respondent requires a high level of honesty and integrity from their employees to ensure that the drugs are kept secure.

3 The Applicant was dismissed after she failed to provide a police clearance certificate and it emerged that she had been convicted of an offence of stealing as a servant when she was employed by a garden chemical manufacturing company, David Gray & Company Pty Ltd.

Background

4 The Applicant first commenced employment with the Respondent on 30 May 2000 as a pharmaceutical operator. The Applicant came to be employed by the Respondent after she made an application for employment and filled out an application for employment form sometime in early 2000. In an application form titled "Employment Details" the Applicant was required to set out the names of previous employers and details of positions held. Among other questions she was required to answer the

question, "Have you had any criminal convictions (excluding traffic infringements)?" to which the Applicant circled on the form "No". At the bottom of the form the Applicant signed the following declaration—

> "I hereby apply for the aforementioned position and am fully aware that if the information I have provided is false or misleading my employment may be terminated."

5 On 29 May 2000, the Applicant was provided with a written offer of a contract for casual employment. Whilst the offer describes the nature of engagement as casual the Applicant says that she commenced work on a full-time basis on 30 May 2000.

6 It was expressly a term of the engagement of the "casual contract" that—

> "A Western Australian State Police clearance certificate is required to be produced within fourteen (14) days of commencement of employment."

It was also a condition of that contract that:

> "The Company may terminate this contract by giving the Employee one (1) hours notice, or alternatively paying salary in lieu of notice. This one (1) hours notice period does not apply if the Employee is deemed to have acted in a manner consistent with wilful misconduct, neglect of duty, or breach of this employment agreement."

7 Despite being advised that it was a condition of her contract of employment that she produce a Police clearance certificate, the Applicant did not produce such a certificate until after her employment was terminated.

8 After working for a period of time pursuant to the terms of the casual contract of employment the Applicant made application for permanent employment. On 13 September 2000 the Applicant filled in an application form for employment in which she was required to again, answer a question in relation to convictions. In particular she was asked the question—

> "Have you, in the last ten years, in WA, or elsewhere, served any part of a sentence of imprisonment, or been convicted of any criminal offence? (*A criminal conviction is not automatically a barrier to employment. Consideration will be given to individual circumstances*). If yes, please provide details: ……"

To that question the Applicant ticked the "No" box. In the application form information in relation to her previous employment was also required. In her response she stated that she was employed by David Gray & Company Pty Ltd for nine years and her reason for seeking a change from that position was, "Wanted less hours". On the last page of the application form, the Applicant signed the following declaration—

> "I declare that all the information I have supplied in this application is true and correct. I understand that any misrepresentation of facts in this application could be cause for termination if employed. …"

9 On 3 October 2000, the Applicant was offered a fixed term contract of employment, the terms of which were set out in writing. The Applicant accepted that offer on 5 October 2000. The material terms of the contract were as follows—

> "This letter is to confirm our offer of fixed term employment as a Pharmaceutical Operator in the BFS & General Production Area. You will employed in accordance with the Pharmacia & Upjohn (Perth) Pty Limited Pharmaceutical Operator Certified Agreement 2000 which is available for your perusal in the Human Resources Department. Your salary and other benefits are as detailed below—
>
> | | |
> |---|---|
> | **Employment Position:** | Pharmaceutical Operator Basic |
> | **Employment Type:** | 12 Months Fixed Term Contract |
> | **Company Benefits Waiting Period**: | 3 Months |
> | **Roster:** | Dayshift Roster 8 |
> | **Area:** | Production Sterile |
> | **Reporting to**: | Production Supervisor (Wendy Woodall) |
> | **Commencement Date:** | Thursday, 5 October 2000 until |
> | | Friday, 5 October 2001. |
> | **Salary:** | $29,061.77 per annum |
> | **Superannuation Contributions:** | 8% |
>
> **Private Health Cover:** Eligibility for participation in the Company's Corporate health scheme in accordance with HR Policy HR036.
>
> Depending on operational requirements within the Sterile, General and Oncology Production Areas, the Employee may be required to work various other shifts from time to time.
>
> …
>
> **Police Clearance**
>
> A Western Australian State Police clearance certificate is required to be produced within fourteen (14) days of commencement of employment.
>
> **Termination**
>
> The Company may terminate this contract by giving the Employee one (1) months notice, or alternatively paying salary in lieu of notice. This one (1) months notice period does not apply if the Employee is deemed to have acted in a manner consistent with wilful misconduct, neglect of duty, or breach of this employment agreement as per the Certified Agreement."

10 The Applicant's employment with David Gray & Company Pty Ltd did not come to an end because she wanted less hours. The Applicant said that the company is a family company run by a Mr Gray. The company manufactures garden products and Mr Gray allowed all his employees to take home as many of the company's products as they wished. The Applicant said whilst she was employed by David Gray & Company Pty Ltd she had a friend staying in her house by the name of Mr Ian Fay, whom she had known since she was a teenager. She said that Mr Fay was unemployed and an alcoholic. She testified that whilst he was living at her house she found that her garden products had gone missing. When she questioned him he informed her that he was taking the products to Bunnings and making a claim for a cash refund after claiming they were products purchased from Bunnings. The Applicant said that she got Mr Fay a job at David Gray's because he was draining her financially, but the job only lasted for about three days. She said that after he ceased work he asked her to take products from David Gray's, specifically ant killer, so he could take the products to Bunnings to obtain a cash refund. She said she agreed to his request because he was draining her financially and he kept pestering her. It was apparent from her evidence that Mr Fay was apprehended by the police and both she and Mr Fay were charged. It emerged from a police clearance certificate tendered into

evidence that the Applicant was charged and convicted of 11 counts of stealing as a servant and 11 counts of fraud on 1 April 1998. As a penalty for the offences she was ordered to carry out 120 hours community work and was given a community-based order for a period of 18 months. Pursuant to s.62 of the *Sentencing Act 1995* the nature of a community-based order is that if the offender commits another offence whilst the order is in force, the offender may be sentenced again for the offence to which the original order relates. Further, during the currency of the order the offender must comply with certain prescribed requirements, including reporting to a community corrections centre.

11 The Applicant testified that the reason why her employment with David Gray & Company Pty Ltd ceased was not because she wanted less hours but because after she was charged by the police, she found it very difficult to look Mr Gray in the face and that both of them agreed she should leave. The Applicant also testified that after she was charged she wrote to both Mr Gray and to Bunnings apologising for her part in the offences. She also paid Mr Gray for the products that were taken.

12 The Applicant said that prior to going to court in relation to the charges, her lawyer, Mr Kitto, advised her that she would not have a police record but that she would get a fine and probably get community service. She said that when she went to court the day in question was a blur, she was very distressed and she did not know that she had been convicted of an offence, only that she was told she had to pay a fine and carry out 120 hours community service. She said that when she filled out the application form for employment with the Respondent in early 1999 she circled "No" in answer to the question "Have you any criminal convictions?" because she honestly believed that she did not have a criminal conviction.

The events that led to the Applicant's employment being terminated

13 The Applicant testified that about six weeks after she had commenced employment for the Respondent in May 2000, she was asked by the Respondent's Recruitment and Administration Officer, Helen West, whether she had obtained a police clearance certificate. She said Ms West was the person who offered her employment on behalf of the Respondent. The Applicant said she informed Ms West that she had not obtained a certificate. The Applicant testified that on that evening she telephoned the police and spoke to a police officer and after telling him what had happened at David Gray & Company Pty Ltd the policeman informed her that the police computer showed that she did have a record and he told her to speak to her employer and tell them the circumstances of the offences. She said that the next day she made an appointment to see Ms West and she told her of the events set out in paragraph 10 of these reasons.

14 The Applicant said that Ms West told her that the Respondent was only interested in drug related cases because they were a pharmaceutical company, that not to worry and to bring her police clearance certificate to her. The Applicant, however, did not provide a police clearance certificate and when questioned why she did not, she said she obtained the paperwork for a national police clearance certificate but did not make an application for a certificate as she was just "hoping it would go away and the matter not surface".

15 When asked why she lied on the application form he filled out by her on 13 September 2000 she said that Ms West had told her they (the Respondent) were only looking for drugs and to bring the police clearance certificate to her. She said she did not want to compromise Ms West so she circled "No" in answer to the question whether she had been convicted of any offence.

16 The Applicant says that after she commenced full time employment in October 2000 she was required to work on the Rommelag 6 machine, which is a machine that fills, prints and packs ampoules.

17 The Applicant says that the real reason why her employment was terminated was because of conflict with Ms Wendy Woodall, a Production Supervisor. The Applicant says that when she commenced using the Rommelag machine she found it very difficult to operate as she had only had experience in manual packing in the printing section of the packing hall. She said she was asked to operate the Farcon section of the machine and when she did so the machine began to jam in three or four sections. She said Ms Woodall came into the room and the Applicant advised her that she was unable to operate the machine as she had not been shown how. She said that Ms Woodall was annoyed and directed her to work on the packing table. A few days later Ms Woodall informed the Applicant that she was required to have a meeting with the Production Manager, Mr Brett Alderson. She said she met with Mr Alderson who said that he had heard she was having trouble operating the machinery to which she responded it was because she had not been trained to do the work. She said that Mr Alderson asked her if she would like to receive some training to which she replied, "Yes". She said that Mr Alderson informed her that he would be going on holidays for two weeks but that he would speak to her when he returned from leave.

18 About a week later, the Applicant was working on the printing machine when a printing error occurred which caused a very fine line across the labels which were being put on ampoules. She said the error had occurred whilst another employee, Ryan, was working on the machine and he had passed the labels. The Applicant said that Ms Woodall came into the room, saw the fine lines across the labels and became really angry. She (the Applicant) said she offered to stay back after work and rub the lines off to which Ms Woodall replied that there was no need. As a result of this altercation the Applicant went to see the Production Controller, Mr Geoffrey Burt, with Ms Woodall. She asked Mr Burt why she was being picked on for these mistakes and she complained that others were making huge mistakes, whereas hers were minimal. The Applicant says that Mr Burt said to her, "Don't worry about what everybody else is doing. We are just watching you." She said she told him she had not had any training and that Mr Alderson had offered her training. She said that Mr Burt told her to just carry on with her duties as she used to do when she was working on the printing machine in the packing hall.

19 Sometime after the meeting with Mr Burt, the Applicant received a letter from Mr Michael Morgan, the Respondent's Human Resources Manager, dated 8 November 2000 advising her that her hours of work had been increased to 42 hours per week and as a result in the change of hours, her salary was increased to $33,650.47 per annum.

20 On 29 November 2000, Ms Woodall informed the Applicant that she was required to attend a meeting with Mr Morgan. Prior to the meeting the Applicant was asked by Ms Woodall whether she had a police clearance certificate. The Applicant said that she informed her that she did. The Applicant said she went to the meeting and that Mr Burt was present together with the Union representative and Mr Morgan. She said that there was a discussion at that meeting about the difficulty she was having with Ms Woodall and that at the end of that discussion Mr Morgan informed her that no one was there to crucify her and Mr Morgan offered her training. She also testified that there were some other issues raised at that meeting. When cross-examined about this part of the meeting the Applicant said that she felt quite positive about the outcome. At the conclusion of the meeting Mr Morgan said to the Applicant that she had not provided a police clearance certificate and did she have a problem with a police clearance. The Applicant testified that she said, "Yes" (meaning she did have a problem) but that she had told Helen West about it. The Applicant said that Mr Morgan informed her that he did not need to hear about it, but she said that she wanted to tell him about the matter, so she told Mr Morgan about what happened at David Gray's. The Applicant said that he then went and spoke to Helen West.

21 When Mr Morgan returned he informed her that he would have to suspend her to conduct an investigation and that he would give her a week's pay. She said Mr Morgan telephoned the Cannington Police Station to arrange for her to obtain a police clearance certificate and then directed her to go to the Police Station to make an application for the certificate.

22 On 1 December 2000 the Applicant received a letter from Mr Morgan advising her that her employment had been terminated. The letter stated—

> "Dear Dianne
>
> **RE: TERMINATION OF EMPLOYMENT**
>
> At our meeting on 29 November 2000 you were questioned by myself about the reasons for your failure to produce a Police Clearance despite several requests for you to do this. At this meeting you admitted to having been convicted of an offence relating to stealing from your previous employer David Grays, although you could not remember the specific details of this offence.
>
> The outcome of this meeting was that your employment was suspended until I could establish the seriousness of this offence. I advise that I have conducted further inquiries regarding your criminal history by contacting the Managing Director of your previous employer David Grays. I am now satisfied that this offence would have been sufficient to preclude you from being offered employment with Pharmacia & Upjohn at the time of your initial application had we been aware of this offence.
>
> On your application form dated 2 March 2000 you have answered "no" to the question "Have you had any criminal convictions?" You have signed this form acknowledging the warning that the provision of false or misleading information may lead to termination of employment.
>
> I hereby inform you effective immediately that your employment with Pharmacia & Upjohn is terminated on the grounds that you provided false information in relation to your criminal history at the time of employment and that the type of offence you have been convicted of was one that would have precluded you from employment at that time.
>
> You will paid up to Tuesday 5 December 2000 as indicated in your suspension letter and this amount will be paid into (sic) nominated account today. As you have been dismissed for misconduct you are not entitled to any accrued leave benefits. Enclosed is a Separation Certificate if required by Centre Link. Also enclosed is details of your termination pay. You are advised to contact Lindsay Palmer of Jones Palmer & Associates the company superannuation advisors on 93882667 to arrange for the rollover of your superannuation funds.
>
> Yours sincerely"

The Respondent's evidence

23 Mr Morgan testified that he employs all staff for the Respondent. He said Ms West's involvement is that Ms West co-ordinates all the paperwork for the applications for employment. He said all applications for each position are sent to the managers of the area responsible for the recruitment process and that once that process has been finalised and he is satisfied that all the requirements of the company have been met, he issues employment contracts on behalf of the company. He said the reason why a police clearance certificate is required by the Respondent within 14 days of commencement of all contracts of employment is that the Respondent is a pharmaceutical manufacturing company that makes a whole range of pharmaceutical products, including cancer drugs and prohibited substances. So it is necessary that all employees have a high level of integrity and honesty. He also said that if a person has a criminal conviction they will not necessarily be regarded as a person who is unsuitable to be employed by the Respondent.

24 Mr Morgan said that it was an oversight that the Applicant was offered permanent employment on 3 October 2000 without having obtained a police clearance certificate as required by the casual contract of employment.

25 Mr Morgan testified that he was not aware that the Applicant had not provided a police clearance certificate until 29 November 2000. He said the reason why he attended the meeting with the Applicant on that day was that he was asked to act as a mediator to assist in finding a solution to a number of performance issues in respect to the Applicant's performance. In particular, to find a solution in relation to her conflict with Ms Woodall. Mr Morgan said that at the meeting the performance issues were raised and the Applicant had an opportunity to put forward her points. He said at the end of the discussion she agreed to do certain things in relation to training and the Applicant agreed to take positive steps in dealing with Ms Woodall and complying with a number of matters. He said they had a positive end to the discussion in respect of these issues. Mr Morgan said, however, that during the meeting when the issues in relation to Ms Woodall were discussed, he became aware that Ms Woodall had asked the Applicant for a police clearance certificate the day before and he (Mr Morgan) became aware that the Respondent's records indicated that the Applicant had not provided a police clearance certificate. He said he decided to question the Applicant about that. Mr Morgan said the Applicant told him that she had provided a police clearance certificate and had left it at the reception area. Mr Morgan said that he suspected that the Applicant was lying about the provision of the certificate so he arranged for Mr Jolly, the union representative, to be present. He then questioned the Applicant further in the presence of Mr Jolly.

26 When Mr Morgan questioned her further she admitted she had not provided a certificate. He said at first she was not very forthcoming, that she could not recall whether there was anything on her criminal record. He also said she appeared confused about what might be on her record. After further questioning she told him that she in fact did have a police record involving some type of theft. He said she told him it was her friend, or boyfriend's fault, that she had been to court but she could not remember whether she had had a conviction or not. He said she informed him that it had occurred whilst she was working for David Gray & Company Pty Ltd. Mr Morgan said he then felt he needed to investigate the matter. He then spoke to Helen West and arranged for her to type a suspension letter. The letter stated—

> "Dear Dianne
>
> **RE: NOTICE OF SUSPENSION OF EMPLOYMENT**
>
> Further to the meeting in my office today involving yourself, myself, Jeff Burt (Production Controller) and Ron Jolly (Union Representative) I hereby inform you that effective immediately you are suspended from employment at Pharmacia & Upjohn with pay for a period of one (1) week to Tuesday 5 December 2000.
>
> This is because you have failed to provide a Police Clearance as required under the terms of employment and when questioned about this today have admitted that you have been convicted of an offence relating to stealing from a previous employer. We also note that you have provided false information on your initial application form where you have stated you have never been convicted of a criminal offence.
>
> As you cannot provide the full details of exactly what offence you were convicted of I intend to gain further information about this matter from your previous employer prior to making a decision about your ongoing employment. You are also required to attend the Cannington Police Station on your way home today and apply for a Western Australian Police Clearance.
>
> I will contact you before next Tuesday to advise you of the outcome of my inquiries and the status of your ongoing employment with the company.

You are required to provide your security keys to Jeff Burt before leaving the building today and are not permitted to attend the work place, except with my permission for the period you are under suspension.

To confirm your understanding of the changes to your conditions of employment, please sign and return one copy of this letter to the Human Resources Department.

Yours sincerely"

27 Mr Morgan then spoke to Mr Gray who confirmed that the Applicant had been charged and convicted of offences which related to stealing chemicals from his company which were taken to Bunnings retail shops for a refund.

28 After Mr Morgan spoke to Mr Gray he consulted the Respondent's Human Resource Director for Australia who is based in Sydney, Mr Peter Land. Mr Morgan sent the following email to Mr Land and to Mr Rob Hayes, the Western Australian Plant Director—

"Dear Rob and Peter

I have today suspended an employee with pay for a period of one week in order to further determine her criminal conviction status and to make a determination regarding her ongoing employment. The employee has been removed from site and has returned her security pass and key. I have also requested that she immediately apply for a police clearance today.

The employee concerned is Dianne Churchill, one of our recent 12 month contract production operators. On her initial employment application she indicated that she had not been convicted of a criminal offence. As usual practice she was requested to provided a police clearance following employment. She has been followed up several times regarding the clearance however she has failed to produce one.

I suspected that the employee was hiding a criminal conviction so I interviewed her on this matter his(sic) morning with Jeff Burt and at her request Ron Jolly present. First the employee said that she had provided a clearance several weeks ago and left it at the reception desk for Helen West, and finally with some probing the employee admitted to having a conviction for some type of fraud but was not forthcoming with the specific charges citing a memory lapse.

The employee did provide the name of the employer where this offence occurred (again not disclosed on the employment application) and I have now contacted the managing director of that company to confirm details. The previous employer has confirmed that the employee was dismissed for stealing goods of significant value from a warehouse and then acting as a customer, returning them to numerous retail outlets for a refund. She was charged by the police and convicted of several offences. This occurred only 2 years ago.

I am now satisfied that this employee should be terminated immediately on the following grounds—

1. Providing false information in relation to criminal record at the time of initial employment.

2. Having a criminal conviction involving stealing from an employer.

Considering that the employee has now admitted to lying at the time of employment and to having a criminal conviction, and having this confirmed by the managing director of her previous employer, I want to proceed to terminate this person's employment and seek both of your approval before proceeding. I do not see the point in waiting the 4 to 6 weeks for the police record to be produced".

Mr Land replied as follows—

"Michael

Dismissal of this person is in line with site standards/practices. Also by not indicating on the employment form her criminal record is justification for dismissal. This form in case you didn't know was designed in consultation with Jackson McDonald. The reason this person is being dismissed is falsifying an employment document not her criminal conviction. Because Jolly is involved it would be a good idea to get JMc to draft the dismissal letter.

I agree with the dismissal."

29 Mr Morgan said he did not agree with Mr Land's view that the Applicant should be dismissed only because she had made false statements in her employment applications. Mr Morgan testified that it was his view that she should be terminated for two reasons. Firstly, that the Applicant had lied when filling in her applications for employment by making false statements. Secondly that the nature of the criminal convictions were such that it would have precluded her from employment in the first place because she had stolen chemicals from an employer who had trusted her as an employee. It was his view the fact of her criminal record raised a real concern for the Respondent as to whether she could be trusted to work with and to assist in the production of the Respondent's products.

30 Mr Morgan testified that he telephoned Mr Land and advised him that he did not agree with his view that the fact of the criminal conviction was not relevant to whether she should be dismissed. Mr Morgan then sent Mr Land the following email—

"Thanks Peter,

Rob Heyes has also supported the dismissal. Ron Jolly only attended as a witness and did not know about the previous criminal history until the employee started to admit it. Ron clearly indicated at the meeting that he had removed his support for the person and totally supported our action to suspend her and terminate if we substantiated the charges.

There is now clear evidence that the person stole from an goods(sic) from a previous employer of significant value, engaged in retail fraud by getting refunds for the goods in retail outlets, and was charged and convicted of these criminal offences. The employee did provide false information in relation to criminal history at the time of employment and I agree that this is the reason for dismissal.

I have previous drafts from Jackson McDonald for what to include and what not to include in termination letters and will use this information to prepare this letter of termination today."

31 When cross-examined in relation to whether he had the authority to terminate the Applicant's employment Mr Morgan testified that he did have the authority to terminate the employment of employees working at the Western Australian site on behalf of the Respondent company. He, however, conceded that if Mr Land had advised him not to terminate the Applicant he would not have done so until he had consulted further with Mr Land. When asked whether he had spoken to the Applicant about whether she (the Applicant) had spoken to Helen West, he said that the Applicant informed him that she had spoken to Helen West about what had occurred at David Gray's, who told her it would be "okay". He said he approached Ms West sometime after he had spoken to the Applicant and Ms West informed him that the Applicant had come to see her at some stage and briefly advised her (Ms West) that she had had some type of minor problem but that she (Ms West) did not know what it was. He said Ms West informed him that she (Ms West) informed the Applicant that she was required to produce a police clearance certificate like everyone else and that it would be looked at on its merits.

32 Ms West gave evidence that she is employed by the Respondent as a Recruitment Administration Officer. She said she did not interview the Applicant but she conducted an ability test, which is a test given to potential employees to ascertain whether they have mechanical dexterity for the work. It is also a literacy test. Ms West said she had had more than one discussion with the Applicant about providing a police clearance certificate. She said on one occasion after the Applicant had signed the fixed term contract she approached her (Ms West) one day in tears and told her (Ms West) that she had not put in a police clearance certificate because she had been involved in something with someone from her past whilst she was employed by her former employer. She said that the Applicant told her she had been left to pay a fine, she had done community service and it had just been a minor offence. Ms West said she informed the Applicant that she would have to provide a police clearance certificate and she told her "not to worry too much because from what you have told me it wasn't anything serious. They are looking for drugs and serious offences, embezzlement and that sort of thing."

33 Ms West said she informed Mr Morgan of her conversation with the Applicant sometime prior to the Applicant being suspended on 29 November 2000.

Respondent's Submissions

34 It is contended on behalf of the Respondent that pursuant to Clause 4.2.2 of the Pharmacia and Upjohn (Perth) Pty Limited Certified Agreement 2000 ("the Agreement") that Applicant was engaged on 5 October 2000 to serve a qualifying period of three months' probation. The terms of the Agreement are expressly incorporated into the terms of the fixed term contract. Clause 4.2.2 of the Agreement provides—

> "4.2.2. Full time and part time employees will be engaged initially on a Base Level and will serve a qualifying period of three months of probationary employment with the Company."

35 The difficulty with the Respondent's argument is that no evidence was adduced that the Applicant was in fact appointed for a period of probation.

36 The Respondent summarily terminated the Applicant's employment. The Respondent also contends that it was a condition subsequent of her contract of employment that she provide a police clearance certificate. By failing to provide a certificate it is argued that the contract came to an end. Alternatively, the Respondent contends that it has discharged its evidentiary onus that the Applicant's conduct was such that her termination was justified. In particular, the Respondent says that the Applicant was clearly dishonest in that—

(a) She clearly gave false information when she completed the employment application forms in early 2000 and on 13 September 2000 in relation to her criminal history; and

(b) She lied on two occasions in November 2000 when asked whether she had produced a police clearance certificate.

37 Further, the Respondent says that the factual circumstances of the criminal convictions rendered her unsuitable for employment as a pharmaceutical operator.

Applicant's Submissions

38 Mr Nugawela on behalf of the Applicant contends that the Respondent by its conduct in continuing to employ the Applicant without ensuring that she provided a police clearance certificate within 14 days of the commencement of her employment on 30 May 2000 has waived its right to rely on the non-fulfilment of the condition. In my view this argument has some merit in that it is clear that the conduct of the Respondent constituted a waiver of the requirement to produce a police clearance certificate within 14 days. However, the evidence establishes that the requirement to produce a police clearance certificate was not waived. It is apparent from the Applicant's evidence and the evidence given by Mr Morgan and Ms West that it was a requirement that a certificate must at sometime be produced and its contents reviewed as to whether the Applicant was suitable to continue to be employed.

39 It is contended on behalf of the Applicant that the real reason why the Respondent terminated her employment was because of poor performance. The difficulty with that argument is that although performance issues were raised by the Respondent with the Applicant, both the Applicant and Mr Morgan testified that the outcome of the mediation in relation to these issues on 29 November 2000 was positive.

40 It is also contended on behalf of the Applicant that as the Applicant informed Ms West about the circumstances of her conviction well prior to 29 November 2000, the Respondent has waived its right to rely upon the previous conviction as a reason for termination, as it has by its conduct condoned the Applicant's conduct by continuing to retain her services after the information was conveyed to Ms West. Secondly, it is argued that the Respondent is not entitled to rely upon the factual circumstances of the conviction as a reason for termination, as Mr Morgan's superior officer determined that the fact of the conviction was not the reason for her dismissal.

41 Resolution of the first issue raised in paragraph 40 of these reasons in my view in part, turns upon credibility. I do not accept the Applicant's evidence that she did not know that she had been convicted on an offence when she applied for employment with the Respondent in early 2000 and on 13 September 2000. The Applicant's evidence in relation to this issue was contradictory. In her evidence she said that when she appeared in court in relation to the charges, the day was "an utter blur". She said she cried the whole time and she did not know she "had a police record to this day". She testified that she spoke to a Police Officer in June 2000 before she informed Ms West of the circumstances of the conviction and he (the Police Officer) informed her she had a criminal record. This evidence when considered with her evidence that she received a sentence when she appeared in court and to her evidence, that she obtained an application form for a police clearance certificate but did not make an application because she was hoping "it would go away" leads to the conclusion that the Applicant tried to suppress her memory of the convictions and simply did not wish to admit that she had been convicted of an offence.

42 The Applicant says she spoke to Ms West about six weeks after her employment commenced. She conceded that she lied when she filled out the application form for permanent employment and ticked "No" to the question "have you had any criminal convictions (excluding traffic infringements)?" and attempted to explain that she did so because Ms West had informed her the Respondent was only concerned with drug offences. The Applicant's counsel contends that Ms West's recollection that the Applicant informed her that she had been involved in an offence after she entered into the fixed term contract should be preferred to the evidence given by the Applicant. Having considered the Applicant's evidence as to why she ticked "No" on the application form for full time work, I prefer the evidence given by the Applicant that this conversation occurred prior to her filling in the application for permanent employment, to the evidence given by Ms West on this issue.

43 As to whether Mr Morgan became aware that the Applicant had a record prior to 29 November 2000, I accept that the Applicant had spoken to Ms West sometime prior to 13 September 2000 and I accept Ms West's evidence that she informed Mr Morgan at some time prior to 29 November 2000 that the Applicant had been involved in some offence involving a previous employer. Mr Morgan was unable to say when the conversation with Ms West occurred when she (Ms West)

informed him that the Applicant had come to his office because she was asked to provide a police clearance and she (the Applicant) gave a vague story that there may have been some issue.

44 As to what was said by the Applicant to Ms West about the circumstances of the offences, given my finding that she has deliberately tried to suppress the fact that she had a conviction recorded against her, I accept Ms West's evidence that she gave a vague account to her (Ms West) about the offences and the circumstances.

45 In summary, I conclude that the Applicant made false declarations on the applications for employment completed by her in March and September 2000. Further, that she lied on 28 and 29 November 2000 when she stated she had provided a police clearance certificate. Leaving aside the issue whether the Respondent was entitled to rely upon the fact that she had been convicted of stealing as a servant and fraud, the question that arises is whether the Respondent unfairly exercised its right to terminate the Applicant's employment.

46 Where an employee is dismissed summarily, the onus is on the Applicant to demonstrate the dismissal was not fair on the balance of probabilities. However, there is an evidential onus upon the employer to prove that the summary dismissal is justified (*Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1998) 68 WAIG 677 at 679). In relation to the giving of false answers on an application form, G J McCarry in *"The Employee's Right to Silence"* (1983) 57 ALJ 607 at 607 observed—

> "A prospective employee is frequently asked questions either on an application form or in interview. False answers given in response to such questions can render the person liable to dismissal if he is employed and the truth emerges. Such dismissal will be justified if the falsity was material to the making of the contract, or, again, if it manifests an absence of the warranted degree of skill. It is here that the relevance of prior misconduct emerges, for while misconduct in earlier employment is not of itself a ground for dismissal in current employment, it can be evidence of the fitness or otherwise of the employee to perform his obligations in new employment and so would seem to be a legitimate subject for questioning by the prospective employer, provided that the prior behaviour was relevant to the requirements of the job being applied for. For example, it would seem relevant to ask an applicant for a cashier's position whether he had been convicted of offences involving dishonesty, or a driver whether he had convictions for driving with more than the prescribed alcohol concentration…."

47 In my view the Respondent has failed to satisfy the onus to demonstrate the summary dismissal was fair. However, I am of the view the Respondent was entitled to dismiss the Applicant by giving her notice. Ms West was aware that the Applicant had failed to provide a police clearance certificate and Ms West advised Mr Morgan that the Applicant had been involved in some offence of a minor nature. Despite receiving that information the Respondent allowed the Applicant to continue to work without investigating the matter further. I am satisfied that when the facts of the convictions emerged on 29 November 2000 it became clear that the Applicant had made false declarations on her applications for employment. It is apparent that the false statements were material to the Respondent entering into the contract and to the terms of her employment. The Applicant by her conduct deliberately tried to conceal that she had been convicted of offences of dishonesty. Given the nature of the Respondent's business and the work required to be carried out by the Applicant the conduct was destructive of the confidence the Respondent had in the employee to honestly and faithfully fulfil her duties, so as to entitle the Respondent to terminate her employment by the giving of notice.

48 As to the factual circumstances of the convictions it is my view that the offences were of a type that rendered the Applicant unsuitable for employment as a pharmaceutical operator to manufacture drugs of the kind manufactured by the Respondent. However, despite the matters set out in the letter of termination I am not satisfied that the Respondent relied upon the circumstances of the conviction as a reason for dismissal. Mr Morgan's superior, Mr Land, advised Mr Morgan that it was not a reason for termination. Whilst Mr Morgan testified that he disagreed with Mr Land's opinion, and he telephoned Mr Land and advised him he did not agree, yet he then sent an email to Mr Land stating "The employee did provide false information relating to criminal history at the time of employment and I agree that this is the reason for dismissal." For the reasons set out in paragraph 47 of these reasons, my finding in relation to this issue is not determinative in relation to the Applicant's claim.

49 Pursuant to the Applicant's contract of employment, if terminating the contract 1 month's notice was required to be given or payment of 1 month's pay. Accordingly, I will make an order that the Respondent pay to the Applicant 1 month's pay as compensation. At the time the Applicant's employment was terminated her salary was $33,650.47 per annum. 1 month's pay has been calculated at $2,804.21.

2001 WAIRC 04383

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIANNE CHURCHILL, APPLICANT
	v.
	PHARMACIA AND UPJOHN (PERTH) PTY LIMITED, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	TUESDAY, 11 DECEMBER 2001
FILE NO.	APPLICATION 2077 OF 2000
CITATION NO.	2001 WAIRC 04383

Result	Applicant unfairly dismissed. Order made that the Respondent pay the Applicant compensation of one month's pay of $2,804.21.
Representation	
Applicant	Mr B L Nugawela of counsel
Respondent	Mr J H Brits of counsel

Order

HAVING heard Mr Nugawela on behalf of the Applicant and Mr Brits on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby—

1. DECLARES that Dianne Churchill was unfairly dismissed from her employment by Pharmacia and Upjohn (Perth) Pty Limited on 1 December 2000;

2. DECLARES that it is impracticable to reinstate the Applicant to her former position;
3. ORDERS that the Respondent pay the Applicant within 14 days of the date of this Order the sum of $2,804.21;
4. ORDERS THAT the application is otherwise hereby dismissed.

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

2001 WAIRC 04398

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SONYA RUTH CORCORAN, APPLICANT
	v.
	GIBSON QUAI PTY LTD , RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	WEDNESDAY, 12 DECEMBER 2001
FILE NO.	APPLICATION 1716 OF 2001
CITATION NO.	2001 WAIRC 04398

Result	Application alleging unfair dismissal dismissed for want of jurisdiction and denied contractual entitlements dismissed.
Representation	
Applicant	Ms S. Corcoran (by way of written submissions)
Respondent	Mr G. Cooke

Reasons for Decision

1 The claim lodged by Ms Corcoran on 25 September 2001 is that she was unfairly dismissed and that she has been denied benefits due to her under her contract of employment with the respondent. The Notice of Answer and Counter Proposal filed by the respondent on 4 October 2001 contests the claim of unfair dismissal on the basis that Ms Corcoran resigned on 16 August 2001 and further that her claim of unfair dismissal is lodged more than 28 days after that date. Further, the respondent states that Ms Corcoran has no claim for denied benefits as she has always been employed on a fixed annual salary with no provision for overtime.

2 The Commission convened a conference in this matter on 7 November 2001. Ms Corcoran attended on her own behalf and the respondent was represented by Mr Cooke, its financial controller. At that conference, Ms Corcoran acknowledged that she had not filed her claim within 28 days of the day she alleges her employment terminated and she concedes that her claim is out of time. In my view, that is a correct concession. Section 29(2) of the *Industrial Relations Act 1979* states that a claim of unfair dismissal cannot be made more than 28 days after the employee's employment terminated. If Ms Corcoran's employment terminated on 16 August 2001 then Ms Corcoran was obliged by that statute to refer her claim of unfair dismissal to the Commission by 13 September 2001. Her claim is therefore out of time and the Commission does not have the power to deal with it. Accordingly, an Order will issue which strikes out her claim of unfair dismissal for want of jurisdiction.

3 Ms Corcoran's claim of denied contractual benefits is not subject to the 28 day claiming period. Accordingly, that claim is validly before the Commission. The Commission discussed this claim with both parties at the conference. However, no agreement was possible and the Commission adjourned the conference to allow Ms Corcoran time to consider her position. Subsequently, Ms Corcoran indicated that she wished to proceed with her claim and the Commission has requested that she provide a statement which sets out the issues upon which she relies to show that it was a term of her contract of employment that she was entitled to be paid overtime. Ms Corcoran has now done so.

4 The respondent relies upon its Notice of Answer and Counter Proposal which requests an Order pursuant to section 27(1)(a)(i) of the Act to dismiss the matter or refrain from further hearing or determining the matter or a part thereof on the ground that it is trivial. Accordingly, the Commission now gives consideration to Ms Corcoran's claim in order to determine whether or not the respondent is justified in seeking the Order as it has done.

5 The relevant facts are as follows. Ms Corcoran commenced with the respondent on 4 September 1995 in the position of administration officer. Within some months, she became administration manager. Ms Corcoran has enclosed the letter of 28 August 1995 which confirmed the offer by the respondent for the position of administration officer. That letter, relevantly, is as follows—

> "Thank you for your interest shown in the administration officer position at Gibson Quai & Associates.
>
> This letter is to confirm the details of our offer for the position. The position offered is on a full-time basis of 37.5 hours per week with a remuneration of $30,000 per annum (including 5% superannuation), paid on a fortnightly basis. This package would be reviewed after completion of 3 months' employment. It is expected this would be increased by bonuses depending on your performance and the firm's profitability.
>
> Commencement date will be Monday September 4, 1995. Your conditions of employment would be for an initial 6 week trial period in which the offer can be withdrawn by either party if conditions are found to be unsuitable. Conditions of employment include 20 days' annual leave on completion of 12 months' continuous service, 8 days' sick leave per annum, fully cumulative long service leave after 15 years, and workers' compensation insurance cover. Leave loading will be paid at the statutory rate.
>
> Office hours are Monday to Friday 8:45am to 5:00pm with a 45 minute lunch break. Termination of employment would require four weeks' notice, in writing, by either party.
>
> The position offered covers a wide range of responsibilities and rewards, and we look forward to you joining the Gibson Quai & Associates team and participating in the success and growth of the company.
>
> Yours faithfully"

6 Ms Corcoran accepted the terms of this letter in a letter to the respondent of 1 September 1995. Her letter thanked the author for the offer and stated that she was looking forward to—

> "an interesting and progressive future as part of the Gibson Quai and Associates team commencing on Monday 4th September 1995."

7 It is apparent that Ms Corcoran had been successful in gaining the position via a personnel placement agency. A copy of its letter to Ms Corcoran of 8 September 1995 congratulates her on the success of her appointment. It states that the initial terms of Ms Corcoran's employment were the commencement date of 4 September 1995, the identity of the persons to whom she would report, a commencement salary of "$30,000 per annum" and a probationary period of three months. It stated that—

> "Other benefits pertaining to the position should be negotiated between yourself and the employer."

8 Ms Corcoran has supplied the job description given to her of the administration officer position. It consists of 16 duties which are comprehensively described.

9 On 22 July 1998 Ms Corcoran submitted a memorandum to the respondent regarding her salary remuneration. She requested a review of her salary for the 4th quarter directors' meeting. It appears that her request was considered favourably and I have concluded from the annotations included in the memorandum that by 1999 her salary was $38,500 per annum. I note in her Notice of Application to the Commission that Ms Corcoran claims her salary at the time that her employment terminated was $45,000 per annum. This is reflected in the remuneration worksheet which is Attachment 8 to her Notice of Application. Attachment 12 to Ms Corcoran's application is a notice of resignation dated 16 August 2001 to the directors of the respondent.

10 Ms Corcoran has included in her Notice of Application as part of Attachment 14B a memorandum dated 18 March 1999 from her to the respondent detailing her job allocation hours relevant to her duties. I note, relevantly, in it, at page 3, she has noted the fact that she works sometimes early mornings and after 5:00pm and that although she has based her job allocation on an 8 hour day "which is possibly a little light" she does where necessary "eat on the run, and work on after hours to get things done. If I have a smooth day and nothing pressing then I go home on time". She notes that her hours for the last two months are January: 184.25 hours and February: 182.25 hours. On 27 July 1999 Ms Corcoran wrote to the directors a memorandum regarding a salary increase (Attachment 17). In it, she notes her "salary package" commenced at $30,000. However, she points out that her hours from 1995/1996 to 1998/1999 had increased significantly including an increase of additional hours per year over the standard hours from 250 in 1995/1996 to 310 in 1998/1999. On 31 July 2001 Ms Corcoran sent a memorandum to the respondent regarding a number of matters. (I acknowledge that a number of the matters contained in the memorandum have been blanked out by Ms Corcoran and appreciate her reasons for doing so where they related to the financial position of the respondent.) Under the heading of role of Administration Manager/Workload Ms Corcoran draws to the respondent's attention that her hours for July 2000 were 189.50, 78.5 hours over base.

The claim

11 Ms Corcoran claims that over the time of her employment she worked 1,852.25 hours more than the base of 37.5 hours per week. She has attached a summary of how this figure has been arrived at. She claims that as her letter of offer was for a position of 37.5 hours per week then she should be paid for those hours at an overtime rate which equates to $39,469.59.

The legislation

12 Ms Corcoran's claim is brought pursuant to section 29(1)(b)(ii) of the Act which allows her to bring a claim to the Commission that she is entitled to a benefit under her contract of employment which has been denied her by her employer. It is clear that Ms Corcoran was an employee of the respondent and that is not an issue. The issue in this matter is whether it was a term of Ms Corcoran's contract of employment that she would be paid overtime for hours greater than 37.5 per week.

13 The task of the Commission therefore is to determine as a matter of fact whether Ms Corcoran had an entitlement to be paid overtime. This involves construing the contract of employment which existed between Ms Corcoran and the respondent. In doing so, it is not for the Commission to rewrite the contract of employment where it may be silent. Neither is it for the Commission to decide whether it is fair in all of the circumstances that Ms Corcoran be paid for the hours that she has worked. If that were the case, then on the material provided (and acknowledging that the Commission does not have before it a detailed response from the respondent to these issues) the Commission might well conclude that it would be fair for Ms Corcoran to be compensated for excess hours she has apparently, and in good faith, regularly worked for the respondent. However, the issue is whether it was a term of her contract of employment that she be paid overtime.

The contract of employment

14 The terms of Ms Corcoran's contract of employment are largely, though not entirely, contained in the letter of 28 August 1995. As Ms Corcoran herself acknowledges, that letter does not contain any provision that she would be paid for any hours worked in excess of 37.5. That is a most significant finding. It means that there is no express term in Ms Corcoran's contract of employment which provides for the benefit which she claims. The fact that it does not is a significant hurdle for her to overcome. I do not regard overtime as being an insignificant issue and the fact that it is not mentioned in the letter, notwithstanding the stipulation of 37.5 hours per week, whereas the letter does nevertheless refer to superannuation, bonuses, annual leave, sick leave, long service leave, workers' compensation insurance cover and leave loading, together with the office hours and period of notice to terminate the employment, is significant. To put it another way, the letter does refer to a number of the significant benefits of a contract of employment. In those circumstances, for it to omit reference to overtime strongly suggests that it was not merely an oversight, or that it was an issue "taken for granted". Rather, it suggests that overtime was not a term of the contract of employment.

15 If there is no express term in her contract of employment that she will be paid for overtime then Ms Corcoran will only be able to show that it was a term of her contract of employment that she be paid overtime if that term can be implied. Implying terms into a contract of employment is not straightforward. The Commission must guard against the possible result of it rewriting the contract in terms more favourable to one party than the other. Nevertheless, it is possible to imply a term into a contract of employment by reference to a course of past dealings between the parties. For example, if Ms Corcoran had been paid overtime at any stage during the course of her employment, then that fact would strongly suggest that she was entitled to be paid overtime notwithstanding that it was not mentioned in the letter of appointment. However, Ms Corcoran does not suggest that she has ever been paid overtime. Indeed, she does not suggest that she has ever previously claimed it. Accordingly, it cannot be said that there was a course of past dealing between Ms Corcoran and the respondent upon which she can rely.

16 Indeed, the fact that she never claimed overtime notwithstanding that she had worked it, and drew that fact to the respondent's attention (as evidenced by her frequent memorandum to the respondent as quoted above), strongly suggests that at the time Ms Corcoran worked those hours she did not herself believe that she was entitled to be paid overtime. That is quite important. Ms Corcoran worked under that contract of employment for almost 6 years. The fact that she never claimed overtime during that time is a strong suggestion that she believed she was not entitled to it.

17 I do not regard the letter containing the offer of employment which is referred to above as containing all of the terms of the contract of employment between Ms Corcoran and the respondent. For example, it does not contain terms regarding the respondent's right to dismiss Ms Corcoran in the event of misconduct: that is a term which is commonly understood as being implied into contracts of employment if it is not otherwise expressly stated. Accordingly, if the offer of employment did not contain all of the terms of the contract of employment then it is open for terms to be implied into it. Nevertheless, before doing so, it is necessary to arrive at some conclusion as to the actual intention of the parties before considering any presumed or imputed intention. In this case, the absence of any express provision regarding overtime in the letter and the fact that Ms Corcoran by her conduct did not believe it was an entitlement that she be paid overtime leads inevitably to the conclusion that there was not an intention between the parties that overtime would be paid. That makes it somewhat more difficult to imply a term that overtime would be paid.

18 I note Ms Corcoran states that other employees received overtime. If I accept that statement to be correct, it is not of great assistance in the present circumstances. There is nothing to suggest that those employees were on the same contract of employment as Ms Corcoran. Although Ms Corcoran suggests that one person who received it was in a similar administration officer position, that comparison may be relevant only for the first few months of Ms Corcoran's employment. Further, I would not regard it as sufficient on its own to counter the conclusions reached earlier in these Reasons for Decision which are against there being a term in Ms Corcoran's contract of employment entitling her as of right to the payment of overtime.

19 For the above reasons, I conclude that if Ms Corcoran's claim was formally listed for hearing that she would have great difficulty in being able to prove her claim. Even if Ms Corcoran had the most deserving case on merit, unless it was a term of her contract of employment that she be paid overtime for the hours beyond 37.5 that she worked, then the Commission is unable to grant her claim. Accordingly, the respondent's request that an Order issue at this stage of the proceedings is made out. An Order therefore issues which dismisses her claim for denied contractual benefits.

20 Order accordingly.

2001 WAIRC 04400

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SONYA RUTH CORCORAN, APPLICANT
	v.
	GIBSON QUAI PTY LTD , RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	WEDNESDAY, 12 DECEMBER 2001
FILE NO.	APPLICATION 1716 OF 2001
CITATION NO.	2001 WAIRC 04400

Result	Application alleging unfair dismissal dismissed for want of jurisdiction and denied contractual entitlements dismissed.
Representation	
Applicant	Ms S. Corcoran (by way of written submissions)
Respondent	Mr G. Cooke

Order

HAVING HEARD Ms S. Corcoran (by way of written submissions) on her own behalf as the applicant and Mr G. Cooke 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 claim of unfair dismissal be hereby dismissed for want of jurisdiction;

(2) THAT the claim of denied contractual benefits be dismissed pursuant to section 27(1)(a) of the Act.

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

2002 WAIRC 04511

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JILL ELIZABETH GRAHAM, APPLICANT
	v.
	ROBERT WATERS , RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DELIVERED	MONDAY, 7 JANUARY 2002
FILE NO.	APPLICATION 699 OF 2001
CITATION NO.	2002 WAIRC 04511

Result	Application to amend the name of the respondent dismissed
Representation	
Applicant	Mr D Armstrong (of Counsel)
Respondent	Ms L Gibbs

Reasons for Decision

1 On 20 April 2001, the applicant filed this application in which she claimed that she has been harshly, oppressively or unfairly dismissed by the respondent. By letter dated 12 June 2001, the applicant's solicitors advised the Registrar that—

1. "The application sent by registered post to the respondent has been returned unclaimed. We will arrange Bailiff's service."

2. "The correct respondent is Palmerville Pty Ltd trading as Queens Hotel, Geraldton. We enclose copy of business name search. Our client will make application to amend."

2 A declaration of service was filed on 27 June 2001 in which it is declared that the Notice of Application was served on "Robert Waters, the Queens Hotel Geraldton" by "personal service" at "Lot 74 Arnold Road, Waggrakine" on 14 June 2001.

3 By letter dated 21 June 2001, the respondent's agent advised the Registrar that—

"Mr Waters has never employed the Applicant and is not the proprietor of a business known as The Queens Hotel.

The Applicant was employed by a corporate identity that has not been served with a claim.

Furthermore, Mr Waters has never been served with the application.

We object to this claim proceeding against the named party."

4 The Commission convened a conference on 23 July 2001 at which the respondent confirmed that he was not the employer of the applicant and did not consent to amending the name of the respondent as sought by the applicant. However, the respondent agreed to formally answer the claim in those terms. The parties agreed that within 21 days of the respondent filing an answer in those terms, the applicant would formally seek leave to amend the name of the respondent and file written submissions in support of that application. Within 21 days thereafter the respondent would file submissions in reply.

5 In accordance with the agreed timetable, on 15 August 2001, the respondent filed a Notice of Answer and Counter Proposal in which the respondent denied having employed the applicant and such Notice of Answer and Counter Proposal was served on the applicant's solicitors on 16 August 2001 (see Declaration of Service dated "20 August 2000"(sic)). Albeit that at conference the applicant had agreed to file an application to amend the name of the respondent within 21 days of the respondent filing an answer, such application was not filed until 22 October 2001, 7 weeks late and following my Associate's enquiries of the applicant's solicitors on 26 September and 12 October 2001. The applicant also filed submissions in support of that application. This Notice of Application was not served on the respondent until 17 November 2001, more than 3 weeks after the filing of such submissions and application, and following enquiries of the applicant's solicitors by my Associate. The respondent filed its submissions on 11 December 2001 and those submissions were served on the applicant on 12 December 2001. In this way, a period of ten weeks beyond the time frames agreed at conference was expended due to the applicant's failure to meet those time frames.

6 The applicant seeks to amend the name of the respondent from "Robert Waters" to "Palmerville Pty Ltd trading as Queens Hotel, Geraldton". The originating application as filed lists the respondent as "Robert Waters, The Queens Hotel, Durlacher Street Geraldton WA 6530".

7 It is noted that on the Form 1 – Notice of Application, in that section of the Form which provides for the applicant to complete the respondent's name the applicant is reminded to correctly identify the respondent by the following words underneath that blank space being "It is the applicant's responsibility to correctly identify the respondent". The applicant wrote in this space that the application was addressed "To Robert Waters". On the next line she wrote "The Queens Hotel, Durlacher Street, Geraldton WA 6530"

8 The applicant has completed the Particulars of Claim in Points 8 and 9 as being—

Employer Details (Respondent)	8 Contact Name (ie - Manager, Supervisor)	Robert Waters
	9 Respondent's trading address or registered office.	The Queens Hotel Durlacher Street suburb/town GERALDTON postcode 6530
	Contact numbers	telephone/s (08) 99211064 facsimile (08) 99211103 ( ) E-mail
	10 Nature of Respondent's business	Hotel, Motel, Liquor Stores

9 The applicant filed a Declaration of Service on 2 May 2001 in which she says that she served the respondent's copy of application 699 of 2001 upon "Robert Waters" at "Geraldton Post Office Certified Mail – Registered Post".

10 The applicant says in her Statutory Declaration attached to the Notice of Application to amend the name of the respondent, formal parts omitted, that:

"4. I was interviewed by Robert Waters of Queens Hotel Geraldton for the position of accounts clerk and was appointed to that position and was employed at the Queens Hotel of Durlacher Street Geraldton for the period 19 March 2001 to 27 March 2001. My Notice of Application is addressed to Robert Waters and on page 1 of the application I name the Queens Hotel, Durlacher Street Geraldton as the name and address of the respondent. In paragraph 8 of my application I name Robert Waters as the contact name (ie. Manager, Supervisor) and in paragraph 9 the Queens Hotel, Durlacher Street, Geraldton as the respondent's trading address or registered office.

5. I am now informed by my solicitors Messrs Altorfer & Stow of 4th Floor, Town Towers Cathedral Avenue, Geraldton and verily believe that:-

(a) The Queens Hotel Geraldton is a registered business name. Annexed hereto and marked with the letter "A" is copy of the business name search of Queens Hotel Geraldton obtained by my solicitors. The

business name search shows that Palmerville Pty Ltd (ACN 008 946 861) is the registered proprietor of the business name and that the principle place of business is 97 Durlacher Street, Geraldton.

(b) Robert William Waters is the director, secretary and sole shareholder of Palmerville Pty Ltd (ACN 008 946 861). Annexed hereto and marked with the letter "B" is a copy of the company's office search of Palmerville Pty Ltd obtained by my solicitors.

(c) The Robert William Waters referred to in paragraph 5(b) hereof is one and the same person as Robert Waters named by me in my Notice of Application.

(d) The correct name of the respondent is Palmerville Pty Ltd (ACN 008 946 861) trading as Queens Hotel, Geraldton."

11 Attached to the applicant's Notice of Application and her Statutory Declaration is an ASIC Company Extract which lists Palmerville Pty Ltd as a company name and lists the director as "**Waters** Robert William" and the address as Lot 74 Arnold Road Waggrakine WA 6530. The company secretary is also "**Waters** Robert William" of the same address. The principle place of business of Palmerville Pty Ltd is also that same address. The member for the ordinary shares is listed as "**Waters** Robert William" of that same address.

12 In submissions the applicant says that the Queens Hotel Geraldton is a registered business name and the registered proprietor is Palmerville Pty Ltd. She says that the Commission has the power to make any amendments to proceedings that it thinks fit (s.27(1)(l)) and to correct, amend or waive any error, defect or regularity whether in substance or in form (s.27(1)(m)). The applicant says that "the power to amend is remedial and is to be given the widest beneficial interpretation which its language will permit and covers not only cases of misnomer, clerical error or misdescription, but also cases where the applicant, intending to sue a person he or she identifies by particular description, was mistaken as to the name of the person who assures that description."

13 The respondent says that in accordance with the *Owners of Johnston Court Strata Plan No. 5493 v Anne Dunancic* 1990 (70 WAIG 1285) that although the Commission has power to amend an application pursuant to s.27, it cannot substitute a new party for the respondent unless the party so substituted waives the irregularity, and the respondent does not so waive the irregularity. The respondent also says that the applicant has misquoted the head note in *State of Queensland v J L Holdings Pty Ltd* 1997 (141 ALR 353 at 353) and says that the amendment in those matters related to pleadings not to an application to amend the respondent's name or substitute a new party as respondent and therefore can be distinguished.

14 Further, the respondent says that if the Commission does have the power to substitute a party, where the circumstances are such that the applicant ought to have known of the defect, the discretion ought be exercised against the applicant *(Reid v Shark Bay Salt Joint Venture* 1998 (78 WAIG 2944); *Parveen Kaur Rai v Dogrin Pty Ltd* 2000 (80 WAIG 1375)). The respondent says that the applicant was an accounts clerk and was in a position to properly name her former employer. It says that the applicant received a pay slip in the name of "Queens Motor Hotel". The respondent says that it has not been suggested that the applicant did not know the true identity of her employer and only made application to amend after objection by Mr Robert Waters, not after obtaining legal advice. Further, the respondent says that neither Palmerville Pty Ltd nor Queens Hotel Geraldton has ever been served with a copy of the Notice of Application at the registered office or principle place of business as required by the Regulations (Regulation 89(2)(b) of the Industrial Relations Commission Regulations 1985).

15 The respondent says that this is not a case where the applicant intended to make a claim against a person identified by a particular description and was mistaken as to the name of the person who answered that description.

16 I note that the applicant does not assert that she was mistaken in naming Robert Waters of the Queens Hotel Geraldton as her employer nor does she give any explanation for citing the respondent's name as she did. She merely notes that she was interviewed by Robert Waters of the Queens Hotel Geraldton for the position of the accounts clerk etc. She addressed the Notice of Application to Robert Waters and says that "on page one of the application I name the Queens Hotel Durlacher Street, Geraldton as the name and address of the respondent. In Paragraph 8 of my application I name Robert Waters as the contact name (ie manager, supervisor) and in paragraph 9 the Queens Hotel, Durlacher Street Geraldton as the respondent's trading address or registered address."

17 Notwithstanding the applicant's assertions, having examined the Notice of Application and the attached schedule, I conclude that the application was addressed to Robert Waters and his address was listed as the Queens Hotel, Durlacher Street, Geraldton and this is repeated in questions 8 and 9 of the employer details in the Particulars of Claim.

18 The respondent does not actually say that Palmerville Pty Ltd was the applicant's employer. However, clearly that is the intention.

19 Therefore, the application seeks to amend the name of the respondent from "Robert Waters" to "Palmerville Pty Ltd" by substituting one party for another. The application does not seek the correction of the name of the employer but the substitution.

20 In *Parveen Kaur Rai v Dogrin Pty Ltd* (supra), all members of the Full Bench found that the amendment to the name of a party by substituting a different party is within the powers of the Commission, and is provided for in s.27(1)(m). His Honour the President, noted that there was no doubt that the appellant intended to make a claim against her employer, and set out the circumstances which would have readily lead the employee into confusion as to the identity of her employer. Fielding SC noted that there is power to substitute if the circumstances warrant the change. He went on to say that he agreed with the observations of Cawley C in *Reid v Shark Bay Salt Joint Venture* (op cit) that where the circumstances are such that the applicant ought to have known of the defect, the discretion should be exercised against the applicant. Gregor C also noted that power exists within the Act to substitute a different party if the circumstances warrant.

21 What, then, are the circumstances in this case?

(a) The applicant—

(i) was employed for a period of one week and one day;

(ii) was an accounts clerk;

(iii) had been interviewed for the position by Mr Robert Waters;

(iv) received a pay slip which contained the name "Queens Motor Hotel";

(v) gives no reason for failing to properly name her former employer; and

(vi) gives no explanation of efforts made to ascertain the correct name of her former employer.

(b) The applicant's solicitors, by letter dated 12 June 2001 addressed to the Registrar, acknowledged that the respondent was wrongly named, yet arranged service via a bailiff upon the respondent as currently named, and made no effort to correct the situation for some months.

(c) On the other hand, the respondent as presently named is the director, secretary and sole shareholder of the party sought to be substituted.

(d) The respondent says that proper service of the application on either Palmerville Pty Ltd or Queens Hotel Geraldton has never been made, at the registered office or principal place of business, as required by Regulation 89(2)(b). However, service of the originating application was made upon Mr Robert Waters at Lot 74 Arnold Road Waggrakine, which is the principal place of business of Palmerville Pty Ltd according to the Company Extract results (Appendix B to the applicant's Statutory Declaration).

22 It is clear that the applicant intended to make a claim of harsh, oppressive or unfair dismissal. Such a claim can only be made against an employer. The applicant intended to pursue a claim against her former employer. She may or may not have been in a position to know the identity of her employer. One might assume that as an accounts clerk, albeit for a short time only, the applicant ought to have been in a position to identify her employer and her pay slip identified the employers' trading name. However, she has given no explanation as to why she did not properly identify her former employer and whether or not she made any efforts to properly identify the appropriate body or simply made an assumption. That information is not before the Commission. The onus lay with her, as she was reminded when she completed the application.

23 In all of the circumstances there is not sufficient to explain why the error was made, and insufficient evidence of real efforts to remedy the situation.

24 On the basis of the dicta in *Parveen Kaur Rai v Dogrin Pty Ltd* (supra), the Commission in exercising its discretion is to consider whether the circumstances warrant the change. In the circumstances of the nature of the applicant's work, the details on the pay slip, and her lack of explanation of the reason for not properly identifying her former employer, or to explain what efforts she made to do so, the application to amend the name of the respondent by substituting Palmerville Pty Ltd is dismissed.

2002 WAIRC 04512

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JILL ELIZABETH GRAHAM, APPLICANT
	v.
	ROBERT WATERS , RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DELIVERED	MONDAY, 7 JANUARY 2002
FILE NO.	APPLICATION 699 OF 2001
CITATION NO.	2002 WAIRC 04512

Result Application to amend the name of the respondent dismissed

Order

HAVING heard Mr D Armstrong (of Counsel) on behalf of the applicant and Ms L Gibbs 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 04487

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETA LYNETTE HARBEN, APPLICANT
	v.
	BUCKERIDGE NOMINEES PTY LTD ACN 008 849 581 T/A BGC WINDOWS , RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	FRIDAY, 21 DECEMBER 2001
FILE NO.	APPLICATION 319 OF 2001
CITATION NO.	2001 WAIRC 04487

Result	Applicant unfairly dismissed. Order made for payment of $5,760.00 as compensation.
Representation	
Applicant	Mr T Crossley (as agent)
Respondent	Mr I Hennessy (of counsel)

Reasons for Decision

1 Peta Lynette Harben ("the Applicant") made an application under s.29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") claiming that she was harshly, oppressively or unfairly dismissed on 8 February 2001 by Buckeridge Nominees Pty Ltd trading as BGC Windows ACN 008 849 581 ("the Respondent"). At the time of her termination, the Applicant worked as a personal assistant and an accounts payable clerk.

2 The Applicant's employment was terminated by the Respondent on grounds of redundancy. The Respondent says the Applicant was selected for redundancy as her position as a personal assistant was a "luxury" it (the Respondent) could do

without and there were no other suitable alternative duties within the Respondent's organisation that could be allocated to her. The Applicant contends that the decision to make her redundant was not genuine in that at the time her employment was terminated the Respondent was actively recruiting new employees and there were other duties she could carry out.

Background

3 The Applicant was first employed by the Respondent on 23 August 1999 as a receptionist. She worked as a receptionist for approximately 12 months and carried out all the duties associated with the reception, namely mailing, faxing, operating a switchboard, typing and word processing. One of her supervisors was Ms Melissa Tilby, who was then the assistant accountant in Administration.

4 In about August of 2000 the position of personal assistant to Mr Eric Thomson, the General Manager, and Mr Craig Anstey, the Assistant General Manager, became available. The Applicant applied for the position and was successful. Her duties as personal assistant were to collect and distribute mail, make tea and coffee for Mr Thomson and Mr Anstey, answer the phone, typing, photocopying and faxing. She would also carry out personal services for Mr Anstey and Mr Thomson that included leaving the office to purchase cool drinks or cigarettes. She was also rostered to relieve the reception area at lunch times. As the personal assistant's job was not a full time position the Applicant was also required to carry out accounts payable work under the supervision of Ms Tilby.

The Applicant's evidence

5 The Applicant testified that prior to her employment being terminated she had never been counselled about her work, nor had any indication been given to her by anyone that any person was unhappy about her standard of work.

6 The Applicant said that when she first started working as a personal assistant the Respondent had some difficulty in finding a receptionist to replace her, so that when she took over the accounts payable position, the work was behind by approximately one month. The Applicant said that the accounts payable work was more than 50% of her work. She said she did not receive any training other than Ms Tilby showed her what to do. She conceded, however, that she had contact with Ms Tilby on a daily basis. The Applicant gave uncontradicted evidence that she had experience working in accounts payable and receivable and had carried out these duties for M G Kailis Gulf Fisheries for three years and for the Main Roads Department for seven years.

7 On 8 February 2001 Mr Anstey called the Applicant into his office and handed her a cheque and informed her that she no longer had a job. She said the cheque was for three weeks' pay, being two weeks' notice and one week's "sorry pay". She said he told her that she could work out the two weeks' notice but that most people chose not to, that it was up to her. She said she asked Mr Anstey why her employment was being terminated and he replied that there was no job for her, that she had been made redundant. She asked Mr Anstey whether he had a problem with her work and he said "no, he did not". When cross-examined, she agreed that Mr Anstey had informed her there was a downturn in the industry and that "she was a luxury that they could do without". The Applicant later received a separation certificate which stated that her employment was terminated because of a shortage of work.

8 The Applicant said that she could not understand why she was being made redundant as two weeks prior to her employment being terminated there had been a request by Ms Celina Chien, the Accountant, to employ extra accounts payable staff and that Mr Anstey had signed a form a week before her employment was terminated, making six to eight part-time factory staff, full time. The Applicant said that two weeks prior to her employment being terminated she applied for the position of sub-contractor's pay clerk which was a part-time position available within the Respondent's organisation. She said she was unsuccessful in obtaining that position and that she questioned Mr Anstey as to why she was unsuccessful and he told her that she was not suitable for the job.

9 The Applicant contended in her evidence that she was not terminated on grounds of genuine redundancy as the work that she performed was being done by a person who was recruited as a new staff member. An advertisement which appeared in the *West Australian* classifieds on Saturday 7 April 2001 was tendered into evidence. That advertisement stated as follows—

> " Accounts Payable/Admin Clerk
>
> We are seeking the services of an Accounts Payable/Admin Clerk for a busy office in Canning Vale. Ideally 1-2 years experience, duties include reconciliations, cheque runs, liaising with the purchasing department accounts payable and general administration duties. Applications in writing to—
>
> Melissa Tilby
> PO Box 1408, CANNING VALE WA 6970"

10 The Applicant said that the only duties referred to in the advertisement that she did not carry out whilst employed by the Respondent, were reconciliations and cheque runs. It was put to her that her typing skills were not of a very high standard and she responded that no one had ever complained about her work. It was not put to the Applicant that she did not perform her duties adequately as an accounts payable clerk or as a personal assistant. However, it was put to the Applicant that she was counselled on one occasion by Ms Tilby prior to her employment being terminated, in particular Ms Tilby told her that she was talking too much to another employee, Ms Sue Boland. The Applicant said that it was raised in a casual way and it was not a formal warning. It was also put to the Applicant that prior to her termination there were a number of employees of the Respondent who either left or were not replaced, or who were made redundant. These employees were—

Steven Nova
Alicia Crook
Donna Hansen
Casey Wenban
Sonya Holmes
Melissa Dueckershoff

The Applicant agreed that all of these people had left but that they had all been replaced. In particular, she said that Ms Sue Boland is now doing Ms Casey Wenban's job.

11 It was also put to the Applicant that she had informed a fellow employee, Ms Patsy O'Connor in January 2001, that her two sons were not coping well with her working full-time, to which the Applicant responded that this was not the case. She said that she informed Ms O'Connor, that she was interested in applying for the sub-contractor pays position because it was a part-time position; it would be good for her boys as she found working full-time and long hours, difficult as a single mother.

12 After the Applicant's employment was terminated the Applicant immediately sought to find other work. She was unemployed for six months. On 28 July 2001 she obtained a part-time position as a telephonist/race-book co-ordinator, working 37.5 hours per fortnight. The Applicant does not seek an order that she be reinstated. She seeks an order that the Respondent pay her six months' remuneration as compensation.

Respondent's evidence

13 Mr Craig Anstey gave evidence that whilst the Applicant was working as a receptionist the position of personal assistant became available as the lady who had been carrying out those duties as well as some marketing work, resigned to take up a job at the Casino. Mr Anstey testified that the Applicant approached him as to whether she could do the job and he and Mr Thomson agreed. He said that whilst she worked as a receptionist her performance was fair and that she only carried out minimal typing work. Mr Anstey testified that the Applicant's role as personal assistant took up about 50% of her time. The rest of her time she spent carrying out accounts payable work. He said that the accounts payable work was supervised by Ms Tilby.

14 Mr Anstey testified that the Respondent employed 120 to 130 factory staff and approximately 60 administration employees. Part of his role was to prepare financial budgets at the end of June of each year for submission to the chief accountant and to the directors of the company. He said that at the end of the financial year of 2001 the Respondent's business came in at about 80% of the budget. He said this came about because the Australian dollar was fluctuating, aluminium prices were fluctuating and there was a considerable drop in work in the housing industry, which led to a large drop in sales. He says sales figures reduced by 10% to 12% and that he made about 20 to 22 people from the factory redundant. Consequently, over a staggered period numbers were reduced across the organisation. This was effected by not replacing people who had resigned and making others redundant. Further, a number of people were moved around to carry out different functions when others resigned or were made redundant.

15 As a result of discussions with Mr Thomson it was determined that the Applicant's position as a personal assistant was a "luxury that they could do without". Mr Anstey said it was not a pleasurable experience for him to inform the Applicant that her employment was being terminated. Mr Anstey conceded in his evidence that he was not aware of the requirements of s.41 of the *Minimum Conditions of Employment Act 1993*. He however, testified that he consulted Ms Tilby and Mr Michael Best, the Commercial Manager, as to whether there were any other positions that could be taken up by the Applicant and they informed him there were no positions available that the Applicant could carry out. He said there were about 5 or 6 people in administration who resigned and were not replaced. Mr Anstey said the commercial administrator of commercial windows, Sonia Holmes, left and was not replaced. Sue Boland asked if she could work in commercial windows and she took up Ms Holmes' position. As a result Sue Boland's position as the sub-contractor pays became vacant. After it was determined that the Applicant was not suitable for that position and her employment was terminated, Casey Wenban moved into the position of sub-contractor pays but resigned shortly after. Ms Boland then regained the sub-contractor pays position in addition to her duties in commercial windows. Mr Anstey also said that Ms Melissa Duechenstoff left and her position was filled internally by Ms Kerry Hodgson. Further, that Ms Alicia Crook left and her duties were allocated to existing staff.

16 In relation to the Applicant's duties as a personal assistant, Mr Anstey said that he required the Applicant to do a little bit of typing. If the work was confidential he would ask Ms Tilby to type the work. He said that the Applicant did not type management minutes. He said this was because the Applicant's quality of typing was not of a high standard and he had a high degree of trust in Ms Tilby keeping work confidential. He however, conceded that he had no reason to have no confidence in the Applicant's ability to keep matters confidential but he had a high degree of trust in Ms Tilby's ability to do so, and that is why he gave her work of that nature. Mr Anstey strongly denied the Applicant's evidence that the Respondent had increased its numbers and replaced the Applicant and other employees who had resigned. Whilst giving evidence, Mr Anstey stated that he had documents with him to support his evidence about the downturn of sales. However, the Applicant's agent did not challenge Mr Anstey's evidence in this regard and did not make a request to inspect those documents.

17 Mr Anstey testified that he asked Ms Tilby whether the Applicant could carry out the sub-contractor pays position. He said Ms Tilby informed him that she did not think that the Applicant could carry out the work as it carried too much responsibility, that the sub-contractor pays deals with millions of dollars' worth of money as substantial weekly earnings payments made to sub-contractors. He said he also asked Mr Best whether the Applicant could do administration work in commercial windows and Mr Best told him "no". He said that Mr Best did not give him any reason but that he accepted the views of his Commercial Manager.

18 Mr Anstey conceded that the Applicant was not given extensive training in the accounts payable work. However, he did not supervise her work in that area and did not have much knowledge of what her duties entailed.

19 Mr Anstey testified that the position advertised on 7 April 2001 was filled Ms Sharon Rodriguez. She was recruited from outside the Respondent's organisation.

20 Ms Tilby testified that she is employed as an Administration Manager with the Respondent, having held that position for approximately two months. She said that at the time the Applicant's employment was terminated she (Ms Tilby) was the accounts payable supervisor, a position she said she held for approximately two years. She was also the Applicant's supervisor whilst she worked as receptionist and as accounts payable clerk. Ms Tilby testified that in her view the Applicant's work as an accounts payable clerk was average as she made a number of errors in her work. She said on one occasion she spoke to the Applicant about talking too much to Ms Boland, as it was her view (Ms Tilby's) that the Applicant could not concentrate on her work if she was talking to Ms Boland at the same time. She said that the sub-contractor pays position became available in January 2001. She said Mr Anstey asked her whether she thought the Applicant would be capable of carrying out the sub-contractor pays work and she told him that she did not think the Applicant's accuracy would be good enough to carry out that work. She also said that Mr Best was in Mr Anstey's office at the same time they had this discussion and that Mr Anstey asked Mr Best whether the Applicant could do the administration work in the commercial division and that Mr Best had said "no, it was not appropriate work". When asked what work that would involve she said that she thought that it may have consisted of invoicing and administering job files but she was not sure.

21 Ms Tilby testified that the position taken up by Ms Rodriguez in April 2001 was advertised as a result of a number of staff movements. She said that the Applicant's accounts payable work consisted of about 50% of her full-time position and that when the Applicant was made redundant her accounts payable work was taken over in part, by an assistant accountant, Mr Aaron Preece, and also by another person from Purchasing, Ms Kim Thompson. Ms Thompson, however, later left the Respondent's employment and her work was taken over by Ms Alicia Crook. Ms Tilby said she trained Ms Crook to assist her (Ms Tilby) with the accounts. Then Mr Preece was transferred to the Metal Roofing Division so Ms Tilby decided that they needed a full-time person and the position was advertised on 7 April 2001. As to the work required for the advertised position, Ms Tilby testified that she did not think the Applicant could do Excel-based spreadsheets and that she would not be able to do cheque-runs or reconciliations. She said that she trained the Applicant in the MFG Pro accounting program used by the Respondent. She could not recall how long the training took. She conceded her training was not substantial but said it was not little either. She said she always found time to assist the Applicant with her work when the Applicant required her assistance. She said she did not consider the Applicant for the position advertised in April 2001 because the Applicant had, at that stage, filed an application for unfair dismissal and she was not seeking reinstatement. Further, that there were extra duties required of that position which comprised part of the work that had been carried out by Mr Preece and by her (Ms Tilby).

22 Ms Patricia O'Connor, an administrator employed by the Respondent, testified that she spoke to the Applicant in January 2001 about her children. She said the Applicant commented that her boys were not adjusting well to her (the Applicant) working fulltime and they discussed whether she (the Applicant) should apply for the sub-contractor pays position as it was a casual or part-time position. She also said she (Ms O'Connor) talked about her daughter who is working with Qantas at the airport and she (the Applicant) said to her (Ms O'Connor) that she should ask her daughter if there was any part-time work available at the airport.

Submissions

23 The Respondent says that it was faced with a significant downturn in work and cost pressures which required it to downsize its workforce. It also says that the reason why the Applicant was selected for redundancy was not because of poor performance. However, her performance was taken into account in determining whether there were any alternative duties open to give her. Further, it is conceded that s.41 of the *Minimum Conditions of Employment Act 1993* was not complied with.

24 It was conceded on behalf of the Applicant that the 3 weeks' pay she received on termination was a reasonable redundancy payment. Mr Crossley contended on behalf of the Applicant that the decision to make her redundant was not genuine as there were duties available that could have been performed by her, in particular accounts payable work. Further, the Applicant was not consulted about work that was available and whether that work could be performed by her. In addition, that the dismissal was harsh in that the Respondent knew the Applicant had an expectation of ongoing employment as she had financial commitments and was a single mother.

Conclusion

25 As Mr Hennessey points out, the question to be determined by the Commission is whether the legal right of the Respondent to dismiss the Applicant has been exercised harshly or oppressively against the employee so as to amount to an abuse of that right (*Ronald David Miles, Norma Shirley Miles, Lee Gavin Miles and Rose & Crown Hiring Service trading as The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 at 386).

26 Where an employee is dismissed summarily the onus is on the Applicant to demonstrate the dismissal was not fair on the balance of probabilities. However, there is an evidential onus upon the employer to prove that the summary dismissal is justified (*Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1998) 68 WAIG 677 at 679).

27 However, in order to establish that a termination of employment for redundancy is unfair on grounds that the selection of an employee was unfair, the employee in question must show that his or her selection was unfair in comparison to other workers (see *AMWSU and OPDU v Australian Shipbuilding Industries (WA) Pty Ltd* (1987) 67 WAIG 733 per Brinsden J at 734 and Olney J at 738). If the selection process was such as to deny procedural fairness, the selection process may also be unfair.

28 Further, a failure to comply with the mandatory requirements under s.41 of the *Minimum Conditions of Employment Act 1993* is a factor to be taken into account in deciding whether a dismissal is unfair, (*Gilmore v Cecil Bros.* (1996) 76 WAIG 4434, per the President at 4445). Section 41 of the *Minimum Conditions of Employment Act* requires that where an employer has decided to 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 and discuss the likely effects of the redundancy and measures that might be taken to avoid or minimise its effect.

29 Given that Mr Anstey's evidence as to the financial position of the company was unchallenged, I do not accept the Applicant's evidence that the Respondent did not have reasonable grounds for terminating her employment as a personal assistant. Further, I accept the evidence of Mr Anstey and Ms Tilby that the position of personal assistant only comprised 50% of her duties. Clearly, the evidence establishes that the Applicant's desire to work part-time was known to the Respondent and that the accounts payable work carried out by the Applicant was work that the Respondent required to be done. However, there was no discussion with the Applicant in respect of her desire to work part-time and whether she would consider continuing to carry out accounts payable work and reduce her hours by 50% per week. In my view it is discussions of this kind that are contemplated by s.41 of the *Minimum Conditions of Employment Act*.

30 I am of the view that termination of the Applicant's employment was unfair. Whilst I accept that in the circumstances the decision to make the position of personal assistant redundant was genuine, it is clear that the Applicant's duties as accounts payable clerk were duties that the Respondent still required to be done. These duties comprised 50% of the Applicant's work. By not having discussions required by s.41, the Applicant lost the opportunity of reducing her hours of work by 50% and continuing to carry out the accounts payable work.

31 At the time of the termination the Applicant was paid $961.54 gross per fortnight for 80 hours per fortnight. I am satisfied that she has taken steps to attempt to mitigate her loss. Since 28 July 2001 she has earned $516.21 for 38 hours per fortnight. I assess her loss as $5,760.00 being the loss of the opportunity to work 20 hours per week from 8 February 2001 until 28 July 2001, that is, 24 weeks compensation calculated at $240.00 per week.

2001 WAIRC 04505

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETA LYNETTE HARBEN, APPLICANT
	v.
	BUCKERIDGE NOMINEES PTY LTD ACN 008 849 581 T/A BGC WINDOWS , RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	THURSDAY, 3 JANUARY 2002
FILE NO/S.	APPLICATION 319 OF 2001
CITATION NO.	2001 WAIRC 04505

Result	Applicant unfairly dismissed. Order made for payment of $5,760.00 as compensation.
Representation	
Applicant	Mr T Crossley (as agent)
Respondent	Mr I Hennessy (of counsel)

Order

HAVING heard Mr Crossley on behalf of the Applicant and Mr Hennessy on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby—

1. DECLARES that Peta Lynette Harben was unfairly dismissed from her employment by Buckeridge Nominees Pty Ltd trading as BGC Windows ACN 008 849 581;
2. DECLARES that it is impracticable to reinstate the Applicant to her former position;
3. ORDERS that the Respondent pay to the Applicant within 14 days of the date of this Order the sum of $5,760.00;

ORDERS that the application is otherwise hereby dismissed.

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

2001 WAIRC 04476

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRETT ANDREW JOHNSTON, APPLICANT
	v.
	DIASSON HOLDINGS PTY LTD THE LONIE FAMILY TRUST T/AS R. H. TROTTER & CO, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	THURSDAY, 20 DECEMBER 2001
FILE NO.	APPLICATION 415 OF 2001
CITATION NO.	2001 WAIRC 04476

Result	Dismissed
Representation	
Applicant	Mr B. Stokes appeared as agent on behalf of the Applicant
Respondent	Mr O. Moon appeared as agent on behalf of the Respondent

Reasons for Decision

1 Brett Andrew Johnston (the Applicant) has applied to the Commission for orders pursuant to s.29 of the *Industrial Relations Act, 1979* on the grounds that he was unfairly dismissed from employment with Diasson Holdings Pty Ltd, The Lonie Family Trust t/a R H Trotter & Co (the Respondent). It appears from the application and from the evidence that there were two separate periods of employment, the first commencing on 22nd February 1999 and finishing on 30th October 2000 as a fulltime worker, then from 15th January 2001 finishing on 20th February 2001 as a casual worker.

2 In the evidence led to the Commission there was considerable attention given to an application that the Applicant has made pursuant to the *Workers Compensation Rehabilitation Act 1981* and in particular, activities occurring as a result of the *Workers Compensation (Conciliation and Review) Rules 1994*.

3 It is not my intention during these Reasons for Decision (Reasons) to recite matters dealing with that claim, notwithstanding that an inordinate amount of time was spent on those issues by the parties.

4 Relevantly for these Reasons the Applicant told the Commission that around 22nd February 1999 he was employed as a casual by the Respondent as a fruit and vegetable packer. This relationship lasted for about six weeks, he became a fulltime employee some six weeks after that. In mid July 2000 he received a wage increase.

5 On 20th October 2000 when he was loading a truck events occurred which are the subject of proceedings under conciliation and review pursuant to the *Workers Compensation Rehabilitation Act 1981*.

6 The next relevant event for these Reasons is that the Applicant says that around 24th October 2000 he went into hospital, he had tests which diagnosed a brain aneurism. On 27th November 2000 he underwent a surgical procedure to relieve the condition.

7 In the meantime, he thinks, around 30th October 2000 he had a meeting with the principal of the Respondent, Mr Ian Lonie, and reported to him that it would be unsafe for him to work in case he collapsed or bumped his head. The Applicant says that Mr Lonie advised him that the Respondent's Accountant and Lawyer had said that it was in the best interests of the Applicant that he be laid off so he could claim sickness benefits. Mr Lonie also said that after he had his operation and had been cleared he could return to work as a permanent employee.

8 The Applicant says that, although he was surprised, he accepted what was said. On 3rd November when he went to Centrelink to make a sickness claim he was told to obtain a separation certificate from his employer. On 6th November (Exhibit S2) he received a certificate and soon thereafter sickness benefits were paid.

9 The Applicant underwent surgery on 27th November 2000. He was subsequently cleared for duty by his General Practitioner on 20th December 2000 (Exhibit S1).

10 The Applicant says he saw Mr Lonie on or about 20th December and gave him a medical certificate. Mr Lonie had told him that he could start work but to take it slowly, and gradually increase his work load until he felt comfortable to resume full days. On 22nd December 2000 he was told by Mr Lonie that work was quiet over the Christmas period, there was no need for him to come in and in due course when the Respondent required him he would receive a phone call.

11 The Applicant received a phone message on or about 13th January 2001. The message was that the Respondent had work for him for up to eight to ten weeks and if he was interested to respond. Apparently there was a need for coverage for two employees who had taken two lots of annual leave; the Applicant was told this would be a casual engagement.

12 The Applicant says on 19th February 2001 he spoke to his supervisor and to Mr Lonie about some time off to attend a funeral of a relative of a close friend. The leave was granted.

13 The Applicant attended the Respondent's premises on the morning of 20th February 2001, worked until the afternoon then went to the funeral. After the funeral he attended a wake at which he drank about six middies of beer. He eventually went to bed at around 3:30am. He had planned to report for work on 21st February 2001.

14 He did not attend for work and at 7:00am there was a phone call for him from Mr Gary James, his supervisor. The Applicant told Mr James that he had a late night and he would be in around 8:00 – 8:30am and he says his supervisor agreed to this.

15 The Applicant says that at 8:15am he rang the Respondent's office and asked to speak to either his supervisor or Mr Lonie. He was unable to do so, so he left a message with Ms Clarke the secretary. He said to her words similar to "I won't be coming in today and I'll be returning to work tomorrow." He was unsure exactly what he may have said to her because he had not had much sleep and was not "feeling too good".

16 The Applicant says that at 9:00am Mr Lonie rang to speak to him. Mr Lonie told him that he was unreliable, that the Respondent had a busy day and that he should not worry about coming back.

17 Later that morning the Applicant and his wife went to the Respondent's premises where they paid their fruit and vegetable account. The Applicant says he sought out Mr Lonie to find out the status of his permanent employment because he thought he had been promised such an appointment when he first found out about his illness.

18 Since his dismissal the Applicant had tried to find work, he is registered for unemployment, says he actively looks through newspapers and has networked with friends and relatives; he is still looking for fulltime work. Presently he had casual work as a stores person.

19 Evidence was led from the witness concerning alleged underpayments, however as I understand that matter has been settled between the parties or at least is subject to other proceedings and therefore I do not intend to summarise that information.

20 Evidence was also taken from Mrs Kerry Johnston, the Applicant's wife. Mrs Johnson said that she attended the Respondent's premises with the Applicant on 30th October 2000. They met with Mr Lonie alone. The Respondent already knew that the Applicant had a brain haemorrhage because Mrs Johnston had told Mr Lonie during the three or four occasions she had spoken to him from the hospital about her husband's condition. Mr Lonie had never said anything about terminating her husband's services although he did say that he would speak to the Respondent's Accountant and Lawyer.

21 Mrs Johnston says that Mr Lonie had said that both his Accountant and Lawyer advised him to terminate the Applicant's services and that he would be reinstated once he had a medical certificate to say he was cleared for work. Although there was some surprise about the termination they were happy that in due course he was to get his job back. Mrs Johnston thought that to be the job he had before he had suffered his illness; it was not a casual job. The termination was made so that the Applicant could go on social service sickness benefits. In due course this happened.

22 Mrs Johnston says that after his operation her husband was a bit slower in speech and memory, but he wanted to go back to work. She says this occurred on 2nd January 2001, but only for a short time. On 13th January 2001 there was a request from Mr Lonie for the Applicant to ring him, to her knowledge he did but she did not witness the conversation.

23 Mrs Johnson confirmed that the father-in-law of a friend had passed away and that they made plans to attend the funeral. The Applicant had told her that he had been allowed time to attend, he did not over indulge in alcohol at the wake.

24 On the following morning Mr James rang and asked for the Applicant, she had passed the phone over to him, she heard her husband say words to the effect that he would try and be at work in 45 minutes. In due course he did not go but he rang in and left a message with Janet the receptionist that he was too tired and was still depressed

25 Later Mr Lonie had called; she had answered the phone and told Mr Lonie that the Applicant was not there. Mr Lonie then told her that her husband was not reliable and he would no longer be offered to work with the Respondent. She then asked him what happened to the fulltime job and Mr Lonie had responded that he had made the offer in context of when there was a vacancy. Her husband appeared at that time and then spoke to Mr Lonie.

26 Later in the day they attended the office of the Respondent where they talked about wage rates. There was later need for her to check when her husband had days off. She says on three days about which the Respondent had complained, her diary showed her husband either had appointments with his doctor or were public holidays.

27 Evidence was also taken on behalf of the Applicant from Mr Reginald William Spinks. He gave evidence that related to the Applicant's accident and related instructions from supervisors about the Applicant's productivity. Evidence was also taken from Mr Nicholas Michael Harrod, about rates of pay and safety issues at the workplace. He said that the Applicant was reliable, a safe person who pulled his weight.

28 Evidence was led on behalf of the Respondent from Mr Ian Lonie, he has a different version of events to that offered by the Applicant. He recalled that in October 2000 he received a phone call from the Applicant's wife telling him that he was very unwell and that he would be unable to work the following week. Mr Lonie offered his sympathy, at the time the medical tests were inconclusive but there was a talk of a brain aneurism.

29 Later Mr Lonie met the Applicant and his wife in the office, also present was the Respondent's Manager Mr Paul Lill. The Applicant and his wife told them that he had suffered a brain aneurism; Mr Lonie had said that he would talk to his accountant and lawyer to get advice as to how the Applicant's employment status should be handled. He also suggested to the Applicant and his wife that they should seek their own legal advice to ascertain how they could qualify for medical benefits. When they had done so they could tell him what they required of the Respondent.

30 The Applicant was unable to say how long that he might be off work after his operation, but Mr Lonie gained the impression that could be for an extended period. The Applicant was also offered a loan of any amount of money to assist him. The Respondent had done this for other employees from time to time. There was no discussion at that meeting of termination of employment, the first thing that Mr Lonie wanted the Applicant to do was to get advice as to what was the best thing for him.

31 A few days later Mr Lonie saw the Applicant alone. During the meeting he told Mr Lonie that he was going onto sickness benefits and for that purpose was voluntarily resigning. At no stage did Mr Lonie suggest to him that he ought to resign nor was he dismissed. As for future work prospects he told the Applicant regardless of the length of his absence, when he was well the Respondent would try and fit him in a job depending on a vacancy being available. At that stage Mr Lonie did not say whether the job would be fulltime or casual, he said if work was available the Respondent would see whether it could fit him in. All entitlements were then paid out.

32 In January 2001 work became available, Mr Lonie rang the Applicant and offered him casual work for approximately nine weeks. He had no discussions with the Applicant before that time. The last time he had seen him had been in late December 2000.

33 When the Applicant commenced work he was told by the foreman to take things easy and look after himself. The arrangements were that he could start work later than the other employees and knock off when he was finished. For instance full timers would start work on Mondays at 2:00am but the Applicant did not start until 5:00am.

34 On his return to work the Applicant appeared disinterested and seemed as though he did not want to be there. On a few occasions he left early he also missed a couple of full days work. On no occasion did he seek permission to leave or did he call in to advise of a pending absence. Mr Lonie spoke to the foreman and instructed that the Applicant be given a verbal warning about his attendance. Mr Lonie thought he had to take the action because the time keeping was getting out of hand. Discussions concerning time keeping took place about a week before the Respondent ceased to employ the Applicant as a casual.

35 Mr Lonie remembered a phone discussion with Mrs Johnson on 21st February 2001. He had made the phone call after being requested to do so by Mr James, the supervisor who had earlier asked the Applicant if he was going to come in to work. Mr James had reported the Applicant said he would be in approximately in 40 minutes. Mr Lonie was told at around about 8:30am by the Secretary, Ms Clarke, that the Applicant had rung in to say that he was not going to come to work. Mr Lonie then informed Mr James and the other supervisor, Mr Jamie Stockton, both of whom became upset. Mr Lonie asked their advice as to what the Respondent should do, both of them said that they did not want the Applicant to work any more because they could not rely on him.

36 Mr Lonie says that at 9:30am he rang the Applicant's home and spoke with Mrs Johnston, at first she stated that the Applicant was not present. Mr Lonie then told her to tell him that there was no longer any work because the Respondent could not rely on him, immediately the phone was passed over to the Applicant so Mr Lonie told him personally.

37 The Respondent says the only offer of work made to the Applicant was as a casual, and that was the basis upon which he accepted it. Mr Paul Lill, the Manager of the Respondent, gave evidence that he recalled the meeting on 24th October 2001 when the Applicant and his wife attended the Respondent's premises after he had been in hospital over the weekend. Mr Lill understood the purpose of the meeting was for the Applicant to tell them what had happened to him, Mr Lonie suggested to the Applicant that he look at the possibility of sickness benefits, because of the potential that he could be unable to work for an unknown period of time, anything up to twelve months. Mr Lonie had offered him any assistance that he needed, whether it was a loan or anything else that the Respondent could do to help him through his problem.

38 Mr James who was the floor supervisor directly responsible for supervision of the Applicant. Mr James had worked for the Respondent for six years and been in charge of the Applicant for about twelve months. He had been made aware of the Applicant's sickness and saw him at the workplace soon after he was discharged from hospital.

39 Mr James produced his home telephone number account to support his claim that on 28th October 2001 he made a telephone call to the Applicant's room at Royal Perth Hospital. He rang to give support because he had personally suffered a tragic year and wanted to wish the Applicant the best. Mr James remembers clearly that he spoke to Mrs Johnston and not the Applicant. Mrs Johnson had denied this and Mr James speculated that may be she did not remember because of the pressure she was under (Exhibit M3 – telephone account G. James).

40 Mr James said when the Applicant returned to work he was told the engagement was casual, Mr James was instructed that he was to ensure the Applicant did not try anything too strenuous because he just finished major surgery. He had a discussion with the Applicant to make sure there was a complete understanding of what he was to do. Mr James understood through discussions with Mr Lonie that after the Applicant had been in hospital he would be offered casual employment until such time as a fulltime position became available.

41 Mr James explained how work is allocated on the floor, and how the Applicant worked differently on his resumption; he would start later and finish earlier. Once his health started to improve he was able to manage more work and although he was starting a little later but he would finish at the same time as the other workers. Towards the end of his employment his starting and finish times became quite ad hoc. He seemed to start and finish whenever it suited him. Mr James asked Mr Lonie whether he still had a relaxed attitude to these times, given that the Applicant was seemingly in good health and according to his friends there was no problem with him outside the work place. Mr James told the Applicant he would have to conform to what the others were doing, he agreed to do so but in practice he did not.

42 Mr James gave examples of how the Applicant would say he has a doctor's appointment and just leave. He was not saying that he was sick he would just say he had an appointment and would walk out. He was asked to give notice because there were orders to fill. If the Applicant could not be available and the Respondent needed to get other casuals in. The straw that broke the camel's back was one occasion the Applicant stormed out of the warehouse, Mr James did not know what happened, whether he had an argument with someone; he just said that he has had a gutful and was leaving. Later the Applicant came to him and told him that he had a funeral to go to, Mr James told him that he should have given notice because he had not the Respondent was left short. This did not appear to concern the Applicant, it appeared his attitude was he had a funeral to attend and was going.

43 The next day when Mr James reported for work the Applicant was not there. No message had been received from the Applicant by 7:00am so Mr James rang his home number, he spoke to Mrs Johnston, asked if the Applicant was coming to work and she told him that he would not because he had attended a funeral the day before. Mr James had acknowledged that he knew about the funeral and repeated his question; there was a pause and then Mrs Johnson she said he would be in in forty minutes.

44 About one hour or so later Ms Janet Clarke the Secretary came out and told Mr James she had received a call from the Applicant and his words were "tell Gary not to bother I'll catch him tomorrow". Mr James said he was unhappy about this. He went to Mr Lonie and made it clear that he had had enough of the Applicant's "antics". He told Mr Lonie it was not fair to others on the floor, there are other casuals that could be effectively used and the Applicant's conduct was denying them the opportunity to work, on top of that other workers had to do the Applicant's share. Mr James said that the Applicant should be sacked; Mr Lonie then said he would speak to the Applicant's work mates and other employees.

45 Mr James was in attendance when Mr Lonie met with those employees, he says they gave him "both barrels". The Applicant had an attitude problem, everyone had been letting it go for some time, Mr James as the supervisor, was having to put up with the Applicant's work mates giving him a blast everyday because they had to work later to get the production out. It was affecting morale, it was affecting the business, it was Mr James' opinion that Mr Lonie was left with no alternative but to tell the Applicant that his services were no longer required.

46 Evidence was also taken from Ms Janet Anne Clarke who is an office clerk/secretary employed by the Respondent. She gave evidence that on 21st February 2001 she received a call from the Applicant at 8:30am in the morning, he said to her "tell Gary not to bother I won't be coming in" these were his exact words, there were no other discussions with him.

47 The rest of Ms Clarke's evidence deals with matters affecting pay and there is no need to recite it for the purpose of these Reasons.

48 The Commission is required to make findings on credibility, this is a case where the difference in the evidence is stark and the outcome of the application depends upon the finding on whose evidence is the most likely to be correct.

49 I have concluded after watching the Applicant give his evidence and seeing his responses under cross examination that there are reasons for concern about the reliability that can be placed on the story he has told. His story has all of the hallmarks of being constructed to suit the outcome that he seeks from this Application. I think his version of the chronology of events he presents is so unlikely as to in some parts be unbelievable.

50 As for the evidence of his wife Mrs Johnston I have reached the conclusion that she has done her best to support her husband in his application. That does not necessarily assist me to arrive at the truth of the matter; I have a question in my mind about the quality of her evidence too. The other evidence led on behalf of the Applicant does not go to the substance of the issues to be decided here and it is unnecessary for me to make findings about the credibility of those witnesses.

51 Evidence was called on behalf of the Respondent from a number of people; the principal witness was Mr Lonie. After careful examination of the transcript and from consulting my notes made at the time I can find no reason to conclude that Mr Lonie was anything other than a truthful witness, a person who on a number of occasions appears to have done his best to help employees of whom the Applicant is one. There is no reason for me to conclude that he is anything other than a credible witness. The supporting evidence and evidence which in the long run is very important for the disposition of this case comes from Mr James.

52 Mr James seemed to me to be a sincere person, there is no reason why he would wish to concoct a story to put this Applicant at prejudice and I do not think he did. I see no reason why his evidence should not be accepted as truthful. The other evidence on behalf of the Respondent from Mr Lill and Ms Clarke does not add much to the pool of information upon which the Commission is to found it's conclusions although Ms Clarke was sure under cross examination about what the Applicant had said to her, it was consistent with what she reported to Mr James at the time it occurred, I see no reason to disbelieve her on that information and I find she has been truthful.

53 Having considered all of the evidence carefully and having made the findings of credibility discussed above I conclude that when the evidence of the Applicant differs from that of the Respondent and I favour that led from the Respondent.

54 During the case there was emphasis put on the status of the Applicant, that is whether he was a casual or not. In the long run this matter is decidable on the tests that are established in *FMWU v Undercliffe Nursing Home (1985) 65 WAIG 315* whether there has been a fair go all round. I can make that determination without traversing the law concerning the Applicant's status, it could well be that he was a casual but I have not for the purposes of these Reasons the need to make a positive finding about that. I therefore do not need to investigate the legal implication of his contractual status.

55 The question is was this dismissal exercised with a fair go to each of the parties?

56 On the balance of probabilities I conclude that there was an employment relationship between the parties which came to an end in October 2000 when the Applicant was unable to continue at work after he underwent a serious operation. I find that it was more likely than not that on 24th October 2000 he and his wife attended a discussion with Mr Lonie. I find, contrary to their evidence, Mr Lill was present at that meeting. At the meeting it was agreed that Mr Lonie would get some advice from his lawyer and accountant about what was the best way to handle the situation in which the Applicant found himself. I also find more likely than not Mr Lonie suggested that the Applicant obtain independent advice.

57 It appears the Applicant did not do so because he attended a meeting with Mr Lonie a few days later in which Mr Lonie told him of the advice he had obtained which was that because of the unknown duration of his illness the best thing for him would be to finish work and go onto sickness benefits. The Applicant took that advice and a Separation Certificate was issued to support an application to social services for sickness benefits. More likely than not Mr Lonie told the Applicant when he was ready to return to work he would do what he could to help him out at the time. Mr Lonie also more likely than not offered the Applicant whatever financial support he needed at that time.

58 In January 2001 Mr Lonie rang the Applicant and offered him casual work, additional hands then being required at the Respondent's premises. The Applicant returned to work and the Respondent was most conscious about his medical and physical condition. He was given the opportunity to work himself into the job, to start later and finish earlier than other people.

59 As the time advanced over January 2001, I find having accepted the evidence of Mr James that the Applicant became less and less cooperative. It seemed as though he did not think it necessary to give notice that he was going to take time off until the last minute. I think it is fair to conclude that the Applicant's attitude in this respect was part of a consistent behavioural pattern which had been manifest in the employment relationship for some time. It was however, on the evidence, worse in January 2001. I find that Mr James had consistently sought to remediate the Applicant's behaviour in the workplace; I accept his evidence over the other evidence that has been led in this case, that the Applicant's behaviour was not only a source of concern to Mr James but to his work mates as well.

60 I accept that when the Applicant went to the funeral he did not ask for leave, he took it by telling Mr James that he would not be in the next day. There is a difference between asking for leave and merely advising the employer, it is indicative of a state of mind that the employee is not elevating his responsibilities to his employer and therefore to his retention of his position, to any sort of responsible level.

61 This was clear when after the wake he was unable to attend for work, I find that when the phone call was made by Mr James that the Applicant was close by when his wife answered. I find there was obfuscation in the evidence presented on behalf of the Applicant about this telephone call. I also find that when Mr Lonie called, the Applicant was close by again notwithstanding Mrs Johnston's claim that the Applicant walked in during the phone call. More likely than not he was present all of the time, again his behaviour is indicative of a lack of concern about continuing with the job. When the Applicant had rung Ms Clarke he was not asking for leave he was telling the employer he was not going to come to work.

62 His conduct in this respect triggered a response at the workplace and Mr Lonie went about consulting with other employees about what ought to happen. This is important in the disposition of this case. Mr Lonie did not merely, on the face of the Applicant's refusal to attend on that morning, dismiss him. He went to the supervisors and other employees and asked them their opinions, in doing so he became more aware of a general concern about the Applicant's behaviour. This concern had been communicated to him by Mr James a week earlier. The Applicant's behaviour confirmed the complaints that were being made against him and the Respondent therefore decided to terminate his services. This is not a decision made on the spur of the moment it is a decision made about an employee who had been supported by the employer, had been offered help by the employer when he was ill, had been given work on a rehabilitation basis and who for all this support I think misread the situation and did not apply himself to his duties as he is required to as a faithful employee. Finally there is no doubt the Applicant had been told on a number of occasions by Mr James that his behaviour was unacceptable. He was sufficiently warned so that he should have had concerns about the viability of his job.

63 I conclude on the basis of the evidence that there has been a fair go all round, the dismissal is not unfair and for those reasons the application will be dismissed.

2001 WAIRC 04462

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRETT ANDREW JOHNSTON, APPLICANT
	v.
	DIASSON HOLDINGS PTY LTD THE LONIE FAMILY TRUST T/AS R. H. TROTTER & CO, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	THURSDAY, 20 DECEMBER 2001
FILE NO.	APPLICATION 415 OF 2001
CITATION NO.	2001 WAIRC 04462

Result Dismissed

Order

HAVING heard Mr B. Stokes on behalf of the Applicant and Mr. O. Moon 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.) J. F. GREGOR,
[L.S.] Commissioner.

2001 WAIRC 04492

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IAN MACFARLANE, APPLICANT
	v.
	HALPERIN FLEMING & MEERTENS, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	FRIDAY, 21 DECEMBER 2001
FILE NO.	APPLICATION 1499 OF 2001
CITATION NO.	2001 WAIRC 04492

Result	Application for enforcement of *Minimum Conditions of Employment Act 1993* – Application dismissed for want of jurisdiction.
Representation	
Applicant	In person
Respondent	Mr D G Fleming

Reasons for Decision

1 This is an application made under s.29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act"). Ian MacFarlane ("the Applicant") claims that he is owed a sum of $2,480.59 being a benefit to which he is entitled under a contract of employment, not being a benefit under an award or order. The sum claimed is an amount deducted from the Applicant's final pay following his resignation as a legal practitioner employed by Ron Halperin, David George Fleming, Brent Douglas Meertens and Bronwen Joy O'Sullivan trading as Halperin Fleming Meertens ("the Respondent").

2 The Respondent deducted from the Applicant's final pay, an amount of $2,123.33 for professional indemnity insurance and $357.26 for the cost of the Applicant's practice certificate paid for the period from 8 August 2001 until 30 June 2002. The deductions were made from the Applicant's last two weeks' pay and accrued annual leave as follows—

"Salary Reconciliation

Final salary due to Ian		
2 weeks ordinary pay:	$1,538.50	
LESS:-		
Tax:	$ 398.00	
HECS	$ 75.00	
Nett Pay:		$1,065.50
17 days holidays:-		
17 days @ $153.85 per day	$2,615.40	
LESS:-		
Tax:	$ 832.00	
HECS	$ 75.00	
Nett Pay:		$1,708.40
TOTAL DUE TO IAN:		$2,773.90

Amount of salary package overpaid to Ian	
Professional Indemnity Insurance paid @ $2,377.35 pa paid to 30/6/02	
326/365 of $2,377.35	$2,123.33
Practice Certificate fee @ $400.00 pa paid to 30/6/02	
326/365 of $400.00	$ 357.26
TOTAL OVERPAID TO IAN	$2,480.59
BALANCE DUE TO IAN:	$ 293.31"

3 Following a direction by the Respondent, the Professional Indemnity Insurers advised the Respondent on 3 October 2001 that it had refunded $1,914.70 to the Applicant by sending him a cheque for that amount.

4 Following a conference in the Commission the parties agreed that this matter could be heard and determined by way of written submissions.

5 The Applicant claims the deduction for the professional indemnity insurance and practice certificate fee was made without his consent and contrary to s.17D of the *Minimum Conditions of Employment Act 1993* ("the MCE Act").

6 Section 3 of the MCE Act defines a "minimum condition of employment" to mean —

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

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

(c) a condition prescribed by Part 5;"

7 Section 5(1)(c) of the MCE Act provides—

"(1) The minimum conditions of employment extend to and bind all employees and employers and are taken to be implied —

… (c) if a contract of employment is not governed by a workplace agreement or an award, in that contract."

8 Section 17C of the MCE Act provides—

"(1) To the extent that an employee receives his or her pay in money the employee is entitled to be paid in full and payment is to be made —

(a) in cash;

(b) by cheque, postal order or money order payable to the employee;

(c) by payment into an account, specified by the employee, with a bank or financial institution; or

(d) in any other manner authorized or required under the workplace agreement, award or contract of employment.

(2) In the case of any employee who is not employed by the Crown, payment can be made under subsection (1) (b) or (c) if, and only if, the employee so authorizes."

9 Section 17D of the MCE Act provides—

"(1) Despite section 17C, an employer may deduct from an employee's pay —

(a) an amount the employer is authorized, in writing, by the employee to deduct and pay on behalf of the employee;

(b) an amount the employer is authorized to deduct and pay on behalf of the employee under the workplace agreement, award or contract of employment; and

(c) an amount the employer is authorized or required to deduct by order of a court or under a law of the State or the Commonwealth.

(2) The employee is entitled to have any amount so deducted paid by the employer in accordance with the employee's instructions or in accordance with the requirements of the workplace agreement, award, contract of employment, court order or law of the State or the Commonwealth (as the case may be).

(3) Nothing in this section requires an employer to make deductions requested by an employee.

(4) An employee may, by giving written notice to the employer, withdraw an authorization under subsection (1)(a)."

Jurisdiction to hear and determine the Application

10 The Respondent contends that the issue whether the Respondent is in breach of s.17C or s.17D of the MCE Act is not "an industrial matter within the meaning of s.22A of the Act" because of the operation of s.7(c) of the MCE Act and s.83(1a) of the Act.

11 Section 7(c) of the MCE Act provides—

"A minimum condition may be enforced —

… (c) where the condition is implied in a contract of employment, under section 83 of the Industrial Relations Act 1979 as if it were a provision of an award, industrial agreement or order other than an order made under section 32 or 66 of that Act."

12 Section 83(1), (1a), (2) and (4) of the Act provide—

"(1) Subject to this Act, where a person contravenes or fails to comply with any provision of an award, industrial agreement or order, other than an order made under section 32, 44(6) or 66 —

(a) the Registrar or a Deputy Registrar;

(b) an Industrial Inspector;

(c) any organization or association named as a party to the award or employer bound by the award, industrial agreement or order; or

(d) any person on his own behalf to whom the award, industrial agreement or order applies,

may apply in the prescribed manner to an industrial magistrate's court for the enforcement of the award, industrial agreement or order.

(1a) An application for the enforcement of an award, industrial agreement or order (other than an order made under section 32, 44(6) or 66) shall not be made otherwise than to an industrial magistrate's court.

(2) On the hearing of an application under subsection (1) the industrial magistrate's court may, by order —

(a) if the contravention or failure to comply is proved, issue a caution or impose such penalty as the industrial magistrate's court considers just but not exceeding $1 000 in the case of an employer, organization or association and $250 in any other case;

(b) dismiss the application,

and, subject to subsection (3), in any case with or without costs, but in no case shall any costs be given against the Registrar, a Deputy Registrar, or an Industrial Inspector.

(4) Where in any proceedings brought under subsection (1) against an employer it appears to the industrial magistrate's court that an employee of that employer has not been paid by that employer the amount which he was entitled to be paid under an award or order the industrial magistrate's court shall, subject to subsection (5), order that employer to pay to that employee the amount by which he has been underpaid."

13 Pursuant to s.83(1a) of the Act an application for enforcement of an award or industrial agreement shall not be made otherwise than to an Industrial Magistrate. In *Crewe and Sons Pty Ltd v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1989) 69 WAIG 2623 at 2626 the President observed that it was established in *Mt Newman Mining Co Pty Ltd v TWU* (1984) 64 WAIG 1075 (for the reasons expressed in *Minister for Works and Water Resources v AMWSU* (1983) 63 WAIG 1389) the Commission does not have any jurisdiction to hear and determine matters which are essentially for enforcement and recovery of wages under an award. In *Mt Newman Mining Co Pty Ltd v TWU* the President at 1076 observed—

"… An award is said to govern relations between the parties to a contract of employment as to all matters with which it deals (*Amalgamated Collieries of W.A. Ltd v True* (supra)). So that whatever entitlement the drivers had, as well as the obligation of the employer to pay wages, was in that sense governed by the award (see also section 114 of the Act). Proceedings to enforce payment imply contravention or failure to comply with provisions of the award and may bear the character of enforcement proceedings which by section 82 and section 83 of the Act are to be instituted before an Industrial Magistrate and not otherwise. An employer is obliged to pay wages in accordance with the award and an order requiring the employer to meet that obligation operates to enforce the award. Consistent with the decision of the Full Bench of the Commission in *Hon. Minister for Works and Water Resources v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1983) 63 WAIG 1389 and for the reasons there set out the Commission does not have jurisdiction to hear and determine proceedings which are essentially for enforcement or recovery of wages owing under an award. In the respondent's submission the claim for payment of working time lost, though it arose out the contract of employment, was not a claim to enforce the award."

14 In *J–Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers, Western Australian Branch* (1993) 49 IR 205 at 213 the President observed, in relation to enforcement proceedings under s.83 of the Act, that the reference to "enforcement proceedings" is the subject of something of a misnomer, in fact no "enforcement" occurs under s.83 except insofar as there can be payments of amounts "underpaid in breach of an award under s.83". Otherwise there can be no power to compel a party to comply with his/her obligations under the award although there is a power for an Industrial Magistrate to impose a penalty for non-compliance of the provisions of an award.

15 By the enactment of s.7(c) of the MCE Act and s.83(1a) of the Act the Commission has no jurisdiction to hear and determine a claim under s.29(1)(b)(ii) of the Act where orders are sought for payment of a sum of money that arise out of an entitlement under or pursuant to a minimum condition (see *Oates v Sanders Executive Pty Ltd t/a L J Hooker Morley* (1998) 79 WAIG 1198). In this matter, what is sought in the application is an order for payment of amounts said to be "underpaid in breach of s.17D of the MCE Act". In my view what is sought is an order for the enforcement of s.17D of the MCE Act, as s.17D is a "requirement as to pay" within the meaning of "minimum condition of employment" in s.3 of the MCE Act. Accordingly, the claim is beyond the jurisdiction of the Commission.

Merit of the Applicant's case

16 Although it is not necessary at law to consider any other grounds why the application should be dismissed, I make the following observations in respect of the Applicant's claim.

17 In an application made under s.29(1)(b)(ii) of the Act, the onus is on the Applicant to establish that the subject of the claim is a benefit to which the Applicant was entitled under his contract of employment. In that regard, it is for the Commission to determine the terms of the contract of employment and to ascertain in a juridical manner, whether the claim constitutes a benefit which has been denied under the contract of employment, having regard to the obligations on the Commission to act accordingly to equity, good conscience and the substantial merits of the case, pursuant to s.26 of the Act (*Belo Fisheries v Froggett* (1983) 63 WAIG 2394; *Waroona Contracting v Usher* (1984) 64 WAIG 1500; *Perth Finishing College v Watts* (1989) 69 WAIG 2307).

18 The Applicant was employed by the Respondent as an articled clerk on 9 August 1999. On 31 July 2000 the Applicant entered into an employment contract with the Respondent to work as a solicitor. The Applicant's employment ceased on 8 August 2001. The material terms of the contract were—

"5. Remuneration

(a) The Employee shall be paid the gross salary ("the Salary") specified in Item 8 of the Schedule in the manner specified in Item 8 of the Schedule.

(b) In addition to the Salary the Employee shall be paid the commission ("the Commission") specified in Item 9 of the Schedule (if any) in the manner specified in Item 9 of the Schedule.

(c) In addition to the Salary and the Commission the Employee shall be paid the bonus ("the Bonus") specified in Item 10 of the Schedule (if any) in the manner specified in Item 10 of the Schedule.

(d) In addition to the Salary the Commission and the Bonus the Employer shall provide the Employee with the benefits in kind mentioned in Item 11 of the Schedule.

…

16. Special Conditions

Notwithstanding anything to the contrary contained in this Contract the special conditions ("the Special Conditions") specified in Item 19 of the Schedule (if any) shall be deemed to be incorporated in and form part of

this Contract and in the event of their being any conflict between the Special Conditions and the remaining terms and conditions of this contract the Special Conditions shall prevail."

19 The material terms of Item 19 Clause 2 of the Schedule to the contract of employment were—

"2. Practising Certificate and Professional Indemnity Insurance

The Employer will pay the Employee's Practising Certificate fee and Professional Indemnity Insurance premium whilst this Contract is in force. The Employee must reimburse the Employer for any period during which the Practising Certificate and/or the Professional Indemnity Insurance are in force whilst the Employee is not employed by the Employer."

20 In their written submissions the Respondent makes the following points—

(a) The Practice Certificate fee is paid on an annual basis for the period commencing on the 1st July in each year and terminating on the 30th June in the following year.

(b) The Professional Indemnity Insurance is paid on an annual basis and was due to be paid on or before the 15th May 2001 for the period 1st July in each year to the 30th June in the following year. However, where an employee is known to be leaving shortly after the 30th June in any year Professional Indemnity Insurance can be paid for a limited period only and not for the full year. Because the Applicant failed to notify the Respondent of his intention to resign prior to the 15th May 2001, Professional Indemnity Insurance premium was paid on behalf of the Applicant for the full year from 1st July 2001 to 30th June 2002.

21 To answer the question as to whether the Applicant has been denied a benefit under his contract of employment it is necessary to ascertain the terms of the contract of employment, in particular what are the benefits that the contract provides. Clause 5 and Item 8 of the Schedule to the contract provide for a gross annual salary, together with commission and bonuses to be paid to the Applicant. Part of that remuneration is payment of the practising certificate fee and professional indemnity insurance premium whilst the Applicant is employed. It is apparent from Item 19 Clause 2 that the Applicant is required to reimburse the Respondent for any period for which the practising certificate and/or indemnity insurance are in force whilst the employee is not employed by the employer. It is clear that there is only an entitlement to have those items paid, for the period of the Applicant's employment. In this case there is no entitlement to payment of those items beyond 8 August 2001.

22 A similar issue was considered by Industrial Magistrate P G Malone SM in *Australian Liquor, Hospitality and Miscellaneous Union, Miscellaneous Workers Division, Western Australian Branch v Board of Management, Fremantle Hospital and Hospital Service* (Unreported, Complaint No 87 of 1997, delivered 17 November 1997) where it was argued that the employer had breached a provision in a Federal award containing a similar provision to s.17D of the MCE Act. The award provision prohibited a deduction being made from an employee's wages unless the employee had authorized the deduction in writing. The factual circumstances were that a deduction of pay had been made from an employee's pay following a period of industrial action. Pursuant to s.187AA of the *Workplace Relations Act 1996* the employer was prohibited from making a payment to an employee during a period in which the employee engaged or engages in industrial action. The Respondent made a deduction of pay, not in the period to which the employee engaged in industrial action, but from a later pay period. The Magistrate found in that case that as the statutory provision prohibited payment there was no deduction within the meaning of the award because there was no entitlement to pay for the period in which the employee engaged in industrial action. The Learned Magistrate found that the employee had no legal entitlement to receive the monies. In particular that monies overpaid, that is monies paid to the employee in the period which she engaged in industrial action, when recovered from the next pay could not be considered a deduction within the meaning of the word "deduction" in the award.

23 The Applicant argues that the decision of the Full Bench in *Conti Sheffield Real Estate v Brailey* (1992) 48 IR 1 in which it was held that the provisions of the *Truck Act 1899* (now repealed) prohibited a claim of a set-off in respect of a debt against monies owed by way of commission. However, the provisions of the *Truck Act* provided for a much wider prohibition on deductions from employee's wages than Part 3A of the MCE Act. Further, the facts of that case are in my view distinguishable from the facts raised in this matter in that there was no consideration of whether the debt sought to be set off against the employee's claim was money due and owing as part of her remuneration under her contract of employment.

24 In my view Clause 2 of Item 19 empowers the Respondent to make a deduction from the Applicant's pay, as the words "The Employee must reimburse the Employer for any period during which the Practising Certificate and/or the Professional Indemnity Insurance are in force whilst the Employee is not employed by the Employer" constitute an amount the employer is authorized to deduct under the contract of employment within the meaning of s.17D (1)(b) of the MCE Act.

25 Alternatively it is my view, that s.17C and s.17D of the MCE Act are not intended to operate so as to prevent an employer from recovering from monies outstanding on one item (namely salary and accrued annual leave that is due and owing under the contract of employment), an amount which is due and owing by an employee pursuant to the express terms of a contract of employment. Given there is no entitlement to have the practice certificate fee or the professional indemnity insurance premium paid for any period after the employment relationship ceases and the contract expressly provides for recovery of any amounts that have been paid for a period after employment ceases, it is my view that no deduction has been made in the terms provided for in s.17D of the MCE Act.

26 Further, claims under s.29(1)(b)(ii) of the Act do not extend to all contractual obligations but to a "benefit". The word "benefit" is very wide. In *Balfour v Travelstrength Limited* (1980) 60 WAIG 1015 at 1015 Johnson C observed—

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

27 When regard is had to the meaning of "benefit" in s.29(1)(b)(ii) of the Act it is my view that there is no entitlement to the money claimed, as the money claimed cannot be said to a benefit in contravention of a provision of the contract of employment.

28 Although the Respondent has put forth other grounds why the application should be dismissed, in light of my findings I have not found it necessary to consider those grounds. I will make an order that the Applicant's application be dismissed.

Costs

29 The Respondent seeks an order against the Applicant for costs of the Respondent on an indemnity basis. Pursuant to s.27(1)(c) of the Act the Commission is empowered to "order any party to the matter to pay to any other party such costs and expenses including expenses of witnesses as are specified in the order, but so that no costs shall be allowed for the services of

any legal practitioner, or agent". The test to be applied in awarding of costs under s.27(1)(c) of the Act is set out in *Brailey v Mendex Pty Ltd t/a Mair & Co Maylands* (1992) 73 WAIG 26 in which the Full Bench held at 27—

> "The question is what does the phrase "costs and expenses" mean? "Costs", as defined above, includes all of the expenses. No costs are allowed for the services of a legal practitioner or agent. Thus, the professional costs element is eliminated.
>
> …
>
> The application, too, must be determined under s.26 of the Act. However, part of that equity and good conscience includes what is settled law in industrial matters that costs ought not be awarded, except in extreme cases, (eg) where proceedings have been instituted without reasonable cause (see *Hospital and Benevolent Homes Award* (1983) AILR 409 where costs were awarded in a matter where the applicant terminated the proceedings after putting the respondent to the expense of defending without obtaining an order)."

30 In my view it cannot be said that this is an extreme case so as to warrant an order for costs. This case does not fall within that category.

2001 WAIRC 04506

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IAN MACFARLANE, APPLICANT
	v.
	HALPERIN FLEMING & MEERTENS, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	THURSDAY, 3 JANUARY 2002
FILE NO.	APPLICATION 1499 OF 2001
CITATION NO.	2001 WAIRC 04506

Result	Application for enforcement of *Minimum Conditions of Employment Act 1993* – Application dismissed for want of jurisdiction.
Representation	
Applicant	Mr I MacFarlane
Respondent	Mr D G Fleming

Order

Having heard Mr MacFarlane on his own behalf and Mr Fleming on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders—

THAT the application be and is hereby dismissed for want of jurisdiction.

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

2001 WAIRC 04381

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JO-ANN MORRISON, APPLICANT
	v.
	SUZANNE GRAE CORPORATION PTY LTD, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	MONDAY, 10 DECEMBER 2001
FILE NO.	APPLICATION 467 OF 2001
CITATION NO.	2001 WAIRC 04381

Result	Application for adjournment – granted
Representation	
Applicant	Mr B. Stokes (as agent)
Respondent	Mr J. Uphill (as agent)

Reasons for Decision - Adjournment

1 The claim by Ms Morrison that she has been unfairly dismissed, and also that she has not been paid a benefit under her contract of employment, was set down to commence for three days of hearing on 10 December 2001. On 6 December 2001 she requested that the hearing be adjourned. The Commission heard the parties in Chambers on 7 December 2001 and advised the parties informally later that day that on the information provided by both parties the injustice to Ms Morrison if the adjournment is not granted is greater than the injustice to the respondent if the adjournment is granted. What follows are the Commission's reasons for that conclusion.

2 Ms Morrison has moved to Queensland since her dismissal. The Commission understands that Ms Morrison's move to Queensland occurred in the middle of this year. She states, through her agent, that she does not have the money to fly her and

her husband (who is also to be a witness) to Perth. (This had resulted earlier in a request from Ms Morrison to have her evidence, and that of her husband, taken by way of video-link from Brisbane. The Commission had granted that request subject to Ms Morrison meeting the cost). The Commission was informed that Ms Morrison considered the costs of paying for video-link evidence to be perhaps greater than the cost involved in flying to Perth for the hearing. However, she has now advised her agent she and her husband are unable to take time off from their new employment before February 2002 without losing their employment. She will be available to return to Perth in February 2002. She presents her apologies to the Commission for the lateness of notice due to her ongoing efforts to try and persuade her employer to agree to her and her husband taking annual leave in advance. She therefore claims it is just not physically possible to attend Perth for the hearing on 10 December 2001.

3 At the proceedings before the Commission on 7 December 2001 Ms Morrison's agent recognised that Ms Morrison may be liable for any costs incurred by the respondent in having prepared for the hearing which are lost as a result of the late notice of the adjournment, although he submitted that there would not be such costs because any preparation for the hearing would in any event be used when the hearing was re-listed.

4 Ms Morrison's agent also drew to the Commission's attention that he had only just received a number of documents from the respondent. These documents, which the Commission has not seen, are notes taken of meetings between Ms Morrison and the respondent on at least two occasions. Ms Morrison's agent strongly complained at the late receival of theses notices. He pointed out, validly from my point of view, that had the Commission earlier made an Order that the respondent produce to the applicant copies of such notes and do so together with an affidavit to the effect that all such documents have been produced, this situation would have been avoided. Ms Morrison's agent also pointed out that the difficulties of seeking instructions from his client in Queensland meant that the late receival of these documents would of itself lead the Commission to granting an adjournment in any event.

5 Finally, Ms Morrison's agent indicated that the events to which most of the controversy related occurred in March of this year and were so well documented that an adjournment until perhaps February next year, a further six or eight weeks' time, would not be significant from the point of view of people's memories when giving evidence about those events. Ms Morrison's agent pointed out that in the event the adjournment was not granted, she would be significantly prejudiced by the inability to give oral evidence and by having to tender evidence by way of statutory declaration while she is not available for cross-examination on that statutory declaration unless both parties agreed to have the hearing proceed on 10 December 2001 with neither party electing to call evidence so that the Commission would decide Ms Morrison's claims only on the documents.

6 The respondent's agent informed the Commission that the respondent would be unlikely to elect not to call evidence. The respondent otherwise opposed the adjournment of the matter. As to the documents referred to, the Commission was advised that the respondent had only just produced them to him and he had promptly forwarded them to Mr Stokes. In any event, their content would not provide grounds for an adjournment.

7 As to the grounds for the adjournment advanced by Ms Morrison, the respondent's agent informed the Commission that the respondent believed that Ms Morrison was self employed in Queensland. For that reason, the respondent doubts Ms Morrison's reason that her employer would not allow her to take annual leave in advance.

8 As to the prejudice to the respondent if the adjournment was granted, its agent informed the Commission that the respondent wished to have the matter brought to a conclusion. Some 18 months might now pass since the events to which the application relates occurred. The respondent might incur some cost in an adjournment if any of the three Western Australian witnesses who are presently available to give evidence for the hearing to commence on 10 December 2001 are not in Perth when the hearing is re-listed. This will involve the respondent incurring the cost of returning that witness to Perth to give evidence. Further, the respondent believes that Ms Morrison's claim of unfair dismissal is contrived and with little or no prospect of success. The respondent therefore reserves the right to claim costs from Ms Morrison.

9 In reply, Ms Morrison's agent produced to the respondent's agent a facsimile showing Ms Morrison's current employer and the employer's contact numbers. Ms Morrison's agent denied that she was self employed. Further, Ms Morrison's agent indicated that he believed there were little or no costs associated with this matter. In any event, Ms Morrison might be aware that she would have to meet any additional costs of a reconvened hearing that would not have been incurred had the hearing scheduled for 10 December 2001 proceeded.

Conclusion

10 As the Commission has recorded on 11 September 2001 when the application by the respondent for an adjournment was refused, the discretion of the Commission whether or not to grant an adjournment is to be based upon an assessment of where the refusal of an adjournment would result in a serious injustice to one party an adjournment should be granted unless in turn this would mean serious injustice to the other party. I find the relative position of the parties to be as follows: If the adjournment is not granted, the injustice to Ms Morrison is that she will be unavailable to give oral evidence, or to be cross-examined on any written evidence which she produces. If the respondent calls oral evidence which conflicts with any written evidence given by Ms Morrison (and the respondent clearly intends to call oral evidence) then the authorities suggest that the Commission is likely to resolve any conflict in the evidence in favour of sworn oral evidence given in court which has been able to be cross-examined. The injustice to Ms Morrison is a serious injustice.

11 I add that this conclusion necessarily implies that Ms Morrison's position is a genuine position. That is, that Ms Morrison has relocated to Queensland in the knowledge that she will return to Perth in order to pursue the claim that she has lodged in this Western Australian Commission. Further, the Commission is prepared to accept in principle that a person who has found new employment may not be able to take time off in the first three months of that employment without some prejudice to that employment. If, however, Ms Morrison genuinely does not intend to return to Perth to proceed with her claim, or if as the respondent suggested, she is not genuinely in employment such that her statement that she has not been allowed time off is false, then any serious injustice incurred by her will be entirely of her own making and would provide grounds for an adjournment.

12 From the respondent's point of view, the injustice said by the respondent to be incurred is the delay in bringing this matter to a conclusion and a possible cost if a person to be called as a witness who is currently in Perth is no longer in Perth when the hearing is re-listed. I do not regard this injustice as serious because the delay occasioned by any adjournment is not necessarily long of itself and any prejudice going to cost will be able to be met by the Commission ordering Ms Morrison to pay that cost should it be incurred. Accordingly, on the information before the Commission, if the adjournment is not granted Ms Morrison will suffer a serious injustice whereas if the adjournment is granted, any injustice suffered by the respondent will be able to be met by an Order for costs. On balance therefore the adjournment is to be granted.

13 In granting the adjournment the Commission however makes the following points. If the respondent was correct in its mere assertion that it does not believe Ms Morrison is an employee whose present employer has refused her leave in advance then that would provide grounds for an application to be made for Ms Morrison's application to be dismissed. Further, the

adjournment is granted on the understanding that the respondent is able to apply for an Order against Ms Morrison for costs which it may incur if it how will have to fly a witness to Perth who is presently in Perth and available for the hearing for 10 December 2001. Further, and as her agent recognised, it is most unlikely that any further adjournments will be granted. While each circumstance must, inevitably, be judged on its own events, the Commission notes Ms Morrison's undertaking to return on a date in February 2002. The Commission will confirm with Ms Morrison when re-listing this matter that she will return at the reconvened time.

14 The Commission notes the respondent's statement that it believes Ms Morrison's claim to be contrived and frivolous. The Commission would only be able to reach that conclusion after a consideration of the merit of the case and in any event the Commission itself has not been asked to reach that conclusion at this stage of the proceedings.

15 For all of those reasons the adjournment was granted. The Commission will contact the parties regarding the date of re-listing.

2001 WAIRC 04379

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMSSION
PARTIES	SUZANNE MARRIE PARKER, APPLICANT
	v.
	MARY-ANNE KENWORTHY - IMAGE INTERNATIONAL PTY LTD, RESPONDENT
CORAM	COMMSIONER J F GREGOR
DELIVERED	FRIDAY, 23 NOVEMBER 2001
FILE NO.	APPLICATION 955 OF 2001
CITATION NO.	2001 WAIRC 04379

Result	Applicant unfairly dismissed. Awarded Compensation
Representation	
Applicant	Ms Suzanne Parker in person
Respondent	Mr Oliver Moon

Reasons for Decision

1 On the 5th June Suzanne Marrie Parker (the Applicant) applied to the Commission for an order under Section 29 of the Industrial Relations Act 1979 (the Act) on the grounds that she had been dismissed in a harsh oppressive or unfair manner by Ms Mary-Anne Kenworthy, the Principal of Image International Pty Ltd (the Respondent) on 8th May 2001.

2 The Applicant says she was employed under an oral contract made during an interview with a representative of the Respondent, Mr Jason Crate, on 8th January 2001. She was engaged to work at the premises of the Respondent at Langtrees 181 Hay Street Kalgoorlie as a receptionist.

3 The principal business of the Respondent is in the sex industry. As a subsidiary activity, it runs tours at its premises Langtrees 181 Hay Street Kalgoorlie. It appears that a substantial proportion of the employment of the Applicant relates to reception duties associated with tourism on the premises. The Applicant said that Mr Jason Crate, at that time the manager of the Respondent's Kalgoorlie operations, employed her to work a four-day week. She acknowledged that included work on Saturdays and Sundays. The Applicant says that during her period of employment there were no issues raised with her by Mr Crate concerning her conduct or work performance. However during a visit to the premises about a month before the dismissal Ms Kenworthy did. The Applicant says Ms Kenworthy told her that she was to enter the address and telephone number of clients into the Respondents database. The Applicant was not entirely clear as to what she had to do, but was told by Ms Kenworthy that she would only explain it once. The Applicant says she was too frightened to ask for further explanation.

4 It appears that the source of the Applicant's confusion was that there were two computers on the premises, one held data on clients and escorts and the other information on business people who do work at the premises. The Applicant thought that Ms Kenworthy's instruction was that she was to enter information into the client computer only.

5 Later Ms Kenworthy returned to Kalgoorlie, she called the Applicant in on her rostered day off to discuss entry of the data. Ms Kenworthy asked the Applicant whether she had entered the information in accordance with the instructions given to her. The Applicant she said had but was then told by Ms Kenworthy that she was lying because the information had not been entered on the business computer. Also present at this meeting was the on site manager Mr Jason Crate. When Ms Kenworthy left the room, the Applicant says that Mr Crate told her not to worry, as she is one of the best receptionists that had ever been employed at the premises. He also told her that she should work her normal roster as they had agreed.

6 The Applicant says she was praised for her organisation of a wedding function. There was never any complaint raised with her concerning the conduct of that function. One of the issues the Applicant admits was raised to her was that she had breached the dress code. According to the Applicant Mr Crate told her that the dress code was black but the Respondent would be introducing a uniform. Nothing more was said about new work clothes during her period of employment, occasionally the Applicant wore an outfit with colour in it or would wear black with one piece of clothing in a different colour. Mr Crate commented favourably on her work dress.

7 The Applicant says that rosters were printed out and posted on the side of the computer. She was therefore not required to ring in to check because she always knew her roster details. On one occasion she asked to have a weekend off to have a break away from Kalgoorlie with her husband. At the start of her employment she was not told that she had to work on both Saturday and Sunday. In fact on occasions she was not rostered to work during a week end, however whenever she was required to work Saturday and Sunday she did except for on one occasion when she asked for leave.

8 In so far as work place relationships were concerned she had no problem with Mr Crate but she admitted that she argued with Ms White who was employed as a 'tour operator'. She says that Ms White threatened to bash her and because she received no support from Mr Crate she went home.

9 Apart from one or two occasions in the early stages of her pregnancy when she was sick she did not have any leave due to illness. On the two occasions she did go home she made sure there were others who could carry on her duties.

10 The Applicant says that on the day of her termination she was on rostered day off and Ms Kenworthy phoned her and asked her to come to the premises. The Applicant had asked Ms Kenworthy what she wanted to see her about as she was reluctant to go in again to work on a day off, she thought the matter could wait until the following day. Ms Kenworthy then told her she was being dismissed. There were no warnings given to her before she was dismissed, the procedure used to terminate her services was unfair; she received no counselling or other opportunity to identify the employer's complaints about her or to remedy them.

11 The Respondent says that the termination came about after a sequence of events involving the Applicant. She had been told from commencement of employment she had to ring in each week to check her roster, but she did not do so. Even though she was not prepared to work the required hours, every effort was made to accommodate her because of her alleged domestic difficulties.

12 The Applicant regularly started work five to ten minutes late and left early without permission. When she was reprimanded she would throw a tantrum and swear and if things became 'too hard' for her she would go home sick.

13 The principle reason for concern about her performance was that she failed to follow directions. She was personally instructed by Ms Kenworthy how to enter addresses and telephone numbers into a computer, when asked whether she had done the work she claimed that she had. This was a lie, because later when a check was made, it was discovered that only ten of two hundred and twenty entries had been made.

14 Even though the Applicant was praised for the job she did at a wedding function she did not follow through because there was inadequate clean up.

15 The Applicant continued to wear coloured clothes after she had been instructed not to and therefore breached the dress standard. The Respondent required her to wear black while she was working.

16 On the 8th May 2001 the Applicant had been asked to come and see Ms Kenworthy in the office. She refused to do so and continued to ask why she needed to come in. Ms Kenworthy decided that she would be dismissed. It was the Respondent's contention that the dismissal came about because the Applicant refused to come to the office for a private discussion with Ms Kenworthy, that private discussion was necessary to canvass issues relating to Applicant's conduct.

17 The proceeding brief recitation is sufficient for purposes of these Reasons for Decision to identify substance of the dispute between the parties.

18 The Applicant, who appeared on her own behalf, gave evidence to the Commission under oath. There was nothing in her demeanour or conduct under cross-examination that would lead the Commission to conclude she was not a witness of credit. There is no reason to call her evidence into question and I find she was a truthful witness.

19 The Commission heard evidence from Ms Mary-Anne Kenworthy. There is no reason why her version of events should not be believed. I say the same for Ms Nora White who also gave evidence on behalf of the Respondent. Ms White's evidence centred on what was clearly a personality clash between her and the Applicant and I accept her evidence as her truthfully held belief of her version of that personality clash.

20 Much of the evidence relied upon by Respondent, particularly through that lead from Ms Kenworthy relates to events that occurred in Kalgoorlie in her absence. According to her evidence Ms Kenworthy visits Kalgoorlie on an irregular basis. The Respondent relies upon the affidavit of Mr Crate (Exhibit M 1) to establish the truth of a number of the allegations it makes against the Applicant.

21 A large part of the evidence given by Ms Kenworthy reflects what had been told to her by Mr Crate about events that occurred in her absence; therefore the standing of the affidavit submitted by Mr Crate is important in determining, on the balance of probabilities, where the truth lies in this case.

22 The Applicant rightly questioned the standing of the affidavit. She says that for the Commission to accept the affidavit would be prejudicial to her because she was unable to cross examine Mr Crate particularly when the majority of what Mr Crate deposed in his affidavit is contrary to her evidence. In those circumstances she submits little weight should be given to the affidavit.

23 Mr Moon, who appeared for the Respondent, says that the reason Mr Crate was not called to give evidence is that he no longer works for the Respondent and had recently started a new position. In view of that fact it was felt by the Respondent it would be inappropriate to inconvenience him by summoning him to give his evidence in person; it therefore urges the Commission to accept the affidavit and to give it substantial weight.

24 I am not inclined to do so because the evidence of Mr Crate is crucial to the disposition of the matter. The Applicant was entitled to cross-examine him in order to test the veracity of his claims. It is not a sufficient reason that to justify his non-attendance that Mr Crate would be inconvenienced and therefore the Commission ought to accept his evidence by deposition and give it full weight as if he had attended, been subject to cross examination, had been observed by the Commission, which with the benefit of that observation had found him to be a truthful witness.

25 I conclude that little weight can be given to the affidavit deposed by Mr Crate. Much of the important evidence from Ms Kenworthy relies upon what Mr Crate told her. Therefore in that circumstance the evidence presented by the Applicant on those issues is to be preferred over the evidence that was lead from the Respondent's witnesses.

26 Applying these findings I conclude that the Respondent, through Mr Crake, employed the Applicant. The arrangements were that she was to work four days a week and that she understood that included work on the weekends, which were the busy days for the Respondent's business.

27 Contrary to the allegations made against her, there is no evidence before the Commission that on other than the two occasions she admitted did she refuse to work in weekends. It would be wrong to say she ever refused to work, it is more correct to say she asked for days off during a weekend and Mr Crate agreed.

28 The number of complaints about the Applicant, for instance her failure to wear a uniform, her alleged failure to report for duty on time together with her alleged personality difficulties with Ms White can all be dealt with concurrently.

29 Applying the findings made on the credibility of witnesses, I conclude that Mr Crate was accommodating of the Applicant concerning her dress at work. It is open to find that on occasion she wore colours other than black; however Mr Crate did not enforce the Respondent's requirements concerning the uniform. If the Applicant was late on occasion whether any disciplinary action should have been taken about that lateness was a matter for Mr Crate. He, on the evidence, did not take any disciplinary action against the Applicant. I accept her evidence that the establishment at Langtrees 181 Hay Street operated, at least in an administration sense, quite differently when Ms Kenworthy was in attendance or was known to be coming to Kalgoorlie. I accept the Applicant's evidence that temporary changes were made by Mr Crate to satisfy Ms Kenworthy's requirements and when she left things went back to the way they were being done before she arrived. This could create nothing but confusion in the Applicant's mind.

30 I accept that Ms Kenworthy become aware that the office was not being run at Langtrees 181 Hay Street in the way she desired it to be and she came to Kalgoorlie with the aim of fixing the problem. She spent considerable time with the Applicant over a two to three day period showing her what she wanted done, particularly concerning maintenance of the Respondent's records.

31 I also accept Ms Kenworthy's evidence that when she returned to Kalgoorlie and checked to ascertain what been done in her absence, that the record had not been entered in the way she required it to be. She was completely justified in wishing to discuss this with the Applicant.

32 When Ms Kenworthy returned to Kalgoorlie on the 8th May the Applicant was on her rostered day off. Ms Kenworthy rang her and asked her to come into the office for a private discussion. The Applicant was reluctant to attend on her day off and asked for an explanation why she should. I find she was not given a sufficient reason at the time to allow her to reach the conclusion that if she did not attend the office that her job was in jeopardy. Instead Ms Kenworthy dismissed her.

33 The dismissal in those circumstances can be nothing other than a summary dismissal, which is a dismissal based upon the presumption that there has been a breach by the Applicant of a fundamental obligation of her contract of employment such that its continuation was untenable. That is, she deliberately flouted an essential condition of her contract. The law to be applied in these matters is well established. The following citation from the reasons of the President in *Sargant v Lowndes Lambert Australia Pty Ltd (2001) 81 WAIG 1149* encapsulates the principles.

> 78 As to the question of summary dismissal, the Commission, constituted by Full Benches, has applied the well known principles express 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 A11 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 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.
>
> 79 This approach is also expressed by Dixon and McTiernan JJ in the well-known passage from their joint judgment in *Blyth Chemicals v Bushnell* (1933) 49 CLR 66 at 81-82.

34 It could well be that after the Applicant had been given the opportunity to explain what she had done with the data entries that the Respondent could have legitimately reached a conclusion that her failure to carry out the instructions of the Respondent justified termination of her service by giving her notice. On the other hand she may have a legitimate and acceptable explanation.

35 It seems to me that Ms Kenworthy when confronted with an employee she thought was being a little recalcitrant in acting precisely in accordance with her instructions immediately they were given decided she would not tolerate such conduct and dismissed her forwith.

36 For that summary dismissal to be justified the disobedience must have the quality of being wilful and be a deliberate flouting of an essential contractual condition. In this respect first, it is not an essential contractual condition to work on the rostered day off, on the contrary the Applicant is entitled to believe that her services would not be required on that day and there would have to be special reasons why the employer would exercise its right to ask the employee to work outside their normal hours. No special reasons were given. The test is that the enquiry as to whether there has been unfair dismissal or not cannot even begin without discovering the work the employee was employed for and had undertaken to perform. She had not undertaken to perform work on a rostered day off. It is also necessary to ascertain that obligation or in fact any obligation agreed between the parties was important or vital. The need to work on rostered day off could not be seen to be vital, in fact the Applicant wasn't being recalled for work at all.

37 On my understanding of the law as expressed in *Laws v London Chronicle (Indicated Newspapers) Newspapers Ltd [1959]* 2 All ER 285 this dismissal does not meet the test required to establish it to be justified as summary. In those circumstances the dismissal cannot anything but unfair.

38 I find on the evidence the only real issue about which Ms Kenworthy has had first hand knowledge were her dealings with the Applicant in making data entries. If she had issued instructions concerning uniform colour of work clothes as its open to find she did, Mr Crate did not enforce those instructions. He was the Respondent's Manager on the spot during the time that the majority of the incidents complained about by the Respondent, and upon which it says it basis its dismissal, occurred and he did nothing about them.

39 It might be that after further investigation or on the knowledge that Ms Kenworthy had that she may have been able to dismiss the Applicant on notice and that dismissal might not have been unfair. However I make no finding on that matter because it is clear that the dismissal was summary and is, for all of the reasons that I have set out above, unfair in itself. It is additionally flawed because it was made in the heat of the moment. Fairness of a decision to dismiss is to be judged against the test of a 'fair go all around'. When considered on balance, that did not occur in this case *(see FMWU v Undercliff Nursing Home (1985) 65WAIG315).*

40 As to the question of remedy the Applicant gave evidence that she is no longer able to work for the Respondent because of her advanced stage of pregnancy. She did obtain part time work after she was dismissed and remained employed until the 30th June. During this period she received payments totalling $2000.00, however on her own admission she has not sought work after that date up until the date of the hearing.

41 The principles to be applied in assessing compensation have been set by the Full Bench in *Boganavich v Bayside Western Australia (1999) 71 WAIG 8*. The principles are well known; in short the Commission is required to make a finding of loss or injury suffered by the employee by reason of the dismissal. Employees are required to establish the loss on the balance of

probabilities and the Commission is required to compensate the employee to the fullest extent of the loss up the statutory limit specified in Section 23 (4) of the Act. Compensation is not compensation unless it as much as possible puts the person who has the suffered the injury loss or damage back into position in, which, but for the injury or loss of damage, they would have been.

42 It is the duty of the employee to mitigate their loss, but the onus of proof of failure to mitigate rests upon the employer. During her cross-examination the Applicant agreed with agent for the Respondent that she had made no effort to mitigate her loss following the completion of her part time job in June. She offered no explanation for this. She did not say she was unable to seek work because of any disability or that she was suffering any ill health due to her pregnancy, in short there was no explanation why she did not continue to search for work following the part time employment in June 2001.

43 Therefore in assessing the loss the Commission should take into account the time from the 8th May 2001 when the Applicant was dismissed to 30th June 2001 when she finished her part time engagement with the new employer. The total period is seven weeks and four days during which the Applicant would have earned $3,825.00 had she remained in the employ of the Respondent. On her own admission she has earned $2,000.00 so the total loss is $1,825.00.

44 The Applicant made no submissions concerning injury, however during her evidence and submissions she told the Commission about her humiliation and upset about the events and the stress and concern she has suffered since.

45 Even though the Applicant did not make specific submissions on injury, application of s.26 of the Act requires that the Commission take into account that she was unrepresented and was most unlikely unaware that she should have addressed the matter. However it is clearly open to conclude from her evidence and I do, that she did suffered stress and humiliation. This was more than normally experienced in a dismissal because of the nature of her employment, the occupation and the industry of her employer and the location of the employment in a country town, I therefore conclude that the circumstances that she has suffered injury and I quantify the injury as being valued at $1,000.00

46 From what has been told to the Commission and due to the Applicant's impending confinement it is clear that reinstatement is not an immediate option and as a remedy is therefore unavailing. In those circumstances it is appropriate that compensation be assessed.

47 This matter will be concluded on the finding that the Applicant was unfairly dismissed, that reinstatement is unavailing and compensation for loss and injury is assessed at $2,825.00.

2001 WAIRC 04239

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SUZANNE MARRIE PARKER, APPLICANT
	v.
	MARY-ANNE KENWORTHY - IMAGE INTERNATIONAL PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	WEDNESDAY, 28 NOVEMBER 2001
FILE NO.	APPLICATION 955 OF 2001
CITATION NO.	2001 WAIRC 04239

Result	Application unfairly dismissed. Compensation for loss and injury.

Order

HAVING heard Ms S. Parker on her own behalf and Mr O. Moon on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

1. THAT the Applicant was unfairly dismissed and reinstatement is unavailing.
2. THAT the Respondent pay to the Applicant $2825.00 for loss and injury.

[L.S.]

(Sgd.) J. F. GREGOR,
Commissioner.

2001 WAIRC 04475

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHARON LISA SEMPLE, APPLICANT
	v.
	PRO SUBI LIMITED, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	THURSDAY, 20 DECEMBER 2001
FILE NO.	APPLICATION 910 OF 2001
CITATION NO.	2001 WAIRC 04475

Result	Unfairly dismissed, compensation awarded.
Representation	
Applicant	Mr M.L. Segler (of Counsel) appeared on behalf of the Applicant
Respondent	Mr S. Edwards (of Counsel) appeared on behalf of the Respondent

Reasons for Decision

1 On 28th May 2001 Sharon Lisa Semple (the Applicant) applied to the Commission for an order pursuant to s.29 of the *Industrial Relations Act, 1979* (the Act) on the grounds that she had been unfairly dismissed from employment with Pro Subi Limited (the Respondent) on 24th May 2001 or at a time later.

2 The Applicant says she entered into a contract of employment with the Respondent on 19th July 2000, the terms of the engagement was secured by the acceptance by the Applicant of a letter of offer dated 28th June 2000.

3 Under the terms of the contract the Applicant is responsible to the Board of Directors. One of her functions was to be active in face reporting to the Board and to provide written reports on its meetings. The Applicant was to be paid a sum of $22,000.00 gross per annum including superannuation, this was to be based on a 19 hour week with any hours worked in excess to be paid on a pro rata basis. There was to be an additional $100.00 per month to cover use of the Applicant's personal computer for the business activities of the Respondent.

4 The employment contract was subject to a probation period of three months. Importantly for these proceedings, Clause 8 provided for a salary/performance review. The clause is as follows—

> "*A review will be conducted after twelve (12) months of employment. In the unlikely event that funding for ProSubi is withdrawn for whatever reason, the position of liaison officer will be re-assessed and its continuation reviewed.*"

5 The meaning of this Clause 8 is important to the outcome of this application.

6 Clause 12 provides for one weeks notice by either party during the probationary period. Thereafter, two weeks notice by either party with the ability to change that period by consent. Under the Clause the employer is empowered to dismiss instantly for unprofessional conduct or breach of company policy.

7 The penultimate paragraph of the letter is also important in disposition of this matter. The paragraph is as follows—

> "*May we take this opportunity to congratulate you on your successful application and trust that your new career with us will be long and mutually rewarding*."

8 According to the evidence of the Applicant, she viewed the position as long term, the amount of hours she worked each week fitted in with her other occupational arrangements as a public relations consultant.

9 The Applicant claims that in May this year the Chairman of the Board of the Respondent asked her to re-apply for her job. She was told that at the previous Board meeting it had been resolved to readvertise the position occupied by her and she was to send her CV to Julie Della Personnel at the "end of her contract".

10 As a result of this information the Applicant sought legal advice and her solicitors wrote to the Respondent informing them, amongst other things, that the Applicant had no intention of resigning from her position in July 2001. The solicitors made this comment because the Applicant had been told that the Board anticipated that her contract of employment would terminate in July 2001. The attention of the Respondent was drawn to the terms and conditions of the letter of offer which do not prescribe, according to the solicitors, that the term of employment was only twelve months or any limited term for that matter. The Board was told that the letter of offer refers to a salary review related to performance to be conducted after twelve months of employment. The letter also drew to the attention of the Board that the Respondent's activities did not appear to be in jeopardy because of lack of funds, which would be the only other reason that the Respondent might be able to terminate the contract. The Respondent was asked to respond within seven days.

11 The Applicant received no response and a second letter was sent on 24th May 2001.

12 That letter referred to a conversation between the Chairman of the Respondent and the Applicant concerning the suggestion that the Applicant apply to an employment agency for her own position which she claims she had not vacated. On this basis the solicitors concluded further that "your corporation has already purported to terminate Ms Semple's employment". The letter then asks that the Respondent advise that the Applicant's position had not been terminated. Failure to do so would result in an application being filed in this Commission.

13 There was no response to that letter by 25th May 2001 nor has there been since.

14 Before the Commission in Exhibit S6 is a photocopy of minutes of a Directors meeting of the Respondent held on 11th April 2001 which contains a resolution that the position of the Applicant be advertised at "the end of the contract".

15 In her evidence the Applicant denied that there was ever anything said to her about the end of the contract. Under cross examination from Mr Edwards of Counsel, who appeared for the Respondent, she admitted that she had been concerned for some time about the increase in hours of work she had to undertake for the Respondent which, she said, was prejudicial to higher paid work she could get from her clients.

16 The Applicant's position in respect of her concerns about her rate of pay were set out in a facsimile she sent to Ms Natalie Hillstone, a member of the Board of the Respondent, concerning those matters (Exhibit E3).

17 Amongst other things the Applicant advised Ms Hillstone that her time was then limited due to family commitments and she could not afford to provide overtime to the Respondent at the rate of $22.70 per hour. She was having to either neglect private work which she charged out of the rate of between $90.00 and $115.00 per hour or her commitment to the Respondent. She objected to having to turn away 'properly' paid work and she therefore wanted the Respondent to reconsider its position in relation to what she described as an 'acceptable token remuneration'.

18 The Applicant then put two options for payment that she would be prepared to consider. She made recommendations that the Board acquire a secretary experienced to take shorthand to prepare, and issue minutes and agendas together with some other suggestions.

19 Since the contract of employment ceased the Applicant has sought employment. In support of this contention she submitted a number of employment applications and their responses (Exhibit S7).

20 During her evidence the Applicant said it was important that it be recognised that there was never any dissatisfaction expressed with her work at any time. She was subject to intensive cross-examination by Mr Edwards concerning the alleged dissatisfaction with her rate of pay.

21 To complete the evidentiary picture from the Applicant's point of view the Commission received a series of documents under subpoena from Julie Della Boska Personnel an employment agency. These documents contain bundles of papers relating to dealings between the agency and the Respondent (Exhibit S1 & S2).

22 The Respondent elected to call no evidence in rebuttal of the contentions of the Applicant. It says is that the actions of the Respondent do not constitute a termination of employment vesting the Commission with the jurisdiction to determine the claim.

23 It conceded that if the Respondent's actions constitute a repudiation as of a matter of law, it might follow that there was an unfair dismissal but the Respondent says the Applicant had been dissatisfied with her employment in a number of profounded respects. She had withdrawn her commitment to certain core responsibilities and the employer by failing to comply with the solicitor's letter cannot be said to have repudiated the contract. If there had been an error made in advertising the Applicant's position that is merely a legal error.

24 The onus is on the Applicant to convince the Commission that the advice to her that there would be an advertisement to "see what was out there" in respect of her job constituted a repudiation. If that were a sufficient act of repudiation it might follow the dismissal was unfair, however the Respondent says that is not the proper conclusion to reach.

25 The Applicant's lawyers made an error of judgement in advising their client. As a matter of law it does not follow that the Respondent's failure to respond constitutes a repudiation because the time limits imposed by the letter were unrealistic. This dismissal was not a constructive dismissal in the sense that the employer failed to do something which had lawfully been required of them which left the employee no choice but to leave employment.

26 The only witness to give evidence before the Commission was the Applicant. The majority of her evidence is not challenged by anything the Respondent has said, but it takes issue with her particularly concerning her intentions for future employment. Insofar as the credibility of the Applicant as a witness is concerned in those areas where there is no challenge to the evidence it is clear that she told the Commission the truth. I am concerned though that her answers to Counsel for the Respondent concerning her intention to stay with the employer for an indefinite period were disingenuous to say the least. In that area of her evidence I do not accept what she said and I will deal with that in the analysis which now follows.

27 Before doing so I briefly examine the law to be applied. There are two concepts here, constructive dismissal and repudiation. The law concerning constructive dismissal is set out in the Decision of the Industrial Appeal Court in *The Attorney General v Prison Officers Union (1995) 75 WAIG 3166* is well understood and need not be repeated in detail here. As I understand the concept it must be clearly established that employees face a position where it is untenable for them to continue, that is, to put it in simple language did they jump or were they pushed?

28 In examining the issues raised by this application the Applicant says the dismissal has occurred on the presumption that there has been a repudiation by the Respondent of its duties under the contract of employment. The texts indicate that although repudiation may have a variety of meanings it is accepted that a repudiation will exist either when there is a breach of a condition going to the essence of the contract or one of the parties to the contract has evinced an intention through conduct either expressly or by implication no longer to be bound by it. Whether there has been a repudiation of the contract in an individual case is not a question of law but a question of fact (see discussion of the concept in *The Law of Employment – Macken O'Grady and Sapideen 4th Edition LBC Information Service 1997).*

29 Underlying Decisions in this jurisdiction relating to unfair dismissal is the test in *FMWU v Undercliffe Nursing Home (1985) 65 WAIG 315* which requires that in assessing what has happened between the parties that the Commission is to ensure that there has been a fair go all round, in doing so it is not to interfere with the right of the employer to dismiss an employee unless it has been exercised harshly, oppressively or unfairly.

30 I find in this matter that the Applicant entered into a contract of employment with the Respondent. The terms were secured by the Applicant accepting a letter of offer dated 28th June 2000 with the employment relationship to start on 19th July 2000. I find that there was no fixed term in the contract. It is wrong to conclude that Clause 8 of the Letter of Offer which provides for a salary review after 12 months of employment set an end date to the contract. It is clearly a contract which was ongoing subject to it being brought to an end by notice by either of the parties in accordance with the provisions of Clause 12. There is nothing in the agreement from which one could draw the conclusion that the contract was to end on the date which was set out in the minutes of the Board meeting on 11th April 2001 or more correctly the implication of the Resolution that the position of public relations/liaison officer be advertised at the 'end of the contract'.

31 Ms Hillstone told the Applicant that there would be a need for the job to be advertised at the so called end of the contract for the purpose of the Respondent "seeing what was out there". When she received this information the Applicant quite properly made inquiries about what it meant for her and she had caused her solicitors to write to the Respondent for that purpose.

32 The first request from the Applicant's solicitors was dated 21st May 2001, there was no response to that request, but in the meantime on 23rd May 2001, according to the papers produced under subpoena from Julie Della Boska's Personal agency the Respondent placed an order for the agency to fill a job which is clearly the position previously occupied by the Applicant. The job was to be filled by 30th July 2001 these dates all fit with the contention of the Applicant that the Respondent had made a decision to terminate her services as early as 23rd May 2001. The papers show that the Respondent set about filling the position quickly. The employment agency were able to do so because the eventual successful applicant had already applied to them for another job on 1st May 2001 and they had all of her documentation before them at the time.

33 It is open to find and I do that on receipt of the letter of 21st May 2001 the Respondent was prompted into action to replace the Applicant. This construction is given force because by 24th May 2001 there had been no answer to the Applicant's request for information about the Respondent's position and her solicitor wrote another letter. That letter was never answered and the Applicant was entitled to reach the conclusion that the Respondent had decided not to continue with the contract of her employment. It is true that she did not know that the Respondent had placed an order with an employment agency to fill the position but the evidence shows that was the intent because that was indeed what the Respondent had done. On the evidence there were no pending problems nor was there any suggestion that the Respondent was relying on lack of funding to dismiss the Applicant.

34 This Respondent has repudiated the contract of employment, its motivating factor appears to be, because there is no other, that the Applicant was asking for more money. She had been consistent in her demands to that extent, it was clear that she was upset about the amount of remuneration she was getting, and the Respondent incorrectly concluded that at the end of the 12 month period the contract would come to an end and it could therefore in the meantime go to the market place and see whether it could attract some other suitable employee. Doing so in the way that it did repudiated the contract of employment. After the 24th May 2001 the Applicant was left in contractual limbo. Lack of any advice from the Respondent justified her conclusion she had no job, that is, she was constructively dismissed.

35 The job previously occupied by the Applicant apparently is now occupied by someone else, reinstatement is not an option and the parties made submissions on the question of compensation. The Applicant's solicitor says that the Applicant has tried to mitigate her loss she has had no earnings and continues to seek employment in her field. This is a case where her loss by lack of employment exceeds six months and she should therefore be awarded the equivalent value of six months wages as compensation.

36 This is challenged by the Respondent who says that the Applicant had made it clear that she was dissatisfied with her rate of wage and that the gap between what she wanted and what the Respondent was able to pay was so large that when the wage review was done in July 2001 in accordance with the contract there is every reason to conclude that they would not have been

able to make an ongoing contract and the relationship would have come to an end. Applying the principles for assessment of compensation this should limit the amount of compensation she is to receive.

37 The principles for assessment of compensation before this Commission are well established in the Decisions of the Full Bench in a range of cases including *Gilmore and Another v Cecil Brothers and Others (1998) 78 WAIG 1099, Capewell v Cadbury Schweppes Australia Ltd (1998) 79 WAIG 299, Bogunavich v Bayside Western Australia Pty Ltd (1999) 79 WAIG 8, Swan Yacht Club Inc v Bromwell (1998) WAIG 759FB, Manning v Huntingdale Vetinary Clinic (1998) 78 WAIG 1107*. What the Commission must do first is make a finding of loss which has been proven before assessing compensation. In this case it is clear that the Applicant has suffered loss. She has presented her taxation records together with information concerning her attempts to mitigate her loss.

38 Earlier in these Reasons in finding on credibility I have indicated some concern about the Applicant's evidence concerning her intention to continue with the employment contract past the July 2001 review due to her dissatisfaction with rates of pay. I find that it is clear from her evidence both verbal and documentary that she had a long standing complaint about the rate of pay, she was genuinely upset about it and her protestations that she would have continued the employment relationship past July 2001 are hard to believe if there was no increase in the rate of pay. On the balance of probabilities I find that the Applicant would not have continued the employment relationship, it is not credible that she would have declined work as a private consultant at almost five times the rate that she was being paid by the Respondent. If she had not achieved a large increase it is clear she would have left. This raises issues about the amount of loss, the Full Bench has recently discussed this precise issue in *Penhross College Inc v Marilyn Mugridge FBA 52 of 2001 citation 2001 WAIG 04343 unreported* at paragraph 115 in his Reasons His Honour the President says—

> "*In establishing that loss the employee establishes the probability of his/her remaining in employment for a period of time (be it long or short or indefinitely foreseeable) on the balance of probabilities (see Malec v J C Hutton Pty Ltd 92 ALR 545 (HC) which is referred to in Bogunovich v Bayside Western Australia Pty Ltd (FB) (op cit) . There was no evidence that she intended to leave her employment or that she would be fairly dismissed. It was not put to her or established that she was likely to be fairly dismissed. In my opinion, given the facts of this case, there was no probability that in the foreseeable future, particularly in the six months after the date of her unfair dismissal, she could be fairly dismissed or would leave, but for the events leading to and constituting her unfair dismissal.*"

39 As I understand the thrust of His Honour's reasoning each of these matters is dependent upon the facts of the case. In the matter before the Full Bench Ms Mugridge was a school teacher and it was clear on the evidence that within six months of the date of dismissal she would not have left or could she have been fairly dismissed but for what had happened to her. The facts as I have found them are that this Applicant would not have stayed after the review date, I therefore conclude that her loss is from 24th May 2001 when she last was paid until 19th July 2001 which is 12 months after her employment started.

40 There were no submissions concerning injury, therefore I calculate her loss as being for a period of 10 weeks and four days which on the figures supplied in the Commission means that she suffered a loss of $4,686.00. An Order will issue that the Applicant was unfairly dismissed, that reinstatement is unavailing and that she should be paid $4,686.00 in compensation.

2001 WAIRC 04471

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHARON LISA SEMPLE, APPLICANT
	v.
	PRO SUBI LIMITED, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	FRIDAY, 21 DECEMBER 2001
FILE NO.	APPLICATION 910 OF 2001
CITATION NO.	2001 WAIRC 04471

Result Unfair dismissed, compensation awarded

Order

HAVING heard Mr M.L. Segler (of Counsel) on behalf of the Applicant and Mr S. Edwards (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 Application was unfairly dismissed and that reinstatement is unavailing.
2. THAT the Respondent pay the Applicant compensation in the amount of $4,686.00.

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

2001 WAIRC 04357

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEBORAH MARION SMITH, APPLICANT
	v.
	NUTRICIA AUSTRALIA PTY LIMITED, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 7 DECEMBER 2001

FILE NO.	APPLICATION 640 OF 2001
CITATION NO.	2001 WAIRC 04357

Result	Applicant dismissed unfairly; compensation and notice awarded
Representation	
Applicant	Mr A Drake-Brockman, of Counsel
Respondent	Ms M Saraceni, of Counsel

Reasons for Decision

1 This is an application made pursuant to section 29(1)(b)(i) and (ii) of the *Industrial Relations Act, 1979* (the Act). The applicant Deborah Marion Smith applied to the Commission on 6 April 2001 alleging that she was harshly, unfairly or oppressively terminated from her employment on 19 March 2001. The applicant was employed by Nutricia Australia Pty Ltd (the respondent) as Territory Manager for Western Australia and as such was responsible for sales for the respondent in this state. She was employed on 26 June 2000 and in her application says:

> "I was dismissed for no legitimate reason without prior notice or discussion as to alternatives. To the extent that I was purportedly made redundant, I received no reasonable redundancy payment and I received no reasonable notice".

In her application Ms Smith claimed reinstatement for unfair termination and in addition as a denied contractual benefit claimed six months redundancy payment and six months notice. The applicant says that her annual remuneration package was approximately $70,000.

2 The respondent in their notice of answer and counterproposal says that the applicant was employed as the only sales representative for Western Australia, on a base salary of $51,000 per annum, plus superannuation and a company car provided for work purposes. The respondent says that the applicant's position, as a result of restructure was changed to incorporate Enteral Clinical Nutrition (ECN) functions. As the applicant did not hold the necessary qualifications and the respondent was unable to sustain two positions in Western Australia, the applicant was made redundant. The respondent says no alternative employment was available. The respondent says that Ms Maureen Lowrie, the respondent's Regional Sales Manager flew to Western Australia and met the applicant on 19 March 2001 to discuss the requirements of the restructured position and provided the applicant with an opportunity to raise any issues. The applicant was paid one month's pay as a termination payment.

3 The matter came on for conciliation conference on 14 June 2001 by teleconference. The matter could not be settled and parties were left to negotiate the application. This likewise proved unsuccessful and the matter was listed for hearing on 11 and 12 October 2001. The respondent applied to the Commission to have the matter adjourned and in so doing filed an affidavit from Mr Zane Turner, the Managing Director of the respondent. The Commission denied the application for adjournment. The statements in Mr Turner's affidavit were inadequate reason in the mind of the Commission to grant an adjournment and would have caused undue delay for the applicant in having her application resolved. The application, if adjourned, would have meant the applicant would not have had her case heard until sometime in 2002.

4 Following the hearing of the application for adjournment on 20 September 2001, the respondent by letter dated 25 September 2001 requested that the respondent's evidence be given by video link due to: "the respondent's witnesses are having great difficulty in obtaining return flights Sydney to Perth for the scheduled hearing". The respondent also undertook to pay the connection fees applicable to the Commission using video conference facilities to enable this evidence to be taken. The Commission acceded to this request, reluctantly, given the difficulties with air travel in Australia at that time.

5 At the directions hearing on 20 September 2001, clarification was also sought by the respondent as to the matters claimed. The applicant reaffirmed that reinstatement was sought. If reinstatement was impracticable, in the mind of the Commission, then the applicant sought six months compensation; and six months redundancy and six months notice as denied contractual benefits; these terms to be implied as terms in the contract. Counsel for the applicant, Mr Drake-Brockman, provided an outline of these submissions prior to the hearing.

6 The applicant in her submission says that she was summarily dismissed on 19 March 2001, in that she was required to leave the respondent's employment immediately upon termination without reasonable notice. The applicant says that there was no condition in the contract of employment for pay in lieu of notice and hence the employer is in breach of the contract if the employer does not give the employee the requisite notice of termination. The applicant says that the onus lies with the respondent to establish the facts upon which a summary dismissal can be justified and that there is nothing in the present circumstances to justify summary dismissal. The respondent terminated the applicant by letter dated 16 March 2001 and no prior notice was given. The applicant says the respondent made no attempt to find the applicant an alternative position at Nutricia Australia, or to provide training for the applicant in ECN products. The applicant says the aspect of the unfairness is the failure to consult, a further aspect is the inadequacy of the redundancy payment. The applicant also says the manner of the termination was effected in a harsh, oppressive and unfair way. After the applicant's employment was terminated, advertisements were placed in the West Australian requesting applications for the applicant's former position.

7 The evidence of Ms Smith is that when she was employed by the respondent under the contract (exhibit DMS3) she was advised that after she had settled in, that is after six months, she would receive training in ECN products. She says that during her time with the respondent she did not sell ECN products except for some drinks. Her duties were to sell products as listed on her business card (exhibit DMS5) to pharmacies, health food shops, general practitioners and paediatricians. She gave evidence that she worked very hard for the company and in November 2000 topped the sales for Australia in Efamol products. Arising from this she received an email from Ms Lowrie, the Regional Sales Manager (exhibit DMS7) congratulating her on her efforts.

8 In February 2001 she attended a sales conference in Katoomba of all sales representatives. At the time she had to give a sales presentation, the details of which were forwarded to her in advance. She says she was approached the evening before by Mr Turner, the Managing Director for the respondent who in part asked whether she had prepared for the presentation. She replied that she was nervous, but prepared and that he was dismissive of her comments. Following her presentation the next day she says she was abused by Mr Turner who gave her, as with others, an individual assessment. He described her as an embarrassment to herself, accused her of being drunk and unintelligent. Her evidence is that this is the last conversation she had with Mr Turner. She attempted to contact Ms Lowrie following the conference but had the impression that Ms Lowrie was avoiding her. She says she only received SMS messages from Ms Lowrie in response.

9 On Friday 16 March 2001 she received a message from Ms Lowrie that she was to meet her the following Monday, 19 March 2001 in Perth at Observation City Hotel. Ms Smith says there was no reason given for the meeting. She met Ms Lowrie on 19 March and was handed a letter which was a letter of termination [Exhibit DMS9]. Ms Lowrie indicated that she was not aware of what was in the letter and when queried about it advised the applicant to contact Mr Turner. The applicant says she did not contact Mr Turner as it appeared from the letter that Mr Turner had made up his mind and given the abuse she had received earlier, decided not to contact him. Ms Lowrie asked Ms Smith for her diary, car, mobile telephone and laptop computer. The applicant was advised to catch a taxi home. Ms Smith says she thinks her final payments were forwarded to her after that date. She says that even though she was suspicious of the meeting given that Ms Lowrie was avoiding her, she was shocked by the dismissal. She says it was unexpected and no warnings had been applied to her earlier.

10 Ms Smith says there was no discussion about alternative positions albeit that two people were being trained in South Australia to take on the role. Since her termination she has obtained a position with Hexsal Australia on 25 June 2001 and is now receiving $5000 per annum less in remuneration. She says she applied for jobs through the newspaper and through the employment agencies and attended interviews. She says that due to her financial position she had to obtain a job quickly and did so.

11 Mr Turner, the Managing Director of Nutricia gave evidence that the company employs 60 people in Australia, 24 of whom are sales representatives. The company has three types of products, infant products such as infant formula, scientific hospital supplies (specialised nutrition) and ECN products for people with compromise dietary situations. The company also sells some vitamins, minerals and supplements.

12 Nutricia started operating in Western Australia in mid 1998. This state is one of the worst performers in sales. There is no company office here but the company maintains a small storage facility. The largest state in company operations is New South Wales with 8 sales representatives. Western Australia has only one. The sales representatives' duties are to solicit orders and to promote the company's products to relevant clientele.

13 Mr Turner says that he had had no involvement with Ms Smith prior to a very brief exposure when she attended the conference in late February, early March 2001. Ms Smith's salary on termination was $51,000 per annum, her salary was above most as the company wanted an "outstanding, high calibre candidate who could work well in a relatively removed situation, show a lot of initiative." He says that Ms Smith's contract is supplemented by the Commercial Travellers and Salesmen's award and information staff handbook which is provided on induction. The motor vehicle provided to sales representatives provides for some private usage up to a maximum of 500 kms per month. Beyond that limitation the employee is to get permission and pay for the additional fuel. The company also provides a laptop computer and a mobile phone which is not to be used for private usage. Mr Turner says the monetary benefit of the car provided to Ms Smith was $1278 per year. This is the figure that appears on Ms Smith's group certificate in relation to fringe benefit tax.

14 Mr Turner says they received two directives from head office regarding increased sales in ECN products. The first was at a meeting on 23 September 2000 when they were forewarned of increased expectations for sale of these products. He then received a document on 21 December 2000 requiring the Australian operation to double sales of ECN products from 15% to 30% [Exhibit ZT2]. This document was objected to by counsel for the applicant due to the absence of the author as witness to the document. Mr Turner consulted members of his extended management team as to how to meet this challenge. There was a meeting in Holland on 8-9 February 2001 of country representatives to discuss how the new objectives would be met. A document flowed from this meeting Exhibit ZT3. Sales objectives had to be met in the year 2001 and the company commenced implementation in New South Wales, Queensland and Victoria. New South Wales then employed a full time clinical nurse consultant to visit clients' homes to assist with feeding the new product through tubes and pumps. In Queensland, a part time ECN nurse consultant was employed. In Victoria a full time ECN nurse consultant was employed. In South Australia a new dietician was employed as a sales representative. In relation to Western Australia, Mr Turner says: "In Western Australia presented our biggest and most difficult change. We had no business – - basically no business at all. We had never had a representative in Western Australia. It is remote. It is expensive to manage. It's very difficult to supervise in terms of geographical location and the person that we had employed under a completely different set of definition in terms of business focus back in the previous year was not qualified nor, in the opinion of the person responsible, capable of meeting the new requirements in West Australia."

15 Mr Turner says ECN products are either administered by gastro-nasal (ie a feeding tube or pump) or can be taken orally. Mr Turner says there is a strict policy in Nutricia, which is not written down, that individuals who promote ECN products must be qualified dieticians with a 3 year degree in Science and they have a two years Masters degree in Dietetics and Nutrition. The reason for this is because it is a highly complex area that requires enormous background.

16 The company ran a sales clinic at Katoomba the week ending 2 March 2001. All sales representatives and senior management and some branch managers attended the conference. These sales representatives had to give a presentation. The sales representatives have 1 to 3 opportunities at the presentation and are critiqued on their performance. Those attending the conference were not alerted to Nutricia's new focus on ECN products. There were different product teams and Ms Smith was not part of the ECN team. The process was the same but the products were different.

17 At one of the dinners during the conference Ms Smith sat down at the table occupied by Mr Turner and voiced her disapproval and her inability to perform to the standard required in the next day sales clinic. He says she rambled on about irrelevant matters. He was surprised and embarrassed on behalf of the other people at the table. He said he suggested to her that everybody gets nervous and not to get too excited and only worry about a problem if there is one at the end. Following this incident he says he spoke to Ms Maureen Lowrie, Ms Smith's immediate superior. He told her of the discussion and his surprise. There was no reprimand for Ms Smith. The next day Ms Smith was in the team coached by Mr Turner. He had a coaching session with Ms Smith following her presentation. He says she was reactive, not accepting, argumentative and totally subjective. She disagreed with each of the points he expressed. He advised her that she should listen more and talk less. He says he had no further involvement with Ms Smith during the conference beyond that which he would have with any of the other sales representatives.

18 Mr Turner's evidence is that Ms Lowrie and he, given the need for increased ECN sales, evaluated the options for Western Australia. They reviewed Ms Smith's credentials, her experience, her performance and all that they knew of her. Due to her lack of academic qualifications and the nature of the product they decided to make her redundant and employ another person in Western Australia who was appropriately academically qualified to sell the ECN products. He says her academic qualifications were not adequate relative to their policy and all other people in the ECN division. He says that other members of the extended management team were also involved in this decision. In making that decision he says they took into account all factors including the time frame. It was March and they had until 31 December 2001 to reach their goal. The decision was made regarding Ms Smith's redundancy on 15 or 16 March 2001. The new employee was employed in July and became active around August 2001. He instructed Ms Lowrie to fly to Western Australia to advise Ms Smith of her redundancy. This happened on 19 March 2001. Mr Turner says the letter dated 16 March 2001 was handed to Ms Smith on 19 March 2001 by

Ms Lowrie. The company decided to pay Ms Smith four weeks notice as that was the minimum suggested in the handbook. He says that Ms Smith was overpaid two weeks as she had been paid to the end of the month. They did not pay her redundancy as she did not qualify as per the award.

19 Mr Turner says the new sales representative in Western Australia who replaced Ms Smith is qualified with a Bachelor of Science with majors in pharmacology and microbiology. He says that the new sales representative is selling a whole different group of products, highly specialised products to a completely different clientele.

20 Under cross-examination Mr Turner says that 20% of the company sales Australia wide are for infant milk formula products and 10% are for ECN products. The balance of the sales are in scientific and hospital supplies, namely metabolism and vitamins, minerals and supplements. This remaining 70% of sales is not covered by the sales representatives. These percentages of sales are reflective of Western Australia, except the representative does not sell any ECN products. The company hopes to sell these products. He says Ms Smith's units in the degree are applied science and her qualifications as a dental nurse did not qualify her for ECN sales.

21 Mr Turner agrees the products listed on the back of Ms Smith's business card included ECN products. He says this was the same for all sales staff and the reference to Ms Smith as having responsibility for ECN sales is incorrect. Nutricia's internal staff telephone directory which lists Ms Smith as "IMF/ECN/GP" is also incorrect. Mr Turner denies that when Ms Smith was recruited she was to be trained in ECN sales. Ms Lowrie provided the same evidence. Mr Turner says that the letter he signed, dated 6 March 2001, was a mistake; a typing error.

22 I do not recite the evidence of Ms Lowrie as I consider it unnecessary to do so. Her evidence in the main backs up the evidence given by Mr Turner. I will deal with segments of her evidence in my conclusions.

23 In terms of the credibility of witnesses I readily accept the evidence of Ms Smith to that of Ms Lowrie and Mr Turner in particular. I consider that Ms Smith's evidence was consistent, direct and not damaged at all under cross-examination. I consider Mr Turner's evidence to be in the main reluctant, inconsistent in parts and less credible. His evidence relating to mistakes in the letter he signed and in the listing for Ms Smith in the internal telephone directory are not convincing. His evidence concerning the discussion with Ms Smith at the dinner in Katoomba and her presentation leaves me with a different impression than that which he sought to convey. The impression gained from viewing his evidence is that he was very annoyed, critical and dismissive of Ms Smith and her behaviour; not that he was tempered and less concerned in his approach. I have similar doubts about the evidence given by Ms Lowrie. Where inconsistencies arise in the evidence of Ms Smith and the witnesses for the respondent, I would clearly favour the evidence of Ms Smith. This is notwithstanding an attempt by counsel for the respondent to portray Ms Smith as less than honest because she wrongly claimed to be employed after having been terminated.

24 In short form, I am led to a conclusion that Ms Smith's performance at the sales conference in Katoomba led to her dismissal. A dismissal that was unfair in many ways and where a fair go all round did not even enter the equation (*Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385). I do not consider that her position was made redundant or that she was rightly made redundant. Instead it is my view that the backdrop of having to increase ECN sales (the extent of which is disputed) was used as an excuse to oust Ms Smith from her job as Mr Turner had formed the view, following the Katoomba conference, that he did not want Ms Smith on Nutricia's sales team. The respondent does not argue that there was some reason founded in Ms Smith's performance or behaviour sufficient to warrant dismissal. It is common ground that Ms Smith's services were terminated without warning or prior notice by Ms Lowrie on 19 March 2001. Given my finding that there was no redundancy, but that a different rationale led to the termination, the dismissal of Ms Smith can only be seen as both unfair and harsh. The payment of monies after her termination do not alter the character of the dismissal.

25 My reasoning in arriving at the above conclusion is as follows. Ms Smith was employed as the only sales representative for the company in Western Australia. The company at that stage sold IMF and ECN products (I will return to this point). Ms Smith was paid a comparatively high salary to attract a quality candidate who could operate with a high degree of initiative. She performed at least adequately in her job. All of this I consider to be common ground. The essential point made by the respondent is that they had to quickly increase the sales of ECN products in Australia, and presumably in Western Australia, and Ms Smith was not qualified to do this.

26 Ms Smith's evidence is that she performed well in her job. She was congratulated by Ms Lowrie on her Efamol sales in December 2000 [Exhibit DMS7]. I accept this and find that her performance was in fact good. So the distinction made in the mind of the respondent is that Ms Smith was simply not equipped to sell ECN products, or at least the range of ECN products that the respondent now had to sell in Western Australia. I simply do not find this to be a plausible stance.

27 To accept this view of the respondent I would have to find that when Ms Smith was recruited it was not envisaged that she would sell ECN products and that her qualifications were not adequate to allow her to sell these products. Ms Lowrie's evidence speaks against this. I consider that it is clear from her evidence that Ms Smith was employed to sell IMF and ECN products. Ms Lowrie says that she told all those who she interviewed that in the future the company would sell ECN products; she wanted to make them aware of the future of Nutricia in Western Australia (Transcript p.223). She says Ms Smith was a high calibre appointment for IMF products but not for ECN products. I doubt her answer. However, even if I were to accept her answer at face value it tells me that Ms Smith was recruited to sell IMF products and to sell ECN products sometime into the future. Yet some ten months later she is supposedly made redundant, after achieving a good sales record, because she was not qualified to sell ECN products.

28 Ms Smith's business card reflects the inclusion of ECN products. Mr Turner says that this is the same for all sales persons in Nutricia. His evidence also is that there is a delineation between IMF and ECN sales personnel. The two pieces of evidence do not sit well together. However, of more relevance is the listing for Ms Smith in the internal directory of Nutricia. This listing includes ECN products as part of Ms Smith's responsibilities. Mr Turner says that this also was a mistake. I do not accept this explanation as plausible, particularly against the background of Ms Lowrie's evidence that Ms Smith was told when recruited that she was in the future to cover ECN products. Ms Smith also gave evidence that she was to be trained in ECN products. I accept this evidence. Ms Smith had some extensive training at the commencement of her employment and the company would appear to value training (eg the Katoomba conference), even though Mr Turner says that they expect their ECN sales personnel to already have appropriate formal qualifications.

29 The appropriateness of Ms Smith's qualifications was in issue. The original advertisement to which she responded [Exhibit DMS1] asked that applicants "ideally have qualifications in either science or nutrition and possess a proven track record in sales." At that stage the respondent thought that they had attracted a high calibre applicant in Ms Smith. Six months later the respondent appeared very happy with her sales performance. Approximately three months after that the respondent advertised for Ms Smith's replacement [Exhibit DMS10] asking for qualifications in "Nutrition/Dietetics/Science". Slightly after that in a similar advertisement placed by a recruitment agency for the respondent, applicants were sought with a "formal qualification in Science, Nutrition or Nursing". It is not contested that Ms Smith is a trained Dental Nurse [Exhibit DMS2] and that she had

achieved some units in an applied science degree. I fail again to see how Ms Smith was suddenly unqualified given the comparison of advertisements when she was recruited and when her replacement was recruited. Ms Lowrie says in evidence that the recruitment agency got it wrong in asking for someone with nursing qualifications. I doubt this evidence and note that the agency would have typically received their instructions about requirements for a position from the employer. The question of qualifications, if the respondent's evidence is to be believed, was critical in their recruitment objective and yet the agency is said to have erred.

30 There is another mistake in the mind of the respondent which is more critical to my conclusions. It relates to the letter of termination signed by Mr Turner. Exhibit AZT3 has a typed date of 6 March 2001 (ie just after the Katoomba conference) and refers to "formal dietetic, nutritional or scientific qualifications". The letter handed to Ms Smith on 19 March 2001 has a typed date of 16 March 2001 and refers to "formal dietetic or nutritional qualifications". Mr Turner on his evidence signed both and the first one was a mistake. Leaving aside a query as to why the qualifications were changed, I do not accept Mr Turner's evidence that the first letter was a mistake. I say this against a backdrop of being convinced, having heard the evidence of Mr Turner and Ms Smith about their exchanges at Katoomba, that Mr Turner had at that stage formed a very low opinion of Ms Smith's competence. I consider that it is most probable that following the sales conference he had determined that Ms Smith had to go and proceeded to give effect to this decision.

31 Having said this it is clear in my view that the supposed redundancy is a sham or excuse used by the respondent to terminate Ms Smith's services. I consider it is also clear on the evidence that Ms Smith's successor has taken over her position. Section 40 of the Minimum Conditions of Employment Act 1993 defines "redundant" as "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." The circumstances surrounding Ms Smith's termination and her replacement do not fit within this description. Leaving aside my finding that Ms Smith was recruited to also sell ECN products, Mr Turner's evidence on her replacement is inconsistent and at best confusing. He says in his evidence in chief that the new sales representative in Western Australia is performing identical duties to that of Ms Smith. He then changes and says the duties are completely different (Transcript p.136). Later under cross-examination he says that Nutricia currently (ie October 2001) has no ECN sales in Western Australia and hopes to make some in the future (Transcript p.139). Ms Lowrie confirms in her evidence that there have been no new ECN sales (Transcript p.202). I infer from that that Ms Smith's replacement must be continuing to sell the IMF products to the clientele developed by Ms Smith, i.e. she has taken over Ms Smith's duties.

32 If I am wrong on this, and wrong as to the reasons for her termination, then Ms Smith was made redundant. I do not take this view, but if it were the case then there has been no discussion with her as to her alternatives. Although this may not necessarily be fatal, it is clear that there were alternatives. The first option would have been to continue her employment whilst a replacement was being found, so as to continue the sales and cushion the blow for her. Another alternative would have been to train Ms Smith in the new ECN products. The respondent says that this was considered and was not appropriate. The qualifications needed are not easily obtained. I have covered already the issue of qualifications and Ms Smith's recruitment. She says also that she was offered training in ECN at commencement and during her employment. Ms Lowrie rejects this and I would prefer Ms Smith's evidence as stated previously. Given this, I consider that it would have been fair to train Ms Smith as promised and at least give her the opportunity to perform.

33 The applicant has appropriately sought to mitigate her loss [Exhibit DMS14] and I so find. She was employed with effect from 25 June 2001 as the Pharmacy Account Manager of Hexsal Australia Pty Ltd. Her base salary is $46,000 per annum [Exhibit DMSR1]. The salary is subject to review following probation (ie four months) and is reviewable annually. The contract provides also for incentive payments and a fully maintained company vehicle or a car allowance of $17,000 per annum. Superannuation at the rate of 7% of salary is also payable.

34 The break in employment is 14 weeks precisely. The difference in remuneration between jobs is $5,000 and is submitted as such by counsel for the applicant, except that he notes that Ms Smith's replacement receives more than she was paid. Ms Smith's loss therefore is 14 weeks at her remuneration rate with Nutricia and whatever ongoing loss is apparent. There is dispute about Ms Smith's remuneration at Nutricia. The applicant says that it was approximately $73,000 and includes salary, car, superannuation, mobile and laptop computer. I consider that the laptop computer and mobile telephone are simply tools of trade and as such do not form part of the remuneration. The salary, motor vehicle and superannuation do form part of the remuneration and should be incorporated in any calculation of loss or notice (*AWI Administration Services Pty Ltd v Andrew Birnie* 81 WAIRC 2849 at paragraph 213). Counsel for the applicant distinguishes the superannuation as being part of the contract as opposed to the Superannuation Guarantee Clause, and I accept this.

35 Counsel for the applicant also seeks to value the motor vehicle at $16,038 as per Exhibit DMS12 (RAC car running costs). The respondent says the value of the car equates to the fringe benefit tax figure of $1,278 [Exhibit ZT1]. The contract provides for a fully maintained motor vehicle. The respondent says the usage of the vehicle was limited to parameters contained within the staff hand book [Exhibit DMS4]. Even accepting this limitation it is patently obvious that the value to Ms Smith of a motor vehicle, which she could use generously for work and private purposes, would be greater than the respondent's submitted figure. In those circumstances and given the estimated value of the motor vehicle in Ms Smith's new contract of $17,000 per annum, I would accept the applicant's submitted figure. Therefore the remuneration package for calculation purposes comprises $51,000 salary, $16,038 motor vehicle and $3570 superannuation; a total of $70,608 per annum.

36 As stated, Ms Smith has an ongoing loss of $5,000 per annum. Given Ms Smith's record of reasonable sales achievement, the incorporation of incentive payments in her new contract and the opportunity for salary review I consider it reasonable to expect that gap in salary to diminish or be overcome in the foreseeable future. In that sense I consider it appropriate to incorporate a component of ongoing loss of $5,000 (ie. twelve months) as the figure to be awarded.

37 The calculation for loss is therefore $5,000 plus 14 weeks @ $70,608 per annum, (ie.$19,010). A total of $24,010.

38 The applicant seeks 6 months payment for redundancy as an implied contractual right. Given my finding that the circumstances of Ms Smith's termination do not amount to a redundancy, I do not consider that such an implied right can be due and payable. The respondent in my view has wrongly manufactured redundancy as a rationale for termination. I do not therefore consider the question of an appropriate redundancy payment is relevant in the context of this matter.

39 The applicant has also sought the payment of reasonable notice as an implied contractual right. Ms Smith was paid four weeks in lieu of notice after her termination. There is no provision of notice expressed in the contract. However, such a term may be implied and paid in lieu and the factors relevant to a consideration of reasonable notice are clear (*Hotcopper Australia Ltd v David Saab* 81 WAIG 2704*; Antonio Carlo Tarozzi v WA Italian Club (Inc)* 71 WAIG 2499). The applicant was the sales representative for Western Australia (referred to as the Territory Manager), she was 41 years of age, on a good remuneration package, had been employed for 9 months and was reasonably mobile in her career (given her job history). The applicant operated on her own dealing in specialised products but within the broader pharmaceutical/nutrition industry. Comparing these circumstances to those found in *Tarozzi* I consider a lesser period of notice is warranted. I consider that two months notice

would be reasonable. This means that the applicant should in my view receive an additional four weeks by way of reasonable notice, i.e. $5,431 (rounded).

40 The notion of injury must be treated with some caution (*AWI Administration Services Pty Ltd v Andrew Birnie* 81 WAIRC 2849 at paragraph 200). A dismissal will often be stressful and accompanied a sense of shock, injustice and concern over reputation and financial hardship. The evidence of Ms Smith displays that the suddenness of the termination impacted upon her and she was concerned financially due to the mortgages carried by her. She did have some suspicions that all was not well, following the instances at Katoomba and the lack of response from Ms Lowrie. The manner in which the termination was executed was not oppressive. Ms Lowrie flew to Perth to deliver the news and discussed the matter with Ms Smith, even though she could not answer all Ms Smith's queries. In that sense the termination was conducted in the same cordial manner that had previously been part of the working relationship between Ms Smith and Ms Lowrie. On balance, having regard to the sudden nature of the termination and in my view the manufactured reason, and having regard to the otherwise reasonable conduct of the actual termination, I would award Ms Smith $1,500 by way of injury.

41 In summary, I would declare that Ms Smith was harshly and unfairly dismissed by the respondent on 19 March 2001. I would find that reinstatement is impracticable given the manufactured reasons behind the respondent's dismissal of Ms Smith, and Ms Smith now being gainfully employed. I would award her $25,510 by way of compensation and injury. I would also award Ms Smith $5,431 for additional reasonable notice. These amounts to be paid within 7 days of the Order of the Commission less any taxation payable to the Commissioner of Taxation.

2001 WAIRC 04497

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEBORAH MARION SMITH, APPLICANT
	v.
	NUTRICIA AUSTRALIA PTY LIMITED, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	THURSDAY, 27 DECEMBER 2001
FILE NO.	APPLICATION 640 OF 2001
CITATION NO.	2001 WAIRC 04497

Result	Applicant dismissed unfairly; compensation and notice awarded
Representation	
Applicant	Mr A Drake-Brockman, of Counsel
Respondent	Ms M Saraceni, of Counsel

Order

HAVING heard Mr A Drake-Brockman, of Counsel on behalf of the applicant and Ms M Saraceni, of Counsel for the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby-

(1) DECLARES that the applicant, Deborah Marion Smith, was harshly and unfairly dismissed by the respondent on the 19th day of March 2001;

(2) DECLARES that reinstatement is impracticable;

(3) ORDERS that the said respondent do hereby pay, as and by way of compensation and notice, the amount of $30,941 to Deborah Marion Smith, within 7 days, less any taxation that may be payable to the Commissioner of Taxation.

(Sgd.) S. WOOD,
[L.S.] Commissioner.

2001 WAIRC 04428

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PEDRO SOBCZUK, APPLICANT
	v.
	CARNARVON MEDICAL SERVICE ABORIGINAL CORPORATION, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	FRIDAY, 14 DECEMBER 2001
FILE NO.	APPLICATION 33 OF 2000
CITATION NO.	2001 WAIRC 04428

Result	Dismissed for want of prosecution
Representation	
Applicant	No appearance for the Applicant
Respondent	Mr D. Howlett (of Counsel) appeared on behalf of the Respondent

Reasons for Decision

1 On the 7th January 2000 Mr Sobczuk (the Applicant), lodged Application No. 33 of 2000 for an order pursuant to Section 29 of the *Industrial Relations Act 1979* (the Act) for outstanding benefits, together with an application for production of documents. On the 4th February 2000 he requested that the application be dealt with in accordance with the Act.

2 On the 8th of March 2000 the applicant was advised in writing by the Registrar that no material difference could be clearly distinguished between Application No. 33 of 2000 and two previous Applications, No. 888 of 1998 and No. 165 of 1999, which he had lodged and which were the subject of a Full Bench Appeal No. 11 of 1999. The Registrar advised the Applicant that Application No. 33 of 2000 would not be listed until after the Full Bench dealt with Appeal No. 11 of 1999.

3 The Full Bench, in a decision delivered on the 11th of June 2000, (2001 WAIRC 02996) dismissed the appeal by order. The solicitors for the Respondent, represented in these proceedings by Mr Howlett, in a letter dated the 29th of May 2000 requested the application be brought on for hearing and finalisation. Application No. 33 of 2000 was then allocated by the Chief Commissioner to the Commission as constituted.

4 Thereafter a whole series of correspondence took place between my Chambers and the Applicant. I will not include all of it in these Reasons for Decision but enough to give the flavour of what occurred.

5 On the 3rd of July my Associate wrote to the Applicant at his last known address telling him that the phone contact numbers which had been lodged in the Commission by him were now disconnected. He was asked to contact the Commission within 14 days. He was advised that failure to contact the Commission by 20th July 2000 might mean that the application may be dismissed.

6 The Applicant wrote to the Commission on 7th July. In the letter, which can best be described as a little incoherent, he mentioned various issues he said arose from his applications and made a number of allegations about the conduct of a number of holders of public office. He asked for advice as to what he should do concerning remedy.

7 My Associate replied to him on 16th July. In that letter the Applicant was advised that the matter would be listed for hearing on 6th December 2001. At the hearing he would be entitled to pursue remedy by appearing in person or by way of an agent. He was asked to advise the Commission that if he was to appear by agent, notice of the identity of the agent be filed.

8 On 16th July 2001 a formal notice of hearing was issued by the Commission, that notice of hearing embodied an order as follows—

> "If you do not intend to proceed with your application you are required to advise the Commission at least 14 days prior to the date of hearing."

9 The next relevant event was a letter dated 7th August 2000 from the Respondent's solicitors to the Commission. Mr Howlett a Senior Associate of the Respondent's solicitors appears today and asks the letter be accepted as the Respondent's submissions, and I so do.

10 The letter sets out eight reasons why the matter ought to be dismissed. They are these—

1. Almost identical applications have been dismissed by the Commission on 11th June 1999 in Applications in No. 1888 of 1998 and No. 165 of 1999.
2. An appeal against the decisions in Applications No. 1888 of 1998 and No. 165 of 1999 was dismissed.
3. Neither the Commission at first instance nor the Full Bench considered it was in the public interest for the Commission to hear the application on their merits.
4. The Applicant has a history of not pursuing his claims. For an example, Application before the Full Bench No. 11 of 1999.
5. The Applicant has been given at least three opportunities to explain how the present Application differs from the previous Applications.
6. The Applicant has not demonstrated that the present Applications are in any way different from the previous Applications.
7. In the light of the history it would put the Respondent, which is a community-based and publicly funded organisation, in an untenable position and cause significant costs and inconvenience.
8. Further reasons may be found in the decision of Beech C dated 11th June 1999 and in the decision of the Full Bench in FBA No. 11 of 1999.

11 Following upon receipt of that letter, my Associate drew to the attention of the Applicant the contents of the letter.

12 My Associate's letter of 7th August 2001 included an advice to the Applicant that he should provide the Commission a written submission in support of his application within 30 days of the date of the letter, and if he failed to do so the matter will be listed for him to show cause why the application should not be dismissed. The hearing listed for 6th December 2001 was then vacated.

13 There was no response from the Applicant to the letter, although copies of various correspondence he has sent to holders of public office has been sent to the Commission by him. Included in these is a letter to the Honourable Attorney-General and Minister for Justice, Mr Jim McGinty MLA, requesting that Mr McGinty be his agent for the purpose of appearances before this Commission.

14 The Commission tried to assist the Applicant by writing to him on 24th August 2001 advising him how he could go about appointing an agent and sending him the appropriate forms to do so. There is various correspondence on the file from the Honourable Attorney-General and the Ombudsman to the Applicant referring to issues that had been raised with their respective offices by him.

15 There was no response to the Commission from the Applicant within 30 days, and on 25th September 2001 the matter was listed for the Applicant to show cause why the application should not be dismissed.

16 Suffice to say, since that listing date, there has been no correspondence to this Commission from the Applicant as to his intentions concerning this matter.

17 This matter has been before the Commission for some time. The issues which are at the heart of this Application are almost identical to those dismissed by the Commission on 11th June 1999 in Applications No. 1888 of 1998 and No. 165 of 1999. Those matters have been dealt with by the Full Bench in a decision issued on 11th June 2000. The Applicant has been given many opportunities by the Commission to pursue his claim. He has not taken advantage of those opportunities. The Respondent at all times has had to continue its representation. It is manifestly unfair that it be required to continue to do so. The Applicant has not pursued the Application when given the opportunity through this proceeding. Even if he had, it is clear from the findings of the Commission at first instance in Application No. 1888 of 1998 and No. 165 of 1999 and the treatment of those matters by the Full Bench in its decision of 11th June 2000 that there is little merit if any in this Application.

18 For all of those reasons the Commission will dismiss this matter for want of prosecution. Orders will issue to give effect to this decision.

19 The rights of the Respondent are preserved concerning any application for costs it might make within 28 days of the date of this hearing.

2001 WAIRC 04425

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	PEDRO SOBCZUK, APPLICANT
	v.
	CARNARVON MEDICAL SERVICE ABORIGINAL CORPORATION, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	FRIDAY, 14 DECEMBER 2001
FILE NO.	APPLICATION 33 OF 2000
CITATION NO.	2001 WAIRC 04425

Result	Dismissed for want of prosecution

Order

HAVING no appearance on behalf of the Applicant and Mr D. Howlett (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 Application be dismissed for want of prosecution.
2. THAT liberty to apply is reserved to the Respondent concerning any application for costs it might make within 28 days of this hearing.

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

2001 WAIRC 04503

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	TROY TRAN, APPLICANT
	v.
	BOUTIQUE CONSOLIDATED PTY LTD t/a TONY BARLOW MENSWEAR, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 3 JANUARY 2002
FILE NO.	APPLICATION 925 OF 2001
CITATION NO.	2001 WAIRC 04503

Result	Application alleging denied contractual entitlements dismissed.
Representation	
Applicant	Mr A. Skerritt (of counsel)
Respondent	Mr K. Trainer (as agent)

Reasons for Decision

1 The claim before the Commission by Mr Tran is that he is entitled to a benefit under his contract of employment which has been denied him by his employer. It is a claim brought under section 29(2)(b)(ii) of the *Industrial Relations Act 1979*. The benefit to which Mr Tran claims he is entitled is to be paid at the salary of $30,000.00 per annum.

2 I find the facts to be as follows. Mr Tran has been employed by the respondent since February 1997. His initial employment was at the Tony Barlow Menswear shop in Hay Street in Perth. In mid 1997 he became the relief manager for the Perth metropolitan area. In October 1997 he became an assistant manager in Melbourne, Victoria, at the Collins Street Tony Barlow Menswear shop. His salary was $30,000.00. Mr Tran returned to Perth in January 1999 at the Tony Barlow Menswear store at Garden City shopping centre in Booragoon. In late 1999 Mr Tran was appointed manager of a new Tony Barlow Menswear store in Southland in Victoria. His salary was $35,000.00. On 1 February 2000 he was given a letter of warning regarding the store's performance (exhibit A1) and shortly after was subsequently transferred to the Melbourne Central shopping centre at a salary of $32,500.00 which was later increased to $35,000.00. At a time prior to September 2000, the respondent became dissatisfied with Mr Tran's performance and presented him with some alternatives which included returning to Perth as the assistant manager of the respondent's Carousel store.

3 Mr Tran agreed and in a letter from the respondent to him dated 27 September 2000 (exhibit A2) the respondent stated the terms of his employment in that capacity—

> "▪ Your commencement date in Perth will be Wednesday the 1st November 2000. Your new location will be in Tony Barlow Carousel in Cannington.
>
> ▪ Salary will be $30,000 per annum with $1500 clothing allowance.
>
> ▪ With regards to your return airfare and transport for your car please supply written quotes for us to authorise as soon as possible."

4 Mr Tran returned to Perth and worked as the assistant manager of the Carousel store from 1 November 2000. On or about 1 December, Mr Di Lello, the respondent's general manager, informed Mr Tran that he was dissatisfied with Mr Tran's performance and the performance of the Carousel store and he had to improve his performance before the end of the month. Mr Rao, the operations manager, visited the store on 23 December and advised Mr Tran that he would have to take a salary cut, that he would be put "onto the roster" and that he would have to work 2 days elsewhere and 3 days in the Carousel store. On 29 December 2000 Mr Di Lello wrote to Mr Tran (exhibit R1). The letter states—

> "Dear Troy
>
> With regard to our discussions earlier in December on your salary review.
>
> This letter confirms your annual salary of $25,000 from January, 2001.
>
> At your request, should opportunities become available at alternative locations, and you were suited to those areas, then we would consider you as an option for the position.
>
> Yours faithfully"

5 I find that Mr Tran objected to this. Even if, as Mr Rao's evidence suggests, Mr Tran accepted the arrangement, it is clear that he did so reluctantly. That evidence together with the fact that Mr Tran wrote to the respondent on 5 February 2001 (exhibit A3) objecting to that course of action, leads only to the conclusion that Mr Tran objected to this arrangement.

6 Since 1 January 2001 Mr Tran has been paid at the salary level of $25,000.00 per annum. Further, he was placed "on the roster" to relieve in various stores. From 1 January he no longer filled the role of assistant manager in any store. His role has been sales assistant, or sales consultant. He has worked in a relieving capacity at the Carousel store on Tuesday, Thursday and Saturday only and on the other two days of the week he works at other stores. Since October he has provided long service leave relief in the Booragoon store.

The terms of Mr Tran's contract of employment

7 Mr Tran claims that he is entitled under his contract of employment to a salary of $30,000.00 per annum and that has not been paid at that rate since 1 January 2001. It is therefore necessary to determine the relevant terms of Mr Tran's contract of employment. The terms are partly oral and partly written. The only written terms of the contract of employment presented to the Commission are those in exhibit A2 reproduced above. I find as a matter of fact that the contract of employment between the respondent and Mr Tran from 1 November 2000 contained an express term that he would be paid a salary of $30,000.00 per annum. I find also that this salary was accepted by Mr Tran on the basis that he would be the assistant manager of the Carousel store. That is, the relevant terms of the contract of employment from 1 November were that Mr Tran would be employed as the assistant manager of Tony Barlow Carousel in Cannington at a salary of $30,000.00 per annum.

8 I also find that there was no term in the contract of employment, either express or by implication, that allowed the respondent to unilaterally reduce Mr Tran's salary and it was not suggested otherwise. Whatever the circumstances have been in the past regarding the differing salaries paid to Mr Tran, the terms of exhibit A2 do not expressly provide for the respondent to vary the salary and to imply a provision to that effect would be to contradict the words: "Salary will be $30,000 per annum" in the second dot point.

Consideration

9 The issue at the heart of the dispute is the change which occurred on 1 January 2001. On and from that date the respondent, unilaterally, without Mr Tran's consent, paid him a lesser salary and removed him from his position as assistant manager of the Carousel store. It is well settled that one party to a contract, in this case the employer, cannot unilaterally vary the terms of the contract of employment. There was no term of the contract which permitted it to do so. Nevertheless, that is what happened here. It is difficult to imagine two more fundamental terms of a contract of employment than the work to be performed and the salary to be paid for that work. The reason why the respondent did so is, for these purposes, not relevant. The Commission is not being asked to assess the fairness or otherwise of what occurred, simply whether Mr Tran has been denied a benefit to which he is entitled under his contract of employment.

10 It is also clear that an action unilaterally taken by the employer to reduce an employee's salary and, as in this case, to change his duties, constitutes a repudiation by the employer of the contract of employment. This has commonly been discussed in the context where it is alleged by the employee that he or she has thereby been dismissed. The Full Court of the South Australian Supreme Court recently observed in *Advertiser Newspapers Pty Ltd v Industrial Relations Commission of South Australia and Grivell* [1999] SASC 300; 74 SASR 240 at [32]—

> "Another method by which a dismissal in the sense discussed may be effected is by way of repudiation of the contract by the employer. For example, the employer, either without notice or with inadequate notice, terminates the services of the employee by sending the employee away or refusing to continue to employ the employee in the position in which the employee is employed. It may also come about by the employer refusing to comply with a fundamental condition, such as refusing to pay the employee at the same rate or to pay the employee at all. It is now well accepted that contracts of employment subject to that type of repudiation are in no different position from any other contract. The repudiation does not, in itself, automatically terminate the contract. The contract continues on unless and until the employee accepts the repudiation: *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435; *Consolidated Press Ltd v Thompson* (1952) 52 SR (NSW) 75."

11 The respondent's action on 1 January removing Mr Tran from the position of assistant manager of the Carousel store and not paying him $30,000.00 per annum was a repudiation of its contract of employment with Mr Tran. In the words of the decision above, the respondent refused to continue to employ Mr Tran in the position in which he was employed and refused to comply with a fundamental condition: to pay him at the same rate.

12 Contrary to the submissions made on behalf of the respondent however the repudiation of the contract by the respondent did not, of itself, lead to the dismissal of Mr Tran (see also *Brackenridge v Toyota Motor Corporation Australia Ltd* (1996) 142 ALR 99). The respondent, by its action, broke the contract of employment but did not terminate it. Rather, the repudiation by the respondent presented Mr Tran with an election. That election was either to accept the repudiation of the contract and regard the contract of employment as at an end or to take action against the employer for loss arising from the repudiation of the contract: see *Advertiser Newspapers* above.

13 That is, had Mr Tran then resigned and lodged a claim of unfair dismissal his employment would have ended and the situation would have been held to have been a dismissal of him by the respondent. That was the circumstance in *Hart v. Robowash* (1998) 78 WAIG 4307. Mr Hart had been employed originally by Robowash as a tradesman welder and subsequently became its production supervisor. When Robowash later found itself in financial difficulties, it abolished the position of production supervisor and proposed that Mr Hart be employed in the workshop principally as a tradesman welder. Robowash did not reduce the salary he received as production supervisor. After some discussion, Mr Hart indicated he would not accept the

employment and he left it. The abolition of the position and the offer of work as a tradesman welder were held to be such a significant change in duties and responsibilities that it constituted a constructive dismissal of Mr Hart from the position of production supervisor. Mr Hart had effectively been made redundant.

14 Similarly, in *Tranchita v. Wavemaster International Pty Ltd* (1999) 79 WAIG 1886, Mr Tranchita had been employed initially as Wavemaster's accountant, then its secretary and financial director. Eventually, Wavemaster removed him as a director, removed his corporate credit card and cancelled the "consultancy arrangement" it had with Mr Tranchita's family company's business. He resigned. It was held that in terminating the arrangement with Mr Tranchita's family company's business, his remuneration package was significantly reduced thereby materially changing the terms of his employment. Further, by unilaterally removing him from the board and by cancelling the "consultancy arrangement" Wavemaster materially altered the basis, if not the terms, of his employment. Accordingly, the actions of Wavemaster constituted the real cause of the appellant terminating his employment and thus Wavemaster should be taken to have dismissed the appellant from his employment.

15 However, neither of these two cases to which Mr Trainer referred are directly applicable here because Mr Tran did not elect to accept the repudiation of the contract and regard his employment as at an end. Rather he continued in employment and elected to bring this application against the respondent.

16 Further, it is not possible on these facts to otherwise hold that the respondent dismissed Mr Tran from its employment. As the evidence reveals, at no stage has the respondent actually dismissed him. Rather, by "reviewing" his salary and placing him "on the roster" the respondent showed every intention of retaining him as its employee. In other words, the contract of employment between them was to remain on foot, but subject to the terms now imposed by the respondent. It therefore cannot be said that the respondent gave Mr Tran notice of termination of employment. In fact, on the evidence in this matter, it is the opposite conclusion: the respondent wished to retain him in its employ.

17 It is argued that because Mr Tran has remained working under the new arrangements, he has accepted what was effectively the offer of the respondent to employ him on new terms of employment and thereby accepted the respondent's repudiation of the previous contract as assistant manager. However, as the authorities suggest, the fact that the employee works under the new arrangement is not of itself proof of acceptance of the repudiation (*Belo Fisheries v Froggett* (1983) 63 WAIG at 2396). On the evidence, it is clear that Mr Tran did not accept the reduction in his salary. He may have felt he had little choice if he was to retain employment. His reluctant agreement to do so given to Mr Rao and, as subsequently seen in his approaches to management recorded in the letter he eventually wrote to the respondent, shows that he has not accepted the arrangement at all.

18 Further, to hold on these facts that Mr Tran should be deemed to have accepted the arrangement is to give the respondent the unilateral right to vary the terms of his contract and that is precisely what the law does not permit. Had the respondent in December 2000 wished to remove Mr Tran from the position of assistant manager at its Carousel store for the reasons which it has given in this Commission, then the only proper course available to it was to give Mr Tran the appropriate notice of termination of his contract of employment. If it wished to, the respondent could then at the same time offer him a fresh contract of employment at the lower salary and with the different duties. This it did not do.

19 It follows that although Mr Tran has, since 1 January 2001 worked "on the roster" and been paid a salary of $25,000.00, he has not thereby accepted the respondent's repudiation of the contract that he would be employed as the assistant manager of Tony Barlow Carousel in Cannington at a salary of $30,000.00 per annum which came into existence on 28 September 2000.

20 Mr Tran claims the difference between the two salaries should now be paid to him. The respondent states that to do so would be to "reinstate" him as assistant manager. In this regard, I note that Mr Tran's claim in this Commission, which was apparently worded by his solicitors, uses that precise expression. Its use is, of course, a misnomer because there is no power in the Commission on a claim of denied contractual benefits to reinstate an employee in any position. Rather, the power of the Commission on a claim of denied contractual benefit is to order a denied benefit to be paid or given to the employee.

21 Nevertheless, Mr Tran's claim raises another, more fundamental issue. It is this. In law, Mr Tran has not accepted the respondent's unilateral action on 1 January 2001. The contract of employment as assistant manager therefore continues on, as the decision in *Advertiser Newspapers* states, although in name only. Even though Mr Tran remained ready, willing and available to work under that contract, wages or salary are only paid for service actually performed, and he has no entitlement to be paid at the rate of $30,000.00 per annum past 1 January 2001 because he did not perform the work as assistant manager of Tony Barlow Carousel in Cannington on or after that date. As Latham CJ states in *Automatic Fire Sprinklers* (cited above)—

> ".... The contract of employment is, upon any view, still in existence. But if, under the contract, wages cannot be earned without work, the continued existence of the contract cannot entitle the servant to wages without work."
>
> (1946) 72 C.L.R. at 454-455

22 Mr Tran may well have a remedy at common law for the unlawful termination of his contract of employment as the assistant manager of Tony Barlow Carousel in Cannington (see *Advertiser Newspapers* above at [38]). In that sense, the submission of Mr Skerrit that this case is a clear breach of contract is to the point. The damages awarded for breach of contract may not be large, and Mr Tran has mitigated his loss by working under the new contract. However, this Commission in not a court of common law. It does not award damages for breach of contract. It can order the payment of a benefit under a contract of employment to which an employee is entitled. For example, Mr Tran may, and I expressly make no finding on this, be entitled to the equivalent of the notice he was due under that contract of employment if it was not given, less the notice he was actually given. However, that is not the application he has made.

23 Mr Tran certainly continued working for the respondent past 1 January 2001. But he did not do so as the assistant manager of Tony Barlow Carousel in Cannington. He did so as a sales assistant, or sales consultant, in a relieving capacity at the Carousel store on Tuesday, Thursday and Saturday only and on the other two days of the week at other stores. It was not an entitlement under the contract of employment as the assistant manager of Tony Barlow Carousel in Cannington that he would be paid the salary of $30,000.00 per annum after he ceased to do that work. Neither is it an entitlement under the current contract of employment as a sales assistant, or sales consultant, in a relieving capacity that he would be paid the salary of $30,000.00 per annum.

24 It is in the changed duties Mr Tran has performed since 1 November 2001 that the facts of this matter are distinguishable from the facts in *Rigby v Ferodo* [1987] IRLR 516; [1988] ICR 27, a case to which the Commission drew the parties' attention. In that case, and as Mr Trainer correctly pointed out in his subsequent written submission, Mr Rigby continued to do the same work as he had previously been doing prior to the unilateral wage reduction imposed by the employer, Ferodo Ltd. Mr Rigby's duties did not change; the employer merely cut his wages. If the respondent in this matter had continued to employ Mr Tran as the assistant manager of Tony Barlow Carousel in Cannington after 1 January 2001 but merely reduced his salary, then Mr Tran's claim here would succeed on the authority of *Rigby v Ferodo*. But it did not.

25 It follows that Mr Tran's claim that he is entitled to a benefit under his contract of employment which has been denied him by his employer, that is to be paid at the salary of $30,000.00 per annum after 1 January 2001, is not made out and his application must for all of the above reasons be dismissed.

26 Order accordingly.

2001 WAIRC 04504

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TROY TRAN, APPLICANT
	v.
	BOUTIQUE CONSOLIDATED PTY LTD t/a TONY BARLOW MENSWEAR, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 3 JANUARY 2002
FILE NO.	APPLICATION 925 OF 2001
CITATION NO.	2001 WAIRC 04504

Result	Application alleging denied contractual entitlements dismissed.
Representation	
Applicant	Mr A. Skerritt (of counsel)
Respondent	Mr K. Trainer (as agent)

Order

HAVING HEARD Mr A. Skerritt (of counsel) on behalf of the applicant and Mr K. Trainer (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders—

THAT the application be dismissed.

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

2001 WAIRC 04484

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KAREN JOY WILLIAMS, APPLICANT
	v.
	HAVENCOURT PTY LTD t/a HELENA VALLEY PHARMACY, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	FRIDAY, 21 DECEMBER 2001
FILE NO.	APPLICATION 928 OF 2001
CITATION NO.	2001 WAIRC 04484

Result	Application alleging unfair dismissal granted.
Representation	
Applicant	Ms K. Williams
Respondent	Mr D. Howlett (of counsel)

Reasons for Decision

1 The respondent operates the Helena Valley Pharmacy and Ms Williams was employed in August 1996 as a pharmacy assistant. Ms Williams claims that she was unfairly dismissed by the respondent. The respondent denies she was dismissed. The Commission heard evidence from Ms Williams herself. For the respondent, evidence was given by the owner, Mr Strutt, and also from Ms Mackertich, a sales representative for a company which deals with the Helena Valley Pharmacy and who had attended the pharmacy and spoken to Ms Williams.

2 Ms Williams' evidence is that she believed she had a good working relationship with Mr Strutt and that each had mutual respect for the other over her past five years of employment at the pharmacy and prior to that at another pharmacy in Kalamunda. Her hours have always been agreed fixed hours and over the last three years of her employment averaged over 20 hours per week. In the last 12 months of her employment she worked consistently and regularly 23 hours per week. She worked part-time on Monday, Tuesday and Wednesday. She states that her duties included serving customers, appointments with representatives, ordering stock, receiving and pricing stock, displaying and merchandising stock and cleaning. Her duties had increased in the last 12 months of her employment to include assisting with wages, the paying and administration of superannuation and co-ordinating a national Quality Assurance Programme which included training of all staff.

3 From Ms Williams' point of view, the events which resulted in her making the claim occurred from 15 May 2001 onwards. She gave evidence that Mr Strutt verbally attacked and humiliated her in front of customers following an incident at work on 15 May 2001. Her evidence is that Mr Strutt demanded that she leave the premises. She asked him whether she was being sacked and he replied "No, I am sending you home and I will talk to you later". She was asked to return her keys and did so and she left the shop.

4 On 16 May 2001, a Wednesday, she arrived at work at 8:30am as normal. The locum, Mr Davies, was present and Mr Strutt was absent at a meeting. She started work and commenced her normal duties. At approximately 9:35am Mr Strutt came into the shop. When he saw her he asked her to get her things and leave. She asked him if he was dismissing her and he replied that he was not. She refused to leave until she was dismissed and Mr Strutt informed her that he was putting her on unpaid leave, she should get her things and leave the shop. She stated that she did not accept those terms, that Mr Strutt became very angry, had a red face and tears in his eyes and she felt he was losing his control. She found his actions threatening and sought support from Mr Davies. She states that Mr Strutt then "completely lost control" for the next 10 minutes or so. Ms Williams had picked up a cup of coffee and states that Mr Strutt poked her in the arm spilling the coffee over her arm and the floor. Ms Williams' evidence is that Mr Davies suggested that both persons calm down. Ms Williams says that she suggested that Mr Strutt and she needed to go and have a coffee when they were both calmer.

5 Ms Williams states that Mr Strutt demanded that she return to the shop later in the day when he was on duty. She stated that she preferred somewhere more private than the pharmacy. Mr Strutt then demanded that she attend the shop on Friday in order to meet with him. She, however, stated this was not suitable to her as she had other commitments over the weekend. She states that she informed Mr Strutt she would see him the following Monday.

6 Ms Williams then states that Mr Davies was instructed by Mr Strutt to pay her her wages and that she was now on paid leave. Mr Strutt told her that when she came in next Monday her job description would be changed to vacuuming the floor and cleaning the shelves. She would not be allowed in the dispensary or to carry out any normal duties. She requested that in writing and "in a rage" he commenced to do this and gave her a document to sign. It also gave her only 6½ hours' work per week. She told him she did not agree with the job description and that she would not sign it.

7 Ms Williams' evidence is at that stage Kerrie arrived to find her crying and upset. She states that Mr Strutt yelled at Kerrie to get Ms Williams' wages done and to make sure that Ms Williams paid her staff account without any discount and that Ms Williams was to get out of the shop. Ms Williams then walked to the back door to try and compose herself as she was very upset. She collected her wages, paid her account, collected her bag and left.

8 Ms Williams never returned to work. Her next rostered day would have been Monday the 21st in accordance with her normal roster. However, she attended a doctor "due to the stress of the previous two days events" and in fact provided the respondent with medical certificates for the period 17 May 2001 to 24 May 2001, and subsequently to 30 May 2001. She did not attend on the Monday.

9 During this time Ms Williams wrote Mr Strutt a letter as follows—

> "Dear Richard,
>
> I understand we have had our differences over the last couple of weeks and this is causing me high levels of stress. I am uncertain of my current employment status even though I am willing to return to work. I suggest we seek some form of mediation to resolve these matters. I therefore require you to confirm my employment status in writing by the 30/05/01 and advise what course of action we should take from here."

10 The same day she received a handwritten response from Mr Strutt as follows—

> "Dear Karen,
>
> Re: Employment status in writing as per request
>
> Your current employment status is pharmacy assistant - part-time "a permanent employee who is engaged by an employer on a regular and systematic basis for a sequence of periods of employment and who is engaged to work an average of less than 38 hours per week and receives pro rata entitlements". To meet the business needs I require you to work from Monday 29th May, 9:30 - 1:00pm Mondays, 3:00 - 6:00pm Tuesdays, as discussed 16/05/01.
>
> Thank you, Richard"

11 Ms Williams also referred in her evidence to the handwritten document dated 16 May 2001 which she had been given at her request on that day which she had refused to sign (exhibit A4). It is a document which contains the same hours and carries with it a note saying "new job description: no ordering without pharmacist's consent, vacuuming Monday morning please, serve customers, clean and stock fill price and put away stock."

12 On 30 May 2001, Ms Williams filed the Notice of Application in this matter in the Commission claiming that she had been unfairly dismissed. Ms Williams argues that the only means by which her duties could be altered were by mutual agreement or by the termination of her old contract of employment and the making of a new one. She submits that it is not permissible for an employer to unilaterally vary the terms of a contract of employment without the variation resulting in a breach amounting to a repudiation of the contract. She says that Mr Strutt substantially changed her hours and duties and as such she was dismissed and therefore the Commission has jurisdiction to deal with her claim. As to the change in duties, she states that she would now only be able to order stock with the pharmacist's consent, was no longer to deal with representatives, was given a specific cleaning duty to vacuum on Mondays, she was no longer required to assist with the wages and no longer required to assist with the administration of superannuation nor to develop the Quality Assurance Programme. She believes that she has been harshly dealt with by Mr Strutt. She states that she should be paid the wages and entitlements due from the last pay period, 13 May 2001, to the date of termination. She seeks compensation of 26 weeks' wages and an additional amount of $5,000.00 being compensation for injury.

13 Mr Strutt's evidence was that Ms Williams' duties were serving and assisting customers, ordering, receiving, checking and pricing stock, stocking shelves and displaying stock, tidying and re-organising stock on the shelves, cleaning and tidying the pharmacy, assisting with customer account reminders, assisting with calculating superannuation entitlements and assisting generally in the pharmacy and working as part of a team. On 5 November 2000, Ms Williams became a part-time employee. Mr Strutt's evidence is that prior to 9 April 2001 he had a relatively good working relationship with Ms Williams. He found her to have a strong personality and to be demanding and difficult, however, she was generally a good employee and good with customers.

14 On 9 April 2001, a product representative arrived at the pharmacy and spoke to Ms Williams to collect some out-of-date stock. When she could not find the stock, Mr Strutt was nearby and heard the representative becoming frustrated. He told Ms Williams where the out-of-date stock was located and Ms Williams then had another look but said she could not find it. Mr Strutt told her that if she used her eyes, it was there. Mr Strutt denies shouting at Ms Williams. Mr Strutt states that after the representative had left Ms Williams confronted him, argued with him and said she had not liked the way he had spoken to her. Mr Strutt told her that the out-of-date stock had been on the shelves for a long time and that Ms Williams should have been able to find it. Mr Strutt's evidence is that the following day, Tuesday, 10 April 2001, Ms Williams was very cheerful and had a polite demeanour. She set about cleaning and mopping floors including the toilet and sinks, which she had not done for about 12 months even though it was part of her job.

15 Mr Strutt states that Ms Williams was on annual leave between 16 and 29 April 2001. When she returned to work on 30 April 2001 he found her behaviour vague, disinterested and confrontational. On 14 May 2001 Ms Williams asked Mr Strutt if she could reduce her hours from 23 to 20 per week.

16 Mr Strutt states that on 15 May 2001 he was in the process of serving a customer when he heard the telephone ringing and asked if Ms Williams would answer it. Mr Strutt says that Ms Williams came out of the kitchenette from where she had been reading the paper and said that she was going to serve a customer. Mr Strutt again asked her if she would answer the phone. Ms Williams picked up the phone, put her hand over the mouthpiece and said to Mr Strutt: "What is your problem? I am serving a customer". Mr Strutt told Ms Williams that that customer had been in the pharmacy for 10 minutes and was being served. He afterwards tried to speak with Ms Williams, indeed he tried to whisper to her about her being vague and not helping with serving customers, however, Ms Williams became loud and confrontational. She acted in such a loud and aggressive manner that Mr Strutt told her to "get her things and go home and that we would not discuss the matter until she had cooled off." Ms Williams asked him if she was being sacked and Mr Strutt replied "no". Ms Williams replied that she would only leave is she was paid and Mr Strutt undertook to pay her.

17 Overnight, Mr Strutt prepared a letter of warning to be given to Ms Williams. However, he did not give it to her.

18 The next day, Wednesday, 16 May 2001, Mr Strutt was not due to be at work as he had a meeting to attend to. However, as he had forgotten his chequebook he went into the pharmacy to pick it up and saw Ms Williams in the pharmacy. He asked her to leave and come back and see him later because they needed to discuss the incident that occurred the day before. He had to stand his ground and insist that Ms Williams leave. Mr Strutt also stated that he had decided on a new roster in which Ms Williams would work less hours. He told Ms Williams this and quickly wrote out her new hours giving her the document and asking her to sign it. She refused and returned the document to him. Ms Williams told Mr Strutt that he could not change her hours and he informed her that she was changing her hours all the time. Mr Strutt states that he never got the opportunity to explain that the new hours would be a temporary situation because Ms Williams in the end did not meet with him. He asked her to return on Wednesday afternoon or evening or on Friday, Saturday or Sunday but Ms Williams stated these times were not convenient for her because she was going to Nannup. Ms Williams again asked Mr Strutt if she was being sacked and Mr Strutt told her that she was not. Ms Williams agreed to leave the pharmacy if she was paid and he agreed to that request. According to Mr Strutt, Ms Williams stated that she would see him at 9:00 o'clock the following Monday, with her lawyer.

19 Mr Strutt's evidence confirmed receipt of the doctors' certificates providing for Ms Williams' absence due to sickness. Mr Strutt also confirmed the letters which were referred to in Ms Williams' evidence. Mr Strutt confirmed that Ms Williams had come into the pharmacy on 25 May 2001 with another medical certificate but no further discussion, other than her ongoing entitlement to sick leave, occurred.

20 Mr Strutt's evidence is that he received a copy of the Notice of Application in this matter on 1 June 2001 and sought legal advice. On 15 June 2001 he sent Ms Williams a letter offering her her job back.

21 Mr Strutt's evidence is that on 10 July 2001, Ms Mackertich made a visit to the pharmacy and asked him where Ms Williams was and Mr Strutt told her what had happened. Ms Mackertich then told Mr Strutt that on her earlier visit to the pharmacy on 8 May 2001, Ms Williams had told her that she was planning to move to Nannup soon and that she asked Ms Mackertich not to mention that to Mr Strutt nor anyone else in the pharmacy.

22 The respondent then called Ms Mackertich to give evidence. Her evidence is that on 8 May 2001 she attended the pharmacy at approximately 12:00 noon and whilst waiting for Mr Strutt she was approached by Ms Williams. Ms Williams showed her some recent photographs of a family holiday taken at Nannup and Ms Williams told her, in a very quiet voice, that she planned to move down to Nannup soon and she specifically asked Ms Mackertich not to mention this to Mr Strutt, nor Kerrie. She did not mention it until her next visit on 10 July 2001 when she asked Mr Strutt where Karen was and he told her what had happened.

23 All persons who gave evidence were cross-examined on their evidence. I make findings as to credibility later.

24 Mr Strutt denies that he dismissed Ms Williams and the Commission must necessarily decide whether there has been a dismissal before it can turn to consider Ms Williams' claim that the dismissal was unfair.

25 The evidence of both Ms Williams and Mr Strutt are that on two occasions, 15 and 16 May 2001, Mr Strutt directed Ms Williams to leave the premises and go home. On both occasions, Mr Strutt indicated that Ms Williams would be paid. It is not suggested that there was an express term of Ms Williams' contract of employment that the respondent could send her home with pay, that is, effectively to stand her down. A question therefore arises whether an employer has a right at common law to send an employee home with pay or whether doing so is breach of the contract of employment amounting to a repudiation of the contract of employment by the respondent. (I add that although Mr Howlett, who appeared for the respondent, tendered to the Commission copies of a Federal award, he did not, as I understand the submission, submit that the respondent was bound by the award and that the award applied by law to Ms Williams' employment. For present purposes, I assume for the purposes of argument that Ms Williams' employment was not covered by the award.) At common law, the right of an employer to stand an employee down with pay has been held not to amount to a repudiation of the contract of employment by the employer, particularly where the employer has stood the employee down with pay for the purpose of investigating an allegation of misconduct (*Cook v. Royal Melbourne Hospital,* Millane JR, 2 August 1995, Industrial Relations Court of Australia, unreported). This situation is less clear where the employee is stood down without pay when that employee is otherwise ready, willing and available to work. Each case needs to be assessed on its own circumstances and in the circumstances of this case, I do not find that Mr Strutt's action in sending Ms Williams home, without loss of wages for that time, to amount to a repudiation of the contract of employment which Ms Williams was entitled to treat as a dismissal.

26 The next issue of significance is the evidence of Ms Williams and Mr Strutt that Mr Strutt reduced Ms Williams' hours of work from 23 hours per week to 6½ hours per week. He did so in the note he handed to her on 16 May (exhibit A4) which was repeated in the letter of 25 May 2001 (exhibit A3). The consequence of the reduction in hours for the contract of employment between Ms Williams and the respondent will depend upon the terms of that contract. It is clear from Mr Strutt's evidence that Ms Williams was a permanent part-time employee. The evidence, as I find, is that Ms Williams had worked a consistent 23 hours per week for the previous 12 months, and between 20 and 23 hours per week for the three years prior to Mr Strutt reducing her hours of work. There is little, if any, evidence regarding the extent to which Ms Williams' hours fluctuated before then. While there is evidence that Mr Strutt told Ms Williams that she changed her hours frequently, on the evidence, that can only have been within the range of 20 to 23 hours per week. On that understanding, Mr Strutt's reduction of her hours to 6½ per week is significant, as was properly acknowledged on his behalf. Had Ms Williams been a part-time employee whose hours of work regularly fluctuated within a wider range, then it may be able to have been argued that the reduction in her hours to 6½ from 23 was envisaged within the terms of the contract of employment. However, it is more difficult to draw that conclusion in these circumstances where there is no evidence before the Commission that at any time in the course of her employment Ms Williams had ever worked hours as few as 6½ per week.

27 I therefore find as a matter of fact that the contract of employment between Ms Williams and the respondent involved Ms Williams working hours which were negotiable between a range of 20 to 23 hours per week. I further find that it was not a term of that contract of employment that Ms Williams' hours could be reduced at the respondent's instigation as significantly as Mr Strutt did on that occasion. (I also note, for the purposes of argument, that even if the Federal award to which Mr Howlett referred me did apply, that award similarly does not confer a right on the employer to unilaterally change the roster without notice to the employee. Rather, the award provides that any change to the roster is only upon one week's notice being given.)

28 Accordingly, I conclude that Mr Strutt's unilateral reduction of Ms Williams' hours as some disciplinary measure in order to allow the relationship between them to "cool down" to have been a repudiation by him of the contract of employment which existed between the respondent and Ms Williams. Ms Williams was entitled to treat that as a dismissal of her from her permanent part-time employment of between 20 and 23 hours per week, with an offer of a new contract of employment at 6½ hours per week. That is not to say that Mr Strutt did not have the right to change Ms Williams' hours. He did have the right, but upon notice. (Indeed, if the award to which reference has been made was applicable, then by Clause 21.4 a roster is able to be changed by one week's notice in writing.)

29 I am not inclined to place weight upon Mr Strutt's evidence that he intended the reduction in hours to be temporary. Even if, as he states, Ms Williams did not make herself available to meet with him, he did not include in his two written communications to her his intention that the reduction be temporary. Indeed, on the evidence, Mr Strutt believed he had the right to unilaterally reduce her hours and, on the evidence, he only offered to reinstate the hours at 20 after the event and after he had sought legal advice. I am not persuaded he did intend the reduction to be temporary at the time but, in any event, even if he did, the contract of employment between the respondent and Ms Williams did not allow such a unilateral reduction even temporarily. For those reasons, Mr Strutt's unilateral reduction of Ms Williams' hours in the manner indicated constituted a dismissal for the purposes of the *Industrial Relations Act 1979*.

30 It follows that the emphasis placed in the respondent's submission that there was not a significant variation to Ms Williams' duties in my view takes on less relevance. It is necessary for Ms Williams to show that she has been dismissed and, she having done so by reason of the reduction in hours, it is not necessary to further rely upon her claim that the change in duties was significant to establish that the Commission has jurisdiction to deal with her claim. Nevertheless, a comparison of the duties referred to by Ms Williams in her statement with the duties in the handwritten document show that she was still to serve customers, still to order stock but only with permission, still to price stock, to stockfill and put stock away. The fact that the statement does not specify displaying and merchandising stock seems to me to be an insignificant change. She was still to clean and specifically vacuum on Monday's. The duties listed did not include appointments with representatives. Neither did they include assisting with wages, the paying and administration of superannuation and co-ordinating a national Quality Assurance Programme which included training of all staff, however these had only been added to Ms Williams' duties in the last 12 months and their removal is likely to be something envisaged within the contract of employment. Therefore, on the evidence, the only real change is the appointments with representatives and I am not persuaded that this alone amounted to a repudiation by the respondent of the contract of employment. Although Mr Strutt's note itself states that the job description was "new" on the evidence the change in duties was not fundamental. The new duties still were the duties of a pharmacy assistant.

31 However, it remains the fact that the significant reduction in her hours from 20 - 23 to 6½ hours per week is a dismissal from her employment for the purposes of the *Industrial Relations Act 1979*. I acknowledge that Mr Strutt did not intend to dismiss Ms Williams. His evidence is that on both 15 and 16 May he made it clear to Ms Williams that he was not dismissing her. I accept his evidence. I also accept his evidence that he believed he had the right to reduce Ms Williams' hours as he intended. However, it is his act of doing so which is significant and for the reasons I have given Mr Strutt did not have the right to unilaterally reduce Ms Williams' hours from 20 - 23 to 6½ hours per week.

32 I have not found it necessary to consider the authorities to which I have been referred which deal with the concept of constructive dismissal. This is not a case where Ms Williams resigned her employment. Rather, it is a case where the actions of the employer constituted a repudiation of the contract of employment between them. The respondent no longer intended to continue with the contract of employment between it and Ms Williams which gave Ms Williams 20 - 23 hours per week employment and the salary commensurate with those hours. Ms Williams made it clear that she did not accept that repudiation. The contract came to an end and it was really the action of Mr Strutt which brought it to an end. Ms Williams' dismissal, as I find, occurred when Ms Williams accepted the repudiation of her contract of employment at 23 hours per week by Mr Strutt. This she did when she filed the claim of unfair dismissal on 30 May 2001.

33 I turn now to consider Ms Williams' claim that the dismissal was harsh, oppressive or unfair. She relies upon her evidence set out earlier in these Reasons of Mr Strutt's attitude and behaviour on 14 and 15 May 2001. However, her evidence of Mr Strutt's attitude and behaviour on 14 and 15 May 2001 is opposed by Mr Strutt's evidence. Ms Williams has the onus of proving her claim, of proving that it is her evidence which is to be preferred and on balance I am not persuaded by her evidence that Mr Strutt's attitude and behaviour was as she has described it.

34 In particular, Ms Williams' evidence that on 15 May Mr Strutt became very angry, had a red face and tears in his eyes, she felt he was losing his control, that she found his actions threatening and sought support from Mr Davies, that Mr Strutt then "completely lost control" for the next 10 minutes or so and that Mr Strutt poked her in the arm spilling the coffee over her arm and the floor are all matters to which there was a witness: Mr Davies. Ms Williams did not call Mr Davies to give evidence. Even if I allow for the fact that Ms Williams presented her own case and might not have had previous experience in doing so, the fact that she did not call Mr Davies leaves her evidence uncorroborated.

35 Also, I was left with the impression that Ms Williams' gesture in the witness box as she described the poke in the arm was exaggerated. I also find it curious, at least, that at the very end of that incident, Ms Williams sat down with Kerrie and had a normal conversation which included Ms Williams saying that she had never been happier. While Ms Williams explains this occurrence by saying that she and Kerrie were not talking about work and her comment was about her private life, the conversation nevertheless tends to suggest that Mr Strutt's behaviour was not as Ms Williams describes. Ms Williams could have called Kerrie as a witness and did not do so even though Kerrie sat in the hearing for its duration. Ms Williams may have had her own reasons for not calling Kerrie, and those reasons may have been the product of inexperience, however, Ms Williams' evidence remains uncorroborated. It is also open to infer that if Ms Williams had called Kerrie to give evidence her evidence may have been unfavourable to Ms Williams.

36 I also have no hesitation in accepting the evidence of Ms Mackertich where it conflicted with Ms Williams' evidence. The cross-examination of her by Ms Williams did not in any sense break down her evidence. I also find it noteworthy that the only part of Ms Mackertich's evidence with which Ms Williams disagrees is that part where Ms Mackertich states that Ms Williams told her that she planned to move down to Nannup soon and not to mention this to Mr Strutt or Kerrie. I regard it as most unlikely that Ms Mackertich would have invented that part of her evidence and accordingly, where it conflicts with the

evidence of Ms Williams, I prefer the evidence of Ms Mackertich. I find that Ms Williams did say to Ms Mackertich that she planned to move down to Nannup soon and not to mention this to Mr Strutt or Kerrie.

37 For these reasons, I am less inclined to prefer Ms Williams' recollections of the events which occurred.

38 In contrast, the cross-examination of Mr Strutt did not reveal any contradictions in his evidence. Indeed, Ms Williams did not challenge, and appeared to accept, his recollection of two other, minor, events when he had "taken her aside" regarding a display and vetting customers who wish to speak to the pharmacist which left me with the impression that his recollection of events was accurate. Where the evidence of Ms Williams and Mr Strutt conflicted, I am unable to conclude that Ms Williams' evidence is to be preferred. Rather, I find events occurred largely as Mr Strutt described.

39 On the evidence, therefore, it is likely that on 15 May Mr Strutt did not verbally attack and humiliate Ms Williams in front of customers as she states but that Ms Williams was loud and confrontational towards Mr Strutt in relation to the request to serve the customer. Mr Strutt's evidence is that he prepared a warning for Ms Williams as a result. It was open to Mr Strutt to do so: Ms Williams' behaviour did not warrant her dismissal in circumstances where she had been employed since 1996 and was otherwise "a good worker and good with customers" with no previous warnings.

40 On the evidence it is likely that on 16 May Mr Strutt did not lose control and poke Ms Williams as she states but that Ms Williams spoke loudly, even aggressively, towards Mr Strutt on 16 May and said she "hated" him. It is clear that an incident occurred and it is also clear that it was sufficiently distressing to Ms Williams that she sought medical advice. However, her evidence has not established that she merely reacted to an unwarranted provocation on the part of her employer. Rather, it is likely that she contributed significantly to the events which occurred.

41 Against that background, was the dismissal of Ms Williams harsh, oppressive or unfair? In answering this question it is relevant to observe that Mr Strutt himself did not intend to dismiss Ms Williams. That is, he did not regard the circumstances as warranting the ultimate penalty of dismissal. Rather, he intended to resolve the differences between him and Ms Williams by working together slowly and his key priority was to maintain harmony and a good working environment within the pharmacy (transcript page 88). He did not regard the working relationship to be at an end.

42 Ms Williams, too, the working relationship was not at an end. She wrote to Mr Strutt seeking mediation. Although the respondent accuses Ms Williams of manufacturing her own dismissal in order for her to bring a claim of unfair dismissal to fund her future lifestyle in Nannup, I find the fact that Ms Williams sought mediation rather than immediately regard herself as dismissed to refute that accusation. Not without some hesitation, I conclude that in circumstances where neither Mr Strutt nor Ms Williams regarded her employment as at an end, after some 4½ years' satisfactory employment, where the incident of 9 April 2001 was not seen as a disciplinary matter, to have actually dismissed Ms Williams was harsh. I therefore conclude that Ms Williams has made out her claim that she was dismissed and that it was harsh, oppressive or unfair.

43 The Commission turns to consider Ms Williams' claim that she should now be paid compensation of 26 weeks' salary plus a further $5,000.00 for injury.

44 It is first necessary to state that I find that it would be impracticable to reinstate Ms Williams. Reinstatement is neither claimed nor offered. The Commission therefore has the power to order compensation to be paid for the loss or injury arising from the dismissal. It is necessary to establish Ms Williams' loss arising from the dismissal and I am far from convinced that Ms Williams' loss is as she has claimed. Significantly, on the evidence of Ms Mackertich Ms Williams intended to leave the pharmacy "soon" from 8 May 2001 and move down to Nannup. The issue then becomes when, on the balance of probabilities, it is likely that Ms Williams would have left the pharmacy in any event. The evidence regarding this is not conclusive. As a matter of fact, Ms Williams moved to Nannup in the beginning of July 2001 and although that occurred after all of these events, I am quite persuaded that Ms Williams had intended to travel to Nannup "soon" after the discussion with Ms Mackertich on 8 May 2001. I conclude that it is most unlikely that even if the events of 15 and 16 May 2001 had not occurred, Ms Williams would have remained at the pharmacy past the end of June 2001 in any event and certainly not for the 26 weeks she claims.

45 The respondent emphasises that on 13 June 2001 Mr Strutt wrote to Ms Williams offering her job back on 20 hours per week and Ms Williams received it on 18 June. To this offer Ms Williams did not reply. The significance of this is that once Ms Williams was dismissed, there was an obligation on her to at least seek alternative employment or seek to mitigate her loss. The mere fact that Mr Strutt wrote to her offering her job back on 20 hours per week does not of itself mean that Ms Williams was obliged to accept his offer. There may be many reasons arising from the events which surround a dismissal which would make the acceptance of such an offer unreasonable. The obligation on an employee to mitigate his or her loss is merely the obligation to do what is reasonable. Depending on the circumstances, it may be quite unreasonable to expect an employee to return to the workplace.

46 However, in the circumstances of this case, the fact that Ms Williams did not even reply to that offer, in circumstances where some 3 weeks earlier she had herself offered mediation to enable her to return to the pharmacy on 20 - 23 hours per week, meant that she lost a reasonable opportunity to resolve the issue between her and Mr Strutt. I did not find in Ms Williams' evidence any firm reason why the re-establishment of the working relationship between her and Mr Strutt became less likely over those 3 weeks and accordingly, the fact that Ms Williams did not reply means that she did not take a reasonable step open to her to mitigate her loss.

47 Therefore, Ms Williams' loss can be no greater than the wages that she would otherwise have earned for the period she would otherwise had worked between 16 May 2001 and 18 June 2001.

48 For the period 17 May 2001 to 30 May 2001, Ms Williams' absence from work was covered by doctors' certificates. On the evidence, Ms Williams' inability to work between those dates was due directly to the events of 15 and 16 May 2001. There is no suggestion otherwise and there is no evidence that Ms Williams otherwise took sick leave on a regular basis. To the extent that Ms Williams has been paid for the days covered by the sick leave certificate, then she has not suffered an economic loss. For those days covered by the sick leave certificate for which she has not been paid, then as that loss arose directly from the events surrounding the dismissal which occurred, that represents a loss arising from the dismissal for which compensation should be ordered.

49 Ms Williams' loss arising from the dismissal is therefore the wages she would have earned from 16 May to 18 June 2001 less payment already made to Ms Williams for her absences due to ill health. The evidence is not clear whether Ms Williams has, or has not, been paid for some of her absence due to ill health and the Commission may be asked to clarify these payments if the parties cannot now agree what payments were made.

50 Ms Williams claims a further $5,000.00 being for the injury arising from her dismissal. However, I am not persuaded from the evidence that the claim is made out. While I accept that Ms Williams provided sick leave certificates for the period which she claimed when viewed against the evidence as a whole I am not persuaded that Ms Williams suffered injury. In particular, I found unconvincing the evidence brought by Ms Williams that on 16 May 2001 she had such an argument with Mr Strutt that she was extremely distressed. Nevertheless, and as she admits, at the end of that confrontation she had a most normal

conversation with one other staff member. In my view, Ms Williams has not made out her claim that she suffered an injury arising from the dismissal which is able to be compensated by the Commission over and above the compensation otherwise to be ordered.

51 A minute of the Order to issue is now provided to the parties. The decision of the Commission is that the respondent forthwith pay to Ms Williams the wages she would have earned from 16 May to 18 June 2001, less payment already made to Ms Williams for her absences due to ill health, as compensation for the dismissal which occurred and the parties are asked to check that the minute gives effect to that decision. The parties may return to the Commission if they are unable to quantify the amount to be paid. If either party considers that the minute should be altered to more properly give effect to the decision, they are requested to advise the Commission within 7 working days of the delivery of this decision. After that date, the Order to issue will issue in the terms of the minute.

2002 WAIRC 04510

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KAREN JOY WILLIAMS, APPLICANT
	v.
	HAVENCOURT PTY LTD t/a HELENA VALLEY PHARMACY, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	MONDAY, 7 JANUARY 2002
FILE NO.	APPLICATION 928 OF 2001
CITATION NO.	2002 WAIRC 04510

Result	Application alleging unfair dismissal granted
Representation	
Applicant	Ms K. Williams
Respondent	Mr D. Howlett (of counsel)

Order

HAVING HEARD Ms K. Williams on her own behalf as the applicant and Mr D. Howlett (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 Karen Joy Williams was unfairly dismissed from Havencourt Pty Ltd t/a Helena Valley Pharmacy;

(2) DECLARES that reinstatement is impracticable;

(3) ORDERS that Havencourt Pty Ltd t/a Helena Valley Pharmacy forthwith pay to Karen Joy Williams the wages she would have earned from 16 May to 18 June 2001, less payment already made to Karen Joy Williams for her absences due to ill health, as compensation for the dismissal which occurred.

(4) ORDERS that liberty to apply within 14 days on the calculation of the sum to be paid.

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

2001 WAIRC 04426

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KATHLEEN MAY ZUGLIAN, APPLICANT
	v.
	ORDBERG NOMINEES P/L T/AS WESTERN BIOMEDICAL, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	FRIDAY, 14 DECEMBER 2001
FILE NO.	APPLICATION 1806 OF 2000
CITATION NO.	2001 WAIRC 04426

Result	Application claiming unfair dismissal, dismissed. Claim for contractual benefit upheld.
Representation	
Applicant	Mr T Lyons (of counsel)
Respondent	Mr M Zilko S.C. (of counsel)

Reasons for Decision

1 Kathleen May Zuglian ("the Applicant") claims that she was unfairly, harshly or oppressively dismissed by Ordberg Nominees Pty Ltd trading as Western Biomedical ("the Respondent") on 24 November 2000 ("the claim for unfair dismissal"). The Respondent says the Applicant resigned after the Respondent lost the agency for products it was intended that the Applicant

would promote and sell. The Applicant also claims she is owed benefits that she is entitled to under her contract of employment.

Background

2 The Applicant was employed by the Respondent on 7 August 2000 as a Sales Manager for Device Technologies products. The Respondent is an agent for a range of medical products. Prior to being employed by the Respondent the Applicant was employed by another medical products company, Maersk Medical, as a Territory Manager. She was responsible for the sale of urology and respiratory consumables and other specialist products, in particular plastic extruder products. The Applicant held that position for two years. Prior to holding that position she was employed as Sales and Marketing Manager for Sterile Products for 14 months. Before that she was State Manager for another medical products company, Smith & Nephew Pty Ltd. Smith & Nephew mainly dealt with wound healing and dressings products. The Applicant was employed by Smith and Nephew Pty Ltd for 16 years.

Applicant's evidence

3 In about May 2000, whilst the Applicant was employed by Maersk Medical she received a telephone call from Mr James Ord ("Mr Ord"), the Director and owner of the Respondent company. Mr Ord asked the Applicant to meet with him, which she did. He asked her if she would be interested in taking on a role of sales manager for a new group of medical products that he had obtained the agency for in Western Australia. The Applicant testified that Mr Ord gave her a document prepared by Device Technologies Australia in which its categories of products were listed under the following faculties of medicine—

> "**Interventional Division**
>
> Cardiology
> Radiology
> Urology
>
> **Surgical Division**
>
> Anaesthesia/Critical Care
> Cardio Vascular
> General Surgery
> Gynaecology
> Laparoscopy
> Orthopaedics
> Vascular Surgery
>
> **Plastic and Reconstructive Surgery**
>
> Breast Implants – For Augmentation and Reconstruction
> Scar Management
> Ultrasonic Liposuction
> Compression Garments
> Plastic Surgery Instruments
>
> **Infection Prevention Division**
>
> Sterilizers – Steam and Low Temperature – liquid and gas
> Washing & Decontamination Equipment (free standing & Tunnel Washers)
> Chemical and Biological Monitoring
> Sterilization Containers
> Cleaning Brushes (specifically designed to clean surgical instruments)
> Operating Lights
> Operating Tables
> Electrosurgery"

4 She said she had no knowledge of the Device Technology products and that they were fairly sophisticated. In particular, she had not sold orthopaedic products other than plaster of Paris for a broken leg. Mr Ord told her that she had an outstanding record in the industry and he wanted someone to head the Division for sales of these products. Mr Ord advised her that he had chosen a person, Ms Chris Meier, who was presently employed as a nurse at the Mount Hospital to sell the plastic surgery products. He told the Applicant that he needed to find someone to sell the infection prevention products. The Applicant advised Mr Ord that she knew someone who would be interested in such a position, a Ms Jan Hall, who was a nurse and was also employed at the Mount Hospital. She said that they discussed the orthopaedic area. She said she knew someone who may be interested in selling the orthopaedic line. The Applicant said she got the impression from Mr Ord that the orthopaedic line of products was "up in the air" and that they may not be carrying that line of products. She said she asked what her role would be and Mr Ord told her that she would be there to manage, that she was to teach the women how to sell because they were nurses and they had no selling experience. She says he offered her a base salary of $56,000 together with an amount of $12,000 per annum which he would pay out of his own pocket, together with commissions, which would add up to an $80,000 per annum package.

5 She agreed to take up the position and after the meeting Mr Ord sent the Applicant a letter setting out her terms of employment—

> "Dear Kathy,
>
> I confirm your appointment with the Company as Sales Manager Device Technologies Products, overseeing Jan Hall, Chris Meier and a yet to be appointed additional specialist salesperson, who will have sales responsibility for selected ranges of D.T.A. lines.
>
> I confirm employment conditions as discussed:-
>
> Salary $56,000 p.a. paid fortnightly
>
> Bonus scheme – as well as your own bonus paid on performance to budget, you will receive in addition, amounts equal to the bonuses paid to the three sales people under your contract.
>
> Total Gross Income to be not less than $80,000.
>
> Fully maintained Company vehicle to be supplied before commencement.
>
> Mobile Telephone supplied, and all charges related paid by the company.
>
> Laptop computer supplied.

4 weeks annual leave, 1 week sick leave p.a.

Out of pocket expenses incurred to be claimed and paid by the Company 15th of each month.

Kathy, I look forward to your role in the development of Device Technologies team within Western Biomedical, and a long and fulfilling career with us.

Sincerely

Jim Ord"

6 It was not in dispute that the value of the use of the motor vehicle to the Applicant was $1,300 per month.

7 The Applicant said that she had planned a holiday so she could not start immediately. She gave notice to Maersk Medical early in July 2000 and commenced employment with the Respondent on 7 August 2000. She was to travel to Sydney to receive training in the products on 14 August 2000. However she did not go to Sydney for training until 9 October 2000.

8 The Applicant said that when she first started working in the Respondent's premises that she and Ms Meier and Ms Hall were allocated a very small, cramped room. She said she had a very good relationship with Ms Hall, that she and Ms Hall were good friends. As to Ms Meier, she said she was not a team player and was an extremely difficult person to get along with. She said she did not wish to answer to anyone and was blatantly arrogant towards her (the Applicant).

9 The Applicant testified that Ms Meier would often purchase cakes and incur expenses for lunches and dinners without asking the Applicant to sign off the expenses for the bills. Further, that she would exclude the Applicant from dinners and lunches with clients so the Applicant had no opportunity of meeting the people that Ms Meier was having contact with. She said she spoke to Mr Ord about this and he indicated to her that she should be signing off expenses for the accounts. As a result, the Applicant sent Ms Hall and Ms Meier an email on 14 September 2000 setting out what she required from each of them—

"Dear Ladies, In an effort to assist me with the running of Device Tech. I would appreciate it if in the future the following information etc. be run past me prior to any action being taken by you.

1. Attending any conferences
2. Lunches or dinners with clients
3. Visits from various interstate personnel from Device. As a courtesy I would like to kept (sic) informed and where necessary meet with these people, especially in the beginning when I have not met them.
4. Expenses are to be signed by me prior to submission to Deena. This is not for you Brigitte unless it's Device related.
5. Any letters or mail outs to hospitals/customers I would appreciate these being run past me first prior to postage. I need to be informed in the event of myself or other people having to deal with a situation in your absence. If I am not in the office please email me a copy and I will respond accordingly. If urgent please phone me on my mobile. Please then place a copy of any mail to customers in the folder on the shelf in my office. (folder being created) Kate ordering this week.
6. All relevant information regarding letters/mail outs etc should be highlighted as pertinent points in your monthly report.
7. In general I would appreciate that we keep the team as cohesive as possible so that we may all benefit from being well informed which is extremely important if we are to assist each other in the event of one's absence or any other situation that may arise.

Kind regards

Kathy Zuglian"

10 The Applicant said that she was required to prepare a monthly report bulletin for Device Technologies in the first week of each month. One copy of the report was to be provided to Mr Ord and one to Device Technologies. She said a report was due on Friday 6 October 2000. Ms Hall gave her report to the Applicant. She asked Ms Meier for her report on a number of occasions but Ms Meier refused to submit a report to her. She asked Ms Meier on 6 October 2000 why she had not provided a report and Ms Meier said "I don't have to answer to you. Jim's given me total autonomy to do basically what I like." The Applicant said she went to speak to Mr Ord about this issue but that Mr Ord was too busy and was unable to see her. She said, however, that when she was leaving the office at about 5.15pm she saw Ms Meier sitting in his office. The Applicant flew to Sydney for training on Sunday 8 October 2000. Mr Ord also flew to Sydney on the same day on a separate flight but he stayed at the same hotel as the Applicant. The next morning the Applicant and Mr Ord were picked up from their hotel in Sydney and taken to the offices of Device Technologies. The Chief Executive Officer of Device Technologies is Mr Ord's brother, Mr Peter Ord. Mr Peter Ord was going to America that day. The Applicant said that Mr Ord was not interested in talking to her, in particular his body language was very non-committal. She said they met most of the people in the office and did a tour of the warehouse. Later that day she sat down with the lady who is the products specialist in the plastic surgery area of products and did some training. The Applicant said she only saw Mr Ord briefly on the Tuesday when he came to part of the cardiology session. She received training in the cardiology range of products for two or three hours. Mr Ord returned to Perth on Tuesday afternoon.

11 On Tuesday evening the Applicant rang Ms Hall, who was in the northwest of Western Australia on company business. The Applicant asked her if she knew anything about what had transpired at the meeting (between Mr Ord and Ms Meier on Friday). She said that Ms Hall told her that "Mr Ord had given Ms Meier total autonomy". She said she felt very upset about that and decided to return to Perth. She telephoned Mr Ord from the airport the next morning and told him "Look, I really think we need to have discussions about what is going on." She said he told her she should not cut her trip short because she was going into a training session on the sterile area of products. The Applicant informed Mr Ord that she had already telephoned the person who was picking her up and told her she would not be there to go to the training session. She flew back to Perth and arrived at about 2.30pm. She said Mr Ord telephoned her when she returned. She said she was at home and that she tried to have a discussion with him about Ms Meier but it was hopeless, that he was not interested in talking to her and he asked her for her email address.

12 The Applicant said that the next day she met with Mr Ord in his office at 7.00am and that he gave her two documents, one of which outlined a package for her to leave. The first letter is dated 11 October 2000 and it stated as follows—

"Dear Kathy

Having just returned from Device Technologies in Sydney, I have to advise you that Device have decided to market their Interventional range of products (Cardiology, Urology and Radiology) Arthrex Orthopedic products and Atrium Mesh through a new company, Medivenn Pty Ltd, which commences trading November 1st.

As this was the range of products you were scheduled to handle for Western Biomedical, I wonder whether you may wish to re-consider your position with us, or alternatively I could offer you another range of products such as Tuta Healthcare etc.

Apparently a husband and wife team have just resigned from Boston Scientific, and being old friends of Device Technologies Australian management, convinced them to alter the WA distribution.

I'm sorry Kathy.

Regards

Jim Ord"

13 The second letter set out the terms and conditions of payment if the Applicant agreed to resign. That letter stated as follows—

"Dear Kathy,

Provided I receive your resignation in writing (due to the Device Technologies Australia decision) by close of trading this week, I am willing to offer you:-

- Full salary until week ending November 24th
- Use of the Company vehicle (inc petrol) to November 24th
- Use of Company mobile telephone to November 24th
- Holiday pay pro-rata to November 24th
- $3,000.00 bonus pay.

As you have only been with us 10 weeks, I feel that my offer is very fair.

Yours faithfully

Jim Ord"

14 When asked what her reaction was to the first letter she said that the orthopaedic range was never going to be sold by the Respondent in Western Australia. She said that when she had had discussions about finding a person to sell the orthopaedic products Mr Ord informed her that there was a husband and wife team coming from the Eastern States who were going to start selling that range in November. As to the offer for her to take up the Tuta Healthcare range of products, she said that that was not a real position. She said that she said to Mr Ord "What are you talking about, Tuta Healthcare?", to which he replied "All managers do that. I have not got a position there to offer you. I'll tell the industry that you left because the agency lost Device Technologies' business and that you refused the Tuta Healthcare products position."

15 The Applicant testified that Mr Ord had a cheque for her which was to reimburse her for her airfare and accommodation in Sydney. She said that he put the cheque down in front of her and she picked it up. She said he snatched it back and he informed her that she would not receive the cheque until she resigned. She said he then became very angry with her, started berating her and told her she was useless. She said he told her that he had rung Smith & Nephew and that she was a "bloody brilliant sales woman" but that she could not manage. The Applicant said that Mr Ord continued to berate her, she became frustrated and said "give me a piece of paper". She then proceeded to scribble out her resignation. She said she had no choice but to resign as she needed the money. She said she had nothing in her bank and it left her in a very difficult position. As to the offer for Tuta Healthcare products she said she would have taken the job as she was in no position at all not to have a job as she had just made an offer on a property and she had financial commitments. She said the meeting lasted about an hour and a quarter and that she begged him to pay her until the end of the year and let her have the car until the end of the year as it would be impossible to get work at that time of the year. She testified he was unsympathetic and he said "bad luck". She said she was not entirely sure of what the Tuta range consisted. The Applicant provided the following letter of resignation in her own handwriting. The letter states—

"Dear Jim

It is with regret that I cannot accept your offer to sell the Tuta range of products or remain with Western Biomedical. So as of today's date 12/10/00 I tender my resignation.

Yours sincerely

Kathy Zuglian"

16 The Applicant said that Mr Ord then handed her a cheque for an amount of $3,134.21 which comprised of $1,400 (net) for her fortnightly salary and the remaining amount was for expenses. She later received on 31 October 2000, two weeks' salary. She did not, however, receive any further payments from the Respondent after that day.

17 The Respondent's sales figures for the Tuta range of products was tendered into evidence. Those figures showed that at the end of the June 2000 financial year, the Respondent sold Tuta products to the value of $367,040.80. Further, that from 1 July 2000 until 22 February 2001 the Respondent sold $240,054.06 worth of products. Both the Applicant and Mr Ord testified that for a company to successfully sell medical products the turnover of sales for each salesperson should be approximately $1million per year.

18 The Applicant's case was that she was not required to be responsible for the sale of any specific part of the Device Technologies range of products, that she was there to manage and to assist Ms Hall and Ms Meier to sell the products. However, she conceded that part of her salary package was that she would receive commissions for the products she sold and for products sold by Ms Meier and Ms Hall. Further, when cross examined as to why she left the training program in Sydney halfway through that program she said "there was no reason for me to stay there when I had gone through the products, the cardiology (sic), which was the thrust of the area that I was told that would probably be the things that I would be selling."

19 When the Applicant was cross-examined about why she did not discuss the issues relating to Ms Meier prior to leaving for Sydney, she said that she had asked Mr Ord on Friday if they could discuss the matter in Sydney and he had said to her "No, it is not appropriate." She said she had thought at that time that it was not that important and they would discuss the issue when she got back to Perth. However, the Applicant conceded that she had not previously raised this issue with Mr Ord and had not complained to him about the conduct of Ms Meier. She said she did not get to complain to him at all about Ms Meier. She said she tried to have discussions with him about Ms Meier on Wednesday afternoon on 11 October 2000 when Mr Ord telephoned her but that he was not interested in talking to her.

20 The Applicant denied being unhappy working for the Respondent and it was very much her case that her employment was terminated by Mr Ord because of her conflict with Ms Meier. However, the Applicant conceded that she did not at any time complain to Mr Ord about Ms Meier's behaviour. However, when it was put to her that the first time Mr Ord had heard of any difficulties she had had with Ms Meier, was when she gave her evidence, she said that was totally untrue. She stated he would have been able to sense it in the office because you cannot work in a small office without knowing that there is a problem.

Further, she said he knew there was a problem because she had tried to make appointments with him to discuss this matter. She did, however, concede that she did not try to speak to Mr Ord at home on the weekend prior to going to Sydney. She said she wanted to return to Perth because there seemed to be a lot of unanswered issues in her management and that she was not in control of her position. However, she also conceded that at no stage did Mr Ord tell her that she was not in charge as sales manager, nor did he tell her that Ms Meier had total autonomy.

21 It was put to the Applicant that the reason why she returned from Sydney was because Mr Ord told her on Tuesday morning that Device Technologies had made a decision that the orthopaedic and interventional division range of products had been lost and that she had said to Mr Ord "Well, what is the point of continuing to train if we haven't got the product?" The Applicant denied that such a discussion had taken place and strongly denied that was the reason why she left Sydney. The Applicant's mobile telephone records of calls made by her on and from 9 October 2000 until 12 October 2000 were tendered into evidence. The records showed the Applicant had telephoned Mr Ord on Wednesday afternoon and spoke to him for 34 minutes and 25 seconds. It was put to the Applicant that Mr Ord discussed with her in a very lengthy conversation whether she wanted to take up selling the Tuta range of products as they had now lost the range of Device Technology products which it had been intended she sell. She denied he did so. It was put to the Applicant that she told Mr Ord that she was not interested in selling "that crap", to which she said she had said no such thing and there was no discussion about the Tuta range, so she could not have made any derogatory comments. It was also put to her that she said, "If I chose to resign what are you prepared to offer me?" which she denied. It was then put to her that she made it fairly clear to Mr Ord on the Wednesday afternoon that she was intent on resigning. She denied this and said that she was not in any position to resign. However, she said that she could not recall very much about the conversation that she had with Mr Ord on the Wednesday afternoon. As to her letter of resignation, she agreed that she composed the letter but said she put the part in about the Tuta range, as Mr Ord told her to put that in otherwise she would not get her pay. When it was put to her that it was intended that she sell the orthopaedic range she denied that that was the case and said you could not learn the orthopaedic range in one week and that she was not equipped or qualified to sell orthopaedic products.

22 When asked what she had said to Ms Hall on the telephone when she spoke to Ms Hall from Sydney, when Ms Hall was in the Northwest, the Applicant said she couldn't recall much about saying anything about the courses in Sydney, although in her opinion the courses were not the most exhilarating she had ever been on.

Respondent's evidence

23 Mr Ord testified that he has been in the hospital and medical supplies business for 41 years and he has been the director and owner of the Respondent company for 23 years. He testified that in 2000 he employed 15 full time employees. He said that six were salespersons and they have nursing backgrounds with degrees and their role is to sell medical products to prospective purchasers.

24 Prior to the acquisition of the Device Technologies products the Respondent held agencies for five principal agencies. Mr Ord said that in early 2000 he was advised by his brother, Peter Ord, that the Western Australian agent, Stubber Medical, had expressed a desire to relinquish the agency because they wished to pursue importation of different products. Consequently, Device Technologies were looking for a new Western Australian agent. As a result of discussions between Mr Ord and representatives of Device Technologies he obtained the agency. He said that the conditions attached to obtaining the agency were that he was required to employ three people to sell and support the product range. He said there were three main divisions of products. Plastics, theatre and sterilisation, and interventional and orthopaedics. He said he engaged Ms Meier to sell the plastic products, Ms Hall to sell the theatre products and the Applicant to sell interventional and orthopaedic products. He testified that the Applicant was primarily employed to do two things. Firstly, she was to sales manage Ms Meier and Ms Hall, who had no experience in selling. Secondly, she was to sell the interventional products and in the short term she was required to sell the orthopaedic products as well. He said that if the market had become big enough he might have employed another person to sell specifically the orthopaedic products. He said he was advised by Device Technologies that he was required to take on the full range of products. However, when cross- examined he said shortly after he obtained the agency that Device Technologies lost the right to distribute gynaecological products. Also, there were no laparoscopic products offered to him. He said there was practically nothing in the product line for general surgery, but that one line of surgical products was given to Ms Hall and anaesthesia and critical care was given to an existing employee. Further, that vascular surgery was given to Ms Meier and electrosurgery products which were intervention division products, were also given to Ms Meier. Consequently, he says that cardiology, radiology and urology, together with orthopaedic products were the responsibility of the Applicant.

25 Mr Ord said that he agreed to guarantee the Applicant a higher salary than Ms Hall and Ms Meier as she was to carry out sales manager duties. Mr Ord testified that the reason he employed the Applicant was because she had an excellent reputation in the market as both a sales person and a sales manager. He said that he estimated when he took over the Device Technologies range of products that it would add to the turnover of his business in the vicinity of $2.5million per annum. This estimation was based on reports of Stubber Medical's performance. He said that he expected that with three sales persons the volume of sales could increase to $3million per annum so as to support three sales persons.

26 As to the range of Device Technologies products Mr Ord said that he did not foresee that the Applicant would have any difficulty learning and understanding the products and being able to oversee the other two sales persons as the products were not very complicated. He said that the Applicant said to him "they don't seem to be very complicated to me. I can sell these." He said that he had anticipated that they would sell roughly $1million in plastic products, $1million in infection prevention products and the balance would be $500,000 to $600,000, consisting of sales in the interventional/orthopaedic division.

27 Mr Ord said there was only one type of orthopaedic product and they were knee implants. He said that in relation to cardiology products that they were principally low-tech disposable products that are inserted in the heart. Further, the radiology and urology range consisted of a range of stents.

28 Mr Ord said that prior to going to Sydney for training the Applicant spent time in the field with Ms Hall and Ms Meier getting to meet the clients and seeing how they reacted with the clients. He said he knew nothing about any difficulty between the Applicant and Ms Meier until he heard the Applicant's evidence. He said that on Friday 6 October 2000 the Applicant was not in the office most of the day; that he understood that she was training elsewhere. He said Ms Meier came into his office but he was not aware that the Applicant wanted to see him or that Ms Meier had refused to provide a monthly report to the Applicant for preparation of the Device Technologies monthly report.

29 Mr Ord testified that the trip to Sydney was for the Applicant to receive training in the products she was going to sell and also to familiarise herself with the products that Ms Hall and Ms Meier were selling. He said she was going to be learning about cardiology, radiology, urology products, some orthopaedic products, plastic surgery products and sterilisation products. He agreed that the Applicant paid for the trip to Sydney on the understanding that the Respondent would reimburse her for all expenses including the cost of accommodation and the airfare.

30 Mr Ord said that the reason he went to Sydney was that he was having some logistical difficulties in getting a sterilisation chemical which was highly corrosive across from Sydney to Perth and he went to Sydney to have discussions with Mr Kevin Ryan, who was also a director of Device Technologies, about the logistics and transportation of that product. He said he had not intended to visit any of the training sessions, although when he had a spare moment he attended the cardiology session for about 15 minutes and he also went to another training session for a short period of time.

31 Mr Ord said that on Monday, 9 October 2000 he and the Applicant were picked up from their hotel by a Device Technologies representative. He said that when they arrived at their office he spoke briefly to his brother who was leaving to travel to America. He then went to speak to Mr Ryan as Mr Ryan was the person that he (Mr Ord) dealt with in the company. He said that Mr Ryan informed him that the Respondent was about to lose the agency for the orthopaedic and interventional range of products as the directors of Device Technologies had made a decision that their products would be better served by granting an agency for these products to a Mr and Mrs McLauchlan who owned a business called Medivenn, and who were about to commence operation in Western Australia. Mr Ord testified that he thought this decision was very unprofessional. He was very unhappy. He said he did not discuss the decision with the Applicant on Monday as she was in training during the day and that evening he and the Applicant went out to dinner with two Device Technologies managers. He said he did not think it was appropriate to discuss it with her in the presence of the managers.

32 Mr Ord said the next morning he spoke to the Applicant shortly after they arrived at Device Technologies office in Sydney in the foyer. He said that her response was "What am I doing here training? Why should I keep on training when I haven't got the products anymore?" He said she was upset and he said to her "Kathy, well look, it's up to you. I've got to go back but it is entirely up to you whether you keep training or whether you return." He said he really left it up to her as to whether she wished to stay on. He said he would have preferred her to stay for the rest of the training because she could have received training in the plastic surgery and surgical theatre products.

33 Mr Ord said he returned to Perth on Tuesday 10 October 2000 and on Wednesday morning, 11 October, the Applicant rang him from Mascot Airport to say that she saw no purpose in continuing the training when they had lost the products so she was coming home. He said he told her "fine, then please phone me when you get here"? He said that she telephoned him later that day and in the phone call that lasted over 35 minutes, they discussed the loss of the agency and he made the offer to her of selling Tuta products. He said she was quite derogatory about the range. Mr Ord said that when he offered the Tuta range of products to the Applicant she said "I don't want to sell that crap." So he said to her "perhaps we should look at you leaving company. If so, let's discuss it." He said he discussed this with her for about 15 minutes and at the end of the conversation he offered to pay her until 24 November 2000 and for her to have the use of the company vehicle and mobile phone until that time. He also said he would pay her pro-rata annual leave until 24 November 2000. He said she asked for a $3,000 bonus. He said he thought that was overboard but he would agree to it. He said that if she had stayed and taken over the Tuta range of products she still would have overseen the sales of Ms Hall and Ms Meier.

34 When it was put to Mr Ord that the offer of the Tuta range of products was not genuine, he said that this was not correct. He said he had received a demand from the marketing manager of Tuta Healthcare that they put in someone specifically to handle their product range, as they had just released two ranges called "Rocket" and "Paragon". He said Tuta Healthcare wanted someone dedicated within his agency to sell those products. Mr Ord testified that after the Applicant refused the offer he appointed another person who was already employed by the Respondent, to take responsibility for the Tuta range. He said that Ms Sandy Oswald had recently lost part of her range of products so he allocated the Tuta range to her. A memorandum from Mr Ord to Ms Oswald dated 24 October 2000, was tendered into evidence stating that Ms Oswald was responsible for that range from 1 November 2000. He said that this range of products was very similar to the range of products the Applicant was selling when she was employed by Maersk. He said that they are extruded plastic products which are manufactured in Australia. They are low-tech, high volume, low-value products. He said she should have known what the Tuta range of products were because quite a few of the products were competitors to the products that she sold at Maersk. He said he had nothing else to offer her apart from the Tuta range.

35 Mr Ord said that when he spoke to the Applicant on the Wednesday afternoon, he told her to come in at 7.30am the following morning before the staff came in so they could discuss the matter. He said she came in about 7.30am the next morning and the first thing he did was to hand her a cheque to reimburse her for the expenses incurred by her for the Sydney trip and he also handed her a pay cheque. He said he asked her whether she had reconsidered the Tuta range of products and that she said, "Yes, I have, but no thank you." He said he then began to talk about why the Medivenn people had been preferred by Device Technologies and his understanding as to why Device Technologies had made the decision to grant an agency to Medivenn. He said she asked if there were any other products he could offer her and he said "No." He then talked about her resignation and he gave her the two letters and after she read them she said, "Well, hand me a pad, Jim, I might as well resign here and now." He handed her a pad and pen and she wrote out the resignation.

36 He said the Applicant was extremely calm during this meeting. After she wrote out her resignation he said to her, "I suggest you get your personal things out of the office" and he said goodbye. He said she had her own office at that stage. He said he paid her two weeks' salary on 28 October 2000 in accordance with the agreement, but then he received a letter from the Applicant's solicitors making a claim for unfair dismissal. He then decided he would not pay the Applicant anymore money in accordance with the agreement because of the action she took in making a claim for unfair dismissal. He said he had been prepared to make the payments in accordance with the letter. The Applicant retained the car and mobile telephone until the first week in December 2000.

37 Mr Ord said at no time did the Applicant ever mention to him that she was having difficulties with Ms Meier or that Ms Meier had not provided her report by the deadline required by Device Technologies. Further, she did not mention anything to him about Ms Meier apparently having total autonomy. He said he had heard nothing about the Applicant's complaints in relation to Ms Meier until he heard her evidence at the hearing. Further, he denied that he had refused to provide her with a cheque for expenses and her salary until she had supplied the resignation. He also denied saying that she was "hopeless". He also denied ringing anyone at Smith & Nephew. He said he did not know anyone at that company to call.

38 When the email to Ms Meier and Ms Hall was put to Mr Ord in cross examination, he said that he had not previously seen a copy of the email. He said that staff were permitted to spend money on petty cash items and claim it back as expenses. He said however, that all visits from Device Technoligies personnel should have been discussed with the Applicant but that Ms Hall and Ms Meier would be entitled to arrange their own lunches and dinners with clients and were not required to discuss those matters or obtain authorisation from the Applicant to make such arrangements.

39 Ms Janet Hall gave evidence on behalf of the Respondent. Ms Hall said she is employed by the Respondent as a Product Specialist and that prior to being employed in that position she worked as a nurse at the Mount Hospital in Perth for a number of years. She said she met the Applicant through her work at the Mount Hospital as she was the Area Manager of a unit that used sterile products. She said she got to know the Applicant when she was with Smith & Nephew and had contact with her again whilst she was working with Maersk. Ms Hall said that the Applicant contacted her and advised her that "she had just

the job for her" and to ring Mr Ord at Western Biomedical. She says that following an interview she obtained her present position. She also said she works with Ms Meier.

40 Ms Hall says she underwent training in Sydney at Device Technologies' office for two days in October 2000. She said Monday of that week was a long weekend so she flew to Sydney on Tuesday, 3 October 2000. She had two days' training on 4 and 5 October and she flew back to Perth on Friday 6 October 2000. She said she did not see Mr Ord on the Friday when she returned as she did not arrive back in Perth until after the office was closed. She said that Tuesday of the following week she flew to Port Hedland and drove to Karratha later that day. She said that whilst she was driving to Karratha she received a call on her mobile phone from the Applicant. She said it was a very long telephone conversation and the Applicant told her that she was in Sydney. The Applicant told Ms Hall that she had gone to Sydney expecting to be given education in new products and that had not eventuated. Ms Hall said the Applicant told her she was not happy. She said initially she was quite aggressive and then she became quite emotional. Ms Hall said they also spoke about Ms Meier and the difficulties she (the Applicant) encountered with Ms Meier. She said that the Applicant and Ms Meier had a personality clash, that they did not get on very well from the very beginning. She said the Applicant told her that she had asked Ms Meier to do her report and Ms Meier had not produced the report, which seemed to upset the Applicant. She said the conversation she had about Ms Meier was along the lines of conversations she had had with the Applicant quite often in the past. When asked whether she had informed the Applicant that Mr Ord had given Ms Meier total autonomy she said she had not said that.

41 In cross-examination Ms Hall was asked about her view of Ms Meier and she said that she thought she was not a team player but that she did not have a problem with her because she did not deal directly with Ms Meier. When asked whether she recalled the Applicant complaining about the quality of the training she had received in Sydney, Ms Hall said that the Applicant commented that she was not having any training because it now appeared there were no products for her to be trained in. Ms Hall said that she did not specifically know what had happened on the Monday and Tuesday in Sydney but the Applicant seemed unhappy with the whole scenario.

42 The Respondent made an application to tender into evidence an Affidavit made by Kevin Gerard Ryan, the Services Marketing Manager for Device Technologies Australia. The application was made pursuant to s.79C(2)(c) and (g) of the *Evidence Act* 1906. Sections 79C and 79D of the *Evidence Act* provide—

"79C. Documentary evidence, admissibility of

(1) Subject to subsection (2), in any proceedings where direct oral evidence of a fact or opinion would be admissible, any statement in a document and tending to establish the fact or opinion shall, on production of the document, be admissible as evidence of that fact or opinion if the statement —

(a) was made by a qualified person; or

(b) directly or indirectly reproduces or is derived from one or other or both of the following —

(i) information in one or more statements, each made by a qualified person;

(ii) information from one or more devices designed for, and used for the purpose of, recording, measuring, counting or identifying information, not being information based on a statement made by any person.

(2) Where a statement referred to in subsection (1) is made by a qualified person or reproduces or is derived from information in a statement made by a qualified person, that person must be called as a witness unless —

(a) he is dead;

(b) he is unfit by reason of his bodily or mental condition to attend or give evidence as a witness;

(c) he is out of the State and it is not reasonably practicable to secure his attendance;

(d) all reasonable efforts to identify or find him have been made without success;

(e) no party to the proceedings who would have the right to cross-examine him requires him to be called as a witness;

(f) having regard to the time which has elapsed since he made the statement and to all the circumstances, he cannot reasonably be expected to have any recollection of the matters dealt with in the statement;

(g) having regard to all the circumstances of the case, undue delay, inconvenience or expense would be caused by calling him as a witness; or

(h) he refuses to give evidence.

(2a) Notwithstanding subsections (1) and (2), in any proceedings where direct oral evidence of a fact or opinion would be admissible, any statement in a document and tending to establish the fact or opinion shall, on production of the document, be admissible as evidence of that fact or opinion if —

(a) the statement is, or directly or indirectly reproduces, or is derived from, a business record; and

(b) the court is satisfied that the business record is a genuine business record.

(2b) Where a statement referred to in subsection (2a) is made by a qualified person that person shall not be called as a witness unless the court orders otherwise.

(3) This section makes a statement admissible notwithstanding —

(a) the rules against hearsay;

(b) the rules against secondary evidence of the contents of a document;

(c) that the person who made the statement or the person who made a statement from which the information in the statement is reproduced or derived is a witness in the proceedings, whether or not he gives evidence consistent or inconsistent with the statement; or

(d) that the statement is in such a form that it would not be admissible if given as oral evidence,

but does not make admissible a statement which is otherwise inadmissible.

(4) Notwithstanding subsections (1), (2) and (2a), in any criminal proceedings a statement in a document which was made in the course of or for the purpose of —

(a) the investigation of facts constituting or being constituents of the alleged offence being dealt with in the proceedings;

(b) an investigation which led to the discovery of facts constituting or being constituents of the alleged offence;

(c) the preparation of a defence to a charge for any offence; or

(d) the preparation of the case of the prosecution in respect of any offence,

shall not be rendered admissible as evidence by this section.

(5) For the purposes of this section a court may —

(a) for the purpose of deciding whether or not a statement is admissible as evidence, draw any reasonable inference from the form of contents of the document in which the statement is contained, or from any other circumstances;

(b) in deciding whether or not a person is fit to attend or give evidence as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner.

(6) For the purposes of this section a court may, in its discretion, reject a statement notwithstanding that the requirements of this section are satisfied with respect thereto, if the court is of the opinion that the probative value of the statement is outweighed by the consideration that its admission or the determination of its admissibility —

(a) may necessitate undue consumption of time; or

(b) may create undue prejudice, confuse the issues, or in proceedings with a jury mislead the jury.

79D. Evidence admitted under s. 79C, weight and effect of

(1) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by section 79C regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular —

(a) to the question of whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated;

(b) to the question of whether or not the qualified person or any person concerned with making or keeping the document containing the statement, had any incentive to conceal or misrepresent the facts;

(c) to the question of whether or not the information in the statement was of a kind which was collected systematically;

(d) to the question of whether or not the information in the statement was collected pursuant to a duty to do so;

(e) where the statement wholly or in part reproduces or is derived from information from one or more devices, to the reliability of the device or devices; and

(f) where the statement reproduces or is derived from any information, to the reliability of the means of reproduction or derivation.

(2) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by virtue of section 79C shall not be treated as corroboration of the evidence given by the qualified person."

43 It was argued on behalf of the Respondent that Mr Ryan was outside the State and it was not reasonably practicable to secure his attendance, and when regard is had to all the circumstances of the case undue expense would be caused by calling him as a witness. In an Affidavit made on 21 August 2001, Mr Ryan states as follows—

"1. I am the Services Marketing Manager for Device Technologies Australia of Unit 6, 10 Rodborough Road, Frenchs Forest in the said state ("Device Technologies").

2. Unless otherwise stated the facts matters and things deposed to by me herein are within my own knowledge and belief.

3. As from 1 July 2000, Ordberg Nominees Pty Ltd trading as Western Biomedical, represented Device Technologies agencies in Western Australia.

4. The agencies to be represented by Western Biomedical were in three divisions, namely plastic reconstruction products, operating suite and infection prevention products, and interventional/orthopedic products.

5. On 9 October 2000 in Sydney, I informed Mr Jim Ord, the Managing Director of Western Biomedical, that Device Technologies had appointed Medivenn WA Pty Ltd to be the Western Australian commission agent for the interventional/orthopedic products for which Device Technologies held the agencies, instead of Western Biomedical.

6. The decision to transfer these agency lines from Western Biomedical to Medivenn WA Pty Ltd was made without the knowledge of Jim Ord or anybody at Western Biomedical.

7. Jim Ord was not aware of this decision until I informed him of it on 9 October 2000.

8. I reside permanently in Sydney and have done so for 40 years. My duties as Services Marketing Manager for Device Technologies Australia make it extremely difficult for me to attend the Hearing in these proceedings which I understand are set down for 24 & 25 October 2001."

44 Mr Lyons, Counsel for the Applicant, objected to the tender of Mr Ryan's Affidavit. Mr Lyons, initially conceded that the requirements of s.79C of the *Evidence Act* were met and argued that the Applicant wanted to challenge his evidence by cross examining him in relation to the issue of when the Respondent lost the agency for the interventional/orthopaedic products as it was an important issue. Mr Lyons then contended the Commission could not be satisfied it was not reasonably practicable to secure his attendance as Mr Ryan is responsible for the sale of his company's products in Western Australia. In the end Mr Lyons put a submission that if the Affidavit is admitted then the Commission ought not to attach any weight to the matters set out in the Affidavit because it goes to such a significant issue.

45 Having heard the submissions the Commission determined that the pre-conditions of s.79C of the *Evidence Act* were met and as none of the matters set out in s.79C(6) of the Act were raised so as to invoke the Commission's discretion to reject the application for the tender of the Affidavit, the Affidavit was admitted.

Weight to be given to Mr Ryan's Affidavit

46 Pursuant to s.79D(1) the Commission is required in estimating the weight, if any, to be attached to a statement rendered as inadmissible by s.79C, regard is to be had to all circumstances from which any inference can be reasonably drawn as to the accuracy and otherwise of the statement.

47 In making submissions as to weight, Mr Lyons sought to tender into evidence without objection, copies of two memoranda written by Mr Ryan on 10 October 2000 and 1 November 2000 in support of the Applicant's argument that no weight, or little weight, should be given to the statements contained in Mr Ryan's Affidavit. The memorandum written on 10 October 2000 stated—

> "1. All stock in Western Biomedical's warehouse to be packed and collected by Medivenn on Tuesday, October 31, 2000. Both parties to agree and sign off and Device Technologies Australia will then credit Western Biomedical for agreed amount (approx. $12,000 L/C) and transfer on consignment to Medivenn.
>
> 2. All consigned inventory in Western Australia hospitals for those products are to be confirmed and added to Medivenn's consignment inventory. Western Biomecial to be credited as appropriate.
>
> 3. No promotional materials or instrumentation have been passed on to Western Biomedical from Stubber Medical. Alex Jarvis to investigate whether any materials can be retrieved.
>
> 4. Medivenn will take full responsibility for these products from November 1, 2000 and will receive the appropriate commissions on these sales.
>
> Would everyone please complete their respective roles in this transition.
>
> Thanks.
>
> Kevin"

The memorandum dated 1 November 2000 stated—

> "This is to inform everyone of the commencement of MediVenn Pty Ltd with effect from November 1, 2000.
>
> Caroline and Paul McLauchlan are representing Device Technologies Australia in the Western Australian market as commission agents on specific product lines. These are areas of business beyond Jim Ord and his Western Biomedical's business base.
>
> The immediate product groups are the total Orthopaedic business of the Surgical Division and the total Radiology, Cardiology and Urology business of the Interventional Division i.e. all Interventional products. These product groups may be (and will be) altered from time to time and all will be informed as appropriate.
>
> The McLauchlans will remit orders as per our old distribution business, Device Technologies Australia will invoice and ship direct to the client, or to the McLauchlans if replacing consignment inventory and a monthly commission will be paid on all sales.
>
> MediVenn's details:-
>
> Caroline McLauchlan mobile 0438 660 129
> Paul McLauchlan mobile 0438 221 965
> 14 Westminster Road
> Leeming WA 6149
> Phone: (08) 9312 3022
> Fax; (08) 9312 3033
>
> Caroline was associated with us and our Interventional product range in the early 90s via Stubber Medical. She proved very successful then and since with BSC on the East Coast.
>
> Paul also has great experience in Interventional areas and more recent success in Neuro surgery and Neuro radiology. Paul will concentrate on the orthopaedic lines initially.
>
> We wish them well in their new endeavour and look forward to sharing success with them both. I know everyone will provide as much support and assistance as required.
>
> Regards
>
> Kevin Ryan"

48 It is argued on behalf of the Applicant that paragraph 3 of the memorandum dated 10 October 2000 establishes that the Respondent never had any promotional material for orthopaedic and interventional products. Further, that when paragraph 3 is read together with the statement in the memorandum dated 1 November 2000 that the areas given to Mr and Mrs McLauchlan are "areas of business beyond Jim Ord and his Western Biomedical's business base", it is clear that as at June 2000 the Respondent did not have the capacity or intention to sell those particular products. The first difficulty with the Applicant's argument is that it was never put to Mr Ord that the Respondent did not have the capacity to sell the orthopaedic and interventional lines. Further, this argument is inconsistent with the evidence given by the Applicant that she received training in one of the ranges of interventional products on 10 October 2000, namely cardiology products. Secondly, paragraph 3 of the memorandum dated 10 October 2000 does not establish the proposition that the Respondent did not have any promotional material at all. All paragraph 3 states is that the former agent, Stubber Medical did not pass on to the Respondent any promotional material. Thirdly, it could be inferred from paragraph 1 that the Respondent on 10 October 2000 did have in its possession $12,000 worth of interventional and orthopaedic products.

49 Notwithstanding that I have rejected these arguments, I do not intend to give any weight to the matters stated in Mr Ryan's Affidavit. My reasons for doing so are that—

(a) Paragraph 3, 6 and 7 simply state conclusions and are unsupported by any factual information on which those conclusions are based.

(b) The matters stated in paragraphs 3 to 7 make statements which go to a central and significant issue in this case.

Conclusion

50 This is a matter where there is little common ground between the parties. Having heard all of the evidence, I prefer the evidence given by Mr Ord and Ms Hall where their evidence departs from the evidence given by the Applicant. In particular, I accept the evidence given by Mr Ord that:

(a) he was not informed by any representative of Device Technologies that the Respondent had lost the right to sell orthopaedic and interventional range of products until 9 October 2000;

(b) the Applicant's role was to sell orthopaedic and interventional products as well as oversee the sales work of Ms Hall and Ms Meier; and

(c) the offer to the Applicant to sell Tuta products was genuine.

In reaching this conclusion I have not had regard to the matters set out in Mr Ryan's Affidavit. I have had the opportunity of seeing the witnesses give their evidence. Of the Applicant I have considerable concern as to the veracity of her evidence. In

preferring the evidence given by Mr Ord and Ms Hall to the evidence given by the Applicant I have had regard to the following matters that I view as significant:

(a) I do not accept the Applicant's evidence that the Respondent lost the right to promote and sell Device Technologies orthopaedic products prior to Monday 9 October 2000. Exhibit 7 shows that Mr and Mrs McLauchlan were granted an agency to sell "the total orthopaedic business of the Surgical Division and the total Radiology, Cardiology and Urology business of the Interventional Division i.e. all Interventional products" from 1 November 2000. Further, the Applicant's contention is inconsistent with her testimony that she received training in cardiology products on Tuesday morning, 10 October 2000. In addition, I do not accept the Applicant's contention that she was not to be responsible for selling any of the Device Technologies products. Her contention is contrary to the express provisions of contract of employment which contemplates that she would be paid commissions on products sold by her, and is inconsistent with her testimony that she completed training in Sydney in the cardiology products, which were products that it was intended that she sell.

(b) Ms Hall's evidence does not support the Applicant's evidence that she returned to Perth because Ms Hall told her that the outcome of the meeting Mr Ord had with Ms Meier on Friday, 6 October 2000 was to give her "total autonomy". Ms Hall says that she did not make this comment. Ms Hall's evidence was that she did not speak to Mr Ord before he went to Sydney as she was travelling from Sydney to Perth on Friday 6 October 2000 and did not return to the office that day. In addition, Ms Hall testified that the Applicant indicated to her in the telephone call that there now did not appear to be any products for her to be trained in.

(c) The only corrobative evidence of the Applicant's version of events is—

(i) her uncontraverted evidence that she was in a vulnerable financial position in that she had no cash reserves and had recently put an offer on a property; and

(ii) the evidence given by the Applicant and solicitor, Mrs Andrea Lyons, of a recent complaint in that she made a complaint to Mrs Lyons on 13 October 2000 that she had signed a letter of resignation under duress.

(d) I have had regard to submission made on behalf of the Applicant that as Ms Meier was not called to give evidence, her evidence would not have assisted the Respondent's case. Further, I have had regard to the fact that Ms Hall's evidence is corrobative of the Applicant's evidence that Ms Meier refused to provide her report, was arrogant towards the Applicant and not a team player. However, the Applicant conceded that prior to her termination she did not raise these issues with Mr Ord. Her evidence at its highest is that she tried to raise these issues with Mr Ord when she spoke to him in the afternoon of Wednesday, 11 October 2000. In addition it was her own testimony that Ms Meier told her (the Applicant) on 6 October 2000 that Mr Ord had given her (Ms Meier) total autonomy. I do not accept that the Applicant returned to Perth on Wednesday, 11 October 2000 because there was some urgency in discussing these issues with Mr Ord, when training had been arranged for her on Wednesday in the products to be sold by Ms Hall.

51 Accordingly, I find that the Applicant resigned without duress. In light of my finding I will make an order dismissing the Applicant's claim that she was harshly, unfairly or oppressively dismissed.

Claim for contractual benefits

52 It is conceded by Counsel for both parties that in the event I dismiss the claim for unfair dismissal I should make orders that the Applicant be paid salary owing from 7 August 2000 until 24 November 2000, calculated at the rate of $80,000 per year, less the amounts paid as salary and pro-rata holiday pay until 24 November 2000. If the amounts are calculated this way it was conceded that the $3,000 bonus that was to be paid in accordance with the agreement made on 12 October 2000 can be deducted as it was negotiated on the basis that salary paid until 24 November 2000 be calculated at the rate of $56,000 per annum.

53 The Applicant was paid fortnightly for 12 weeks based on a salary of $56,000 per annum until 27 October 2000. Given that her annual salary was guaranteed at $80,000 per annum and there is no evidence that she earned any commissions in that period, the Applicant says she is owed $5,561.52. Further, she is also owed another 4 weeks' pay calculated at $80,000 per annum which is $6,153.85. In addition, the parties agree that the Applicant is owed $1,889.23 being 1.228 weeks salary as pro-rata annual leave calculated at the rate of $80,000 per annum. Accordingly I will make an order that the Respondent pay the Applicant the gross sum of $13,604.60.

2001 WAIRC 04448

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KATHLEEN MAY ZUGLIAN, APPLICANT
	v.
	ORDBERG NOMINEES P/L T/AS WESTERN BIOMEDICAL, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	TUESDAY, 18 DECEMBER 2001
FILE NO.	APPLICATION 1806 OF 2000
CITATION NO.	2001 WAIRC 04448

Result	Application claiming unfair dismissal, dismissed. Claim for contractual benefit upheld.
Representation	
Applicant	Mr T Lyons (of counsel)
Respondent	Mr M Zilko S.C. (of counsel)

Order

HAVING heard Mr Lyons on behalf of the Applicant and Mr Zilko 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's application under s.29(1)(b)(i) that she had been harshly, oppressively or unfairly dismissed is and will hereby be dismissed.

(2) THAT the Respondent pay to the Applicant the sum of $13,604.60 within 10 days from the date of this order.

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

SECTION 29 (1)(b)—Notation of—

Applicant	Respondent	Number	Commissioner	Result
Allison J	Pacmin Mining Corporation Limited Company	1846/2001	BEECH C	Discontinued
Armstrong JT	Atlas Copco Australia Pty Ltd	1661/2001	GREGOR C	Order Issued
Ashby GM	Ian J. Eade - The Lunch Bowl	1891/2001	BEECH C	Discontinued
Atzenhoffer CE	The Original Croissant Gourmet Pty Limited	1767/2000	SMITH, C	Discontinued
Beam N	Kwik & Swift Co Pty Ltd	1477/2001	BEECH C	Dismissed
Beer DH	Australian Bakeries Pty Ltd	1926/2001	BEECH C	Discontinued
Borrill DF	Worley Safety and Risk Management Pty Ltd	1737/2001	SMITH, C	Discontinued
Boyce M	Anaconda Nickel Ltd, Anaconda Operations P/L	1599/2001	KENNER C	Discontinued
Buxton LA	Southern Metropolitan Regional Council and South West Group	1706/2000	KENNER C	Discontinued
Catten GP	CSR Limited T/A CSR Building Materials	1745/2001	BEECH C	Discontinued
Churchill LC	Regal Croft Pty Ltd ACN 060 562 512	1708/2001	GREGOR C	Order Issued
Cook S	Amfal Pty Ltd C/- IMS Health	11/2001	SCOTT C.	Discontinued
Dann A	Family and Children Services	1057/2001	GREGOR C	Discontinued
Dann A	Robert Ronan (Manager) Aboriginal Youth Hostel	1894/200	KENNER C	Order Issued
David R	Homestyle Pty Ltd T/as BGC Construction	589/2001	SCOTT C.	Discontinued
De'Abreu MI	George Weston Foods Ltd	734/2001	SMITH C	Discontinued
Dillon D	Armadale Youth Accomodation Services Incorporated	1956/2001	BEECH C	Discontinued
Etienne FL	Safari Treks	1851/2001	KENNER C	Discontinued
Fowler MJ	Western Savannah Piggery Pty Ltd	1511/2001	GREGOR C	Order Issued
Fraser TD	Dick Anza - Perth Swedish Auto Centre	1409/2001	GREGOR C	Dismissed
Furness S	Shenton Park Chiropractic Centre	2094/2001	SCOTT C.	Discontinued
Godden DP	Broadwater Pagoda Hotel (A.B.N. 16072899060)	1580/2001	SCOTT C.	Discontinued
Green B	Goodman Fielder Consumer Foods	1325/2001	SMITH, C	Discontinued
Grose PL	Move Clothing & Linen Supplies	657/2001	SCOTT C.	Discontinued
Hanley CA	Helen Brown - Volona Nominees Pty Ltd	1904/2001	KENNER C	Discontinued
Hansen D	Delta Gold Limited ABN 17 002 527 899	1569/2001	GREGOR C	Discontinued
Harding S	Mick Morrisey - Ausdrill	1801/2001	BEECH C	Discontinued
Hellyer M	Nationwide Oil Pty Ltd	547/2001	WOOD,C	Dismissed
Hickling KD	Savoia Cafe Wine Bar	1736/2001	KENNER C	Discontinued
Hughes TJ	Stewarts Pest Managers Pty Ltd	1332/2001	GREGOR C	Dismissed
Jones AJ	S.C. Nigam & Co	575/2001	SMITH, C	Discontinued
Jones CRM	Shaun Morgan - Emerge Technologies Pty Ltd	1797/2001	BEECH C	Discontinued
Kumaran D	Normandy Yandal Operations Ltd	1425/2001	KENNER C	Discontinued
Lee GMY	Filson Nominees Pty Ltd	1412/2001	SMITH, C	Discontinued
Leopardi RE	Speedheat Perth Pty Ltd	1372/2001	SMITH, C	Dismissed
Liptay R	Sacred Heart College	1786/2001	KENNER C	Discontinued
Lusher PJ	Widdeson Party Hire	1973/2001	KENNER C	Discontinued
MacIver NJ	Western Australian Meat Marketing Co-operative Limited	1604/2001	SCOTT C.	Discontinued
Marsland BK	K.Mountain Holdings P/L (Administrator Appointed) as Trustee for The Mountain Unit Trust trading as K.Mountain + Co, K.M.C Maintenance & Mountain Dev	1334/2001	BEECH C	Discontinued
Marvin SP	6PR Southern Cross Radio Pty Limited	468/2001	KENNER C	Discontinued
Maxwell GA	Perth Auto Alliance Pty Ltd	570/2001	BEECH C	Discontinued
McGuire HG	Mercure hotel Perth	1575/2001	GREGOR C	Discontinued
McHugh H	Anaconda Nickel Ltd ACN 0611 170 780	1574/2001	BEECH C	Discontinued
Menz G	Ground and Foundation Supports Pty Ltd	198/1999	BEECH C	Dismissed
Morgan CD	Men's Meeting Place Inc	567/2001	SCOTT C.	Discontinued

Applicant	Respondent	Number	Commissioner	Result
Morgan JD	Servcorp	431/2001	COLEMAN CC	Dismissed
Mosel E	Hanson Publishing Pty Ltd - James Douglas Sharland	1348/2001	GREGOR C	Discontinued
Moseley AD	Sam Monza	1151/2001	SCOTT C.	Discontinued
Neave B	Workpac Perth Industrial Pty Ltd	1961/2001	BEECH C	Discontinued
Nicholson ME	One Tel Limited	800/2001	COLEMAN CC	Dismissed
Pearce BS	Espana Nominees Pty Ltd T/A Pool and Spa Mart Bullcreek	1453/2001	GREGOR C	Discontinued
Powell AG	Salesforce Australia Pty Ltd	495/2001	GREGOR C	Discontinued
Redman T	Sir Charles Gairdner Hospital	1865/2001	SCOTT C.	Discontinued
Reed K	Atlas Software Pty Ltd	1729/2001	GREGOR C	Discontinued
Reid MA	BX Management Trading as Mt Barker Hotel	741/2001	SCOTT C.	Discontinued
Rhoades BT	Chelsea Painting Services	1401/2001	GREGOR C	Discontinued
Ribbons AJ	Dimension Data Learning Solutions	1816/2001	SMITH C	Discontinued
Robinson W	CD Dodd Trading As Ross's	1654/2001	BEECH C	Discontinued
Samsa LM	Tadgin Pty Ltd (ACN:069 207 423) t/a Exchange Hotel	1718/2001	SMITH C	Discontinued
Seaman DK	Getaway Camping & Fishing	1505/2001	BEECH C	Discontinued
St. Quintin SJ	West Australian Vintners	1838/2001	KENNER C	Discontinued
Stansfield PE	Lewis Concrete Services	1650/2001	KENNER C	Discontinued
Stevenson ME	Landfill Gas and Power Holdings Pty Ltd	1463/2000	SCOTT C.	Discontinued
Sylvester SD	Dennis John McKenna trading as Regent Cinemas and as the Picadilly Cinema	1388/2001	SMITH, C	Discontinued
Tartano PA	Future Engineering and Communication Pty Ltd	1277/2001	GREGOR C	Discontinued
Tiwari D	Kailis & France Foods Pty Ltd	952/2001	KENNER C	Order Issued
Tucker MF	Park Inn International Hotel	1715/2001	GREGOR C	Order Issued
Van der Merwe J	Drake Australia Pty Ltd	1795/2001	SMITH, C	Discontinued
Vanderburgt BG	Chiquita Mushrooms Pty Ltd	1790/2001	SCOTT C.	Discontinued
Ventouras PJ	Fini Group Pty Ltd t/a Fini Group of Companies	128/2001 & 129/2001	BEECH C	Discontinued
Viljoen VM	Oceanfast Pty Ltd	755/2001	GREGOR C	Discontinued
Wiltshire A	Anaconda Nickel Limited	1129/2001	KENNER C	Discontinued
Worth B	Lifecare Health Ltd	943/2001	KENNER C	Discontinued

CONFERENCES—Matters arising out of—

2001 WAIRC 04419

INDUSTRIAL DISPUTE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT

v.

QUIRK CORPORATE PTY LTD, RESPONDENT

CORAM COMMISSIONER J H SMITH

DELIVERED WEDNESDAY, 12 DECEMBER 2001

FILE NO/S. C 262 OF 2001

CITATION NO. 2001 WAIRC 04419

Result Declaration that the Respondent's employee has been detrimentally affected in her employment and an order made that work be provided on Sundays.

Representation

Applicant Ms D MacTiernan

Respondent Ms N Thomson (as agent)

Order

HAVING heard Ms MacTiernan on behalf of the Applicant and Ms Thomson on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under s.44 of the *Industrial Relations Act* 1979 hereby—

1. DECLARES that the Applicant's member, Ms Wendy Caines, has been detrimentally affected in her contract of employment in that the Respondent has not rostered her to work on Sundays when the Mandurah Forum Shopping Centre is trading on Sundays, in accordance with her contract of employment.

2. ORDERS that the Respondent is to forthwith provide to Ms Caines work on each Sunday when the Mandurah Forum Shopping Centre is trading except where on a Sunday or part of a Sunday it is necessary to roster other employees to work to provide training to those other employees and at least 3 days' notice is given to Ms Caines of that training.

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

CONFERENCES—Notation of—

PARTIES		COMMISSIONER/ NUMBER	Dates	Matter	Result
Australian Workers' Union	Dampier Salt Pty Ltd	KENNER C C190/2001	24/08/2001 11/09/2001 25/10/2001 24/08/2001 11/09/2001 25/10/2001	Operations at Cargill Salt site.	Referred
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Airdrill 2000 t/a Airdrill	GREGOR C C94/2001	4/05/2001	Dispute over the dimissal of Graeme Gaden, Leslie Donnelly and Glynn Allison	Referred
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Airdrill 2000 t/a Airdrill	GREGOR C CR94/2001	6/12/2001	Dispute over the dimissal of Graeme Gaden, Leslie Donnelly and Glynn Allison	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Skilled Engineering Limited	SMITH, C CR137/2001	1/11/2001 1/11/2001	Wage increases	Discontinued
Builders' Labourers, Painters & Plasterers Union	Osborne Park Hospital of Osborne Place	GREGOR C CR69/2001	25/06/2001	Access to overtime roster in relation to the Boiler Blow Down work	Discontinued
Civil Service Association	Commissioner of State Revenue Department	SCOTT C. PSAC19/2001	N/A	Cessation of ongoing employment contracts	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union	Dampier Salt Pty Ltd	KENNER C C190/2001	24/08/2001 11/09/2001 25/10/2001 24/08/2001 11/09/2001 25/10/2001	Operations at Cargill Salt site.	Referred
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union	Skilled Engineering Limited	SMITH, C CR137/2001	1/11/2001 1/11/2001	Wage increases	Discontinued
Construction, Forestry, Mining & Energy Union	Blastworks Pty Ltd	GREGOR C C273/2001	N/A	Time and wages records	Concluded
Construction, Forestry, Mining & Energy Union	Carl Anthony Perrott and Sandra Lee Perrott Trading as C & S Perrott	GREGOR C C285/2001	N/A	Failure to provide time and wages records	Concluded
Construction, Forestry, Mining & Energy Union	Collins Earthmoving	GREGOR C C283/2001	19/12/2001		Concluded
Hospital Salaried Officers Association	Board of Management, Metropolitan Health Service at Armadale Health Service	SCOTT C. PSAC12/2001	N/A	Dispute re alleged harassment of Mr Brent Flood	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Bob Wegner Culleys Tea Rooms	SMITH, C C281/2001	14/12/2001	Reduction in hours after refusing to sign State Workplace Agreement	Concluded
Plumbers and Gasfitters Employees' Union	King Edward Memorial Hospital	SCOTT C. C282/2001	N/A	Dispute over alleged discrimination of two applicant union members	Concluded
Prison Officers' Union	Attorney General	BEECH C C239/2001	N/A	Proposal to Implement new staffing arrangements at Hakea and Casuarina Prison Gatehouses.	Concluded
Prison Officers' Union	The Hon. Attorney General	BEECH C C222/2001	31/10/2001 8/02/2002	Meal breaks	Referred

PROCEDURAL DIRECTIONS AND ORDERS—

2001 WAIRC 04413

ALLEGED UNFAIR DISMISSAL AND DENIED CONTRACTUAL BENEFITS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR S. K. MCDERMOTT, APPLICANT
	v.
	CSR EMOLEUM (PARTNERSHIP BETWEEN CSR LTD, VACUMN OIL COMPANY), RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DELIVERED	WEDNESDAY, 12 DECEMBER 2001
FILE NO.	APPLICATION 216 OF 2001
CITATION NO.	2001 WAIRC 04413

Result Order issued

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) and (ii) of the Industrial Relations Act 1979; and

WHEREAS on the 11th day of December 2001 the Commission convened a conference for the purpose of conciliation and scheduling; and

WHEREAS the Commission issued directions for the expeditious hearing of the application;

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

1. THAT the evidence in chief of witnesses in the hearing of this application be given by way of witness statements, except with the leave of the Commission.
2. THAT by no later than the 1st day of April 2002 the applicant shall file with the Commission and serve on the respondent an outline of submissions and any witness statements (including any annexures) he seeks to rely upon at the hearing of the matter.
3. THAT by no later than the 22nd day of April 2002 the respondent shall file with the Commission and serve on the applicant an outline of submissions and any witness statements (including any annexures) it seeks to rely upon at the hearing of the matter.
4. THAT by no later than the 29th day of April 2002 each party shall give notice to the other specifying those witnesses, if any, required to attend for cross examination.
5. THAT by no later than the 8th day of May 2002 the parties shall file and serve upon each other a list of authorities.

(Sgd.) P. E. SCOTT,
[L.S.] Commissioner.

2001 WAIRC 04436

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	VALERIE MARGARET VILJOEN, APPLICANT
	v.
	OCEANFAST PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	MONDAY, 17 DECEMBER 2001
FILE NO.	APPLICATION 755 OF 2001
CITATION NO.	2001 WAIRC 04436

Result Order of 11th December 2001 cancelled

Order

WHEREAS on 11th December 2001 the Commission made orders that the application be discontinued; and

WHEREAS on 14th December 2001 the Commission received written submissions from solicitor for the Applicant seeking that the matter re-opened; and

WHEREAS it is clear from the supporting documentation that the issues raised by the application had not been resolved at the time the Order of Discontinuance was issued; and

WHEREAS having considered the matter ex parte the Commission has decided that the Order made on 14th December 2001 was made in error in that the matter was still alive; and

WHEREAS the Commission has concluded that it is not functus officio in the matter and the Applicant is entitled to proceed with the application; and

WHEREAS the Commission while issuing this Order of cancellation has decided that there should be finality in the matter and for that reason has decided that if the Applicant does not advise the Commission of the disposition of the application by 31st January 2002 the matter will be listed to show cause why it should not be dismissed for want of prosecution.

NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act, 1979,* the Commission, hereby orders—

1. THAT Application No. 755 of 2001 Citation No. 2001 WAIRC 04394 be, and is hereby, cancelled.
2. THAT the Applicant is required to advise the Commission of the disposition of the Application by 31st January 2002 failure to do so will result in the matter being listed for the Applicant to show cause why the Application should not dismissed for want of prosecution.

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

2001 WAIRC 04415

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JULIE-ANNE LEISHA HURST, APPLICANT
	v.
	HOUSE OF STUART, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	WEDNESDAY, 12 DECEMBER 2001
FILE NO.	APPLICATION 773 OF 2001
CITATION NO.	2001 WAIRC 04415

Result	Order to produce document issued.
Representation	
Applicant	Ms J. Hurst
Respondent	Ms J. Auerbach (as agent)

Order

WHEREAS an order for Discovery issued on 24 August 2001 requiring the respondent to provide to Julie-Anne Leisha Hurst, on affidavit, copies of the contracts, notes and worksheets relevant to Julie-Anne Leisha Hurst's claim in this Commission;

AND WHEREAS an affidavit of discovery sworn on the 28th day of September 2001 was filed in the Commission on 2 October 2001;

AND WHEREAS the applicant has identified a photocopy of a document produced to her by the respondent ("the Taylor contract") which shows by a paper clip in the right hand corner and by a partial copying of a paper behind the Taylor contract that it has attachments which are the notes that she made in relation to the Taylor contract;

AND WHEREAS the applicant has requested the production of the Taylor contract with its attachments without success;

AND WHEREAS on 15 November 2001 the Commission requested that the respondent produce to the Commission the document identified as the Taylor quotation together with the attachments to that document as indicated by the of the photocopy;

AND WHEREAS that document has not been produced to the Commission as at the date of this Order;

AND WHEREAS the Commission is of the view that an Order ought now issue requiring the respondent to produce that document to the Commission;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order—

THAT the House of Stuart produce to the Commission by 4.00pm on Wednesday, 19 December 2001 the original of the Taylor quotation and its attachments.

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

2001 WAIRC 04488

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT GALLOTTI, APPLICANT
	v.
	ARGYLE DIAMOND MINES PTY LTD TRADING AS ARGYLE DIAMONDS, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	TUESDAY, 18 DECEMBER 2001

FILE NO/S.	APPLICATION 1455 OF 2001
CITATION NO.	2001 WAIRC 04488

Result	Direction issued.
Representation	
Applicant	Mr M Richardson as agent
Respondent	Mr S Ellis of counsel

Direction

HAVING heard Mr M Richardson as agent for the applicant and Mr S Ellis of counsel for the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

1. THAT the respondent produce for inspection by the applicant documents in relation to the respondent's investigation of the Bath incident within 14 days.
2. THAT the documents referred to in para 1 above are not to be disclosed to or their content communicated to Mr Bath in any manner whatsoever.
3. THAT the parties have liberty to apply on short notice.

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