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INDUSTRIAL APPEAL COURT—Appeals against decision of Commission in Court Session—

[2002] WASCA 24

JURISDICTION	:	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	:	CHAMBER OF COMMERCE & INDUSTRY OF WESTERN AUSTRALIA (INC) -v- THE AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH [2002] WASCA 24
CORAM	:	SCOTT J PARKER J McKECHNIE J
HEARD	:	3 SEPTEMBER & 26 OCTOBER 2001
DELIVERED	:	15 FEBRUARY 2002
FILE NO/S	:	IAC 3 of 2001
BETWEEN	:	CHAMBER OF COMMERCE & INDUSTRY OF WESTERN AUSTRALIA (INC) Appellant AND THE AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH Respondent
FILE NO/S	:	IAC 4 of 2001
BETWEEN	:	AIRLITE CLEANING PTY LTD & ORS Appellant AND THE AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH Respondent

Catchwords:

Industrial law (WA) - Awards - Application for variation of award - Policy of employers to offer employment only under workplace agreement - Whether an "industrial matter" - Whether Commission may amend award to also require employment to be offered under award - Whether Commission may have regard to effects in industry of *Workplace Agreements Act 1993 (WA)* - *Industrial Relations Act 1979 (WA)*, s 7(1), "industrial matter"

Legislation:

Workplace Agreements Act 1993 (WA)

Industrial Relations Act 1979 (WA)

Result:

Appeal IAC 3 of 2001 allowed

Appeal IAC 4 of 2001 allowed

Decision of the Commission in Court Session set aside

Application of the union dismissed

Category: A

Representation:

IAC 3 of 2001

Counsel:

Appellant	:	Mr G R Blyth (Agent)
Respondent	:	Mr D H Schapper

Solicitors:

Appellant	:	Chamber of Commerce & Industry of Western Australia (Inc) (Agent)
Respondent	:	Derek Schapper

IAC 4 of 2001

Counsel:

Appellant	:	Mr R L Le Miere QC
Respondent	:	Mr D H Schapper

Solicitors:

Appellant	:	Mallesons Stephen Jaques
Respondent	:	Derek Schapper

Case(s) referred to in judgment(s):

Re Cram & Ors; ex parte NSW Colliery Proprietors' Association Limited & Ors (1987) 163 CLR 117

RGC Mineral Sands Ltd & Anor v Construction, Mining, Energy, Timberyards, Sawmills, Woodworkers Union of Australia WA Branch & Ors [2000] 80 WAIG 2437

RGC Mineral Sands Ltd & Anor v Construction, Mining, Energy, Timberyards, Sawmills, Woodworkers Union of Australia WA Branch & Ors [2000] WASCA 162, 5

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

Case(s) also cited:

Commissioner, Public Service Commission & Ors v Civil Service Association of Western Australia Inc (1998) 78 WAIG 3629

Fraser v Fletcher Construction Australia Ltd (1996) 70 IR 117

Orange City Bowling Club Ltd v Federated Liquor Industries Employees Union [1979] AR 90

R v Gaudron; ex parte Uniroyal Pty Ltd (1978) 141 CLR 204

The Australian Tramways Employes Association v The Prahran and Malvern Tramway Trust & Ors (1913) 17 CLR 680

The Master Builders and Contractors Association of WA v Wolff & Ors (1938) 41 WALR 59

Totalisator Agency Board v Federated Clerks Union of Australia (1980) 60 WAIG 624

1 **SCOTT J:** In this matter I have had the opportunity of reading the draft reasons to be published by Parker J.

2 In my view, it is not necessary to dispose of this appeal to revisit the issues involved in ***RGC Mineral Sands Ltd & Anor v Construction, Mining, Energy, Timberyards, Sawmills, Woodworkers Union of Australia WA Branch & Ors*** 80 WAIG 2437.

3 In my opinion, it is sufficient to dispose of these appeals to note that the Commission in Court session concluded its reasons on the basis that the terms and conditions offered to the relevant employees under workplace agreements were, generally speaking, less than those currently provided by the award which would otherwise apply.

4 What is clear from the relationship between the *Industrial Relations Act 1979* ("the IRA") and the *Workplace Agreements Act 1993* ("the WPA") is that the legislative scheme contemplates that the two streams of employment should coexist. The WPA contemplates employment in an industry other than pursuant to an award. That being the case, I agree with Parker J that the conclusions of the Court below "involves the Commission setting itself up to assess the appropriateness of the policy of the WPA and to countermand effects of legislative measures".

5 It follows, in my view, that the Commission below sought to exercise jurisdiction on a basis which runs counter to the legislative scheme. I agree with Parker J that if there is to be any adjustment to the legislative scheme, then that is a matter for Parliament and not the Commission.

6 Subject to these considerations, I otherwise agree with the reasons of Parker J and with the orders contemplated by his Honour. I too would allow the appeals, set aside the decision of the Commission in Court session and dismiss the application of the respondent in each case.

7 **PARKER J**: This decision is in respect of two appeals against a decision of the Commission in Court Session given in matter 975 of 2000 and delivered on 30 April 2001. The appellant in IAC 3 of 2001 is the Chamber of Commerce and Industry of Western Australia (Inc) which was granted leave below to be heard and to adduce evidence before the Commission in Court Session in relation to identified issues. The appellants in IAC 4 of 2001 were three of the respondents to the Contract Cleaners Award, 1986, No A6 of 1985 ("the Award") and a number of other employers bound by the Award by reason of its common rule application, all of which were parties to the proceedings below or intervened in those proceedings. The respondent union in each appeal is a party to the Award and was the applicant before the Commission.

8 A number of the grounds in each appeal are identical, but additional grounds are also relied on in IAC 4 of 2001. The grounds variously contend that the decision of the Commission was erroneous in law or was in excess of jurisdiction or both; *Industrial Relations Act 1979 (WA)*, s 90(1).

9 The application of the union which originated the proceedings before the Commission sought a variation of the Award to insert a new clause, described as "Freedom of Choice". It may be somewhat loosely said of the application that it sought to regulate the making of an offer of employment by an employer in the contract cleaning industry, in effect, so as to preclude

an offer being conditional on the employment being pursuant to a workplace agreement within the meaning of the *Workplace Agreements Act 1993 (WA)*. In the originating application the respondent to these appeals ("the union") stated:

> "The merit of the application is on the basis that workers who are entering the industry are being denied the right to have their wages and conditions fixed as determined by the Western Australian Industrial Relations Commission as correct and proper wages for the work they perform. The mandatory imposition of Workplace Agreement (*sic*) as pre-conditions of employment has contributed to the lowering of wages throughout the industry."

10 The hearing of the application by the Commission involved receiving extensive evidence and submissions.

11 The Commission published a lengthy and very carefully reasoned decision in which it decided that the union's application to vary the Award should be granted. The Commission determined, however, that the variation to the Award should be more limited than, and in its precise form quite different from, that proposed by the union in the application. The variation ordered by the Commission, as amended by a supplementary decision given on 4 May 2001, is in the following terms:

> "10A. – FREEDOM OF CHOICE
>
> Where an offer of employment is made by an employer to a prospective employee and the offer is subject to the prospective employee entering into a workplace agreement the following provisions of this clause shall apply:
>
> (1) If the prospective employee advises the employer he/she wishes his/her terms and conditions of employment to be regulated by this award and the employer refuses to employ the prospective employee on that basis, the employer is required to as soon as reasonably practicable make a further offer of employment to that prospective employee. The further offer shall be to engage the prospective employee pursuant to a contract of employment which is expressed to be not intended for or capable of registration as a workplace agreement and the terms of which shall reflect those of this award.
>
> (2) Nothing in sub-clause (1) of this clause shall prevent the employer from making a further offer to engage the prospective employee pursuant to a workplace agreement at the same time as an offer to engage is made under sub-clause (1) of this clause.
>
> (3) For the purposes of this clause: "prospective employee" means any person an employer proposes to engage as an employee to perform work any part of which is referred to or covered by a classification contained in this award."

The amendment so ordered applies not only to employers bound by the Award as named respondents, but also to those employers bound by reason of its common rule application.

12 While the grounds of appeal are extensive and some raise questions of potential significance it is not necessary to consider them exhaustively to deal with these appeals, for reasons which follow.

Underlying problem

13 At the heart of the difficulties which these appeals raise, and with which the Commission was faced as it dealt with the original application, is the absence of any adequate indication of the interrelationship intended by the Parliament between some key aspects of the *Industrial Relations Act 1979 (WA)* ("the IR Act") and the *Workplace Agreements Act 1993 (WA)* ("the WPA Act").

14 By the WPA Act, and amendments made at the same time to the IR Act, the Parliament established a second and quite distinct system for the regulation of the relationship between an employer and employee and their mutual rights and obligations. By s 4 of the WPA Act, it has effect despite any provision of the IR Act. This is complemented by the general effect of Part 1A of the IR Act which by s 7A subjects the operation of the IR Act to the WPA Act, and by s 7B and s 7C provides that where an employer and an employee are parties to a workplace agreement they are no longer an employer and employee within the meaning of those terms as defined in the IR Act. By s 7C IR Act a matter that is part of the relationship between an employer and employee who are parties to a workplace agreement is not an "industrial matter" as defined in s 7(1) of the IR Act. Further, by s 6(1) WPA Act, a workplace agreement which has come into force has the effect that no award applies to the contract of employment, or to the employer or employee, so long as the workplace agreement remains in force.

15 The scheme of the WPA Act provides for both collective and individual workplace agreements entered into by way of agreement between the employer and one or more of the employer's employees. It is the effect of s 5(3) WPA Act that a contract of employment and a workplace agreement may be entered into at the same time, ie at the commencement of the employer/employee relationship, and, consistently with this, in relation to negotiations for a workplace agreement, s 15(8) of the WPA Act extends the meaning of employer and employee in that section to include persons who wish to negotiate with a view to entering into a contract of employment and a workplace agreement that will govern that contract. The WPA Act contains provisions which, by s 16(1), must be complied with in any workplace agreement and also provisions which must not be contravened by any such agreement. By s 17 the *Minimum Conditions of Employment Act 1993* prevails over any provision of a workplace agreement, and by s 18 terms are implied into every workplace agreement precluding unfair, harsh or oppressive dismissal from employment under a workplace agreement. Otherwise, by s 16(2), a workplace agreement may contain whatever provision the parties agree to include.

16 By s 26 a collective workplace agreement has no effect unless it is registered, and by s 27 an individual workplace agreement ceases to have effect if it is not lodged for registration within 21 days. Before registration, by s 30, the Commissioner for Workplace Agreements is to be satisfied *inter alia* that no party was persuaded by threats or intimidation to enter into the agreement, and that the parties understand the rights and obligations for which it provides, and genuinely wishes to have the agreement registered.

17 Provisions such as s 6(1) and (2) and s 19(4) of the WPA Act clearly reveal that the Parliament contemplated that the terms and conditions of employment pursuant to a workplace agreement would be distinct from those applicable pursuant to any award that would otherwise apply to employment in the relevant industry, and the combined effect of s 16(2) and s 17 is to confirm that the parties to a workplace agreement should be at liberty to agree on their respective rights and obligations but not so as to provide for conditions including remuneration which are less than the *Minimum Conditions of Employment Act 1993* requires. It is clear from s 17, in particular, that Parliament expressly contemplated that conditions including levels of remuneration under a workplace agreement might well be less than those for which an otherwise applicable award provides.

18 It is an inevitable consequence of the existence of these two distinct systems of industrial regulation that, at times, there must be a choice between them by employers and employees. In essence, the appellants in these appeals contend that this must entail an ability of an employer to offer to employ under one system or the other. Where that is done the employee has the choice of accepting or refusing the offer of employment. On the other hand, the union contends an employee should be able to choose whether any employment is pursuant to the Award or a workplace agreement. It seeks to achieve this by

an amendment to the Award to require in certain circumstances an employer to offer employment on Award terms as well as under a workplace agreement.

19 It will be immediately apparent that this divergence is in respect of a quite fundamental policy issue – how the schemes of the IR Act and the WPA Act are to be reconciled.

20 It is surprising, indeed, that the legislature has not made clear its intention in this respect. It is in the absence of express legislative provision that this important question has become an issue of ongoing difficulty before the Commission and this Court. That difficulty can only be resolved in the light of what little guidance can be gleaned from the two Acts.

Union's case before Commission

21 It was the case of the union before the Commission that in the contract cleaning industry increasingly, and in particular over the past two years, existing and prospective employees have been offered employment pursuant to a workplace agreement in pursuance of a policy adopted by a significant number of employers that, at least in most situations, employment will only be offered pursuant to a workplace agreement. There was a body of evidence which supported the view that, overall, workplace agreements did not offer better terms and conditions of employment than those for which the Award provided. Indeed, there was a body of evidence that there was a growing prevalence of employers in the industry who were preferring to employ on the basis of workplace agreements to enable those employers to tender for work on more "competitive terms". In the union's case this greater competitiveness was because the remuneration and other conditions of employment pursuant to workplace agreements overall were of a lower standard than the Award provisions. Further, there was evidence to suggest that progressively fewer cleaners were employed under the Award and an increasing number were employed under workplace agreements.

Respondents' and interveners' cases before Commission

22 One employer gave evidence on behalf of a number of respondents and interveners. His evidence confirmed the growing competitiveness of the industry and suggested that clients had become increasingly aware of the ability of contractors to avoid the penalty rate provisions of the Award by the use of workplace agreements. It was also his evidence that some administrative and other cost efficiencies could be achieved by the use workplace agreements because they allowed greater flexibility in the organisation of work than the Award, as well as the greater ability to avoid penalty rates. It was his evidence that the difference to the amount of a tender for work by an employer could be in the order of a 20 per cent reduction if the tender was on the basis of employment under workplace agreements rather than award employment.

Reasons of Commission

23 The Commission found that there had been a shift in the contract cleaning industry from tendering for work by contractors on the basis that their employees would be paid on Award terms, to tenders based on the terms of workplace agreements. The Commission noted this could result in a tender cost reduction of approximately 20 per cent although in some part this might be due to administrative efficiencies and greater flexibilities, for example by the extension of the spread of ordinary hours of work. It was also clear, in the finding of the Commission, that the effect of the policy of the employers of preferring workplace agreements is that since 1998 there had been a downward effect on wages and conditions in the industry. The Commission was also persuaded, however, that there was a substantial number of employers in the industry that shared the view that minimum rates of pay in the industry should be equal to the Award rate of pay. The Commission went on to find:

> "We conclude that because of the exclusive nature of offers of employment pursuant to workplace agreements, such offers containing conditions and rates which are substantially lower than those provided by the Award, and that it is only in a limited range of areas that employees are being offered work other than exclusively on such a basis, that opportunities for employment in the industry at Award rates and conditions are becoming increasingly limited."

24 It was noted that there was no submission that employers did not have the capacity to pay Award rates of pay and conditions and that the employers had not sought any amendments to the Award to improve its flexibility. The Commission also noted some submissions as to the public interest including a submission by the Minister that a consequence of granting the union's application would be to defeat the stated intention of Parliament. This submission was put aside on the basis of some observations in ***RGC Mineral Sands Ltd & Anor v Construction, Mining, Energy, Timberyards, Sawmills, Woodworkers Union of Australia WA Branch & Ors*** [2000] 80 WAIG 2437 at 2448, although it should be noted that there the observations were directed to the question whether there was an industrial matter rather than the exercise of discretion by the Commission in the public interest.

25 By this process of reasoning the Commission came to the conclusion that the union's application to vary the award should be granted. In view of jurisdictional arguments in respect of "refusal to employ", and evidence that some perspective employees may wish to be employed under a workplace agreement, it decided to vary the award by the inclusion of an additional term as set out earlier in these reasons.

The appeals

26 A submission for the appellants, arising from more than one of the grounds of appeal, is that the Commission erred in law in finding that there was an industrial matter in this case. In this respect the Commission concluded that generally, though not exclusively or on all occasions, employers were following a policy of only offering employment in the industry under a workplace agreement. It concluded this was a widespread and growing practice by employers. This led the Commission to conclude that the union's application raised a matter that relates to a refusal to employ a class of persons within the meaning of par (c) of the definition of industrial matter in s 7 IR Act. In this respect, the reasoning of the Commission adopted and applied the view of the majority of this Court in the ***RGC*** decision (*supra*) at [80] that a policy of an employer to only employ persons who agree to enter into a workplace agreement involves the employer refusing to employ, in any vacancy that it is offering, persons who comprise an identifiable class, namely those who wish to be employed pursuant to the relevant award.

27 In this appeal this reasoning is questioned on a number of bases. It is submitted that, in contrast to the ***RGC*** case, there is no specific evidence in this case of actual offers to employ particular persons in particular vacancies for employment, and that the evidence does not establish that any employer has a policy of employing solely pursuant to workplace agreements. Further, it is submitted that the reasoning of the majority in ***RGC*** was in error, in particular in holding (it was submitted) that a prospective employee is an employee as defined by s 7(1)(b): see ***RGC*** at [88]. The appellants also advance in support of the appeal the view which commended itself to the third member of the Court in ***RGC*** that a policy of employing staff solely on the basis of workplace agreements is not one which involves an intention to exclude any particular person or class of persons from the workforce, but only an intention to offer employment to persons who are prepared to enter into workplace agreements.

28 While there are some factual differences between the circumstances in the ***RGC*** case and the facts in the present case, it does not appear to me that those factual differences are determinative. In the ***RGC*** decision at [59] – [69] attention was given by the majority to the definition of industrial matter in s 7(1) and to the decisions which have sought to analyse that definition and its legislative predecessors, and equivalent definitions, in the context of a requirement that an employer give preference in employment to a class of persons or be directed to make an offer of employment to a particular person or a class of persons. As was said at [67]:

> "It will be seen that a refusal to employ a person was regarded as within the definition of industrial matter on two bases, first because of the express words of par (c) and, secondly, because it was within the general introductory words of the definition … In neither case was the absence of an existing employer and employee relationship regarded as material."

A number of those cases were in the context of what is usually known as "preference to unionist clauses" which were frequently found in awards in earlier times. Such clauses have long been accepted as coming within the definition of industrial matter, being a "matter affecting or relating to the work, privileges, right or duties of employers or employees in any industry" within the general introductory words of the definition. It is because of the breadth of those general introductory words and their long accepted application to preference to unionist clauses that such preference is now expressly excluded from the definition of industrial matter by par (k) of that definition.

29 This consideration of the authorities led to the following views expressed at [69]:

> "In my respectful view these decisions correctly focus attention on the terms of the definition of industrial matter and illustrate something of the breadth of the true scope of the general introductory words, as well as of par (c). The decisions give rise to the following propositions. A refusal by an employer in an industry to employ a person or a class of persons may be an industrial matter even though that person or class of persons is not employed by the employer and has never been employed by that employer in the past. An employer in an industry may be directed to give preference of employment to a class of persons when employing persons. Further, an employer may be obliged when seeking to employ a person in a vacancy to make an offer of employment to a particular person or a class of persons, at least where that person or that class are then employed by some employer in the same industry. The decisions may well stand as authority for more than these propositions, but they are enough for present purposes."

30 At [62] it was said:

> "The refusal, as a matter of policy, of an employer to employ a class of persons, such as members of a union, or to give preference over others to one class of persons, would appear to 'relate to' a 'refusal to employ' and so be within the ambit of the notion in par (c) of a 'refusal to employ' a class of persons in an industry. In turn this would appear to 'affect or relate to' the 'rights of an employer' to determine the type qualities and qualifications of employees which the employer employed in his industry."

I would add that perhaps even more clearly, a policy to employ or to refuse to employ persons according to whether or not they would accept employment on a basis which affected the terms and conditions of employment, such as employment pursuant to a workplace agreement rather than pursuant to the relevant award, would appear to "affect or relate to" the "rights of an employer" to determine the basis upon which it would employ persons in its industry and so be within the definition of "industrial matter".

31 This analysis led the majority in ***RGC*** to conclude in [80]:

> " … the matter sought to be raised is the policy of WSL, which was confirmed in evidence before the Commission, that in filling its existing vacancies in the industry, vacancies which at the time of the application it was actively seeking to fill by offering employment to prospective employees, it would only employ persons who agree to enter into a workplace agreement. By committing itself to this policy WSL refuses, and has indicated it will continue to refuse, to employ in the vacancies it is offering persons who comprise an identifiable class, ie those who wish to be employed pursuant to the award that would apply if no workplace agreement is entered into. There is no existing contract of employment between WSL and any of the prospective employees who have been offered employment, but employment was clearly in immediate contemplation."

It followed, in the view of the majority that it was also open to the Commission in that case to conclude that the application raised a matter within the definition of an "industrial matter" being, or relating to, a refusal by WSL to employ in the industry that class of persons.

32 It follows, from the decision in the ***RGC*** case, that it was open to the Commission in the circumstances disclosed by the evidence before it on the present application to be satisfied, as the Commission held, that the application was in respect of an industrial matter and so was within the jurisdiction of the Commission. This is so because, in the finding of the Commission, there was a policy of many employers in the industry, although not necessarily in all cases, to only offer employment on the basis that the employment should be the subject of a workplace agreement and not regulated by the Award. For the reasons given in ***RGC*** and in the cases there considered, the present application which sought to ensure that any offer of employment in the industry should, at the option of the potential employee to whom an offer of employment was made, be either on the basis of the Award or a workplace agreement, would appear to be a matter relating to the rights of employers or employees in the industry and so be an industrial matter. And, for the reasons given in ***RGC***, the usual policy of the employers identified by the Commission could be accepted by the Commission as constituting a refusal to employ in the industry a class of persons being those who wished to be employed pursuant to the Award.

33 In this last regard, it should be noted that the policy as found by the Commission operated at the time that an employer in the industry made an actual offer of employment to a prospective employee. For the reasons considered in the ***RGC*** decision it was, in my view, not material that at that time there was no existing employer and employee relationship, merely a prospective one. That is so whether one considers the general introductory words of the definition of industrial matter or the notion of a refusal to employ a class of persons the subject of par (c).

34 It is not necessarily the case, of course, that every offer to employ and every refusal to employ will necessarily give rise to an industrial matter. The decision of the High Court in ***Re Cram & Ors; ex parte NSW Colliery Proprietors' Association Limited & Ors*** (1987) 163 CLR 117 contains a discussion at 133-138 of matters now seen as directly affecting the relationship of employer and employee so as to constitute an industrial matter. As was pointed out in that unanimous decision of the Full Bench of the High Court, while issues such as recruitment and manning levels may once have been regarded as within the managerial prerogative and not industrial matters that is no longer the case, in particular, because of a growing recognition that "management and labour have a mutual interest in many aspects of the operation of a business enterprise" (see 135). There is a particular discussion at 135-136 of some aspects of the manner in which a recruitment policy may be an industrial matter. That discussion was in a context where there was no issue but that any recruitment

would be to a position governed by an award. The context of the present case is that recruitment is either on the terms of the Award or on the terms of a workplace agreement; that difference being one which goes to material aspects of the rights of employers and employees in an industry.

35 I would conclude this reference to ***Re Cram*** by noting the comments at 138 that the existence of an industrial matter is not necessarily excluded even where there is no existing employer/employee relationship and even though the employer may not have an immediate job vacancy; and by drawing attention, once again as was done in the ***RGC*** decision, to the passage in ***Re Cram*** at 136-137 which emphasises the appropriateness of caution before an award is made in settlement of a dispute where that award would amount to a substantial interference with the autonomy of management to decide how a business enterprise should be efficiently conducted.

36 In so far as the submissions direct attention to [88] of the decision in ***RGC,*** that paragraph is to be read in its context and in particular with [87]. They are each concerned with the interrelationship between the WPA Act and the IR Act. As was pointed out in [87] there is no provision in either Act that negotiations between a prospective employer and a prospective employee with a view to employment, which negotiations concern or lead to employment in respect of which a workplace agreement is in force, are in some way removed from any jurisdiction which the Commission might otherwise have. It is only when a workplace agreement is *in force* that the operation of the IR Act ceases with respect to that employer/employee relationship in so far as it is regulated by the workplace agreement. At [88] attention is drawn to the circumstance that when an offer of employment is made, even though it is an offer of employment pursuant to a workplace agreement, it is nevertheless an offer of an employer to a prospective employee, and the terms of s 7B and s 7C IR Act have no application or operation at the time of the offer as there is then no workplace agreement *in force*. It is true, as the submissions of the appellants have pointed out, that in [88] there is a reference in parenthesis to par (b) of the definition of employee in s 7(1) of the IR Act which speaks of a person whose "usual" status is that of an employee. The submissions concerning this passage may have been distracted by this supplemental reference from what was really the key word in that passage which was "prospective". The reasoning in [88] does not depend on whether an offer of employment was to a person whose usual status is that of an employee, but on whether the offer of employment is made to a prospective employee.

37 In ***RGC*** at [88] the essential point is that until an offer of employment, albeit under a workplace agreement, is accepted on terms that attract the operation of s 7B and s 7C, there is no provision which limits the ordinary operation of the IR Act. That being so, if, and to any extent that, the circumstances surrounding the offer of employment may give rise to an industrial matter within the meaning of the IR Act, it is open to the Commission to be satisfied that the jurisdictional threshold of the IR Act has been established. As the reasons in ***RGC*** go on to make clear, however, it remains necessary for the Commission to determine the scope of the industrial matter, and it is then for the Commission to determine what, if any, relief should be granted within the limits of the powers of the Commission.

38 The appellants also submit that there is error in the decision of the majority in ***RGC*** at [80] in the acceptance of the view that by committing itself to a policy of only employing persons who agree to enter into a workplace agreement the employer may be found to have refused to employ, in the vacancies it was offering, persons who wished to be employed pursuant to the relevant award. It is submitted that persons should not be classed according to the basis upon which they wish to be employed for the purposes of par (c) of the definition of industrial matter, but rather according to other qualities which identifies them as a class. In this respect there is, in my view, nothing in the IR Act to suggest or require that the notion of class should be limited or restricted in that way. It is further submitted that there is relevantly a fundamental distinction between an intention to offer employment to persons who are prepared to enter into workplace agreements and the adoption of a policy of refusing to employ (as a class) persons who wish to be employed pursuant to an award. It is obvious from the reasons in ***RGC*** at [38] that differing views can be taken of this matter. In my respectful view, it is a necessary and inherent consequence of an employer adopting a policy, whether in respect of some or all of its job vacancies, that it will only employ persons who are willing to be employed under a workplace agreement, that the employer is thereby pursuing a policy which involves the refusal to employ in those vacancies persons who are not willing to be employed pursuant to a workplace agreement. Those who are only prepared to be employed under award conditions, necessarily, are thereby to be refused employment by the employer. The two propositions appear to me to be necessary corollaries. They are but two sides of the one coin.

39 In the present case there are factual issues raised on these appeals whether the true effect of the evidence was that no employer had been shown to have a policy of exclusively recruiting employees under workplace agreements. Without there being need to explore that ground fully for present purposes, the evidence appears to me to be sufficient to support the finding that the policy adopted by most employers in the industry involves them, at least on most occasions, offering employment only on the basis of workplace agreements. For the reasons given that is sufficient by way of foundation for the finding of an industrial matter in the present circumstances, although it is a point of factual distinction from the circumstances considered in the ***RGC*** decision.

40 It remains the case, my respectful view, that the precise provisions of the IR Act and the WPA Act do not have the effect of excluding from the scope of the definition of industrial matter, in so far as they might otherwise be within that scope, offers of employment even though the offer may be limited to employment under the terms of a workplace agreement, or a refusal by an employer to employ a class of persons that class being constituted by prospective employees who are not prepared to be employed under a workplace agreement but would be willing to be employed under the relevant award. In my view, relevantly, the statutory provisions that have been enacted operate to exclude what would otherwise be the jurisdiction of the Commission only when a workplace agreement is concluded and is in force.

41 The arguments advanced on this appeal do not persuade me that there is reason not to follow the view of the majority of this Court as expressed in the ***RGC*** decision.

Reasons of Commission

42 I turn now to what in my view is the really significant issue raised by the decision of the Commission. Having concluded that the application did give rise to an industrial matter, the Commission then turned to a consideration of the question whether it should grant the application. It did so under the heading "Equity, good conscience and the substantial merits of the case", which suggested it was directing attention in particular to s 26(1)(a) of the IR Act. I would not, however, regard that heading as any indication that it was failing to have regard to the other provisions of s 26(1), and in particular par (c) which requires regard to be had to the interests of the persons immediately concerned and, where appropriate, to the interests of the community as a whole.

43 In its reasons for decision at [144] the Commission described the primary case for the union as being:

> "The Union contends that the evidence given in these proceedings shows that the policy of employers in the industry of offering employment to prospective employees only if they agree to enter into workplace agreements

> is widespread. Further a consequence of the policy is that a downward effect on wages and conditions taken as a whole has occurred in the industry so that below Award terms and conditions are being offered."

At [147] the Commission noted:

> " … we find that there has been a shift in the industry 'playing field' from the tendering of work based on Award terms and conditions to tenders based on proposed workplace agreements which can result in a tender cost reduction of approximately 20 % … a large part of the cost reduction comes from a diminution of conditions of employment offered …"

The Commission continued at [148]:

> "It is also clear from the evidence that the effect of the policy is that since 1998 a downward effect on wages and conditions in the industry has occurred. … a substantial number of employers in the industry share the view that minimum rates of pay in the industry should be equal to the Award rate of pay."

This led to the Commission at [151] to find and reason that:

> "We conclude that because of the exclusive nature of offers of employment pursuant to workplace agreements, such offers containing conditions and rates which are substantially lower than those provided by the Award, and that it is only in a limited range of areas that employees are being offered work other than exclusively on such a basis, that opportunities for employment in the industry at Award rates and conditions are becoming increasingly limited."

44 The reasoning in these passages is critical to the decision. In essence, the Commission has identified that employees are agreeing with employers in the industry to be employed under workplace agreements on terms and conditions of employment which are less, generally speaking, than those for which the Award provides. This is occurring in particular because employers are only offering to employ pursuant to a workplace agreement in all but a limited range of areas of employment in the industry. The Commission has identified that there are commercial reasons why employers are doing this. In short it enables them to be more competitive in securing business. A further consequence is that the numbers employed on award terms and conditions in the industry are diminishing.

45 Implicit in this reasoning is the clear assumption that these developments, in the view of the Commission, are against the interests of the employees and perhaps also the employers affected in the industry, and the interests of the community as a whole.

46 It appears to me there is a fundamental difficulty with this reasoning. The consequences so identified and relied upon by the Commission in its reasons, namely employment generally in the industry on terms and conditions different from or less than award terms, and a diminishing number of persons employed in the industry on award terms and conditions, appear to be consequences directly contemplated by the legislature, and for which it legislated, when it enacted the WPA Act (and at the same time amended the IR Act to allow for the scheme of the WPA Act to operate alongside, but independently of, the IR Act).

47 By this legislative scheme Parliament contemplated and authorised employment in an industry other than pursuant to an award. When that occurred it would necessarily follow that the numbers of persons whose terms and conditions of employment were regulated by the award would necessarily diminish. Further, if, as the WPA Act clearly contemplates, an employer and an employee reach mutual agreement on terms and conditions different from those for which an otherwise applicable award provides, the difference may favour the employer or the employee, by comparison with award terms and conditions, whether wholly or partly. The WPA Act does not regulate or restrict this, save for the requirements of s 16 and s 17 and the implied terms as to dismissal for which s 18 makes provision. As a consequence, it is necessarily contemplated and authorised by the WPA Act that the terms of any particular workplace agreement, or of workplace agreements generally in an industry, may include provisions which differ from (whether inferior or superior to) those provided by the otherwise applicable award.

48 Given these features of the legislative scheme it is not open to the Commission, in my view, to exercise its jurisdiction to counter their effects. Doing so involves the Commission setting itself up to assess the appropriateness of the policy of the WPA Act and to countermand the effect of legislative measures which Parliament expressly contemplated and authorised.

49 The decision and reasoning of the Commission in this case may be seen as involving the Commission concluding, in effect, that the policy of the WPA Act as provided by the Parliament was having deleterious effects on the terms and conditions of employment prevailing in the industry as the Commission considered those terms and conditions ought to be, and was diminishing the numbers of employees who enjoyed the terms and conditions which the Commission considered appropriate. In my view, it is not open to the Commission, when determining whether or not it should exercise jurisdiction in relation to an identified industrial matter, to act on such considerations, or to seek to counter such tendencies, given that they are directly contemplated and authorised by an act of the Parliament to which the jurisdiction of the Commission is subjected by s 7A of the IR Act and s 4 of WPA Act. The policy and effect of the WPA Act are matters for the Parliament to review. Whether the effects identified in the reasons warrant some adjustment to the legislative structure is for the Parliament, not the Commission.

50 For these reasons, in my respectful view, the Commission erred in the exercise of its discretion to grant the application by having regard to and giving significant weight to the effects of workplace agreements on prevailing terms and conditions in the industry, and to the diminution of employment under the Award as a consequence of workplace agreements. For these reasons, alone, the decision cannot stand.

51 It is not intended by these reasons to indicate that the Commission may never be justified in acting in some respect in relation to the recruitment policy being followed by an employer, or employers generally, in an industry, or in the case of a refusal to employ a class of persons in an industry, where there is some relevance to the industrial matter of a workplace agreement or workplace agreements. Future cases may well identify circumstances where action by the Commission in such cases is both within jurisdiction and is warranted. The critical point of these reasons is that the Commission may not properly be persuaded that it should exercise jurisdiction in respect of an industrial matter by virtue of matters directly contemplated and authorised by Parliament in the WPA Act.

Decision in these Appeals

52 The question arises whether these appeals should be remitted to the Commission for further consideration. As indicated earlier in these reasons the merits of the union's case were set out in the application on two bases. The first was that workers were being denied the right to have their wages and conditions fixed by the Award when they entered the industry. The second is that the use of workplace agreements had contributed to the lowering of wages throughout the industry. The second of these, of course, is substantially one of the matters upon which the Commission relied and is a matter within the direct contemplation of the WPA Act. There would be no point in recommitting the application to the Commission for

further consideration of that issue for the reasons given. The other basis upon which the union sought to advance its case, however, is one that need not necessarily involve any attempt to rely on effects directly contemplated and authorised by the WPA Act. At least in theory, therefore, there might have remained some scope for further consideration by the Commission of this aspect of the union's case. However, in developing its case in this respect the union has essentially relied on the prevalence of wages and conditions different from the Award and the diminution of numbers of persons whose employment is regulated by the Award. As a consequence there is no real scope for the present application, as it has been presented and supported, to succeed.

53 In my view there would be no practical point in these circumstances in remitting the application for further consideration by the Commission in Court Session.

54 The appeals should be allowed, the decision of the Commission in Court Session set aside, and instead the application of the union should be dismissed.

55 **McKECHNIE J**: I agree generally with the judgment delivered by Parker J. The *Workplace Agreements Act* has brought about the changes identified by the Commission. It is not open to the Commission to exercise its discretion to counter what it may perceive to be deleterious consequences of that Act.

The decision in *RGC*

56 The appellants argue that the majority decision in ***RGC Mineral Sands Ltd & Anor v Construction, Mining, Energy, Timberyards, Sawmills, Woodworkers Union of Australia WA Branch & Ors*** [2000] WASCA 162 was in error. In their submission, offering employment only on workplace agreements is an offer to employ any person on certain conditions. It is not a refusal to employ any persons with particular attributes or characteristics.

57 This was the point of difference between the majority and the minority judgments in ***RGC.***

58 The Commission was bound to follow the majority judgment in ***RGC***.

59 The general principles of *stare decisis* apply to cause this Court to follow the majority decision in ***RGC***. Nothing will promote uncertainty more quickly than a ready opportunity to re-argue the merits of majority decisions in fresh proceedings when the Industrial Appeal Court is constituted differently.

60 I am not persuaded that there is a compelling case to depart from the principle in ***RGC***.

Conclusion

61 Because of the way in which the issues before the Commission were developed in evidence and submission, I agree with Parker J that in the particular circumstances of this case, there is no practical point in remitting the matter back to the Commission in Court Session for further consideration. I would also allow the appeal, set aside the decision of the Commission in Court Session and order that the application by the respondent to vary the award be dismissed.

FULL BENCH—Appeals against decision of Commission—

2002 WAIRC 05011

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE BREWERIES AND BOTTLEYARDS EMPLOYEES' INDUSTRIAL UNION OF WORKERS OF WESTERN AUSTRALIA, APPELLANT
	v.
	KIRIN AUSTRALIA PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER J F GREGOR
	COMMISSIONER J H SMITH
DELIVERED	WEDNESDAY, 13 MARCH 2002
FILE NO/S.	FBA 56 OF 2001
CITATION NO.	2002 WAIRC 05011

Decision	Appeal upheld, decision at first instance suspended and remitted to the Commission at first instance, and appeal otherwise dismissed
Appearances	
Appellant	Mr D H Schapper (of Counsel), by leave
Respondent	Mr S Heathcote, as agent

Reasons for Decision

THE PRESIDENT—

INTRODUCTION

1 This is an appeal brought by the abovenamed organisation of employees pursuant to s.49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act") against the whole of the decision of the Commission constituted by a single Commissioner given on 2 November 2001 in application No 1394 of 2001. The notice of appeal was filed on 22 November 2001, the decision having been deposited in the office of the Registrar on 6 November 2001.

2 The decision appealed against (see page 9 of the appeal book (hereinafter referred to as "AB")) was a dismissal of an application made by the abovenamed appellant. It is that decision that the appellant organisation of employees has now appealed against on the following basis.

GROUNDS OF APPEAL

3 The grounds of appeal are as follows:-

"1. In dismissing the application the Commission erred in the exercise of its discretion in that the Commission—

(a) failed to give any or any sufficient weight to the scheme of the Act and/or the wage fixing principles

(b) failed to give any or any sufficient weight to the respondent's evidence that it engaged contractors for the purpose of avoiding payment of the rates prescribed in the applicable industrial agreement

(c) wrongly regarded the evidence of Mr Murphy as demonstrating that there was some custom and practice regarding contractors

(d) wrongly regarded the evidence of Mr Murphy, however characterised, as conclusive of the application or requiring that it be dismissed

(e) failed to distinguish between the purpose of using of contractors as described by Mr Murphy and the purpose to which the respondent was using contractors.

Relief sought—

An order quashing the order appealed from and remitting the matter back to the Commission for hearing and determination in accordance with the decision of the Full Bench."

BACKGROUND

4 There were two applications made by the appellant organisation of employees, The Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia (hereinafter referred to as "the BBEIU"). The applications arose from a dispute that the respondent employer, Kirin Australia Pty Ltd (hereinafter referred to as "Kirin"), in relation to the employment of one of the BBEIU members, Mr Denis Patrick Carmody, and the engagement of malt production operators via a labour hire firm. Both applications were heard together, by consent. The reasons for decision, at first instance, encompass both applications, but this appeal relates only to the decision in application No 1394 of 2001.

Application No C169 of 2001

5 The original application No C169 of 2001 related to the employment of Mr Carmody and came on for conference before the Commission pursuant to s.44 of the Act. There were conferences held on 24 July 2001 and 14 August 2001, but the matter was not resolved and was referred for hearing and determination in the following terms:-

"The union claims an order but upon the making of this order, the respondent shall offer to employer Denis Carmody as a full time malt production operator under the terms of the *Malt Industry Award* and any applicable industrial agreement between the parties."

6 The respondent opposed this claim.

7 The matter was referred for hearing on 7 September 2001 and heard on 19 October 2001. Having heard the matter, the Commissioner at first instance, determined that Mr Carmody be offered employment by the respondent employer. There is no appeal against that decision.

Application No 1394 of 2001 – The Application to vary the Award

8 By the second application, No 1394 of 2001, lodged in the Commission on 27 July 2001, the appellant organisation sought variation of the *Malting Industry Award 1993* (hereinafter referred to as "the award") by the insertion of two clauses as follows:-

"Clause 8A. – Part time Employees

(It is not necessary to reproduce clause 8A because that clause was inserted by consent in the award and its insertion is not the subject of this appeal).

Clause 23. – Use of Contractors

(1) This clause shall apply only to Kirin Australia Pty Ltd ("Kirin").

(2) All work falling within the classifications covered by this award or any industrial agreement between the union and Kirin shall only be performed by persons employed directly by Kirin.

(3) Provided that subclause 2 shall not apply for engagements not exceeding 3 months where—

1. temporary coverage for an employee on leave is required

2. for seasonal reasons there is a temporary increase in the need for labour

3. an emergency or breakdown necessitates increased or specialised labour which Kirin's employees are unable to provide.

(4) The period of 3 months referred to in subclause (3) may be extended by consent of the union provided that consent shall not be unreasonably withheld.

(5) No work referred to in subclause (2) shall be let out to contractors unless the contractor's employees are paid in accordance with the terms and conditions of this award and any agreement between the union and Kirin."

9 The only other respondent to the award, Joe White Maltings Ltd was not represented and did not appear at the hearing.

10 The reasons advanced by the union for the insertion of the proposed clauses were as follows.

(a) Clause 8A:-

"The applicant seeks the insertion of this clause to increase the modes of employment available to the employer thereby increasing flexibility and maintaining the relevance of the award for modern work practices."

(b) Clause 23:-

This clause was required because Kirin has employed and continues to engage long term labour by way of labour hire firms and thereby avoid payment of the terms and conditions of employment for the working question which terms and conditions are agreed between the appellant and Kirin as being fair and reasonable.

11 Kirin consented to the inclusion of the proposed Clause 8A, but did not consent to the inclusion of the proposed Clause 23, and indeed opposed its inclusion.

12 The reason advanced was that the proposed Clause 23 would impose restrictions on the employer's right to engage contractors and upon its right to engage persons under terms and conditions determined by the employer.

BACKGROUND

13 There was evidence before the Commissioner, at first instance, from Mr Denis Patrick Carmody, a member of the BBEIU, and Mr Ronald James Murphy, the Secretary of the BBEIU. There was evidence given for Kirin by Mr Naoki Inoue, the Financial Director and Secretary of Kirin.

14 Kirin, which commenced its malt production business in Western Australia in 1978, processes malt for sale to brewers of beer. The only other such enterprise in this State is Joe White Maltings Ltd.

15 Both of those companies are named parties to the *Malting Industry Award* 1993 (No A6 of 1993). BBEIU is also a party to the award (see Schedule A of the award) and is an organisation of employees duly registered under the Act.

16 The Scope clause of the award, Clause 2 applied the provisions to the two companies which are the only employer parties to the award and to "employees engaged" by them in the classification contained in the award.

17 Both employers employ "Malt Production Operators" which classification is defined in the award, Clause 6(2) "to mean and be deemed to be a classification consisting of various levels of employee who handles malt or barley or work specifically associated with a malthouse". "Malthouse" is not defined in the award.

18 However, it was common ground between the parties that the applications related to "Malt Production Operators", although the variation would, on its face, apply to all employees covered by the award.

19 It should be noted that Clause 2 – Scope of the Award, provides that the provisions of the award applies to parties named in the Schedule attached to (the) award and the employees engaged by the employer in the classifications contained in this award.

20 Joe White Maltings Ltd was not involved in the proceedings because all of its employees are covered by workplace agreements.

21 There was evidence for the respondent from Mr Naoki Inoue, as to a number of facts which I recite hereunder and which were not in issue.

22 The background to the making of the industrial agreements (as defined in s.7 of the Act), was that Kirin and the BBEIU entered into such an industrial agreement in 1997, and that until March 2000 Kirin attempted to contain or reduce labour costs through negotiations with the BBEIU. In other words there was a history of industrial agreements during that time, based on the award.

23 Kirin next attempted to contain labour costs through negotiation of individual agreements directly with its employees, but these attempts were abandoned because the employees refused to enter into the proposed agreements.

24 In March 2000, Kirin withdrew from the existing industrial agreement and returned to the award conditions as a safety net above which conditions could be negotiated.

25 Between March 2000 and 11 August 2000 Kirin experienced a period of low level industrial disputation, with no industrial action occurring.

26 The industrial disputation was resolved by this Commission making orders to register the two hereinafter mentioned agreements by consent:-

"(a) Kirin Australia ("Fitters") Enterprise Agreement 2000 which expired on 11 August 2001; and

(b) Kirin Australia Enterprise Agreement 2000 (80 WAIG 5669) which expired on 8 November 2001."

(The latter covered malt production operators, inter alia).

(At the time when the order appealed against was made the second agreement (the agreement applying to the malt production operations), had not expired).

27 Mr Denis Patrick Carmody commenced work at Kirin's premises on 28 September 1999. He was employed by an employee hire company called Westaff. He worked as a malt production operator.

28 It is unnecessary to deal further with Mr Carmody's situation other than to note that the Commissioner, at first instance, accepted that he had been promised employment by the respondent itself after three months, which promise had not been honoured and the Commissioner, having heard and determined the application, ordered that he be offered such employment.

29 The most relevant evidence in support of the application to vary the award was that of Mr Murphy who gave evidence that, before Mr Giuliani, a long term employee on an enterprise bargaining agreement finished his employment, two additional employees were brought on through labour hire companies; and they were being trained on the malt production operation. They were from Drake Industrial and Westaff respectively. Labour hire firm employees were also referred to in evidence as contractors.

30 He said that there were eight out of the nine malt production employees who were on enterprise bargaining agreements at Kirin, at the time of the hearing, at first instance. Now there are only seven – with the two hired employees.

31 Mr Murphy made it clear (see page 43 (AB)) that Kirin had used contractors labour hire employees in the past and have been doing it, at least, since September 1999. It had done so before that time when there were shutdowns and people were brought in to assist with the plants maintenance, and for finite periods.

32 Persons were also brought in on one or two occasions to work when there was not a shutdown, but never for a long time. No employee had lost a benefit of his employment because a contractor was engaged, or was dismissed because a

contractor was taken on. He was, however, able to say that all of Kirin's employees were less secure now that there were contract workers on the site. He agreed that Kirin had not threatened to dismiss the union member employees. The insecurity, he said, existed because Kirin had demonstrated that they could engage people through a labour hire company at a lesser rate. He said that Kirin had abused its right to engage contractors and it was unfair for a number of reasons. First, he said that he believed that any employee or person engaged in full-time employment in malt production at Kirin's was entitled to the conditions agreed upon between Kirin and the union. He agreed that there was a justifiable case for labour hire "for extraordinary means" and that the union operates its own local hire company. He did not dispute that Joe White Maltings Ltd was a significantly larger "player". He agreed that the first clause of Clause 23 expressly excludes or rather only includes Kirin in the use of contractor's proposal. He did not agree that that led to a competitive disadvantage. Labour hire in the past had been used for malt production operators and fitters, but not for a long period of time, and it may be while someone was on extended leave, his evidence was.

33 Significantly, The Kirin Australia Enterprise Agreement ("the agreement"), was registered by consent of the parties, as I have observed.

34 The agreement did not, according to Mr Inoue, deliver any significant reduction in Kirin's labour costs. Thus, he said, Kirin still needed to look for further options to reduce costs. Mr Inoue in evidence too, (page 120 (AB)) said "historically Kirin has employed its own work force and relied on contractors only at peak times. It has enjoyed a right to use contractors and has always exercised that right responsibly". That is clear evidence of the limited use of hire firm employees also called "contractors".

35 Mr Inoue made it quite clear in evidence that Kirin considered and decided to use labour hire from "external labour suppliers" instead of direct employment. Indeed, these resulted in significant savings "and make labour hire financially attractive compared with the cost of direct employment" Mr Inoue said. There are other benefits to which Mr Inoue referred in evidence (see page 122 (AB)).

36 On 27 September 1999, Mr Carmody's services were provided to Kirin by a labour hire firm, Westaff. This experiment, Mr Inoue said, proved successful in that the cost of obtaining his services from Westaff was up to 30 percent lower than the cost of engaging him as a full-time employee. When it became necessary to reduce Kirin's labour requirement, the arrangement it had with Westaff enabled it to reduce labour hours by eight per week at no cost and at reasonably short notice.

37 At the hearing the Commissioner, at first instance, was informed, quite clearly in evidence, by Mr Inoue that Kirin had decided to increase the number of people which it engaged through external labour suppliers and to expand on the success of its labour hire strategy. Mr Inoue said that it did not propose to take any action which would disadvantage any of its permanent employees "by comparison to their current entitlements".

38 Of significance, too, was that there are only two employers in the malt industry. Joe White Maltings Ltd employs persons, as I have said, only on workplace agreements so that the actuality is that the award applies to the respondent (see page 115 (AB)).

FINDINGS AT FIRST INSTANCE

39 I refer to the findings made at first instance, relevant to this appeal.

40 The Commissioner found that Kirin decided to engage in the further hire of labour through labour hire firms to reduce the cost of engaging full-time employees. This was as a result of not achieving sufficient reduction in wages costs as a result of the agreement.

41 As a result there was a strategy entered into of hiring labour through external labour suppliers to reduce costs and increase flexibility. Therefore having made the offer of employment to Mr Carmody, conditional upon only the settlement and negotiations between the union, and those negotiations having been completed and the company not having been satisfied, Mr Carmody was then caught in the revised strategy to source new labour from external labour suppliers to reduce costs.

42 The Commissioner went on to find that the "balance of equity" lay with Mr Carmody's case and that he should have been provided with full-time employment directly by the respondent as a malt processing operator.

43 The condition precedent to the finalisation of his employment at exhibit DC1.4 was a finalisation of negotiation with the union which condition was fulfilled and the resulting agreement was registered by the Commission in November 2000. This refusal to employ Mr Carmody, he found to be unfair.

44 However, the Commissioner went on to dismiss the application to vary the award because he was of opinion that, having regard to s.26 of the Act, the application cut across some of the already established practice in the industry regarding engagement of contractors for "short fall" work. He was of the view that such a clause would put an obligation on the employer which was not due. Whilst the Commissioner did not accept Mr Heathcote's submission on behalf of Kirin that the matter takes away the rights of the employer in the conduct of his business, he found that the application did, particularly in respect of Clause 25.5 (sic), make a third party, the contractor, apply the rates of the award and agreement; and in that sense, he held the clause also extended too far.

45 He went on to finally dismiss the application for award variation for the reasons which he had expressed.

ISSUES AND CONCLUSIONS

Discretionary Decision - Principles

46 The decision made in this matter was a discretionary decision as that is defined in *Norbis v Norbis* (1986) 161 CLR 513.

47 The grounds of appeal were directed only to a complaint that there had been a miscarriage in the exercise of the discretion at first instance. Of course, it is for the appellant to establish that the Commissioner at first instance erred in the exercise of its discretion 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)).

48 The Full Bench has no warrant to interfere with the exercise of the discretion at first instance, and, in particular, cannot substitute the exercise of the Full Bench's discretion for that of the Commissioner, at first instance, unless it is established that the Commissioner erred in accordance with the principles laid down in *House v The King* (op cit) and *Gromark Packaging v FMWU* (op cit).

Effect of the variation

49 What was sought to be effected by the variation, was that Kirin should, by the award, be bound to employ only employees falling within the classifications covered by the award (which includes malt production operators) if they were employed directly by Kirin.

50 In other words no person could be engaged to do that work who was a "contractor" or who was hired from a labour hire company.

51 This prohibition would not affect the engagement of persons for periods not exceeding three months; where temporary coverage for an employee on leave was required, or to cover a temporary seasonal increase in labour needs; or where an emergency or breakdown necessitates increased or specialised labour; or, in the case of specialised or increased labour, which Kirin employees are unable to provide.

52 Next, the variation if made, could prevent the respondent from employing labour hire firm employees or "contractors" on lesser wages and conditions than directly employed labour who are covered by the award and any agreement based on the award.

The decision and the issues

53 There was little dispute about the facts.

54 What was open to the Commissioner to find (see the evidence of Mr Murphy and Mr Inoue) and what it should have found, was that there was no evidence that contract or labour hire company employees were used, except from time to time when there were shutdowns to enable maintenance to be carried out, and sometimes while staff were on leave before September 1999.

55 It was also open to find (on Mr Inoue's evidence) that, shortly before September 1999, the respondent had decided that in order to attempt to reduce employment costs it would engage employees of labour hire firms to work for it. Mr Carmody was one such person. This was successful and the respondent intends now to embark on such a course of labour hire on an expanded basis. This was because the respondent wanted to reduce its costs and alter or reduce the number of hours of work to better fit operational requirements. Further, of course, the labour hire employees received a wage 30 percent less than that payable under the agreement to those employees covered by the award and the agreement, and the total wage bill accordingly reduced.

56 It was also open to the Commissioner, at first instance, to find that the respondent did not intend, and had not intended to reduce its employees' conditions of employment or disadvantage them in relation to their current entitlements, I must say however.

57 It was quite clear, on the evidence, and it was open to so find, and should have been found, it being Mr Inoue's evidence, that the respondent engaged contractors for the purpose of avoiding payment of the rates prescribed by the industrial agreement, and, include that wages up to 30 percent less than those payable under the industrial agreement were payable to labour hire employees and to reduce costs and the hours of work.

58 It was also open to find, and it should have been found, as a fact, that within twelve months of entering into a consent agreement in order to settle industrial disputation the respondent was engaging persons on a planned basis to reduce the expense of its award or enterprise bargaining agreement workforce.

Grounds of appeal

59 I now deal with the grounds of appeal.

60 It was submitted that the Commissioner, at first instance, erred in the exercise of his discretion in that he gave no weight to the scheme of the Act.

61 It was the respondent's case that the Commissioner, at first instance, had not erred in the exercise of his discretion.

62 I have carefully considered all of the submissions made to me in relation to the grounds of appeal.

63 It was a relevant fact, as the Commission should have found, that whilst a party to consent industrial agreements, the most recent of which was entered into by consent to put an end to industrial disputation, the respondent embarked upon a new systematic and alternative labour recruitment programme using labour hire for employees in order to reduce labour costs and hours, as I have outlined above, and as was clearly asserted in evidence by Mr Inoue.

64 It is difficult to reconcile that approach with the fact that an industrial agreement, fixing the wages and conditions of employees, was entered into whilst this process was being embarked upon.

65 It was the fact, as all of the evidence revealed, that before that plan was embarked upon, labour hire employees or temporary employees were not engaged or used except in times of shut down and maintenance, or to fill in during leave and always on a very short term basis, called "short fall".

66 The use of labour hire employees embarked upon from about September 1999 onwards was the fruit of a decision which became even firmer later, namely to engage a bigger component of work force in the form of labour hire from labour hire employers. This was not on a short term basis or to fill in for short falls, or for any of the limited purposes for which labour hire or "contract" employees were engaged in the past. Simply as a matter of fact there was no custom or practice similar to the practice embarked upon after September 1999 in relation to the use of labour hire firm employees. The Commissioner himself so found, and found correctly.

67 In any event, there was no custom or practice within the plain English meaning of either word, or within the legal definition of that phrase. I say that because there was no habitual custom or practice or usual way of acting in given circumstances, (see the Macquarie Dictionary) which reflected an unlimited, in time numbers of employees and/or otherwise, the proposed or actual use of labour hire employees as a permanent or substantial part of the work force, in lieu of directly employed persons who enjoyed the benefits of the award or any agreement based on it.

68 Further, there was no question in this matter of the implication into any contract of employment, of a "crystallised" custom as there was in *Byrne and Frew v Australian Airlines Ltd* [1995] 185 CLR 410.

69 As to custom otherwise, the custom must be established to be the custom of the industry generally and not merely the practice of a particular employer. It must be generally recognised too, throughout a calling or locality (see *Ivanhoe Gold Mine v Wood* (1923) 27 WALR 20).

70 Further, it must be notorious, certain, reasonable and must not offend against the intention of any enactment or an award (see per Dwyer P in *AWU (Goldfields) v Lake View and Star* (1936) 16 WAIG 344). In this case the practice adopted by one employer, not the whole industry, was not a custom within the meaning of the industrial law for those reasons. It was not notorious. It was not industry wide.

71 In any event there was, as I have observed, no practice until 1999 of employment of labour hire employees on anything but a short term basis and for restrictive objects and limited labour requirements.

72 The Commission expressly dismissed the application for two reasons. One was because of what he called an established custom in the industry regarding engagement of contractors or labour hire firm employees, for short term work, which itself

was not a contract. I have already commented above on the limited nature of that practice and the fact that it was not a custom as such, across the industry. There was no custom and practice which would be "cut across" by the variation sought. Indeed if there were a custom and practice in employment of "contractors" and labour hire employees, it was more accurately reflected in the variation sought and, in the limited terms applied in the variation.

73 Next, the Commission expressed a view that the new Clause 23 took the matter too far by binding a third party to rates agreed between the respondent and the applicant, at first instance.

74 First I must say that that is not so because no third party is bound by such a provision, and could not be. Only the respondent is. Whether a labour hire firm agrees that the amounts at which it hires its employees to the respondent should be the rates which the respondent has agreed to pay, is a matter for that labour hire firm. Presumably it does not hire to the respondent if the price is not acceptable, whatever the reason for that is. The Commission erred in finding as it did in that respect.

75 Further, there is no evidence that there is any such custom and practice in either the ordinary meaning or the legal meaning of that phrase which is contrary to what the variation would apply in any significant term.

76 Next, the question of whether the variation sought would affect any competitiveness between Joe White Maltings Ltd and the respondent was not directly before the Commission. The Commissioner observed correctly that he did not know about the respondent's competitiveness vis a vis Joe White Maltings Ltd.

77 There was no evidence on which he could have found otherwise.

78 Indeed, it was clearly expressed to us in any event that Joe White Maltings Ltd employees were all subject to workplace agreements and not at all subject to the terms of the award or any agreement based on it.

79 It seems to me, therefore, that in the absence of evidence to the contrary, and if it were at all a matter properly raised on this appeal, which I doubt, then it would be entirely academic, if not futile, to seek to vary the award to cover Joe White Maltings Ltd employees, or to suggest that the failure to cover them was at all unfair, when they were all on workplace agreements; and when by that very fact it would difficult to equate labour hire firm employees to workplace employment employees; and when s.26A prohibits the Commission from examining the terms of any workplace agreements.

80 It was submitted, as was the fact, that the conditions and wages applicable to the existing award employees had not been reduced. It was also the fact that the company does not propose to take any action which would disadvantage any of the permanent employees by comparison to their current entitlements. That, in my opinion, is not a factor which is at all favourable to the respondent given that the respondent could not contract out of the industrial agreement or the award without committing a breach of s.114 of the Act, and is bound not to do so. All that can be said about that fact is that if the respondent were to seek to do otherwise, then it would be grossly unfavourable to it on any proper consideration of the equity and good conscience of the application.

81 Another factor, of course, was that the respondent embarked on a systematic process of employing labour hire employees at a reduced rate at the same time as it had entered into an industrial agreement, by consent with BBEIU, to resolve industrial disputation between them. That leads me to deal with the submission that it was contrary to the intent of the Act, the award and the Wage Fixing Principles to, in effect, permit the respondent to avoid the operation of an industrial agreement which was extant at the time the application, at first instance, was made and heard and the order appealed against was made.

82 S.6(a) reads as follows:-

> "(a) to promote goodwill in industry;"

83 S.6(c), which is also a principle object of the Act, reads as follows:-

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

84 S.6(d), which is also an object of the Act, reads as follows:-

> "(d) to provide for the observance and enforcement of agreements and awards made for the prevention or settlement of industrial disputes;"

85 In my opinion it is not, on the face of it, conducive to the promotion of goodwill in industry to permit the avoidance of the operation of an agreement clearly directed to covering the whole of the permanent directly employed workforce by the use of labour hire firm staff. I say that because inevitably labour hire staff use was to be directed to the replacement of directly employed persons. Further, the labour hire staff are paid 30 percent lesser rates which, on Mr Murphy's evidence, was a cause of insecurity in the respondent's employees.

86 Next, it would be correct to say that the object of the Act to provide a means for preventing and settling industrial disputes, which clearly was implemented in this case by the registration of a consent agreement, would not be advanced by refusing to vary the award to prevent the circumvention of an agreement which was consented to in order to settle disputation, in the manner in which it has occurred in this case (see s.6(c)).

87 S.6(d) would not at all be advanced by allowing agreements not to be observed directly or circumvented indirectly or enforced when the agreement had been reached, particularly by consent, for the settlement of an industrial dispute. It is, of course, clear that the act of engaging labour hire firm employees during the course of the industrial agreement, on the basis on which this was done, has lead to a dispute which was sought to be resolved by the award variation applied for at first instance.

88 It is difficult for me to see that s.49A is, on the face of it, relevant to a consideration of this matter; nor do I see the appendix to the award concerning dispute resolution to be relevant.

89 Those provisions deal with the requirement and the mechanism for dispute resolution in awards. The application, at first instance, sought to deal with a matter which had given rise to a dispute sought to be resolved by variation of the award.

90 It is, in any event, quite clear that the Commission correctly took account of the following relevant factors in the context of s.6(a), (b) and (d) of the Act and the Wage Fixing Principles (see *Re Minister for Labour Relations and Others* (2001) 81 WAIG 1721).

91 The Commission correctly held that the nature of the Act and the nature of the Wage Fixing Principles are to provide an orderly structure for the conduct of industrial relations and are fundamental to the conduct of industrial relations.

92 Correctly, and relevantly as well, the Commissioner adverted to the existence of an award, its operation, and an agreement which took time to complete. That, of course, was correctly a recognition of the existence of the agreement, how it came about, and the effect of the respondent's act which, in effect, represented a circumvention of it. It follows that the

Commissioner recognised correctly that the appellant sought to prevent that and future circumventions of the agreement or the award by the application to vary the award.

WAGE FIXING PRINCIPLES – THEIR APPLICATION

93 It is necessary to consider this matter and the appeal generally in the context of Mr Schapper's concession and submission (see page 23 of the transcript on appeal) which were that "the award should have been varied by inserting the new clause 8A, but also by omitting subclause 5 of clause 23", and inserting clause 23(1 to 4).

94 This would mean that there would be no requirement in the new clause 23 that no work be let out unless the contractors' employees were paid in accordance with the terms and conditions of the award or any agreement between BEBIU and Kirin.

95 Thus the new clause 23 would provide only that all of the work falling within the classifications of the award would be performed by persons employed directly by Kirin and further, would limit the use of hire firm employees by Kirin.

96 The appellant's case, at first instance, was clearly directed at that and the variation sought was directed only at the limitation of the use of hire firm employees, not the right of the employer to use outside contractors with their own employees.

97 Mr Heathcote, for the respondent, made a submission that the application was, in any event, not dealt with in accordance with the Wage Fixing Principles in that, it could only be dealt with by the Commission in Court Session and not by a single Commissioner, as in fact was the case. It was common ground that that submission was not made at first instance, and it was somewhat unhelpful that it was not. Indeed to all intents and purposes the matter proceeded before the Commission, at first instance, constituted by a single Commissioner on the basis that the application was able to be decided by the Commission, at first instance, and the Commission, at first instance, constituted by a single Commissioner accordingly, without objection, decided the matter.

98 Mr Schapper opposed the question of the Wage Fixing Principles and the compliance with them or non compliance with them being raised on appeal when it had not been raised at first instance. Indeed, it could not prima facie be raised (see s.49(4) and see also *Metwally v University of Wollongong* (1985) 60 ALR 68 (HC)). That is authority for the proposition that since the point was not argued or raised, at first instance, and then in the circumstances of this case, the respondent should be bound by the case which it had "run" at first instance. It was not part of that case of either party, at first instance, that the Wage Fixing Principles were not complied with because the matter was not heard by a Commission in Court Session.

99 Of course, if the fact that the matter was heard by a single Commissioner instead of the Commission in Court Session constituted a jurisdictional error, then the respondent would not be excluded upon this appeal by the doctrine in *Metwally v University of Wollongong* (op cit) from arguing that there was no jurisdiction or that the matter had been heard by a jurisdictional error, at first instance (see *SGS Australia Pty Ltd v Taylor* (1993) 73 WAIG 2328 (FB)).

100 The law is also quite clear that the Commission, constituted by a single Commissioner, is bound by a general order of the Commission; and, where the principles are, as is the case here, prescribed as part of a general order giving effect to a national wage decision, then they bind the Commission constituted by a single Commissioner, and the Commissioner is required to apply those principles (see *RRIA v AMWSU and Others* (1993) 73 WAIG 1993 at 1998-9 per Nicholson J with whom Wallwork and Owen JJ agreed (IAC)).

101 As to the Wage Fixing Principles see *In The Matter of the State Wage Case* and in *Re The Minister for Labour Relations and Others* (op cit). If the Commission fails to apply those principles, that is more than an error committed by failure to have regard to a relevant consideration because the Commission is bound to apply the principles.

102 It is also, of course, a failure to have regard to a relevant consideration because the principles by prescription are entirely relevant.

103 The next question is whether such an error, if made, is a jurisdictional error, that is that the Commission acted without jurisdiction or, put another way, committed a jurisdictional error. It was a condition of the exercise of jurisdiction in this case that the Commissioner, at first instance, applied the Wage Fixing Principles if, on a proper construction of their terms, they were applicable (see *Re Robins SM; Ex parte WA Newspapers Ltd* (1999) 20 WAR 511 at pages 520-1 per Ipp J with whom Pidgeon and Steytler JJ agreed, and the cases cited therein).

104 It is fair to say that I do not think that there was a constructive failure to exercise jurisdiction within the meaning of that term as used by Gaudron J in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 75ALJR 889 at 903-4 (HC).

105 The crucial question is, of course, whether the principles in their terms were applicable to the application, at first instance. If they were not, there was no jurisdictional error because the Commissioner was not bound to apply them. It was the case for the respondent that the principles were applicable and that the matter should have been heard by a Commission in Court Session after being referred by the Chief Commissioner. It was the case for the appellant that they were not.

106 It was common ground that if the Wage Fixing Principles were applicable, this could only be because of the operation of Principles 1, 2 and 10. It is to be noted that the principles are Wage Fixing Principles (my emphasis). They do not purport to govern other industrial matters, save and accept as such matters are prescribed in the actual terms of the principles.

107 First, what is clearly expressed by Principle 1, is that existing wages and conditions in an award or a relevant agreement of the Commission, constitutes the safety net which protects employees who may be unable to reach an industrial agreement.

108 Second, by virtue of Principle 2, there is a prescription of those instances when an award or agreement may be varied (or another award made), without the claim being regarded as above or below the safety net. All of the exceptions relate specifically to wages or related matters, namely structural efficiency or productivity. The principles otherwise refer to work value and wage rates, hours of work, safety net adjustments and the minimum adult award wage. There is no doubt that an application to insert Clause 23 is not authorised to be made by Principle 2. The question is whether the principles, read as a whole, on a fair reading of the principles, forbids such an application being made to a single Commissioner.

109 Clause 10 regulates the making of an application to vary "wages or conditions" above or below the safety net, which application can only be made to the Commission in Court Session if the Chief Commissioner refers such an application.

110 The safety net is of course the award in its existing terms. It is entirely plain, on a fair reading of the whole of the principles, that the safety net which the award provides, was not at all sought to be varied by the application to insert Clause 23 (with Clause 23(5) omitted). I do not, of course, say that with Clause 23(5) the application would be an application to vary the award qua safety net. Further, there is a clear relationship between the words "wages" and "conditions" used in the phrase "wages or conditions", in Principle 10. Thus, if the conditions do not bear a relationship to

wages, since the principles are Wage Fixing Principles, then the application is not one to which Principle 10 can apply or does apply.

111 The application insofar as it related to the insertion of Clause 23 without the proposed Clause 23(5), was not an application to vary wages or conditions within the meaning of Clause 10. The application bore no relationship to "wages and conditions" and sought no variation of the award as a safety net. Indeed it was the clear evidence that the practice which it sought be regulated, did not affect existing conditions of employment. The new Clause 23 sought and seeks merely to preserve the employment of directly employed employees and limit the use of hire firm employees, or alternatively formally provide further use.

112 The application and its subject matter, in that respect, were not matters to which the Wage Fixing Principles, on a fair reading of them as a whole, could or did apply. There is no element of influence upon wages, hours, conditions, flexibility, efficiency etc, in the variation sought. The Commission had jurisdiction and power sitting alone to grant the application and should have done so for the reasons which I have advanced above.

CLAUSE 8A

113 The new Clause 8A which was sought to be inserted is palpably indifferent case. Clause 8A deals with hours of work, variations in rates, and conditions of employment in the wage fixing principle sense of the word in relation to part time employees.

114 The application could only be dealt with by the Commission, in Court Session, on reference from the Chief Commissioner, according to the prescription of Principle 10. That this did not occur constituted a jurisdictional error which should be corrected. Hence, the decision to dismiss the application in that respect could not be held to be in error. I would add, however, that as I read the grounds of appeal, they do not constitute an appeal against the inclusion of the new Clause 8A.

INDUSTRIAL MATTER

115 There was one other matter which I would wish to make some comment upon. I am not at all persuaded, despite Mr Schapper's concession that the application to insert the proposed Clause 23(5) in the award was outside jurisdiction, a concession which seemed to be implicit in his not pursuing that part of the appeal, that the application to insert such a clause and the resultant order sought by the application were not industrial matters or within jurisdiction.

116 In my opinion, cases such as *R v Commonwealth Industrial Court Judges; Ex parte Cocks* (1968) 121 CLR 313 and *R v Moore Ex parte FMWU* (1978) 140 CLR 470 and *ALHMWU v Abergeldie – St Andrew's Hospital Inc* (1995) 37 AILR 3-001, are distinguishable on the facts and by reference to the narrow definition of "industrial dispute" in the Federal legislation, from the facts in this case and the definition in s.7 of the Act of the phrase "industrial matter".

117 In my opinion, an apposite authority because of the greater similarity in the two definitions of "industrial matter" in s.7 of the Act and in the South Australian Act, the Industrial Conciliation and Arbitration Act 1972-9 (s.25), is *The Queen v Industrial Commission of South Australia; ex parte Master Builders' Association of SA Inc* (1981) 26 SASR 535 at 537-8 per King CJ (Mohr J agreeing) and Zelling J (In Banco).

FINALLY

118 In my opinion, the Commission erred in making findings in error and in not having regard to a number of relevant matters which I have explained above. It is quite clear that the appellant, for those reasons, has established error in the exercise of the discretion, in accordance with *House v The King* (op cit). For my part the findings which the Commission made and the relevant factors above which should have been considered, and some of which were, would enable me, for the reasons which I have expressed, to say that the Full Bench should substitute the exercise of its discretion for the exercise of the discretion, at first instance, and grant the application, the equity, good conscience and substantial merits of the case and a proper exercise of discretion requiring it.

119 That being so, there is no need to put and no point in putting the parties to inconvenience and expense by remitting the matter.

120 I would therefore, for those reasons, uphold the appeal, insofar as it relates to the failure to grant the application to vary by inserting the new Clause 23 without Clause 23(5), and issue a minute of proposed order to reflect the variation sought by the application, namely the insertion of that clause, as expressed in the application at first instance. I would otherwise hold that the dismissal was correct and otherwise dismiss the appeal insofar as it might bear upon the failure to insert Clause 8A.

121 I would order accordingly.

COMMISSIONER GREGOR AND COMMISSIONER SMITH—

122 The matter subject to the appeal arises from decisions of the Commission in dealing with two Applications, No. CR169 of 2001 and Application 1394 of 2001. The determination in Application No. CR169 of 2001 finalised that matter however that relating to Application No. 1394 of 2001 gave rise to No. FBA56 of 2001.

123 Application No. 1394 of 2001 seeks orders from the Commission to vary the Malting Industry Award 1993 by inserting a Clause 8A. – Part Time Employees and Clause 23. – Use of Contractors. It appears from the Reasons for Decision at first instance that the Commission was of the opinion that if the claim to insert Clause 23 failed then, the claim for the new Clause 8A. – Part Time Employees also fell away.

124 In dealing with the award variation at paragraph 20 of the Reasons for Decision the Commission at first instance wrote as follows—

> *"I turn to the other application that is the award variation, application 1394 of 2001. Mr Schapper advises me the application should stand as one and having read the application and having heard you both today, can I say that I have some sympathy for the view put by Mr Schapper that the nature of the Act, and the nature of the wage fixing principles, are to provide an orderly structure and form to the conduct of industrial relations and that at base, in both the Act and the principles, parties are bound by the agreements they make. That is fundamental to the conduct of industrial relations, I think generally, but certainly within the jurisdiction that I deal." (AB016)*

125 It is clear that the Commissioner had cognizance of the importance of the Wage Fixing Principles, however not sufficiently according to the Appellant because the grounds of appeal in paragraph 1(a) are as follows: (AB002)

> *"1. In dismissing the application the Commission erred in the exercise of its discretion in that the Commission—*
> *(a) failed to give any or any sufficient weight to the scheme of the Act and/or the wage fixing principles*
> *(b) ...*
> *(c) ...*
> *(d) ...*
> *(e) ..."*

126 Mr Schapper (of Counsel) who appeared for the Appellant, submits that the Commission at first instance clearly failed to attach any weight to the matters referred to in paragraph 20 of the Reasons for Decision among which is the weight which ought to have been given to the Wage Principles. It is argued on behalf of the Appellant that the thrust of the Principles is that industrial agreements are to be the prime means by which improvements in wages and conditions of employment were to be secured and that it is contrary to the spirit of the Principles to allow parties to contract out and sidestep industrial agreements they make. In particular clause 1 of the Principles sets out this policy. However the Appellant argues that Principle 10 does not apply because the Union's application to amend the award is not to vary the award above or below the award safety net.

127 In its argument the Respondent concedes that the Commission is required to abide by the Principles. It claims that Principle 1 was irrelevant to the matter given the observations of the Commission at first instance that the relevant employees were covered by both an award and an agreement. Principle 2 was of greater significance because it sets out matters with which the Commission constituted by a single Commissioner might deal without working outside the safety net. The Respondent's submission was that the Commission had rightly concluded that there is no Principle upon which he could decide the application. The Respondent also argued that the application before the Commission at first instance did not fit into any of the categories set out in (a) to (h) of Principle 2, and was therefore outside the safety net and subject to Principle 10. Although the Respondent in its written submissions did not cast this argument in the alternative, clearly such an argument is cast in the alternative.

128 We now consider these submissions. The Schedule to the Statement of Principles issued by the Commission in Court Session in June 2001 (81 WAIG 721) describes the Principles to be applied by the Commission. It is our view that those relevant to the disposition of this appeal are as follows—

> **1.** "**Role of Arbitration and the Award Safety Net**
>
> Existing wages and conditions in awards and relevant agreements of the Commission constitute the safety net which protects employees who may be unable to reach an industrial agreement.
>
> **2.** **When an Award or relevant Agreement may be varied or another Award made without the claim being regarded as above or below the Safety Net—**
>
> In the following circumstances an award or relevant agreement may, on application, be varied or another award made without the application being regarded as a claim for wages and/or conditions above or below the award safety net—
>
> (a) to include previous State Wage Case increases in accordance with Principle 3.
>
> (b) to incorporate test case standards in accordance with Principle 4.
>
> (c) to adjust allowances and service increments in accordance with Principle 5.
>
> (d) to adjust wages pursuant to work value changes in accordance with Principle 6.
>
> (e) to reduce standard hours to 38 per week in accordance with Principle 7.
>
> (f) to adjust wages for arbitrated safety net adjustments in accordance with Principle 8.
>
> (g) to vary an Award or relevant Agreement to include the Minimum Adult Wage in accordance with Principle 9.
>
> (h) a consent variation to a single enterprise specific award or a consent replacement award to a single enterprise specific award under Principle 10 giving effect to structural efficiency initiatives or productivity based arrangements.
>
> **10.** **Making or Varying an Award or issuing an Order which has the effect of varying wages or conditions above or below the safety net**
>
> An application or reference for a variation in wages or conditions above or below the safety net will be referred to the Chief Commissioner for determination by the Commission in Court Session.
>
> A party seeking such a claim must support it with material justifying—
>
> - why the matter has not been progressed and/or finalised pursuant to s.41 of the Act;
> - why the matter has not been pursued under any other Principle set out in this Statement; and
> - how in the discharge of its statutory function to consider varying above or below the safety net the Commission should take into account, to the extent that it is relevant, each of the matters identified in section 26 of the Act.
>
> Provided that where parties to a single enterprise specific award apply to vary the award by consent or consent to a replacement award to give effect to structural efficiency initiatives or productivity based arrangements the Chief Commissioner may allocate the matter to a single Commissioner.
>
> **11.** **First Award and Extension to an existing Award**
>
> The following shall apply to the making of a first award and an extension to an existing award
>
> (c) In the extension of an existing award to new work or to award-free work the rates applicable to such work will be assessed by reference to the value of work already covered by the award, providing structural efficiency considerations including the minimum rates adjustment provisions where relevant have been applied to award."

129 The Commission is required to apply the Principles in determining matters before it (*Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia and Others* (1993} 73 WAIG 1993). Pursuant to Principle 1 – Role of Arbitration and the Award Safety Net, existing wages, conditions, awards and relevant agreements constitute the safety net. This means that the awards and relevant agreements as they were at the time the Statement of Principles was made are the safety net. By Principle 2 the award or relevant agreement cannot be varied by the Commission singularly constituted unless it is varied in accordance with the exceptions which are listed in paragraphs (a) to (h) of Principle 2. A variation of the safety net includes an addition to awards or relevant agreements that varies a wage or condition. If the proposed Clause 23. – Use of Contractors is inserted in the *Malt Industry Award 1993* (the Award), it would vary that award. Under Principle 2 no such variation can be made unless the variation is in one of the circumstances described in paragraphs (a) to (h) of Principle 2. The subject matter of Clause 23 is not mentioned in any of the paragraphs and therefore the claim is required by the Principles to be regarded as a claim for wages and/or conditions above or below the safety net.

130 Further it is apparent from the terms of the variations sought to the award that what is sought in relation to the proposed Clause 23 (1) to (4) is in our opinion the creation of provisions that are arguably an extension to the existing award, as the provisions seek to extend the operation of the award to award free work, in that the extension is to the circumstances under which the Respondent can engage contractors. In such a case pursuant to Principles 2 and 11 the claim must be dealt with under Principle 10. Prima facie Principle 11 appears to be invoked, as proposed clause 23(2) to (4) expressly prohibits the Respondent from engaging contractors to carry out work falling within the classifications covered by the Award or any industrial agreement unless the pre-conditions in proposed clause 23(3) and (4) are met. Presently the Respondent is unrestricted in its ability to engage contractors to carry out work covered by the classifications in the Award or the *Kirin Australia ("Fitters") Enterprise Agreement 2000* or the *Kirin Australia Enterprise Agreement 2000*. Where it engages contractors to perform such work the terms of the engagement are award free. As to proposed clause 23(5) the extension sought is not only to an extension to award free work but is to a matter that is beyond the jurisdiction of the Commission as it does not constitute an "industrial matter". Although the issue of jurisdiction in respect of proposed clause 23(5) was not the subject of argument before the Full Bench, it was conceded by counsel by the Appellant that proposed 23(5) was objectionable and could have been severed by the Commission at first instance. In our view this concession was properly made. In *R v Commonwealth Industrial Court Judges; ex parte Cocks* (1968) 121 CLR 313, the High Court held that a log of claims containing a demand that no employer shall permit any of the relevant work to be done by a contractor except in accordance with the terms of the award, did not raise a dispute as to an industrial matter. (See also *R v Moore; ex parte Federated Miscellaneous Workers' Union of Australia* (1978) 140 CLR 470 and *ALHMWU v Albergeldie – St Andrews Hospital Inc* (1995) 37 AILR 3-002).

131 Leaving aside proposed clause 23(5), it is our view that the proposed clause 23 would constitute a variation in wages or conditions, above the safety net and in that case Principle 10, must be applied. The effect of the decisions of Full Court in *The Western Australian Industrial Relations Commission; ex parte Confederation of Western Australian Industry (Incorporated)* (1992) 6 WAR 555 per Rowland J at 561 and Murray J at 574 and the Industrial Appeal Court in *Robe River Iron Associates v The Amalgamated Metal Workers and Shipwrights' Union of Western Australia* (op cit) is that by operation of s.51(2) of the Act, where a National Wage decision by General Order has been made by the Commission and in a particular case the Principles are invoked, the Commission has no discretion but to apply the Principles.

132 The Reasons for Decision of the Commission at first instance show that it did not apply the Wage Principles. The failure to do so is a jurisdictional error. A jurisdictional error arises when a court or tribunal mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist (*Craig v South Australia* (1995) 184 CLR 163 per the Court at 177). The Appellant argues that as the Respondent did not argue at first instance that the application to amend the Award should proceed under Principle 10, the Respondent should be bound by the case which it ran at first instance (*Metwally v University of Wollongong* (1985) 60 ALR 68). However the principle enunciated by the High Court in *Metwally v University of Wollongong* (op cit) prohibiting a party from raising a matter on appeal that was not raised at first instance, does not apply to a jurisdictional error of law (see *SGS Australia Pty Ltd v Taylor* (1993) 73 WAIG 2328).

133 For these reasons we are of the view that Appeal Ground 1(a) is made out.

134 As the Commission at first instance made an error going to jurisdiction, there is no need to examine the other appeal grounds. We would remit the matter back to the Commission at first instance for hearing and determination in accordance with the Decision herein.

THE PRESIDENT—

135 For those reasons, the appeal is upheld, the decision of the Commission in matter No 1394 of 2000 delivered on the 2nd of November 2001 be and is hereby suspended and the case be and is remitted to the Commission at first instance to be heard and determined according to the reasons for decision herein and according to law, and the appeal be and is otherwise hereby dismissed

Order accordingly.

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2002 WAIRC 05018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE BREWERIES AND BOTTLEYARDS EMPLOYEES' INDUSTRIAL UNION OF WORKERS OF WESTERN AUSTRALIA, APPELLANT
	v.
	KIRIN AUSTRALIA PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER J F GREGOR
	COMMISSIONER J H SMITH
DELIVERED	WEDNESDAY, 13 MARCH 2002
FILE NO/S.	FBA 56 OF 2001
CITATION NO.	2002 WAIRC 05018

Decision	Appeal upheld, decision at first instance suspended and remitted to the Commission at first instance, and appeal otherwise dismissed
Appearances	
Appellant	Mr D H Schapper (of Counsel), by leave
Respondent	Mr S Heathcote, as agent

Order

This matter having come on for hearing before the Full Bench on the 30th day of January 2002, and having heard, Mr D H Schapper (of Counsel), by leave, on behalf of the appellant, and Mr S Heathcote, as agent, on behalf of the respondent, and the Full Bench having reserved its decision in the matter, and the parties having waived their rights pursuant to s.35 of the *Industrial Relations Act 1979 (as amended),* and reasons for decision herein being delivered on the 13th day of March 2002, it is this day, the 13th day of March 2002, ordered as follows:-

(1) THAT this appeal be and is hereby upheld.

(2) THAT the decision of the Commission in matter No 1394 of 2000 delivered on the 2nd of November 2001 be and is hereby suspended and the case be and is remitted to the Commission at first instance to be heard and determined according to the reasons for decision herein and according to law.

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

By the Full Bench

(Sgd.) P. J. SHARKEY,

[L.S.] President.

2002 WAIRC 04881

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANTONY ALAN CHEESMAN, APPELLANT
	v.
	JAMCO NOMINEES PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER S WOOD
DELIVERED	THURSDAY, 28 FEBRUARY 2002
FILE NO/S.	FBA 54 OF 2001
CITATION NO.	2002 WAIRC 04881

Decision	Appeal upheld
Appearances	
Appellant	Mr M A Tedeschi (of Counsel) by leave
Respondent	Mr J Mouritz for the respondent

Reasons for Decision

THE PRESIDENT—

INTRODUCTION

1 This is an appeal by the abovenamed appellant employee against the decision of the Commissioner at first instance, constituted by a single Commissioner, in application No 628 of 2001 and brought pursuant to s.49 of *Industrial Relations Act* 1979 (as amended) (hereinafter called "the Act").

2 By the order, the Commissioner struck out an application by the abovenamed appellant, for want of prosecution, the order being dated 4 October 2001. The order was deposited in the Registry on 5 October 2001. A notice of appeal was filed herein on 7 November 2001 and served on 14 November 2001.

FRESH EVIDENCE

3 The Full Bench, without objection and having satisfied itself that it should do so in accordance with the principles laid down in *FCU v George Moss Limited* (1990) 70 WAIG 3040 at 3041 (FB), *Blakeman ATF The Blakeman Family Trust t/a McBride's Collectables and Giftware v Gudgin* (2000) 80 WAIG 457 at 460 (FB) and the cases cited therein, and without objection or cross examination, admitted as fresh evidence the affidavits of the appellant, Antony Alan Cheesman and his solicitor Peter Albert Nevin, sworn on 12 November 2001 and 6 February 2002 respectively. (We should add that the affidavits were first admitted in evidence in support of the appellant's applications to extend time).

APPLICATIONS TO EXTEND TIME

4 There were before the Full Bench applications to extend time within which to institute the appeal and within which to apply out of time for extensions of time. All were filed on 7 November 2001. The notice of appeal was therefore filed 12 days out of time. The grounds alleged in support of the application to extend time, summarised, are as follows.

5 The solicitor, having the conduct of the application, was absent from his office and the jurisdiction for the period, including 3 and 4 October 2001, the dates of the hearing and the Commissioner's decision, which it is sought to be appealed against.

6 The solicitor did not return to the office until 5 November 2001 and first became aware of the Commissioner's decision in the afternoon of that date and communicated it to the applicant.

7 The decision made against the applicant on 4 October 2001 occurred as a result of the non-attendance by the applicant's solicitor of a hearing of 3 October 2001.

8 This occurred due to an oversight by the applicant's solicitor, coupled with the absence of the applicant's solicitor from the jurisdiction, and was not the fault of the applicant personally.

9 There is little prejudice to the respondent caused by the granting of the requested time extensions because:-

(a) The period of the requested extension, namely twelve days from the last day upon which an appeal could be lodged pursuant to s.49(3), is not at all substantial.

(b) The decision made on 4 October 2001 was made when the applicant's application was at an early stage, namely prior to the convening of a conciliation conference between the parties.

(c) For reasons which appear hereinafter the appellant had a strong case.

(d) Some compensation is available in costs.

10 The delay on all of the evidence which was uncontroverted, which we accept and it was open to find, occurred as a result of the appellant's solicitor being absent from the office on leave. It was not the appellant's fault (see *Hall v Nominal Defendant* [1966] 117 CLR 423 at 435).

11 On his return from leave Mr Nevin did attend to the institution of the appeal and the filing of applications to extend time promptly.

12 It was not the appellant's fault therefore and the appellant, in all of the circumstances of this case, particularly having regard to the short delay in the lodging of the appeal and the strength of his case, should not suffer by the substantial prejudice which would be occasioned by depriving him of the opportunity to appeal (see *Ryan v Hazelby and Lester trading as Carnarvon Waste Disposals* 73 WAIG 1752 (IAC), *Tip Top Bakeries v TWU* 73 WAIG 1788 and *Rosemist Holdings Pty Ltd v Khoury* 79 WAIG 645 (FB)).

BACKGROUND

13 The file reveals that an application was filed on behalf of the applicant on 5 April 2001 and served by pre-paid post on the respondent on 5 April 2001. An answer and counter proposal were filed on 23 April 2001.

14 The application was made by the applicant employee against the respondent employer pursuant to s.29(1)(b)(i) of the Act alleging that the respondent had harshly, oppressively and unfairly dismissed the appellant employee from his employment on 12 March 2001. Indeed it was alleged that he was unfairly summarily dismissed. The claim was of course opposed.

15 Mr Nevin was informed by the applicant that he was to travel overseas for approximately two months, departing this State on 19 April 2001.

16 On 23 April 2001, Mr Nevin wrote to the Commission requesting that the appellant's application be dealt with in accordance with the Act as requesting sufficient notice of the conciliation conference date so that the appellant could participate in the conference by telephone.

17 Mr Nevin was advised by letter from the Commission dated 7 May 2001 that the application had been listed for conference before Commissioner Beech on 7 June 2001. The matter, at the request of the respondent, was adjourned until after 19 July 2001, on the uncontradicted evidence, that being the date when the appellant expected to return from overseas.

18 There was, at the time, a workers' compensation claim by the appellant against the respondent on foot, as there is and were claims in the Small Disputes Division of the Local Court, by the respondent against the appellant and the appellant against the respondent.

19 According to the evidence of Mr Nevin, which was not denied, and which we accept, it was agreed that the claim for unfair dismissal would not proceed for the time being so as to allow resolution of the claims in the small claims division of the Local Court.

20 On 5 August 2001, Mr Nevin wrote to the Associate to Commissioner Beech advising that he would write to her and inform her of the current status of the claim. He did not do so because, in the meantime, he received a letter from the Commission dated 6 September 2001 enclosing a notice that the application by the abovenamed appellant had been listed for mention in the Commission on 3 October 2001.

21 As he admitted in his evidence, Mr Nevin did not advise his client of the listing, he did not diarise it, and as a result, no practitioner from the appellant's solicitors' office attended on that date in the Commission.

22 The Commissioner then made an order dated 4 October 2001 striking out the application, there having been no attendance on behalf of the applicant or by the applicant, on the date listed for the mention of the matter in the Commission.

23 Mr Nevin's explanation was that he had been concentrating on matters relating to the workers' compensation case and had overlooked diarising the hearing date in the Commission of 3 October 2001.

24 Further, he was married on 29 September 2001 and travelled overseas on 1 October 2001, not returning to the office until 5 November 2001. He therefore overlooked the Commission hearing and did not notify any other practitioner in the firm so that that practitioner could attend.

25 On his return to the office on 5 November 2001 he learned that the application had been struck out, and immediately obtained instructions the same day to file the notice of appeal herein, which he did.

26 The appellant's evidence was corroborative of this evidence in those particulars of which he was aware. The appellant also asserted in his affidavit that he was dismissed summarily without valid reason, asserted too that he had no advance warning of allegations against him and denied the allegations of fraud and dishonesty made against him as untrue and a slur on his reputation. These assertions, as to the strength of his case, were not denied on oath but were from the bar table. However, they constitute on oath sufficient material upon which the Full Bench can and should find that the appellant has a case of sufficient strength to justify it being heard and determined in the Commission.

27 It is of course, clear that notice was duly given of the hearing by the Commission and that there was no appearance when there should have been one. It is clear too, that it was open to the Commissioner, pursuant to s.27(1)(d) of the Act to hear and determine the matter in the absence of the appellant, and to make an order striking out the proceedings in the absence of the appellant (see s.27 of the Act).

28 It is also quite clear that the fresh evidence which the Full Bench admitted would have led the Commissioner to properly find that the discretion exercised by the Commissioner at first instance miscarried, since had the fresh evidence been available to the Commissioner, it would clearly have exercised its discretion differently (see *House v The King* [1936] 55 CLR 499, *Gromark Packaging v FMWU* (1992) 73 WAIG 220 (IAC) and *McConkey v M & A's of Denmark* (2001) 81 WAIG 1561 at 1562 (FB)).

29 We say that because the fresh evidence for the Commissioner would, and ought properly lead to the following findings:-

(a) That the failure of the appellant's solicitor to attend the hearing on 3 October 2001, as a result of which the application was struck out, was not the fault of the appellant but of his solicitor.

(b) That the appellant, indeed, was not aware of the hearing and was "blameless" therefore.

(c) That he had and has always intended to pursue his application.

(d) That his claim has merit.

(e) That the injustice occasioned to the appellant by striking out or dismissing his claim which could not, in all likelihood, be brought again because of the 28 day time limit on the making of such claims (see s.29 of the Act), is far greater than the injustice occasioned to the respondent by allowing the claim to proceed. (The latter injustice is particularly slight when a conciliation conference has not even commenced) (see *McConkey v M & A's of Denmark* (FB) (op cit)).

(f) Further, as was the evidence, which should also have been accepted, the parties had agreed not to proceed further with the application for unfair dismissal while the small disputes matters completed in the Local Court.

Finally

30 Accordingly, for those reasons, and based on those findings which we would make, we agreed with my colleagues to uphold the appeal and to an order that the Full Bench should substitute the exercise of its discretion to that of the Commissioner at first instance and suspend the order appealed against, remitting the matter back to the Commission to hear, determine and otherwise deal with according to law.

Costs

31 The only compensation available to the respondent for the undoubted inconvenience suffered by it, is an award of costs which the Full Bench agreed for three hours of a Director's time engaged in preparation and the appearance at the Court, should be fairly assessed at $450.00, and it was so assessed.

32 That amount was ordered to be paid.

33 Otherwise, it should be noted that the appeal is upheld and that the order which was made was made for those reasons.

CHIEF COMMISSIONER W S COLEMAN—

34 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—

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

THE PRESIDENT—

36 For those reasons, the appeal is upheld.

Order accordingly

2002 WAIRC 04788

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	ANTONY ALAN CHEESMAN, APPELLANT
	v.
	JAMCO NOMINEES PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER S WOOD
DELIVERED	TUESDAY, 12 FEBRUARY 2002
FILE NO/S.	FBA 54 OF 2001
CITATION NO.	2002 WAIRC 04788

Decision	Appeal upheld and decision at first instance suspended and remitted back to the Commission.
Appearances	
Appellant	Mr M A Tedeschi (of Counsel) by leave.
Respondent	Mr J Mouritz

Order

This matter having come on for hearing before the Full Bench on the 12th day of February 2002, and having heard Mr M A Tedeschi (of Counsel), by leave, on behalf of the appellant and Mr J Mouritz on behalf of the respondent, and the parties having waived their rights to speak to the minutes pursuant to s.35 of the *Industrial Relations* Act 1979 (as amended), and the Full Bench having determined that its reasons for decision will issue at a future date, it is this day, the 12th day of February 2002, ordered as follows:-

(1) THAT the application to extend time within which to institute the appeal herein be and is hereby granted.

(2) THAT the application filed herein to extend time to file the appeal books in appeal No FBA 54 of 2001 out of time be and is hereby granted.

(3) THAT the applications filed herein to extend the time to make applications to extend time be and are hereby granted.

(4) THAT the application by the appellant for leave to admit fresh evidence be and is hereby granted.

(5) THAT appeal No FBA 54 of 2001 be and is hereby upheld.

(6) THAT the decision of the Commission in matter No 628 of 2001 made on the 4th day of October 2001 be and is hereby suspended and remitted back to the Commission to be heard and determined according to law.

(7) THAT the appellant do pay the costs of the respondent of and in relation to this appeal fixed at the sum of $450.00 within seven days of the 12th day of February 2002.

By the Full Bench
PRESIDENT

2002 WAIRC 04899

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 WOOD
DELIVERED	TUESDAY, 5 MARCH 2002
FILE NO/S.	FBA 55 OF 2001
CITATION NO.	2002 WAIRC 04899

Decision	Appeal upheld
Appearances	
Appellant	Mr D J Matthews (of Counsel) by leave
Respondent	Ms M in de Braekt (as agent)

Reasons for Decision

THE PRESIDENT—

INTRODUCTION

1 This is an appeal against the decision of the Commissioner at first instance, constituted by the Public Service Arbitrator (hereinafter called "the Arbitrator") and is brought pursuant to s.49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter called "the Act").

2 The decision appealed against was made on 30 October 2001, and the Arbitrator ordered as follows:-

> "1. THAT the respondent shall cease any and all disciplinary action against Mr Peter Han in relation to allegations made by Ms Barbara Silvester, and is prohibited from re-instigating any such action in relation to those allegations.
>
> 2. THAT the investigation and report by Dr Maureen Smith for and on behalf of the respondent in relation to allegations of misconduct against Mr Peter Han is hereby void ab initio.
>
> 3. THAT within 7 days of the date of this Order the respondent shall remove from Mr Peter Han's personal file all documentation connected with or flowing from the investigation and report by Dr Maureen Smith."

GROUNDS OF APPEAL

3 It is against that decision that the abovenamed appellant appeals on the following grounds, which were amended by leave upon the hearing of the appeal, and which were filed on 18 December 2001:-

> "1. The Commissioner erred in law in finding that the Respondent's alleged conduct did not touch the Respondent's employment with the Appellant in circumstances which would mean that the employer is entitled to enquire into that conduct as there was a relevant connection between the Respondent's alleged conduct and his employment with the Appellant.
>
> **PARTICULARS**
>
> 1.1 The Appellant should have been allowed to enquire into the Respondent's alleged conduct because, depending on the factual findings made, there was a potential for a finding that the Respondent's conduct was so intrinsically improper as to render him unfit for work with the Appellant;
>
> 1.2 The Appellant should have been allowed to enquire into the Respondent's alleged conduct because, depending on the factual findings made, there was the potential for a finding that the Respondent had committed a breach of discipline given the role of the Department of Community Development in contributing to the quality of family life in Western Australia and promoting caring, responsible families and communities within Western Australia;
>
> 1.3 The Appellant should have been allowed to enquire into the Respondent's alleged conduct because, depending on the factual findings made, there was the potential for a finding that the Respondent had committed a breach of discipline given that he was the Manager of the branch of the Appellant

involved in the development and delivery of "community skills training" which training included how the Appellant's staff should deal with traumatic events;

1.4 The appellant should have been allowed to enquire into the Respondent's alleged conduct because, depending on the factual findings made, there was the potential for a finding that the Respondent had committed a breach of discipline given that he was involved as Manager in the development and delivery of training to a class of persons which included Ms Silvester and persons at the same level and doing the same work as Ms Silvester; and

1.5 The Appellant should have been allowed to enquire into the Respondent's alleged conduct because, depending on the factual findings made, there was the potential for a finding that the Respondent had committed a breach of discipline given that he was a Level 6 employee and Ms Silvester was a Level 2 employee."

NOTICE OF CONTENTION

4 There was a document filed herein on behalf of the respondent and called a notice of contention. What it contained were arguments and allegations relating to matters which were not decided by the Arbitrator because it was not necessary to do so. In addition, the notice of contention did contain some arguments relevant to the appeal that would seem to have been covered by the outline of submissions for the respondent.

5 Some of the matters raised by the notice of contention related to the conduct of any investigation which might be initiated by the appellant and were not at all relevant to the grounds of appeal or any necessary answer to any such grounds of appeal.

6 Further, in earlier proceedings relating to this appeal a notice of contention relating to different matters was filed on behalf of the respondent and the parties were then informed that such a notice was not prescribed by the *Industrial Relations Commission Regulations* 1985 (as amended). To avoid unnecessary delay, and so as not to let form unnecessarily stand in the way of substance, on that occasion, the Full Bench dealt with the matters raised by the notice of contention.

7 In this case, there was no good reason at all why such a notice, which is not provided for in the *Industrial Relations Commission Regulations* 1985 (as amended), and which contained a large number of matters which were not relevant to the appeal, should be entertained. Accordingly, the notice of contention was rejected by the Full Bench.

8 It should also be noted that there was no cross-appeal, nor would one have been expected given that the decision to permanently stay any investigation, and to declare void ab initio any report by one Dr Maureen Smith provided to the appellant, was very much in the respondent's favour.

BACKGROUND AND ISSUES

9 The Civil Service Association of Western Australian Incorporated (hereinafter called "the CSA") is an organisation of employees which represents, amongst others, public service officers as defined in s.3 of the *Public Sector Management Act* 1994 (hereinafter called "the PSM Act").

10 The respondent is the Chief Executive Officer of a department of government.

11 At all material times, a CSA member, Mr Peter Han was a level 6 officer and a manager in the appellant's department, and Ms Barbara Silvester was a level 2 officer.

12 The facts which include matters of difference between the parties are not in real dispute.

13 On 21 February 2001, Mr Han travelled to Kalgoorlie for work purposes to participate in a course called "The Critical Incidences Stress Debriefing Training Course". On a previous course, at Carnarvon, some time previously, Mr Han had met Ms Silvester, who was a 23 year old level 2 graduate welfare officer. He had, in fact, trained her. In addition, he had also met her on another occasion in Perth. She at the time was residing and working in Kalgoorlie. She contacted him before the course in Kalgoorlie commenced and invited him to meet her and others for drinks after the training course concluded on 21 February 2001. She was not participating in the course in Kalgoorlie.

14 Ms Silvester and other work colleagues of Mr Han and of Ms Silvester then picked up Mr Han after the training course, took him to his hotel where he changed and went to another hotel until 6.00 pm for drinks, where they met the rest of the group. The group then went to a restaurant and had dinner. Then at about 9.30 pm or 10.00 pm they went to another hotel, then after that to another hotel until midnight. After some time, about five people, including Mr Han and Ms Silvester, went back to her house where Mr Han remained until he returned to his hotel at 2.00 am. He then booked out of the hotel in the morning and went to work at the training centre, and then, having completed his work there, returned to Perth.

15 Nothing relevant occurred, Mr Han said, until 23 March 2001 when he was requested to go to CIB headquarters in Perth to discuss an allegation which had been made against him. When he arrived with a solicitor to represent him, he became aware that Ms Silvester had made an allegation that he had on 21 or 22 February 2001 sexually penetrated her without her consent. He declined to comment to police about the allegation, and was duly charged with sexual penetration of Ms Silvester without her consent, contrary to s.325 of the Criminal Code.

16 There were various court appearances, and then on 6 June 2001 when he attended court he was discharged on the basis that the Director of Public Prosecutions presented no evidence and therefore did not proceed with the prosecution.

17 He rang his Director, Mr Lex McCulloch, whom he had previously advised that he had been charged. He advised Mr McCulloch that the complaint had been dismissed.

18 Mr McCulloch wrote to him on 20 June 2001 advising him that on 11 June 2001 Ms Silvester had made a complaint to him involving serious allegations about his conduct with her following the training course in Kalgoorlie on 21 February 2001.

19 On 6 July 2001, Mr McCulloch wrote to Mr Han again, advising that the complaint was "very serious and, if proven, strike at the core of your duties and responsibilities as an officer and senior manager of this department". He then said in the letter:-

> "Accordingly, I have appointed Dr Maureen Smith, as nominated by the Public Sector Standards Commission, to conduct a formal and independent investigation into these matters and determine whether there is any substance to matters raised within Ms Silvester's complaint."

20 The letter ended as follows:-

> "Should you fail to comply with my directions, you are on notice that formal disciplinary proceedings may be commenced against you pursuant to Section 81 of the Public Sector Management Act (PSMA) 1994. Copies of Ms Silvester's complaint and relevant sections of the PSMA 1994 are attached for your reference."

21 Mr Han declined to be interviewed by Dr Smith, and on 31 August 2001, Mr McCulloch wrote to him advising that he, Mr McCulloch, had received a report from Dr Smith and then stated as follows:-

> "I refer to my letter dated 6 July 2001 in which I advised you of the appointment of Dr Maureen Smith to conduct a preliminary investigation on my behalf into a complaint regarding your conduct towards Ms Barbara Silvester.
>
> On 9 August 2001 I received a report from Dr Smith. I have considered the contents of the report and have made some preliminary inquiries into matters raised in it and by it. I now give you notice that, pursuant to Section 81(1) of the Public Sector Management Act (PSMA) 1994, I suspect you have committed the following breaches of discipline—
>
> 1. On 22 February 2001 you sexually penetrated Ms Barbara Silvester without her consent and thereby committed an act of misconduct;
> 2. On 22 February 2001 you sexually penetrated Ms Barbara Silvester without her consent and thereby contravened the WA Public Sector Code of Ethics, specifically the key principles of Justice, Respect for Persons and Responsible Care;
> 3. On 22 February 2001 you sexually penetrated Ms Barbara Silvester without her consent and thereby contravened a provision of the PSMA 1994 applicable to you, namely Section 9(b), in that you failed to act with integrity in the performance of official duties;
> 4. On 22 February 2001 you sexually penetrated Ms Barbara Silvester without her consent and thereby contravened a provision of the PSMA 1994 applicable to you, namely Section 9(c), in that you failed to exercise the proper courtesy, consideration and sensitivity expected of you in your dealings towards a fellow employee;
>
> In accordance with Section 81(1) I am giving you the opportunity to submit an explanation to me in relation to the allegations. You have until close of business Friday 7 September 2001 to submit your written response to these allegations.
>
> Copies of Dr Smith's report and relevant provisions of the Public Sector Management Act 1994 and the Western Australian Public Sector Code of Ethics are attached."

22 The CSA then made the application which was heard at first instance, seeking, inter alia, the orders which the Arbitrator, after hearing and determining the application, made, and which are the orders appealed against.

FINDINGS

23 The Arbitrator made the following findings:-

(a) The test as to whether this was a matter which could properly be investigated depended on whether the alleged misconduct "touched the employment" and was "relevant to the employment" (see the authorities referred to at pages 17-18 of the appeal book).

(b) The Arbitrator then went on to find that the alleged conduct did not touch the employment in circumstances which would mean that the employer was entitled to enquire into that conduct, because there was not a relevant connection between the conduct and the employment.

24 In particular, the Arbitrator found:-

(a) That Ms Silvester was not Mr Han's subordinate but his junior.

(b) That the contact between them was on one occasion where Mr Han was conducting a training course in which Ms Silvester participated ((ie) presumably prior to the Kalgoorlie contact).

(c) That there was no evidence of any "ongoing obligation or relationship for training or other work purposes between Mr Han and Ms Silvester".

(d) That there was no evidence that Mr Han's alleged conduct touched his capacity to provide leadership to the group which he manages (even though it included women).

(e) That the role of the Department, its purpose, vision and responsibility in respect of protection of children, and the training centre's role does not sufficiently relate to or touch upon the alleged conduct such as to create the necessary connection to bring the alleged conduct within the purview of an employer.

THE APPEAL

25 The crux of the appeal was that there was a potential for a finding that Mr Han's alleged conduct was so intrinsically improper that it rendered him unfit to work with the appellant, as well as a potential for finding the breaches of discipline referred to in the grounds.

26 For the respondent, it was submitted that the test which was applied by the law was not the correct test. It is difficult to understand how that submission could be justified when there was and could be no cross-appeal.

27 However, we would add this. There is nothing discernable within the PSM Act which confines the power to conduct disciplinary investigations to matters strictly within the performance of the duties of an employee.

28 S.9 of the PSM Act merely prescribes principles of conduct for employees. It does not purport to prescribe what is "misconduct". Further, the section does not purport to confine the requirement to exercise proper courtesy and consideration to dealings with employees in the performance of their duties.

29 In any event, s.80 of the PSM Act defines "breaches of discipline" so that, inter alia, an employee who commits an act of misconduct "commits a breach of discipline" (see s.80(c)). There is no express restriction by the section of a misconduct to misconduct at work or in the performance of an employee's duties, unlike s.80(d) where negligence or carelessness "in the performance of the employee's function" is defined as a breach of discipline.

30 In our opinion, a breach of discipline is committed when an act of misconduct is committed by an officer and the act is validly linked to his employment by the correct test which we will consider hereinafter. That is a breach of discipline within the meaning of s.80(c) of the PSM Act.

31 Suffice it to say that s.81(1) of the PSM Act empowers an employing authority, as defined in s.3 of the PSM Act, when that employing authority suspects that a person has committed a breach of discipline to do certain things.

32 However, importantly, and by way of fortification of the view that the power to investigate a breach of discipline in the case of an act of misconduct does not require that the alleged misconduct be committed in the course of performance of the duties of the employee concerned, we refer to s.81(1). The power to investigate a breach of discipline is activated pursuant to s.81(1) by a "suspicion" that a person has committed a breach of discipline whilst "serving as an employee in its public sector body".

S.81(1), in other words, specifically takes the power to conduct an investigation beyond the investigation of something which has merely been alleged to have happened in the course of the performance of the employee's duties. It is sufficient that the employing authority suspects that a person has committed a breach of discipline and that the employing authority suspects that that breach of discipline has been committed "whilst the person was serving" as an employee or officer in its public sector body.

33 It is not necessary to say so for the sake of disposing of this appeal. However, it is quite clear that s.9, s.80 and s.81 of the PSM Act, read in the context of the whole of the PSM Act, impose no different test to what the Arbitrator applied for finding a power in the appellant to investigate misconduct committed by an employee.

34 Whether misconduct is misconduct which justifies action being taken against an employee, qua employee (pursuant to s.81 in this case) (see McCallum "Employer Controls Over Private Life" 25 and see *Hussein v Westpac Banking Corporation* 59 IR 103) depends on whether the test is met.

35 It is fair to say that reported decisions in relation to "immoral behaviour" of employees are rare, but for an improper act to warrant dismissal, it must diminish the capacity of the employee to perform the employment. For example, where employees are placed in positions of trust, such as police officers and school teachers, they are subject to stricter moral controls because even out of hours activities may be regarded as inconsistent with their future employment (see, for example, *Henry v Ryan* [1963] TSR 90 and *Wall v Westcott* [1982] 1 IR 252) (the first case related to a police officer and the second a middle ranking employee in private enterprise in a country town).

36 A manager in the Public Service is placed in a position of trust, particularly in relation to junior employees.

37 In our opinion, there was such a relevant connection between the alleged misconduct and the employment so as to empower the Director to take the steps which he is empowered to take under s.81 of the PSM Act and in accordance with that section.

38 The allegation that Mr Han had sexually penetrated a person who was drunk (or not drunk) without her consent, is an allegation that he committed an act which is serious enough to be prescribed by the Criminal Code as a criminal act. It is the sort of act which, for reasons we will mention hereinafter, diminished his capacity to perform his employment were it established. (We emphasise that this appeal deals only with an allegation against Mr Han and not with any proven act by him).

39 The fact that in this case the Director of Public Prosecutions did not pursue the prosecution of Mr Han does not detract from the very serious nature of the misconduct alleged to have been committed by him. The intrinsically serious nature of the alleged act, which is an alleged act accounted serious enough to attract the prescription of the criminal law, (whether pursued by criminal prosecution or not), has a sufficiently relevant connection to his employment so as to justify an investigation, or, indeed, a summary dismissal, if established, because:-

(a) This character, if the allegation were proven, would render him unsuitable for employment in a government department.

(b) Would denote him a person of such bad character that he should not be employed as an officer or as a manager.

(c) Would constitute a breach of his duty of his fidelity to his employer as a manager.

(d) It is conduct so intrinsically improper that it would render him unfit to work as an officer of the appellant.

(e) Might well constitute sexual harassment contrary to the *Equal Opportunity Act* 1984.

(f) Would be evidence that he was not fit to be a manager or an employee in that he preyed upon a junior employee when he was a manager and she was a co-employee in a junior capacity. (In our opinion, *Applicant v Respondent* (unreported) AIRC, Deputy President Drake, Print P9973, 20 May 1998, on appeal to a Full Bench Senior Deputy President McBeal, Deputy President Duncan and Commissioner Deagan, Print R1221, 1 February 1999, which, in any event, did not involve a manager and a junior employee, is not good law and should not be followed (see the reference to it in McCallum (op cit) at pages 43-44)).

(g) Further, it was relevant that the alleged victim of the alleged misconduct was a woman and there are women amongst those whom he managed and trained.

(h) The act would be highly incompatible with the trust that the employer should have been able to repose in him.

(i) That such an act, if it had occurred, would certainly have caused harm and humiliation to a fellow employee and would lead to justified serious disaffection and distrust of Mr Han by Ms Silvester and other employees. That that would be the case would, we think, be axiomatic.

(j) That, further, although the incident is alleged to have occurred whilst they were off duty it occurred in the context of and in the aftermath of a training session and subsequent socialisation by a number of employees of the appellant, including Mr Han and Ms Silvester.

(k) That they were involved in socialising out of which this event arose because they were fellow employees and for no other reason.

(l) That indeed, Ms Silvester, on the evidence, joined in the socialising and initiated her own participation in it because Mr Han and she, amongst others, were fellow employees.

CONCLUSIONS

40 It follows that the Arbitrator erred in failing to find that there was an allegation of misconduct constituting a breach of discipline because the misconduct was relevantly connected to the employment of Mr Han. It touched upon him and would diminish his ability to properly perform his employment, if proven.

41 It follows that the Arbitrator erred in imposing a permanent stay upon the initiation and/or conduct of the investigation process pursuant to s.80 of the PSM Act which was a clear power in the appellant to act in accordance with s.81(1).

42 There were no grounds of appeal directed to orders 2 and 3, although there were really no reasons provided for making such orders, and it is difficult to understand why they were made. In any event, we have some difficulty in understanding why Dr Smith's report could be declared to be "void ab initio", particularly in the absence of reasons. However, in the absence of any grounds of appeal attacking those orders, we am not persuaded that the Full Bench can deal with them.

43 For all of those reasons, however, we would uphold the appeal, all of the grounds being made out. We would quash order 1 of the orders made at first instance, and issue a Minute to reflect that.

CHIEF COMMISSIONER W S COLEMAN—

44 I have had the advantage of reading His Honour's draft reasons for decision. I agree for the reasons expressed therein that the appeal should be upheld.

45 When an allegation of misconduct is raised which gives rise to the suspicion that there has been a breach of discipline under the *Public Sector Management Act*, 1994, (hereinafter referred to as "the PSM Act") in the first instance it is necessary to

determine whether the alleged misconduct has a relevant connection to the performance of the officer's duties as an employee. When this is satisfied the employing authority may investigate the employee's alleged misconduct.

46 It is not the case, as the respondent tried to argue, that the PSM Act provides an exclusive code for the assessment as to whether or not the alleged behaviour occurred, is to be limited to behaviour within the discharge of official duties. Sections 9, 80, 81 and 92 of the PSM Act, and indeed the Act when read as a whole, do not displace the "relevant connection to employment test".

47 The Public Service Arbitrator correctly identified the test to apply and found that the incident giving rise to the allegation of misconduct did not occur in a work related function or activity. Furthermore, while the female officer was junior to the employee against whom the allegation of misconduct is directed, she was not a subordinate; they did not work together and their professional relationship had been limited to their participation in one training session. The Public Service Arbitrator found that there was no ongoing obligation or relationship for training or other work purposes. The Public Service Arbitrator also found that the conduct complained about did not touch on the employee's capacity to provide leadership to the group he managed.

48 Finally, the Public Service Arbitrator rejected the notion that the Department's role, its purpose, vision and responsibility in respect of protecting children and the Training Centre's role in the provision of training is sufficiently related to or touched upon the alleged conduct such as to create the necessary connection to bring the alleged conduct within the purview of the employer.

49 While in the circumstances of this matter, the Public Service Arbitrator identified the correct test to ascertain whether the alleged misconduct had a relevant connection to the performance of the employee's duties as an employee, I consider that in this application, undue weight was placed on the absence of a formal relationship between the two officers within the departmental structure. The fact that the complainant officer was not employed in the Training Centre with the employee, that she was not subordinate to him and that there was not an ongoing working relationship between them does not, in my view, militate against findings which were open to be made by the Public Service Arbitrator.

50 The connection between the alleged misconduct and the performance of duties extends to beyond a direct link between the employee and the complainant officer. The seriousness of the allegations excites the scope of connections which, depending on subsequent findings of fact, go to the efficacy of training being delivered to the class of persons which include the complainant officer and person doing the same work as her and at the same level within the departmental structure. Even if the employee against whom the allegation of misconduct is raised is confined to the present position, it is not an answer to say that duties performed within the Training Centre are not sufficiently touched to secure the necessary connection with employment. Depending on findings of fact, there is the potential for the integrity of training of departmental officers to attain skills to deal with traumatic events to be compromised. In my view it is not going too far, as the appellant asserts to conclude that depending on the factual findings, the alleged misconduct was so intrinsically improper as to render the employee unfit for work within the Department. The alleged misconduct could prejudice the employee's ability to perform duties consistent with the Department's role in contributing to the quality of family life and in promoting caring and responsible families and communities in this State.

51 On the application of the test the Public Service Arbitrator should have concluded that there was a relevant connection between the alleged misconduct and the employee's employment. The appeal should be upheld and Order 1 of the Public Service Arbitrator's should be quashed. Thereby the employing authority would no longer be prevented from pursuing action under Section 81 of the PSM Act if it continues to suspect a breach of discipline has been committed. Orders 2 and 3 are unaffected by the outcome of this appeal.

COMMISSIONER S WOOD—

52 I have had the benefit of reading the reasons for decision of His Honour, the President, and agree with those reasons with the exception of paragraph 39. I agree that the appeal should be upheld hence removing the obstacle to an investigation under the PSM Act of the alleged breach of discipline.

53 The Arbitrator erred in failing to find that there was a relevant connection between the alleged conduct and Mr Han's employment. The alleged conduct, if proven, touches upon Mr Han's character and judgement and would diminish his ability to properly perform the duties of his employment. Mr Han is involved as a Manager in the development and delivery of training to a class of persons which included Ms Silvester and persons at the same level and doing the same work as Ms Silvester. The alleged conduct, depending on the actual findings made, could seriously diminish or remove the trust the employer could place in Mr Han and the performance of his duties. The alleged conduct is of an intrinsically serious nature. The two persons concerned are officers of the same Department and as such it is of no consequence, in my view, that the alleged conduct occurred out of hours in connection with social activities or that Ms Silvester was not part of the training course conducted by Mr Han at that time.

THE PRESIDENT—

54 For those reasons, the appeal is upheld and order 1 made at first instance quashed.

Order accordingly

———

2002 WAIRC 04918

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 WOOD
DELIVERED	TUESDAY, 5 MARCH 2002
FILE NO/S.	FBA 55 OF 2001
CITATION NO.	2002 WAIRC 04918

Result	Appeal upheld
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 hearing before the Full Bench on the 10th day of December 2001 and the 6th day of February 2002, 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 reserved its decision in the matter, and the parties having waived their rights pursuant to s.35 of the *Industrial Relations Act* 1979 (as amended), and reasons for decision being delivered on the 5th of March 2002, it is this day, the 5th of March 2002, ordered as follows:-

(1) THAT there be leave to amend and leave is hereby granted to amend the grounds of appeal herein in terms of the amended notice of appeal filed herein on the 18th day of December 2001.

(2) THAT a document filed herein and called a Notice of Contention be and is hereby rejected by the Full Bench.

(3) THAT appeal No. FBA 55 of 2001 be and is hereby upheld.

(4) That order No. 1 of the decision made by the Public Service Arbitrator, at first instance, on the 30th day of October 2001 in matter No. P26 of 2001 be and is hereby quashed.

By the Full Bench

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

[L.S.]

2002 WAIRC 04830

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN LANE, APPELLANT
	v.
	AUSSIE ONLINE LIMITED (ACN 004 160 927), RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER J F GREGOR
DELIVERED	WEDNESDAY, 20 FEBRUARY 2002
FILE NO/S.	FBA 50 OF 2001
CITATION NO.	2002 WAIRC 04830

Decision	Appeal upheld and decision at first instance quashed
Appearances	
Appellant	Mr M L Bennett (of Counsel), by leave, and with him Ms L Broadley (of Counsel), by leave
Respondent	Mr S K Shepherd (of Counsel), by leave

Reasons for Decision

THE PRESIDENT—

INTRODUCTION

1 This is an appeal against a decision of the Commission, constituted by a single Commissioner, made on 15 February 2001 in matter No 1039 of 2000 and deposited in the Registrar's office on 11 June 2001. The notice of appeal was filed on 10 August 2001.

THE DECISION APPEALED AGAINST

2 The order appealed against was in the following terms:-

> "WHEREAS this is an application pursuant to section 29(1)(b)(i) of the Industrial Relations Act 1979; and
>
> WHEREAS on 28 November 2000 a conference was held pursuant to section 32 of the Act, at which time terms of settlement were agreed; and
>
> WHEREAS the Commission wrote to the applicant on 30 January 2001 advising that the application would be discontinued on the Commission's own motion unless advised otherwise by the applicant by 14 February 2001; and
>
> WHEREAS there has been no response on behalf of the applicant;
>
> NOW THEREFORE the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—
>
> THAT the application be and is hereby discontinued."

GROUNDS OF APPEAL

3 The appeal is made on the following grounds:-

"1. The Commissioner erred in exercising his discretion to make an order discontinuing matter number 1039 of 2000 for the following reasons—

1.1 the Commissioner's discretionary decision to discontinue the matter on the basis that the matter had been settled between the parties was made in error in that the matter had not been settled;

1.2 in the absence of a response to the Commission's letter dated 30 January 2001, the Commissioner should have re-listed the application to determine the status of the likely settlement and should not have discontinued the application."

4 The reasons for decision are contained in the recitals to the order.

5 This matter has been dealt with from another aspect in the reasons for decision of the Full Bench delivered on 10 August 2001 in *Aussie Online Ltd v Lane* (2001) 81 WAIG 2511, when the Full Bench quashed the decision made at first instance that application No 1039 of 2000 be and is hereby discontinued.

APPLICATION TO EXTEND TIME

6 There was an application to extend time within which to institute this appeal and for leave to extend time within which to make this application, filed on 10 August 2001, which was approximately six months after the order appealed against.

7 The grounds for the application to file the appeal out of time are as follows:-

"**Background**

1. On 7 July 2000 the Applicant lodged an application in the Commission for an order pursuant to section 29 of *the Industrial Relations Act (WA) 1979* ("the Act") on the grounds that the Applicant's dismissal was harsh, oppressive and unfair.

2. The Respondent is and was at all material times a company incorporated under the laws of Western Australia and is and was engaged in the business of the provision of various internet-related services.

3. At all material times from 16 June 1999 the Applicant owned 20% of the business known as "aussie.com.au" ("the Business"). The other 80% of the Business was owned by Brian Fletcher.

4. On or about 20 August 1999 the Applicant commenced employment for the Respondent as Business Development Manager.

5. On 18 November 1999 whilst the Applicant was in the United States of America, the Respondent and Brian Fletcher executed an agreement by which Brian Fletcher purported to transfer to the Respondent the entirety of the Business to the Respondent, without the consent of nor consideration for the transfer by the Applicant.

6. On 26 June 2000 the Applicant issued a letter of demand to the Respondent and Brian Fletcher requiring the Applicant's 20% entitlement in the Business to be properly acknowledged and transferred to him.

7. On the morning of 27 June 2000 the Applicant arrived at his office at the Respondent's premises and found his door locked. The General Manager of the Respondent walked to the Applicant's office, unlocked the door, and handed the Applicant a letter which alleged that the Applicant had been made redundant, stipulated by the letter as being effective from receipt. The Applicant was required by the terms of the letter to immediately gather his personal possessions, hand over all keys and his company mobile telephone and leave the premises which the Applicant was obliged to do.

8. On 28 November 2000 a conference was held pursuant to section 32 of the Act in matter number 1039 of 2000 at which time terms of settlement were agreed.

9. On 4 December 2000 the Applicant's solicitor sent a letter to the Respondent's solicitor accepting the Respondent's counter offer to settle the Industrial Relations Commission proceedings on the general terms of the draft deed, save for the deletion of some ancillary clauses.

10. In good faith and in the belief that the matter had been settled the Applicant's solicitor sent a letter to the Commission on 6 December 2000 confirming the matter had been settled between the parties with the only outstanding matter being the execution of a Deed of Settlement and the filing of a notice of discontinuance.

11. On 15 December 2000 the Respondent's solicitor sent a facsimile transmission to the Applicant's solicitor which stated that "should you not accept our client's proposal for settlement by 5.00pm today, all offers from our client will lapse immediately thereafter. If no or no adequate response is received by that time, we propose writing to the Commissioner requesting a directions hearing in the new year and a date for trial."

12. On 15 December 2000 the Applicant's solicitor sent a facsimile transmission to the Respondent's solicitor confirming that all essential terms of the settlement had been agreed and the matter had clearly settled. It also provided that if the Respondent intends to repudiate the settlement agreement it was requested to do so in clear and express terms.

13. On 11 January 2001 the Applicant's solicitor sent a letter to the Respondent's solicitor requesting it to confirm its position in regard to whether it agrees that a valid settlement is in place.

14. On 15 February 2001 the Commission made orders upon its own motion that the Applicant's application be dismissed, such orders being predicated upon—

14.1 the non-response of the Applicant's solicitor to a letter from the Commission dated 30 January 2001; and

14.2 a recited fact within the Commission order that the Commission considered that the matter had been settled at a conciliation conference on 28 November 2000.

15. Upon communicating the Commission's order of 15 February 2001 to the Respondent's solicitor, and re-affirming the Applicant's contention that the Applicant's application had been settled, the Respondent denied that a binding settlement had been reached between the parties.

Application 440 of 2001

16. On 12 March 2001 the Applicant lodged an application at the Commission for an order pursuant to section 27(1)(v) of the Act that the Commission's order discontinuing the Applicant's application dated

15 February 2001 be set aside and vacated and that a directions hearing be listed in the Applicant's application.

17. On 17 May 2001 a hearing of the Applicant's application number 440 of 2001 was held by the Commission. On 8 June 2001 an order was issued by the Commission whereby the order of 15 February 2001 in matter number 1039 of 2000 was revoked.

18. On 19 June 2001 the Respondent lodged a Notice of Appeal to the Full Bench, being appeal number FBA 36 of 2001 against the decision of Commissioner Wood given on 17 May 2001 and the order made on 8 June 2001.

19. On 28 July 2001 the Full Bench ordered that appeal number FBA 36 of 2001 be upheld and that the decision of the Commissioner made on the 8th day of June 2001 in matter number 440 of 2001 be quashed.

20. The above series of events has resulted in the Applicant's delay in bringing an appeal against Commissioner Wood's decision to discontinue application number 1039 of 2000 on 15 February 2001.

21. The order of Commissioner Wood discontinuing the Applicant's application 1039 of 2000 was made in error.

22. The Respondent will not suffer any prejudice if the application is successful.

23. The Applicant will suffer prejudice if the application is dismissed, because he will absolutely and irrevocably lose the opportunity and right to appeal, thereby losing the opportunity to have his unfair dismissal claim heard and determined."

HISTORY AND BACKGROUND OF THE MATTER

8 The history of this matter is as follows:-

(a) On 7 July 2000, the appellant filed a notice of application in the Commission whereby he claimed that he was an employee who was harshly, oppressively and unfairly dismissed by the respondent employer on 27 June 2000. He sought reinstatement.

(b) A number of conciliation conferences took place involving the parties, in this Commission, the last of which was held on 28 November 2000.

(c) In *Aussie Online Ltd v Lane* (op cit) at page 2513, the Full Bench referred to a finding made by the Commission in the proceedings at first instance that, as a result of that conference, settlement of the claim had not been reached and noted that following that conference there was an agreement between the parties which was an agreement which was "all but settled" in the conference of 28 November 2000, bar for some wording in a deed of settlement (which was to be confidential between the parties). Apart from that settlement, the Commission observed, that achieved.

What is clear was that, as part of the settlement, it was sought to be agreed that the appellant give appropriate releases and discharges in respect of an action in the Supreme Court.

(d) On 5 December 2000, the solicitors for the appellant, Bennett & Co, wrote to Mallesons, Stephen Jaques, solicitors for the respondent, which accepted an offer to settle proceedings in terms of a draft deed forwarded to them by Bennett & Co. However, the settlement was clearly expressed to depend upon amendments to the deed, and, more importantly, its execution secured. The second last paragraph of that letter, which bears that out, reads as follows:-

> "Upon your client's execution of the Deed, we ask that your client obtain a bank cheque for the Settlement Sum made payable to "John Lane" and advise this firm when this is completed, so that we may arrange for our client to execute the Deed, receive that bank cheque, and provide your client with a signed Notice of Discontinuance of the Industrial Relations Commission proceedings in accordance with paragraph 3.1 of the Deed."

That paragraph makes it clear that the matter was not then settled. (A copy of that letter was forwarded to the Associate to the Commissioner at first instance). That it was not settled was not disputed by the solicitors for the respondent, in correspondence.

(e) Bennett & Co replied by letter dated 6 December 2000 in the following terms:-

> "We refer to the abovementioned Application and to the Conciliation Conference before Registrar Wood on 28 November 2000. That Conference was adjourned for 7 days, with an indication from the Commissioner that the Applicant should contact the Commissioner should the matter not be settled at the expiration of that 7 days.
>
> We write to confirm that the matter has now been settled between the parties with the only outstanding matter being the execution of the Deed of Settlement – now substantially settled between the parties – the payment of the settlement sum, and the filing of the Notice of Discontinuance (which must await the execution of the Deed and payment of the settlement sum).
>
> We shall write to you immediately if there are any difficulties experienced in the settlement of the above Application, which we anticipate should be completed, and a Notice of Discontinuance filed within the next 10 days."

(f) On 15 December 2000, the solicitors for the respondent Mallesons, Stephen Jaques, wrote to the solicitors for the appellant in the following terms:-

> "1 We have received no correspondence from you since our letter of 6 December.
>
> 2 Given the delays which have occurred in connection with this matter (none of which have been attributed to our client), we are instructed to inform you that, should you not accept our client's proposal for settlement by 5.00pm today, all offers from our client will lapse immediately thereafter.
>
> 3 If no or no adequate response is received by that time, we propose writing to the Commissioner requesting a directions hearing in the new year and a date for trial.

It is quite clear of the evidence that there was no response from which it could be found that there was a settlement.

(g) On 30 January 2000, the Associate to the Commissioner at first instance, having received no reply, wrote to the solicitors for the appellant, only, in the following terms:-

> "A conciliation conference pursuant to section 32 of the Industrial Relations Act 1979 was held before Commissioner Wood on 28 November 2000. At the conclusion of which the matter was settled and the Commission advised that the matter would be adjourned for seven days.

> On 6 December 2000 correspondence was received from the applicant's solicitor indicating that the matter was settled and a notice of discontinuance would be filed within 10 days.
>
> Please advise the Commission, in writing, of progress with the matter or alternatively file a notice of discontinuance by close of business Wednesday 14 February 2001. If the Commission has not had a reply by this date the matter will be discontinued on the Commission's own motion."

(h) That letter, it is to be noted, was forwarded only to the solicitors for the appellant and not to the solicitors for the respondent. Had it been forwarded to the respondent's solicitors and received by them they could have informed the Commissioner of the fact that the respondent had withdrawn its offer of settlement on 15 December 2000.

(i) There was no reply by Bennett & Co to that letter.

(j) It was the evidence of the employee's solicitor, Mr Jason MacLaurin, who was employed by the appellant's solicitors at that time, that he did not reply to that letter because he did not receive the letter. He said that he located it some time after the order, to which I am about to refer, was made. He located it, he said, in cross examination, in a concertina file at his secretary's workstation. In any event, he did not, for that reason, respond to the letter from the associate to the Commissioner at first instance dated 30 January 2001. He said in cross-examination that, (notwithstanding the express evidence to the contrary), as at 6 December 2000 he thought that the matter was settled. There is no evidence, and it seems implicit in the evidence, that no deed of settlement has been executed by the parties and that the matter was not settled. Indeed for the reasons I have expressed above it is quite clear that there was no settlement.

(k) In any event, having received no reply, the Commissioner at first instance, without giving notice of hearing, conducting a hearing or giving the parties, and in particular, the applicant (the appellant) any opportunity to be heard, made the order which I have reproduced above and which is now the subject of this appeal, such order being made on 15 February 2001 (see pages 13-14 of the appeal book (hereinafter referred to as "AB")).

(l) About one month later, but outside the 21 day period within which an appeal was required to be instituted pursuant to s.49(3) of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act"), the appellant made application to the Commission, constituted by Commissioner Wood, as before, by a fresh application, which was numbered No 440 of 2001, seeking to have the Commissioner "revoke" the order made in matter No 1039 of 2000 whereby he had "discontinued" application No 1039 of 2000. The Commissioner heard that application and by order dated 8 June 2001, deposited in the office of the Registrar on 11 June 2001, revoked the order of 16 February 2001 in application No 1039 of 2000.

(m) The respondent employer then appealed against the decision to revoke the order of discontinuance.

(n) That appeal was upheld by the Full Bench by orders made on 26 July 2001, in appeal No FBA 36 of 2001, and reasons therefore were delivered on 10 August 2001 (see *Aussie Online Ltd v Lane* (op cit)). The Full Bench made orders that the decision at first instance revoking its decision to discontinue the original application, (and made upon application No 440 of 2001), be quashed.

(o) Upon the hearing of that appeal, Counsel for the respondent was asked whether he wished to seek leave to file out of time a document which was referred to as a draft notice of appeal but which would then have become a notice of appeal, alleging the same grounds of appeal as does the appeal herein.

(p) The notice of appeal was filed herein on 10 August 2001 after the Full Bench issued its orders in the appeal in *Aussie Online Ltd v Lane* (op cit), on 27 July 2001 and almost six months after the discontinuance order made on 15 February 2001, on 20 August 2001. In the ordinary course, the notice of appeal was required to be filed no later than 8 March 2001.

(q) Because of the exceptional delay in filing the appeal, two applications were required to be made by the appellant by 8 March 2001, namely an application for extension of time within which to appeal, and an application for leave to bring the appeal out of time. These applications were, in fact, filed on 10 August 2001, over five months later.

(r) The Full Bench decided at the hearing of this appeal that it would hear and determine arguments directed to the application to extend time and the merits, together, and that it would rule on the application to extend time and the merits of the hearing, if necessary, after hearing all of the arguments.

THE APPLICATION TO EXTEND TIME

The Principles

9 The principles which relate to applications to extend time are well known. The Full Bench summarised them in *Rosemist Holdings Pty Ltd v Khoury* 79 WAIG 645 where the Full Bench followed and applied as it is required to do, *Ryan v Hazelby and Lester t/a Carnarvon Waste Disposals* 73 WAIG 1752 (IAC) at pages 1752-1753 per Kennedy J, with whom Rowland and Nicholson JJ agreed, and *Tip Top Bakeries v TWU* 74 WAIG 1189 (IAC) per Nicholson J, with whom Franklyn and Rowland JJ agreed. The principles in those cases were derived, to a large extent, from the reasons for judgement of McHugh J in *Gallo v Dawson* [1990] 64 ALJR 458 at 459. They are as follows:-

(a) The grant of an extension of time is not automatic.

(b) The object of a power to extend time is to ensure that legislative provisions or rules which fix times for doing acts do not become incidents of injustice.

(c) The discretion to extend time is given for the sole purpose of enabling the Commission to do justice between the parties.

(d) The discretion to extend time can therefore only be exercised in favour of an applicant upon proof that strict compliance with the rules will work as an injustice upon the applicant.

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

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

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

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

(i) The initial steps in determining whether there would be an injustice to the appellant if the extensions of time were not granted may often be to decide whether the prospects of the appellant succeeding in the substantive appeal if an extension of time were to be granted is a real one.

(These factors were also reflected in *Esther Investments Pty Ltd v Markalinga Pty Ltd* (1989) 2 WAR 196 (FC)).

The Appellant's Prospect of Success

10 The crux of the appeal in this matter was that in exercising the discretion to "discontinue" the matter on the basis that the matter had been settled there was a miscarriage of discretion because:-

(a) No settlement had occurred between the parties and the respondent had denied that there was a settlement; and

(b) The matter remained in dispute and was yet to be heard and determined by the Commission.

11 The respondent's case, on the other hand, was that this was a discretionary decision (as it was) to which the principles in *House v The King* [1936] 55 CLR 499 applied. It was submitted for the respondent that no error had been demonstrated within the principles in *House v The King* (op cit) in the exercise of the discretion. This submission was based, it was said, on the fact that in the Commissioner's letter of 30 January 2001 three options were given to the appellant employee, and these were said to be:-

(a) That he advise the Commission of progress in the matter.

(b) That he file a notice of discontinuance.

(c) That he do nothing and 14 days after that the Commission would discontinue the matter on its own motion.

12 The submission went further than that, and it was to this effect. The employee, by his solicitors, did nothing, and, accordingly, the matter was "discontinued".

13 The case for the appellant was that the Commission erred in fact by finding that the matter was settled because, as a matter fact, it was not. In any event, on Mr MacLaurin's evidence, it is quite clear the letter did not even come to the attention of the appellant's solicitors or to the appellant so that they could reply or he could instruct them to reply.

14 Against that, the respondent submitted that the discontinuance of the application by the Commission was a direct result of the employee's solicitor's failure to answer the Commission's inquiry about the matter.

15 It was also submitted for the respondent that if there were a settlement and a breach thereof then the remedy of the appellant was to sue to enforce and accord and satisfaction.

16 For the appellant, it was submitted that the appellant, if that were the case, could elect whether to proceed to enforce the settlement or to proceed with the application made to the Commission.

17 It was also submitted on behalf of the appellant that the order appealed against was made invalidly because it was not reduced to the form of minutes and the parties were given no opportunity to speak to the minutes before the order was delivered and perfected; thus there was no compliance with the mandatory requirement of s.35 of the Act.

18 It was submitted that such an allegation could be readily inferred from the words of the grounds of appeal. I am not, of course, certain that that is a valid submission.

19 There are a number of conclusions which might be properly reached:-

(a) That to make an order "discontinuing" the appeal was not within the power of the Commissioner at the time when he made the order.

(b) The powers conferred by the Act and which might be exercised by the Commissioner at that time were:-

(i) The power (and duty) to decide, having attempted to resolve the matter by conciliation, whether he should resort to arbitration. That was a matter in relation to which the Commissioner was required to satisfy himself.

That duty in turn required the Commissioner to satisfy himself that the matter had not been settled.

(ii) If the matter were not settled, then the Commissioner, if satisfied that further resort to conciliation was unavailing, was required to decide if the matter should be arbitrated.

(iii) The Commissioner was also required in the alternative to ascertain whether it was required by all of the parties to the proceedings to decide the matter by arbitration, if the matter were not settled.

(iv) Until such time as the Commissioner had taken those steps as required by s.32 of the Act, which would require a hearing of the matter before the Commissioner could be satisfied in accordance with the Act, the Commissioner could not in the valid exercise of a discretion "discontinue" the matter pursuant to the powers conferred on it by s.27 of the Act.

(v) The Commissioner's powers in the matter were otherwise relevantly governed by s.27(1) of the Act which confers a power to discontinue or a power to dismiss.

(vi) If the Commissioner decided to discontinue the application, (after a hearing of course), then the order should have been reduced to minutes and a speaking to the minutes commenced. This was not done, s.35 of the Act was not complied with, and the failure to comply or breach rendered the order invalid, it was open to be found. (S.35 is a mandatory section and failure to comply with it renders the order invalid (see *RRIA v AMWSU and Others* (1989) 69 WAIG 990 at 988-9 (IAC) per Nicholson J).

(See also *WALEDFCU v WA Government Railways Commission* (1989) 70 WAIG 656 (FB)).

(vii) If, however, on the other hand, the Commissioner proposed to dismiss the matter, which it did not do, it was not required by s.35(1) to reduce the order to the form of minutes, but merely to order the dismissal after a hearing.

(However, the grounds of appeal as pleaded, and on a fair reading of them, could not be construed as alleging a failure to comply with s.35 of the Act). Further, whilst what I have outlined above represents strong arguments, they are not arguments which were put upon appeal, nor were they actually grounds of appeal so that the matter cannot be decided on the basis of them.

(c) (i) Next, it was submitted for the respondent that, as a matter of fact, there was no settlement reached and the discretion was exercised on the basis of a serious error of fact. The answer to that is that the Commissioner adjourned to enable the settlement to be effected, and, indeed, completed. This was to be done confidentially and by deed. Without an executed deed, as was entirely clear on the evidence, there could be

no settlement. There was no settlement and the Commission erred in so finding and in relying on such a finding. This of course caused the discretion to miscarry.

(ii) In fact, also, there were a number of matters to be referred to in the deed of settlement, including recognition of the settlement of a contemporaneous action in defamation by the appellant in the Supreme Court of Western Australia.

(d) The fact is that these matters were not resolved and no deed was executed. It was quite clear that within the principles in *Masters v Cameron* [1954] 91 CLR 353, the agreement was to be constituted by the execution of the deed, and the deed was not merely to evidence an actual agreement reached, but to constitute the agreement. Put in the terms of the principle in *Masters v Cameron* (op cit) the only relevant legal relationship between the parties in the context of any settlement was to be constituted by a validly executed deed of settlement, an accord and satisfaction. There was none. Thus, there was no settlement.

(e) As a matter of fact, therefore, the Commissioner at first instance erred in finding that the matter had been settled and erred in making an order to discontinue the matter when there was no settlement. There was, in fact, no evidence of a settlement, and no sufficient evidence to justify the order which was made. As a result, there was a clearly established miscarriage of the exercise of the discretion, in that respect.

(f) (i) It is also fair to observe that the order was made ultra vires.

(ii) There is no power conferred upon the Commission to hear and determine a matter which the Commissioner set out to do, except by s.27(1)(d) of the Act, which reads as follows:-

> "(1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
>
> …
>
> (d) proceed to hear and determine the matter or any part thereof in the absence of any party thereto who has been duly summoned to appear or duly served with notice of the proceedings;"

(iii) In this case, the Commissioner at first instance was required from the valid exercise of its power to hear the parties and determine, having heard them, whether it had jurisdiction and power to do so and whether a sound exercise of discretion required it to dismiss or refrain from hearing the matter or whether it should discontinue the hearing. That was a decision which could only be made if the Commissioner was satisfied within the meaning of s.27(1) of the Act that it should make that decision.

(iv) In order to be satisfied, the Commissioner was required to hear and determine this part of the matter, but it was not competent for the Commissioner to do so in the absence of the parties when neither had been duly served with a notice of proceedings which had in fact only been adjourned without a date being fixed for a new hearing. This required a further notice of hearing to be given and none was given.

(g) The Commission is required to afford natural justice (see *Dianella Hotel and Others v FCU of Australia, WA Branch* (1989) 69 WAIG 2303 (FB), *Hocks v Ken and Faye Davies t/a Kembla Built-In Furniture* (1987) 67 WAIG 1527 at 1528 (FB) and *RRIA v AMWSU* (1986) 66 WAIG 1553 at 1559 (IAC)).

(h) There was a denial of natural justice or procedural fairness in that the parties were not given a reasonable opportunity to be heard before the order of discontinuance was made. Indeed there was no reasonable opportunity and, in fact, no opportunity afforded for the appellant to be heard. He was deprived of the right to argue that his claim not be extinguished by it being discontinued. It was not at all sufficient that his solicitors were purported to be advised by letter that the application would be discontinued unless certain advice was given. Apart from the fact that no hearing was validly listed, there was no sufficient opportunity to be heard. All that was done was that a letter was forwarded in the terms to which I have referred above to the solicitors for one party, who for one reasons or another, took no account of it. Within the principle in *Stead v State Government Insurance Commission* [1986] 161 CLR 141 (HC), as a result, the appellant was deprived of any opportunity to achieve a different result. What was required was that the parties, and, in particular, the appellant, should be given an opportunity to be heard before any order was made.

(i) All that occurred was that one party was informed that an order of discontinuance would be made unless there was a response indicating whether the matter was settled or not. Even if that response had been given, it was not an end of the matter. The Commissioner could not assume that there was no objection to or that there was consent to an order being made in the terms in which it was made. The Commissioner erred in failing to afford procedural fairness or natural justice in terms of *Kioa and Others v West and Another* [1985] 159 CLR 550 and also *Annetts and Another v McCann and Another* [1990] 170 CLR 596 (HC).

(j) For all of those reasons, there was a very strong case made out upon appeal.

PREJUDICE

20 It is quite clear and the Full Bench should find that the appellant will suffer prejudice if the application to extend time within which to appeal is not granted since the appellant will lose his right to have the matter heard and determined by the Commission.

21 Further, as was submitted on behalf of the appellant, the respondent was aware that this appeal would be filed before it was filed. As a result, so the submission went, there was no prejudice to the respondent, and, in fact, there was no prejudice to the respondent established at all.

22 The respondent's case was that there was no material put forward to support the application for extension of time. In particular, it was submitted that the delay was excessive, which it was, and that the merits of the appeal were poor. I have already dealt with the merits of the appeal above. They were far from poor.

23 It was also submitted that to enable this matter to be revived long after the events giving rise to it would cause prejudice to the respondent because of the reinstatement sought especially.

24 In addition, and particularly, there had been a delay caused by a defective and expensive application on behalf of the appellant to revoke the order now appealed against, which application itself failed and failed further on appeal. This resulted in the discontinuance order not being overturned.

25 This appeal as an appeal was not pursued when it should have been due to the decision taken on two occasions by the appellant's legal advisers. That the appeal was not pursued, was an error which caused unnecessary and lengthy delay.

26 I want to deal with the question of delay which arose from the error of judgement by the appellant's legal advisers, in that they firstly pursued one means of setting the original order aside which was an application to have it revoked and not to appeal, and did not pursue an appeal against the order, and the fact that on the hearing of the appeal against the order revoking it, the legal advisers elected not to pursue an appeal against the order by way of cross appeal, albeit out of time. There was, of course, an invitation at that time by the Full Bench to counsel for the appellant to consider that matter and advise what his views were.

27 That the wrong decision was taken led indubitably to a delay of about six months in this appeal being instituted.

28 Barwick CJ in *Hall v Nominal Defendant* [1966] 117 CLR 423 at 435-7 considered the part played by a delay arising from legal advice given to a litigant. In my opinion, having regard to the nature of the proposed proceedings, namely this appeal, and the circumstances of the matter generally, this was a matter in which the appellant was entitled to rely on his counsels and solicitors' advice, that is whether to appeal in terms of this appeal and when to do so.

29 This was not at all, or primarily, a matter involving fact. In the context of his responsibility to "sue" within time, because of the necessity for him to rely on that advice which one can clearly infer from the circumstances, he is therefore "blameless" used by Barwick CJ (op cit). The Full Bench can therefore proceed to consider whether the time limit sought to be extended, can be extended.

30 In my opinion the prejudice to the respondent occasioned by granting this application is not great. What it means is that the respondent faces, after a very long period, the necessity of arguing the appeal brought by the appellant if the applications for leave are extended. However, against that the appellant would be deprived of the right, through no fault of his own, to pursue an appeal by which he seeks to be given the opportunity to continue his application in this Commission, an application which was discontinued even before, it would seem, the conciliation process was completed and before the merits were at all dealt with, if the application to extend time were dismissed. That is a manifestly greater prejudice, in my opinion, than that which would be suffered by the respondent if these applications were granted. A major factor in the matter is of course too, that in my opinion the appellant has a very strong case upon this appeal.

31 I should add that there was no accord and satisfaction reached because no deed was executed as I have said above. The question, therefore, of whether the prejudice to the appellant could be alleviated by consideration of his right to enforce any accord and satisfaction in a separate action in the appropriate Court, does not arise.

32 In any event, the Full Bench, in my opinion, heard no cogent argument that it was sufficient reason not to grant these extensions of time, that such an action would lie and that the appellant would be deprived of the right to pursue this matter in this Commission, having regard to s.26(1)(a) and s.26(1)(c), when the application in this Commission might be strongly said to have been erroneously cut off in its prime. The justice of the matter requires that the applications to extend time, for those reasons, be granted.

CONCLUSIONS

33 This was a matter where, having regard to s.26(1)(a) of the Act, the equity, good conscience and the substantial merits of the case lay with the appellant. That was so because there is a very real and substantial case to be tried on appeal, indeed, a very strong case.

34 Next, the prejudice of the delay and expense occasioned to the respondent is far outweighed by the appellant being prevented from pursuing its claim, which had not even been dealt with on the merits when the hearing was discontinued.

35 Next, the reasons for the delay in the hearing of the appeal is clearly that the wrong advice was given and the wrong course taken by the appellant by making application to have the order made at first instance revoked. The appellant was "blameless".

36 This appeal, however, should have been part of the appeal previously determined by the Full Bench as a result of a properly filed and served cross-appeal. This would have avoided the delay in the appeal being heard. There is no valid reason, in law, apparent why that appeal was not pursued. However, it can be said that the matter was being proceeded with in one shape or form and that the delay was caused by error in pursuing the wrong course in litigation and not inactivity or contumaciousness. Given the substantial prejudice which the appellant will suffer if the application is not granted, and the relatively minor prejudice to the respondent, as well as the very strong case which the appellant has upon this appeal, the justice of the matter, and the equity, good conscience and substantially merits of the case, lie in granting the applications to extend time, notwithstanding the nearly seven months delay before this appeal was instituted.

The Merits of the Appeal

37 For the reasons advanced above under the heading of merit, I am satisfied that in the exercise of the discretion by the Commissioner at first instance he erred. There are a number of other reasons on which it could be established that the decision at first instance was made in error, but they were not argued or pleaded, and I of course make no finding in relation to them.

38 I have, however, considered all of the relevant evidence, the relevant material and the relevant submissions. I would uphold the appeal.

39 I would quash the order made at first instance and there would therefore be no further obstacle to the Commissioner at first instance hearing and determining this matter according to law.

CHIEF COMMISSIONER W S COLEMAN—

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

COMMISSIONER J F GREGOR—

41 I have had the opportunity of reading the Reasons for Decision of His Honour, the President. I agree that the appeal should be upheld. In my view this appeal resolves to two crucial matters, the first is, was there an agreement made to resolve the dispute between the parties prior to the time it was discontinued by the Commission, and secondly, were the parties given an opportunity to be heard before dispositive orders were issued?

42 Clearly on the facts as set out in His Honour's Reasons the matter had not been concluded and similarly it is clear that there was no opportunity to be heard prior to the Commission issuing its final orders. In my view it is fundamental that the parties be allowed the right to be heard, I am not so sure that involves setting up a formal hearing but it does involve the Commission hearing from the parties in such a manner as the requirements for natural justice are met.

43 I agree that the order at first instance should be quashed.

THE PRESIDENT—

44 For those reasons, the appeal is upheld and the order made at first instance quashed.

Order accordingly

2002 WAIRC 04851

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	JOHN LANE, APPELLANT
	v.
	AUSSIE ONLINE LIMITED (ACN 004 160 927), RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER J F GREGOR
DELIVERED	WEDNESDAY, 20 FEBRUARY 2002
FILE NO/S.	FBA 50 OF 2001
CITATION NO.	2002 WAIRC 04851

Decision	Appeal upheld and decision at first instance quashed
Appearances	
Appellant	Mr M L Bennett (of Counsel), by leave, and with him Ms L Broadley (of Counsel), by leave
Respondent	Mr S K Shepherd (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on the 19th day of October 2001 and the 23rd day of January 2002, and having heard Mr M L Bennett (of Counsel), by leave, and with him Ms L Broadley (of Counsel), by leave, on behalf of the appellant, and Mr S K Shepherd (of Counsel), by leave, on behalf of the respondent, and the Full Bench having reserved its decision in the matter, and reasons for decision having been delivered on the 20th day of February 2002, it is this day, the 20th day of February 2002, ordered as follows:-

(1) THAT the application for an extension of time pursuant to the Industrial Relations Commission Regulations 1985 (as amended) ("the Regulations") in which to file an application to extend time to file a notice of appeal be and is hereby granted.

(2) THAT the application for an extension of time within which to institute the appeal herein be and is hereby granted.

(3) THAT there be an extension of time for the doing of any other things required by the Regulations to be done in relation to the said appeal.

(4) THAT there be leave to amend and leave is hereby granted to amend the grounds of appeal herein in terms of the amended notice of appeal filed herein.

(5) THAT the application by the appellant for leave to admit fresh evidence be and is hereby granted.

(6) THAT appeal No FBA 50 of 2001 be and is hereby upheld.

(7) THAT the decision made at first instance on the 15th day of February 2001 in application No 1039 of 2000 be and is hereby quashed.

By the Full Bench
PRESIDENT

PRESIDENT—Matters dealt with—

2002 WAIRC 04799

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE, APPLICANT
	v.
	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	THURSDAY, 14 FEBRUARY 2002
FILE NO/S.	PRES 3 OF 2002
CITATION NO.	2002 WAIRC 04799

Decision	Application dismissed.
Appearances	
Applicant	Mr R Andretich (of Counsel)
Respondent	Ms M in de Braekt, as agent

Reasons for Decision

1 This is an application brought by the abovenamed applicant employer pursuant to s.49(11) of the *Industrial Relations Act* 1979 (as amended) (hereinafter called "the Act"). By the application there is sought an order that the Commission, constituted by the President, order the stay of the operation of the decision of the Commission constituted by the Public Sector Arbitrator made on 28 December 2001 in application No P27 of 2001. The decision is in the form of a declaration, namely that the Public Service Arbitrator has jurisdiction to deal with the application before it.

2 The abovenamed respondent organisation of employees, the Civil Service Association of Western Australia Incorporated (hereinafter called "the CSA"), by application No P27 of 2001, had made application to the Public Service Arbitrator under s.80E and s.80F of the Act.

3 The application was brought on behalf of three members of the CSA, namely Mr John MacColl, Mr James Fisher and Mr Deans McClue. The three CSA members, who are and were prison officers, employed in the Department of Justice, were subject to disciplinary proceedings, and the application seems to relate to allegations of failure to provide copy of a document called the "Hedges Report" to the gentlemen concerned, and to provide an apology to them for any detriment they suffered as a result of the disciplinary proceedings taken against them and subsequently discontinued, as well as an order for compensation. The application was opposed by the applicant Director General. The Arbitrator was able to advance no further than hearing and determining a question of jurisdiction. She did this by deciding that she had jurisdiction to hear and determine the application. The finding that she had jurisdiction produced in a decision as a declaration was a "finding" as that is defined in s.7 of the Act. The finding is there to find as follows:-

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

4 In relation to an appeal against a finding the leave of the Full Bench is required pursuant to s.49(2)(a) of the Act.

GROUNDS OF APPLICATION

5 The grounds of the application in this matter are as follows:-

"1. The Public Service Arbitrator erred in law in finding she had jurisdiction to deal with the application.

PARTICULARS

(a) the application raised no industrial matter.

2. The Public Service Arbitrator erred in law in not finding she had no jurisdiction or power to order that a copy of the Hedge's Report be provided to Messrs MacColl, Fisher and McClue.

PARTICULARS

(a) provision of the Report does not involve an industrial matter concerning Messrs MacColl, Fisher and McClue;

(b) such an order would involve granting injunctive relief which is not within the jurisdiction of the Public Service Arbitrator to grant.

3. The Public Service Arbitrator erred in law in finding the application raised an industrial matter she could deal with constituted by the allegation that the appellant had caused detriment to Messrs MacColl, Fisher and McClue as a result of disciplinary proceedings instituted against them.

PARTICULARS

(a) the disciplinary proceedings instituted against Messrs MacColl, Fisher and McClue resulted in no finding being made against them as the proceedings were discontinued in or about February, 1997;

(b) there was no outcome or finding arising from the disciplinary proceedings in respect of which relief is claimed in the application or in respect of which relief can be awarded;

(c) if any detriment was suffered as a result of the disciplinary proceedings by Messrs MacColl, Fisher and McClue—

(i) there is no relief that the Public Service Arbitrator can award on the facts contained in the application award;

(ii) any right to seek relief in respect of such detriment has been waived by reason of the effluxion of time and the abovenamed remaining in the employ of the appellant.

4. The Public Service Arbitrator erred in law in not finding she had no jurisdiction or power to order the appellant to apologise to Messrs MacColl, Fisher and McClue.

PARTICULARS

(a) this is not a recognised form of relief;

(b) it would involve providing injunctive relief which is not within the jurisdiction of the Arbitrator to award.

PUBLIC INTEREST

5. This appeal raises matters of public interest in—

(a) that it requires consideration of the limits of the Commission's jurisdiction by reference to what constitutes an industrial matter;

(b) that the respondent seeks by way of relief, essentially, provision to named employees of a confidential report prepared for the appellant employer concerning the behaviour of another employee. Employers need to know the extent to which confidential reports may be made available to employees on the basis that the reports constitute or concern an industrial matter;

(c) that the application seeks a novel form of relief in the form of an apology from an employer to employees in relation to whom it has discontinued disciplinary proceedings. Employers and employees need to know the limits of relief available to or against them in the Commission."

Principles

6 The principles by which applications pursuant to s.49(11) of the Act are determined are well settled in this Commission (see *Commissioner of Police v CSA* 81 WAIG 2553 at page 2554—

> "The principles by which applications pursuant to s.49(11) of the Act are determined are well settled in this Commission. Amongst others, the reasons for decision in *AWU v BHP Iron Ore Ltd* 81 WAIG 406 properly expresses them at pages 407-408—
>
> I reproduce hereunder the relevant extract from *CSA v Director General, Department of Transport* 80 WAIG 2855 at 2856—
>
> > "These principles have been laid down in a number of cases, including *Gawooleng Dawang Inc v Lupton and Others* 72 WAIG 1310, *Director General of the Ministry for Culture and the Arts v CSA and Others* 79 WAIG 670 and *City of Geraldton v Cooling* 80 WAIG 1751.
> >
> > It is for the applicant to establish that the stay should be granted. It is, of course, an underlying principle that the successful party is entitled to the fruits of her/his/its order, award or declaration.
> >
> > For the applicant to succeed, it must be established that there is a serious issue to be tried, that the balance of convenience favours the applicant and that other factors consistent with the application of s.26(1)(a), s.26(1)(b) and/or s.26(1)(c) of the Act, if they exist, require that the application be granted.
> >
> > If these ingredients exist, then exceptional circumstances exist which warrant the granting of the application as a matter of equity, good conscience and the substantial merits of the case. (I say that to further explain the principles.)"
>
> 13 The need to prevent there being any more uncertainty than is necessary, in industrial matters, is important, too (see *Re Moore; Ex parte Pillar* [1991] 65 ALJR 683 at 685 (HC))."

SERIOUS ISSUE TO BE TRIED

7 I should observe that, significantly, no submission was made on behalf of the appellant upon the hearing of this application that the matter was of such importance that in the public interest an appeal should lie. That is because s.49(2)(a) prescribes that an appeal does not even lie from a finding unless, in the opinion of the Full Bench, the matter is of such importance that, in the public interest, an appeal should lie. That was an important element which the appellant was required to establish before me to establish that there was a serious issue to be tried, and it was not established, by any submissions, or otherwise.

8 The Arbitrator found that there was jurisdiction because the matter, the subject of the application at first instance, and the remedies sought related to an industrial matter as defined in s.7 of the Act. That is a very well known definition but I repeat the first paragraph of it here for convenience:-

> "**"industrial matter"** means, subject to section 7C, any matter affecting or relating to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter relating to – "

9 The Arbitrator found that she had jurisdiction to hear and determine the matter and because the matter was an "industrial matter" as defined and I paraphrase, because:-

(a) Since the application sought that the Arbitrator inquire into and determine whether, by mounting an investigation and laying charges against the three officers and then discontinuing the investigation and dropping the charges, the applicant had caused detriment to the three officers.

10 It was, of course, clearly an "industrial matter" as defined when one ground of the application alone was that the investigation or disciplinary proceedings affected the career progression of the officers concerned.

11 There was a strong argument that this was "any matter affecting or relating to the work privileges, rights or duties of employers or employees in any industry or of any employer or employee therein …..".

12 As to the application seeking an order for production of the Hedges Report, that, the Arbitrator held, was a matter consequential on an industrial matter. In my opinion since, as the Arbitrator held Mr Hedges' report was directed to examining the employees' concerns about the respondent's conduct in relation to the investigation, as an employer and the effect of it upon them as employees, this was strongly arguable to be an industrial matter as defined in the same terms which I have quoted above from s.7 of the Act.

13 Next, as far as the order for an apology, which was sought at first instance, was concerned, it was submitted that that was injunctive relief and not within the competence of the Arbitrator to order.

14 That was held to be an industrial matter and was strongly arguable as so. It is clearly one which affects the rights of the employees and the obligations of the employer and the duties of the employer etc, in an industry as defined (see s.7 of the Act).

15 It is also not clear to me that any remoteness in time from these events, which the application might be said to have had, does not necessarily mean that these were not industrial matters.

16 Next, it was submitted to the Commissioner, but not decided, whether an order that there be an apology was competent or not because it was submitted to be injunctive relief and therefore not within the jurisdiction or power of the Arbitrator except by way of power exercise prior to an arbitration being embarked upon (see s.32 and s.44 of the Act).

17 No authority was cited to support that argument and I am unable to say that there is a serious issue to be tried as a result.

Balance of convenience

18 As to the balance of some convenience, some reliance was placed by the appellant's Counsel on a submission that if there is no order made for a stay, then the appellant will be put to the inconvenience of an eight day hearing. I do not see that as going to the balance of convenience if there is no strong argument that there was an error made in finding that there was jurisdiction.

19 For the respondent there was some reliance on what Scott J said in *Swan Television and Radio Broadcasters Limited trading as STW Channel 9 Perth v Satie* (1999) 79 WAIG 1863 (IAC). In that case His Honour said at paragraph 43:-

> "The attitude of the employer has remained the same throughout these proceedings so that the respondent who has, by the application, sought to ventilate this dispute with her employer, has been taken through the entire industrial process to this Court in relation to a preliminary point, the underlying facts of which remain in dispute. In my opinion, that state of affairs is unsatisfactory and contrary to the legislative spirit of the *Industrial Relations Act*."

20 In my opinion, the argument that there was no jurisdiction is not a strong one.

21 In my opinion the balance of convenience of both the parties requires that the jurisdiction, having been determined as *Springdale Comfort Pty Ltd t/a Dalfield Homes v BTA* (1987) 67 WAIG 325 (IAC) requires, the matter should now proceed to determination without further unnecessary delay.

22 It has finally not been established to me by the applicant that there is a serious issue to be tried, that the balance of convenience favours the applicant, or that having regard to s.26(1)(a) and s.26(1)(c), the equity, good conscience and substantial merits of the case or the interests of the parties require that this application be granted.

23 I have considered all of the material and all of the submissions.

24 Those views which I express in relation to questions of fact and/or law in this matter cannot, of course, bind me in any hearing by the Full Bench of an appeal, which is a different hearing, requiring different determinations upon necessarily more comprehensive and sometimes different arguments.

25 For those reasons I dismissed the application.

2002 WAIRC 04793

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE, APPLICANT *v.* CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	WEDNESDAY, 13 FEBRUARY 2002
FILE NO/S.	PRES 3 OF 2002
CITATION NO.	2002 WAIRC 04793

Result	Application dismissed.
Representation	
Applicant	Mr R Andretich (of Counsel)
Respondent	Ms M in de Braekt, as agent

Order

This matter having come on for hearing before me on the 12th day of February 2002, and having heard Mr R Andretich (of Counsel), by leave, on behalf of the applicant and Ms M in de Braekt on behalf of the respondent, and having determined that the application should be dismissed and having determined that my reasons for decision will issue at a future date, it is this day, the 13th day of February 2002, ordered that application No. PRES 3 of 2002 be and is hereby dismissed.

(Sgd.) P.J. SHARKEY,

[L.S.] President.

AWARDS/AGREEMENTS—Variation of—

2002 WAIRC 04910

ENROLLED NURSES AND NURSING ASSISTANTS (GOVERNMENT) AWARD

(No. R 7 of 1978)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT *v.* BOARD OF MANAGEMENT, ALBANY REGIONAL HOSPITAL & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	FRIDAY, 1 MARCH 2002
FILE NO/S.	APPLICATION 988 OF 2001
CITATION NO.	2002 WAIRC 04910

Result	Award varied

Order

Having heard Mr J Ridley on behalf of the applicant and Mr M Taylor 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 Enrolled Nurses & Nursing Assistants (Government) Award (No. R 7 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 1st day of March 2002.

(Sgd.) W. S. COLEMAN,
[L.S.] Chief Commissioner.

SCHEDULE

1. Clause 8. –Overtime: Delete subclause (5) of this Clause and insert the following in lieu thereof—

(5) Where a worker has not been notified the previous day or earlier that she is required to work overtime the employer shall ensure that workers working such overtime for an hour or more shall be provided with any of the usual meals occurring during such overtime or be paid $8.40 each meal.

2. Clause 11. – Public Holidays: Delete subclause (1) of this Clause and insert the following in lieu thereof—

(1) An employee who works on any public holiday named herein shall be paid a loading of $6.85 per hour or pro rata for part thereof in addition to his/her ordinary rate of wage for the time worked in ordinary hours on that day.

3. Clause 17. – Transfer: Delete subclause (2)(a) of this Clause and insert the following in lieu thereof—

(2) (a) In addition, she shall be allowed travelling allowance of $7.20 for any meal purchased, or the actual cost of any meal purchased, if such cost exceeds $7.20. Meal times shall be 8.00 a.m., 1.00 p.m. and 6.00 p.m. $2.70 for each morning and afternoon tea shall be allowed when travelling at 11.00 a.m. and 4.00 p.m. Reasonable porterage shall also be allowed. Claims for taxi fares must be supported by receipts.

4. Clause 19. – Laundry and Uniforms: Delete subclauses (7), (10)(c) & (e) of this Clause and insert the following in lieu thereof—

(7) All washable clothing forming part of the uniform supplied by the employer shall be laundered free of cost to the workers. Provided that in lieu of such free laundering the employer may pay the employee $1.28 per week.

(10) (c) Provided further that in lieu of providing uniforms the employer may pay an allowance of $5.43 per week, and the nurse shall wear uniforms which conform to the uniform stipulated by the employer with respect to material, colour, pattern and conditions.

(e) Each nurse shall be entitled to all reasonable laundry work at the expense of the employer, but where the employer elects not to launder the uniforms, the nurse shall be paid an allowance of $1.76 per week.

5. Clause 24. – Shift Work: Delete subclauses (1)(a), (2)(a), (3)(a) & (b) of this Clause and insert the following in lieu thereof—

(1) (a) Subject to subclause (2) of this clause where on any day an employee commences his/her ordinary hours of work before 4.00 a.m. or after 12 noon, he/she shall be paid a loading of $1.85 per hour or pro rata for part thereof in addition to his/her ordinary rate of wage.

(2) (a) A loading of $2.80 per hour or pro rata for part thereof shall be paid to an employee in addition to his/her ordinary rate of wage for time worked on permanent afternoon or night shift.

(3) Subject to the provisions of subclause (5) of this clause work performed during ordinary hours on the weekend shall in addition to the ordinary rate of wage attract a loading as follows—

(a) Saturday - $7.43 per hour or pro rata for part thereof;

(b) Sunday - $14.84 per hour or pro rata for part thereof.

6. Clause 26. – Wages: Delete subclauses (7)(c), (11)(a), (b) & (c) of this Clause and insert the following in lieu thereof—

(7) (c) The ordinary rate of wage prescribed for an Enrolled Nurse in this clause shall be increased by $10.60 per week when a Registered Enrolled Nurse has obtained a second post basic certificate approved by the Nurses' Board of W.A., and he/she is required to use the knowledge gained in that certificate as part of his/her employment.

(11) Leading hands shall be paid the ordinary wage prescribed for the classification in which they are employed increased by—

(a) $17.15 per week when in charge of not less than three and not more than ten other employees;

(b) $25.75 per week when in charge of more than 10 and not more than 20 other employees; and

(c) $34.35 per week when in charge of more than 20 employees.

The provisions of this subclause shall not apply to enrolled community nurses or enrolled community school nurses.

2002 WAIRC 04912

ETHNIC CHILDREN'S SERVICES INDUSTRIAL AWARD, 1993

No. A 10 of 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	ETHNIC CHILD CARE RESOURCE UNIT & ANOTHER, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	FRIDAY, 1 MARCH 2002

FILE NO/S. APPLICATION 994 OF 2001
CITATION NO. 2002 WAIRC 04912

Result Award varied

Order

Having heard Mr J Ridley 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 Ethnic Children's Services Industrial Award, 1993, (No. A 10 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 1st day of March 2002.

(Sgd.) W. S. COLEMAN,
[L.S.] Chief Commissioner.

SCHEDULE

1. Clause 20. – Fares and Travelling Allowance: Delete subclause (2)(c) of this Clause and insert the following in lieu thereof—

(2) (c) A year for the purpose of this clause shall commence on the first day of July and end on the thirtieth day of June next following.

Rates of hire for use of employee's own vehicle on employer's business.

Schedule 1 - Motor Vehicle Allowance

Area and Details	Engine Displacement (in cubic centimetres) Over 2600cc	1600 - 2600cc	1600cc & Under
Rate per Kilometre	¢/km	¢/km	¢/km
Metropolitan Area	69.2	60.29	53.1
South West Land Division	71.1	61.7	54.8
North of 23.5° South Latitude	78.0	68.1	60.6
Rest of the State	73.5	63.8	56.6

Schedule 2 - Motor Cycles

Distanced Travelled During a Year on Official Business	Rate ¢/km
All Areas of State:	23.9

Motor vehicles with rotary engines are to be included in the 1600-2600cc category.

2002 WAIRC 04913

GOVERNMENT WATER SUPPLY, SEWERAGE AND DRAINAGE EMPLOYEES AWARD 1981
(No. 2 of 1980)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
v.
WATER CORPORATION, RESPONDENT
CORAM CHIEF COMMISSIONER W S COLEMAN
DELIVERED FRIDAY, 1 MARCH 2002
FILE NO/S. APPLICATION 1005 OF 2001
CITATION NO. 2002 WAIRC 04913

Result Award varied

Order

Having heard Mr J Ridley on behalf of the applicant and Mr S Rooke 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 Government Water Supply, Sewerage and Drainage Employees Award 1981 (No. 2 of 1980) 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 1st day of March 2002.

(Sgd.) W. S. COLEMAN,
[L.S.] Chief Commissioner.

SCHEDULE

1. Clause 10. – Special Rates and Provisions: Delete this Clause and insert the following in lieu thereof—

(1) Meter Fitters' Vehicle Allowance

A Meter Fitter who in the course of his/her duties has to ride a motor cycle or drive a motor vehicle shall receive $7.80 per week extra.

(2) An employee who regulates and controls vehicular traffic in thoroughfares shall receive an allowance of $1.57 per shift above his/her usual rate.

(3) Offensive Allowance

(a) An allowance of $3.26 per day shall be paid to each employee who comes into contact with filth during the operation of cleaning out septic tanks, sand pits, ripple chambers, suction chambers of sewerage pumping stations or in de-ragging of sewerage pumps.

(b) An employee (other than a sewerage maintenance employee) employed on offensive work in connection with working in or about old sewers or working in ground where fumes arise from decomposed material or from any other cause shall be paid an allowance of 26 per cent of his/her ordinary time rate.

(4) Dirt Money

36 cents per hour extra shall be paid to an employee when engaged on work which is agreed to be of an unusually dirty nature.

(5) Confined Spaces

An employee working in a compartment, space or place the dimensions of which necessitate working in a unusually stooped or otherwise cramped position, or without proper ventilation, shall be paid an allowance of 45 cents per hour whilst so engaged.

(6) Underground Allowance

An employee required to work underground on tunnelling or shaft sinking shall be paid an amount of $1.57 per day or shift, in addition to any other amount prescribed for such employee elsewhere in this Award. Where a shaft is to be sunk to a depth greater than six metres the payment of the underground allowance shall commence from the surface. The allowance shall not be payable to employees engaged upon "cut and cover" work at a depth of 3.5 metres or less or to employees in trenches or excavations.

"Shaft" means an excavation over 1.8 metres deep with a cross sectional area of less than 13.4 square metres.

"Tunnelling" shall include all work performed in a tunnel until it is commissioned.

(7) Well Work

An 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 $2.01 for such examination and 77 cents per hour extra thereafter for fixing, renewing or repairing such work.

(8) Hot Work

An employee who works in a place where the temperature has been raised by artificial means to between 46°C and 54°C shall be paid 36 cents per hour or part thereof, and to more than 54°C - 42 cents per hour or part thereof, in addition to any other amount prescribed for such employee elsewhere in this Award. Where such work continues for more than two hours the employee shall be entitled to 20 minutes' rest after every two hours' work without loss of pay, not including the special rate provided by this subclause.

(9) Height Money

An employee shall be paid an allowance of 33 cents per hour, in addition to the ordinary rate, on which the employee works at a height of nine metres or more above the nearest horizontal plane.

(10) Drivers' Licences

Initial issue or additional classifications of drivers' licences required by the employer shall be paid for by the employer. In addition the employer shall allow the employee sufficient time off with pay to take the requisite test.

(11) Explosive Powered Tools Allowance

An employee qualified in accordance with the laws and regulations of the State to operate explosive powered tools shall be paid an allowance of 82 cents per day on which such tools are used.

(12) Any employee actually working a pneumatic tool of the percussion type shall be paid 30 cents per hour extra whilst so engaged.

(13) Fumes

An employee required to work in a place where fumes of sulphur or acid or other offensive fumes are present shall be paid an allowance of 33 cents for each hour worked.

(14) An employee using a steam or water cleaning unit shall be paid an allowance of 36 cents per hour whilst so engaged.

(15) Wet Places

(a) An employee required to work in a wet place or during wet weather shall be provided with rubber boots and adequate waterproof clothing, including waterproof head covering so as to protect the employee from getting wet.

Such waterproof clothing and rubber boots shall be replaced as required, subject to fair wear and tear in the service of the employer.

(b) Any employee working in a wet place shall be paid an allowance of $1.68 per day in addition to the ordinary rate, irrespective of the time worked unless his/her classification expressly includes an allowance for wet pay.

(c) A place shall be deemed to be wet when it is agreed that water (other than rain) is continually dropping from overhead to such an extent that it would saturate the clothing of an employee if waterproof clothing was not provided or when the water in the place where the employee is standing is over 2.5 centimetres deep.

(d) Where the employer directs work to continue during rain, the employer may, if adequate protective clothing is supplied the employee, require the employee to continue working. For such work the employee shall be paid an allowance of 25% of the ordinary rate.

(16) Handling Lime Cement or Flyash

Any employees involved in the handling of dry cement, lime or flyash shall be paid $1.89 per day.

(17) Hot Bitumen

An employee handling hot bitumen or asphalt or dipping materials in creosote, shall be paid 44 cents per hour extra.

An employee shall be provided with gloves and overalls and with oil or other solvents suitable for the removal of the above materials.

(18) Pesticides and Toxic Substances

(a) An employer who requires an employee to use a pesticide or toxic substance shall—

(i) inform the employee of any known health hazards involved; and

(ii) pursuant to the relevant Acts and Regulations, ascertain whether and, if so, what protective clothing and/or equipment should be worn during its use.

(b) Pending advice obtained pursuant to the relevant Acts and Regulations, the employer may require the pesticide or toxic substance to be used, if the employee is informed of any safety precautions specified by the manufacturer of the pesticide and instructs the employee to follow those precautions.

(c) The employer shall supply the employee with any protective clothing or equipment required pursuant to paragraph (a) or (b) hereof and, where necessary, instruct him/her in its use.

(d) An employee required to wear protective clothing or equipment for the purposes of this subclause shall be paid 44 cents per hour or part thereof while doing so unless the union and the employer agree that by reason of the nature of the protective clothing or equipment the employee does not suffer discomfort or inconvenience while wearing it, or in the event of disagreement, the Board of Reference so determines.

(e) An allowance is not payable under this subclause if the advice obtained pursuant to subparagraph (a)(ii) hereof in writing indicates that protective clothing or equipment is not necessary.

(19) Asbestos

An employee using materials containing asbestos or working in close proximity to any employee using such material shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority.

Where such safeguards include the mandatory wearing of protective equipment, i.e. combination overalls and breathing equipment or similar apparatus, any such employee shall be paid 45 cents per hour extra whilst so engaged.

(20) Shotfirers Allowance

An employee being a permit holder, responsible for the proper handling of explosives and the conducting of firing shall be paid an allowance of $3.85 per shift.

(21) The work of an electrical fitter shall not be tested by an employee of a lower grade.

(22) An Electronic 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 $14.35 per week. Provided that an employee appointed to the DC classification structure as contained in Clause 38. - Wages, of this Award shall not receive this allowance as the wage rate contained in the DC classification structure includes a component for licence allowance.

(23) 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 further that this subclause shall not apply to confined space, dirt money, height money, hot work or wet work the rates for which are cumulative.

(24) Special Disability Not Otherwise Provided For in This Award

Where a union representing a particular group of employees claims the existence of special disability not otherwise provided for in this Award, representatives of the employer and the union shall confer with a view to agreeing upon an appropriate special rate. In the event of agreement not being reached, the matter may be referred to the Western Australian Industrial Relations Commission.

(25) (a) All employees called upon to clean closets, connected with septic tanks or sewerage shall receive an allowance of 43 cents per closet per week.

(b) For the purposes of this subclause, one metre of urinal shall count as one closet and three urinal stalls shall count as one closet.

(c) All such employees shall be supplied with rubber gloves on request.

(26) 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 $1.44 per hour whilst so engaged.

(27) Spray Application Painters

A painter engaged on any spray applications carried out in other than a properly constructed booth approved by the Department of Occupational Health, Safety and Welfare shall be paid 36 cents per hour or part thereof in addition to the rates otherwise prescribed in this Award.

(28) Fuel, Kerosene and Water

Electric pump attendants and pumping station assistants shall be supplied with free water and in lieu of fuel and kerosene be paid $4.65 per week or such other amount as may be agreed between the parties or determined by the Board of Reference.

(29) (a) Subject to the provisions of this clause, an employee whilst employed on foundry work shall be paid a disability allowance of 25 cents for each hour worked to compensate for all disagreeable features associated with foundry work including heat, fumes, atmospheric conditions, sparks, dampness, confined spaces 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/her 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 any 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 subparagraph (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 moulds;

(cc) continuous casting for metal into billets;

(dd) melting of metal for use in printing;

(ee) refining of metal.

(30) Fluoride Allowance

An employee who is required to handle fluoride shall be paid an allowance of $3.40 per week. This allowance shall only be payable to an employee who was formerly covered by the Government Water Supply (Kalgoorlie Pipeline) Award No. 15 of 1981.

2. Clause 12. – First Aid Attendant: Delete subclause (3) of this Clause and insert the following in lieu thereof—

(3) An employee who is a qualified first aid attendant and is appointed by the employer to carry out first aid duties in addition to normal duties, shall be paid an additional rate of $1.39 per day.

3. Clause 14. – Travelling Time and Allowances: Delete subclause (3)(a) of this Clause and insert the following in lieu thereof—

(3) An employee required to "follow the job" as in paragraph (1)(a) hereof shall be compensated for fares and travelling time to and from the job incurred by the employee, by—

(a) For travelling daily to and from the job within a radius of 50 kilometres of the G.P.O. Perth - an allowance of $13.18 per day.

4. Clause 17. – Tea Breaks, Meal Hours and Refreshments: Delete subclause (6)(a) of this Clause and insert the following in lieu thereof—

(6) (a) An employee required to work overtime for more than 1.5 hours without being notified on the previous day or earlier that he/she will be so required to work shall either be supplied with a meal by the employer or paid $9.06 but payment need not be made to employees residing in the locality of the work who can reasonably return home for meals.

5. Clause 26. – Distant Work - Construction: Delete subclauses (6) & (7) of this Clause and insert the following in lieu thereof—

(6) An employee to whom the provisions of subclause (1) of this clause apply shall be paid an allowance of $27.56 and for any weekend he/she returns home from the job but only if—

(7) Where an employee, supplied with board and lodging by the 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 $12.02 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 38. – Wages: Delete subclauses (6), (7) & (8) of this Clause and insert the following in lieu thereof—

(6) Tool Allowance

(a) Engineering Trades

(i) 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—

(aa) $9.99 per week to such tradesperson; or

(bb) in the case of an apprentice a percentage of $9.99 being the percentage which appears against the year of apprenticeship in subclause (5) of this clause.

(ii) Any tool allowance paid pursuant to paragraph (i) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in subclause (2) of this clause.

(iii) An employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(iv) A tradesperson or apprentice shall replace or pay for any tools supplied by the employer if lost through the negligence of the employee.

(b) Building Trades

In addition to the rate of pay prescribed in this clause for a Painter or a Signwriter, such employee shall be paid a tool allowance of $3.48 per week in accordance with the provisions of the Building Trades (Government) Award.

(7) Leading Hands

An employee placed in charge of—

(a) Metal Trades

(i) Three and not more than 10 other employees shall be paid $18.03 per week extra.

(ii) More than 10 and not more than 20 other employees shall be paid $27.59 per week extra.

(iii) More than 20 other employees shall be paid $35.62 per week extra.

(iv) 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 a Leading Hand and shall be paid at the rate prescribed for a Leading Hand in charge of not less than three and not more than 10 other employees.

(b) Building Trades

(i) Three and not more than 10 other employees shall be paid $27.80 per week extra.

(ii) More than 10 and not more than 20 other employees shall be paid $37.04 per week extra.

(iii) More than 20 other employees shall be paid $46.38 per week extra.

(8) Construction Work Allowance

(a) Subject to the provisions of this clause, an employee specified in this clause shall be paid an allowance at the rate of $16.95 per week to compensate for disabilities when actually engaged on construction work on site (as defined).

(b) "Construction Work" for the purpose of paragraph (a) hereof, shall mean and include all work performed on site on the construction, alteration, repair or maintenance of roads, reservoirs and drainage works, pipelines, water and sewerage mains and services. It shall not include the following classes of work—

(i) work in, around and/or adjacent to any workshop, depot, yard, treatment works, nursery or other similar establishments;

(ii) work in, around and/or adjacent to pumping stations for less than two hours;

(iii) gardening operations; or

(iv) driving vehicles, floats or fork lifts when that driving is not directly associated with construction work (as defined) for less than four hours on the day.

(c) An employee referred to in paragraph (a) of this subclause who is employed on construction work (as defined) for less than one week shall be paid for each day so employed, 1/5th of the said allowance.

(d) Provided that an employee under this clause who is engaged in the construction, or alteration of any building, structure or other civil engineering project which is carried out in areas excluded in paragraph (b) of this subclause shall be paid a construction allowance at the rate of $8.47 per week.

2002 WAIRC 04911

HEALTH WORKERS - COMMUNITY AND CHILD HEALTH SERVICES AWARD 1980

No. R21 of 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	HON MINISTER FOR HEALTH, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	FRIDAY, 1 MARCH 2002
FILE NO/S.	APPLICATION 989 OF 2001
CITATION NO.	2002 WAIRC 04911

Result Award varied

Order

Having heard Mr J Ridley on behalf of the applicant and Mr M Taylor 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 Health Workers – Community and Child Health Services Award 1980, (No. R 21 of 1979) 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 1st day of March 2002.

(Sgd.) W. S. COLEMAN,
Chief Commissioner.

[L.S.]

SCHEDULE

1. Clause 16. – Uniforms: Delete subclause (3) of this Clause and insert the following in lieu thereof—

(3) The employer shall pay an allowance of $1.15 cents per week for the laundering of uniforms.

2002 WAIRC 04941

METAL TRADES (GENERAL) AWARD 1966

No. 13 of 1965

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	ANODISERS W.A. AND OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	FRIDAY, 8 MARCH 2002
FILE NO/S.	APPLA 1756 OF 2001
CITATION NO.	2002 WAIRC 04941

Result	Award varied
Representation	
Applicant	Mr T Kucera
Respondent	Mr M Borlase

Order

HAVING HEARD Mr T Kucera on behalf of the applicant and Mr M Borlase 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 Metal Trades (General) Award 1966 (No. 13 of 1965) 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 8th day of March 2002.

(Sgd.) W. S. COLEMAN,
[L.S.] Chief Commissioner.

SCHEDULE

Part I - General

1. Clause 14. – Overtime: Delete subclause (3)(f) of this Clause and insert the following in lieu thereof—

(3) (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, the employee shall be supplied with each such meal by the employer or be paid $5.70 for each meal so required.

2. Clause 18. – Special Rates and Provisions: Delete subclauses (1), (2), (3), (4), (5), (7), (9), (10), (11), (12), (14), (20)(a), (21) & (22) of this Clause and insert the following in lieu thereof—

(1) 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, but this provision does not apply to linesmen nor to riggers and splicers on ships and buildings.

(2) 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.

(3) Grain Dust—

Where any dispute arises at a bulk grain handling installation due to the presence of grain dust in the atmosphere and the Board of Reference determines that employees employed under this award are unduly affected by that dust, the Board may, subject to such conditions as it deems fit to impose, fix an allowance or allowances not exceeding 67 cents per hour.

(4) 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 the employee is working, the employee is required to work in a stooped or otherwise cramped position, or without proper ventilation.

(5) Diesel Engine Ships—

The provisions of subclauses (2) and (4) 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 67 cents per hour whilst so engaged.

(7) Hot Work—

An employee shall be paid an allowance of 40 cents per hour when the employee works in the shade in any place where the temperature is raised by artificial means to between 46.1° and 54.4° Celsius.

(9) Tarring Pipes—

The provisions of subclauses (2) and (4) hereof do not apply to an employee engaged in tarring pipes in the Cast Pipe Section but the employee shall, in lieu thereof, be paid an allowance of 64 cents per day whilst so engaged.

(10) Percussion Tools—

An employee shall be paid an allowance of 23 cents per hour when working a pneumatic rivetter tools of the percussion type.

(11) 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 $9.85 per week. This 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.

(12) Abattoirs and Tallow Rendering Works—

An employee, employed in and about an abattoir or in a rendering section of a tallow works shall be paid an allowance calculated at the rate of $13.00 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 receive any other allowance under this clause.

(14) Phosphate Ships—

An employee shall be paid an allowance of 57 cents for each hour the employee works in the holds or 'tween decks of ships which, immediately prior to such work, have carried phosphatic rock, but this subclause only applies if and for as long as the holds and 'tween decks are not cleaned down.

(20) (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 spaces, and noise.

(21) An employee, 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 $7.70 per week in addition to the employee's ordinary rate.

(22) An electronics tradesperson, 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" Grade or "B" Grade license 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 $16.05 per week.

3. Clause 19. – Car Allowance: Delete subclause (3) of this Clause and insert the following in lieu thereof—

(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
MOTOR CAR

AREA AND DETAILS	ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES) RATE PER KILOMETRE (CENTS)		
Distance Travelled Each Year on Employer's Business	Over 2600cc	Over 1600cc -2600cc	1600cc & Under
Metropolitan Area	64.16	57.45	49.98
South West Land Division	65.66	58.94	51.23
North of 23.5° South Latitude	72.12	64.98	56.45
Rest of the State	67.9	60.81	52.85
Motor Cycle (in all areas)	22.13¢ per kilometre		

4. Clause 21. – Distant Work: Delete subclauses (4) & (5) of this Clause and insert the following in lieu thereof—

(4) An employee, to whom the provisions of subclause (1) of this clause apply, shall be paid an allowance of $27.15 for any weekend the employee returns home from the job, but only if—

(a) the employee advises the employer or the employer's agent of such 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 week-end;

(c) the employee returns to the job on the first working day following the week-end; 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.

5. Clause 31. – Wages and Supplementary Payment: Delete subclauses (2)(a), (3), (4), (7)(a) & (8) of this Clause and insert the following in lieu thereof—

(2) (a) Leading Hands

In addition to the appropriate total wage prescribed in this clause, a leading hand shall be paid per week—

		$
(i)	if placed in charge of not less than three and not more than ten other workers	20.25
(ii)	if placed in charge of more than ten and not more than twenty other workers	31.00
(iii)	if placed in charge of more than twenty other workers	40.10

(3) **Apprentices—**

Wage per week expressed as a percentage of the Level C10 Engineering Tradesperson's rate which includes a supplementary payment and arbitrated safety net adjustment.

Four Year Term	**%**
First year	42
Second year	55
Three year	75
Fourth year	88
Three and a Half Year Term	**%**
First six months	42
Next year	55
Next year	75
Final year	88
Three Year Term	
First year	55
Second year	75
Third year	88

(4) **Junior Employees—**

Wage per week expressed as a percentage of Level C13 base rate which includes a supplementary payment and arbitrated safety net adjustment.

	%
Under 16 years of age	35
16 years of age	45
17 years of age	55
18 years of age	65
19 years of age	78.5
20 years of age	93

(7) 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) $11.25 per week to such tradesperson; or

(ii) in the case of an apprentice a percentage of $11.25 being the percentage which appears against the year of apprenticeship in subclause (3) of this clause;

for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of work as a tradesperson or apprentice.

(8) An employee employed in rock quarries, limestone quarries or sand pits shall be paid an allowance of $18.10 per week to compensate for dust and climatic conditions when working in the open and for deficiencies in general amenities and facilities, but an employee so employed for not more than three days shall be paid on a pro rata basis.

This subclause shall not apply to employees employed by Cockburn Cement Limited.

Part II – Construction Work

6. Clause 5. – Special Rates and Provisions: Delete subclause (4) of this Clause and insert the following in lieu thereof—

(4) An electronics tradesperson, 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" Grade or "B" Grade license 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 $16.05 per week.

7. Clause 6. – Allowance for Travelling and Employment in Construction Work: Delete subclause (1)(a) of this Clause and insert the following in lieu thereof—

(1) An employee, who on any day is required by the 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 - $13.30 per day.

8. Clause 7. – Distant Work: Delete subclauses (6) & (7) of this Clause and insert the following in lieu thereof—

(6) An employee, to whom the provisions of subclause (1) of this clause apply, shall be paid an allowance of $27.15 for any weekend that the employee returns home for the job, but only if—

(a) the employee advises his/her employer or the employer's agent of his/her intention not later than the Tuesday immediately preceding the weekend in which he/she so returns.

(b) the employee is not required for work during that week-end;

(c) the employee returns to the job on the first working day following the week-end; 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 $11.95 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.

9. Clause 10. – Wages: Delete subclauses (4)(a), (4)(b), (5)(a), (5)(b), (5)(c) & (6)(a) of this Clause and insert the following in lieu thereof—

(a) In addition to the appropriate rates of pay prescribed in this clause an employee shall be paid—

(i) $35.85 per week if the employee is engaged on the construction of a large industrial undertaking or any large civil engineering project.

(ii) $32.25 per week if the employee is 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 such employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(iii) $19.00 per week if the employee is engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of Part I - General of this Award.

(5) Leading Hands

In addition to the appropriate total wage prescribed in 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	20.25
(b) If placed in charge of more than 10 and not and not more than 20 other employees	31.00
(c) If placed in charge of more than 20 other employees	40.10

(6) (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) $11.25 per week to such tradesperson; or

(ii) in the case of an apprentice a percentage of $11.25 being the percentage which appears against his/her year of apprenticeship in subclause (4) of Clause 31. – Wages and Supplementary Payments of PART I - GENERAL (subject to Clause 13. – Apprentices in PART II) of this award, for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of his/her work as a tradesperson or apprentice.

10. Clause 15. – Special Provision – State Energy Commission of Western Australia: Delete Clause (15) and insert the following in lieu thereof—

15. - SPECIAL PROVISION - STATE ENERGY COMMISSION OF WESTERN AUSTRALIA

(1) This clause shall apply to any employee otherwise covered by this Part of the award who is engaged on work being carried out for the State Energy Commission of Western Australia at Kwinana or Muja.

(2) In addition to the wage otherwise payable to an employee pursuant to the provisions of Part II - Construction Work of this Award, an employee (other than an apprentice) shall be paid—

(a) $1.60 per each hour worked if employed at Muja;

(b) 95 cents per each hour worked if employed at Kwinana;

(c) a safety footwear allowance of eight cents per each hour worked to compensate for the requirement to wear approved safety footwear which is to be maintained in sound condition by the employee. Failure to wear approved safety footwear or to maintain it in sound condition as determined by the employer shall render the employee liable to dismissal.

(3) (a) An employee, to whom Clause 6. - Allowance for Travelling and Employment in Construction Work of this PART applies and who is engaged on construction work at Muja, shall be paid—

(i) an allowance of $13.30 per day if the employee resides within a radius of 50 kilometres from the Muja power station;

(ii) an allowance of $35.00 per day if the employee resides outside that radius,

in lieu of the allowance prescribed in the said clause.

(b) Where transport to and from the job is supplied by the employer from and to a place 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.

(4) In addition to the allowance payable pursuant to subclause (6) of Clause 7. - Distant Work of this PART, an employee to whom that clause applies shall be paid $26.10 on each occasion upon which the employee returns home at the week-end, but only if—

(a) the employee has completed three months' continuous service with the employer;

(b) the employee is not required for work during the week-end;

(c) the employee returns to the job on the first working day following the week-end;

(d) the employer does not provide, or offer to provide, suitable transport,

and such payment shall be deemed to compensate for a periodical return home at the employer's expense.

(5) An employee to whom Clause 7. - Distant Work of this PART applies and who proceeds to construction work at Muja from home where located within a radius of 50 kilometres from the General Post Office, Perth—

(a) shall be paid an amount of $61.50 and for three hours at ordinary rates in lieu of the expenses and payment prescribed in subclause (3) of the said clause; and

(b) in lieu of the provisions of subclause (4) of the said clause, shall be paid $61.50 and for three hours at ordinary rates when the employee's services terminate, if the employee has completed three months' continuous service,

and the provisions of subclause (3) and subclause (4) of Clause 7. - Distant Work of this PART shall not apply to such employee.

(6) (a) An employee, to whom the provisions of Clause 7. - Distant Work of Part II Construction Work of this Award applies, who works at Muja and who elects not to live in Construction Camp Accommodation shall, subject to paragraph (b) of this subclause, be paid a living-out allowance at the rate of $308.50 per week to meet the expenses reasonably incurred by the employee for board and lodging.

(b) (i) The allowance prescribed in paragraph (a) shall only apply to an employee while the employee continues to live with his wife (including de facto) in accommodation provided by the employee.

(ii) The accommodation shall be of a reasonable standard.

(iii) The employee shall continue to maintain the original residence.

(iv) Employees on site at Muja as at 18th September 1984 shall advise their employer not later than 3rd October 1984 of their intention to avail themselves of the provisions of this subclause.

(v) The employee shall satisfy the employer, upon request, that the circumstances meet the requirements of this subclause.

(vi) Any dispute as to the application of this clause shall be subject to discussion between the employer and the Union and, failing agreement, shall be referred to a Board of Reference for determination.

(c) Provided that the provisions of subclause (6) of Clause 7. - Distant Work of Part II of this Award shall not apply.

2002 WAIRC 04914

RANGERS (NATIONAL PARKS) CONSOLIDATED AWARD, 2000

No. A17 of 1981

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	DEPARTMENT OF CONSERVATION AND LAND MANAGEMENT, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	FRIDAY, 1 MARCH 2002
FILE NO/S.	APPLICATION 1019 OF 2001
CITATION NO.	2002 WAIRC 04914

Result Award varied

Order

Having heard Mr J Ridley on behalf of the applicant and Mr R Heperman 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 Rangers (National Parks) Consolidated Award, 2000 (No. A 17 of 1981) 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 7th day of January 2002.

(Sgd.) W. S. COLEMAN,
[L.S.] Chief Commissioner.

SCHEDULE

1. Clause 9. – Overtime: Delete subclauses (7)(a) & (d) of this Clause and insert the following in lieu thereof—

(7) (a) An employee required to work continuous overtime for more than one hour shall be supplied with a meal by the employer or be paid $8.10 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 $4.75 for each meal so required.

(d) An employee required to work continuously from midnight to 6.30am and ordered back to work at 8.00am the same day shall be paid $4.20 for breakfast.

2. Clause 14. – Conditions and Allowances: Delete subclauses (3), (5), (6)(c), (7)(d) & (8) of this Clause and insert the following in lieu thereof—

(3) A Park Maintenance Employee who is the holder of an approved First Aid Certificate shall, in addition to his/her normal rate of pay, be paid an additional allowance of $1.51 per week. This allowance shall be paid to Park Maintenance Employees on their accrued days off.

(5) All employees, excluding Ranger classifications whose rates of pay are specified in subclause (1) of Clause 17. - Wages of this Award, shall be paid an allowance of $17.68 per week to compensate for the disabilities associated with the construction and maintenance industry.

(6) The following conditions shall apply to Park Maintenance Employees on vermin, plant or noxious weed control who are required to use a toxic substance.

(c) The employee using toxic substances or materials of a like nature shall be paid 48 cents per hour extra. Employees working in close proximity to employees so engaged shall be paid 39 cents per hour extra.

(7) (d) An employee required to wear protective clothing or equipment for the purpose of this subclause shall be paid 48 cents per hour or part thereof while doing so unless the Union and the employer agree that by reason of the nature of the protective clothing or equipment the employee does not suffer discomfort or inconvenience while wearing it or, in the event of disagreement, the Western Australian Industrial Relations Commission so determines.

(8) All Park Maintenance Employees called upon to clean toilet closets shall receive an allowance of 48 cents per closet per week and for these purposes one metre of urinal shall count as one closet and three urinal stalls shall count as one closet.

3. Clause 17. – Wages: Delete subclause (2) of this Clause and insert the following in lieu thereof—

(2) A Park Maintenance Employee placed in charge of others shall, in addition to his/her ordinary rate, be paid the following weekly allowance—

In charge of -	$
less than three other employees	13.40
three to six other employees	23.40
more than six other employees	28.80

2002 WAIRC 04909

WARD ASSISTANTS (MENTAL HEALTH SERVICES) AWARD 1966

No. 35 of 1966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	HON MINISTER FOR HEALTH, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	FRIDAY, 1 MARCH 2002
FILE NO/S.	APPLICATION 966 OF 2001
CITATION NO.	2002 WAIRC 04909

Result Award varied

Order

Having heard Mr J Ridley on behalf of the applicant and Mr M Taylor 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 Ward Assistants (Mental Health Services) Award 1966 (No. 35 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 1st day of March 2002.

(Sgd.) W. S. COLEMAN,
[L.S.] Chief Commissioner.

SCHEDULE

1. Clause 16. – Post Mortem Attendance: Delete this Clause and insert the following in lieu thereof—

16. - POST MORTEM ATTENDANCE

A worker carrying out mortuary duties in connection with post mortem examinations, shall be paid an allowance of $2.65 per body provided that if a worker is assisting another worker in carrying out such mortuary duties he or she shall be paid in lieu of the foregoing allowance, an allowance of $1.80 per body.

2. Clause 21. – Uniforms: Delete subclause (7)(d) of this Clause and insert the following in lieu thereof—

(7) General—

(d) All washable clothing forming part of the uniforms supplied by the employer shall be laundered free of cost to the employee. Provided that in lieu of such free laundering the employer may pay the employee $1.26 per week to partly cover the cost of same.

AWARDS/AGREEMENTS—Application for variation of— No variation resulting—

2002 WAIRC 04959

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGIN & ELECT DIV, WA BRANCH, APPLICANT
	v.
	JOHN LYSAGHTS (AUST) LTD., RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	MONDAY, 11 MARCH 2002
FILE NO.	APPLICATION 1962 OF 2001
CITATION NO.	2002 WAIRC 04959

Result Discontinued

Order

WHEREAS on 6 November 2001 the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch applied to the Commission to vary the John Lysaght (Australia) Limited Award No. 27 of 1967; and

WHEREAS on 17 December 2001 the Commission requested the Applicant to advise of the status of the application; and

WHEREAS by 25 February 2002 no advice had been received by the Applicant in this matter and a For Mention hearing was listed for 15 March 2002; and

WHEREAS on 7 March 2002 the Applicant sought leave to discontinue the application and the Commission granted leave.

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,
Commissioner.

[L.S.]

AWARDS/AGREEMENTS—Interpretation of—

2002 WAIRC 04864

ANDERSON FORMRITE PTY LTD/CFMEUW COLLECTIVE AGREEMENT 2001— DISCONTINUED BY LEAVE

ANDERSON FORMRITE PTY LTD / CFMEUW COLLECTIVE AGREEMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANDERSON FORMRITE PTY LTD (ACN 097 507 652), APPLICANT
	v.
	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	FRIDAY, 22 FEBRUARY 2002
FILE NO/S.	APPLICATION 233 OF 2002
CITATION NO.	2002 WAIRC 04864

Result	Leave granted to discontinue
Representation	
Applicant	Mr A Drake-Brockman of counsel
Respondent	Ms J Harrison

Order

WHEREAS this is an application pursuant to Section 46 of the *Industrial Relations Act 1979*; and

WHEREAS on the 15th day of February 2002 the Applicant filed a Notice of Discontinuance in respect of the application;

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

THAT the application be and is hereby discontinued by leave

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

2002 WAIRC 04903

WATER CORPORATION PAY AND ALLOWANCES AGREEMENT 2000 —DISIMISSED

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS' UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, W.A. BRANCH, APPLICANT
	v.
	WATER CORPORATION, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DELIVERED	TUESDAY, 5 MARCH 2002
FILE NO.	APPLICATION 1194 OF 2001
CITATION NO.	2002 WAIRC 04903

Result	Application pursuant to s.46 dismissed

Order

WHEREAS this is an application pursuant to Section 46 of the Industrial Relations Act 1979; and

WHEREAS on the 5th 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 parties sought time to have further discussions; and

WHEREAS by emails to the Commission dated the 27th and 28th days of February 2002 the Applicant's representative advised the Commission that the matter was resolved and could be dismissed;

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

THAT this application be, and is hereby dismissed.

(Sgd.) P. E. SCOTT,
[L.S.] Commissioner.

AGREEMENTS—Industrial—Retirements from—

AUSTRALIAN FINE CHINA ENTERPRISE AGREEMENT 1998

No. AG 281 of 1998

IN THE WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION
No. 284 of 2002
IN THE MATTER of the Industrial Relations Act 1979
and
IN THE MATTER of the filing in the
Office of the Registrar of a Notice
of Retirement from Industrial
Agreement in accordance with
section 41(7) of the said Act

The Federated Brick, Tile and Pottery Industrial Union of Australia (Union of Workers) Western Australian Branch will cease to be a party to the Australian Fine China Enterprise Agreement 1998 No AG 281 of 1998 on and from the 21st day of March 2002.

DATED at Perth this 18th day of February 2002.

J.A. SPURLING,
Registrar.

NOTICES—Award/Agreement matters—

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION
Application No. A 1 of 2002
APPLICATION FOR REGISTRATION OF AN AWARD
ENTITLED "BIBRA LAKE FABRICATION WORKSHOP AWARD"
No. A1 of 2002

NOTICE is given that an application has been made to the Commission by Bulkwest Engineering Pty Limited under the Industrial Relations Act 1979 for the above Award.

As far as relevant, those parts of the Award which relate to area of operation or scope are published hereunder.

3 AREA AND SCOPE

This award relates to all work performed by employees employed by Bulkwest Engineering Pty Ltd in the State of Western Australia in any calling mentioned in Clause 25 – Wages of this award.

4 TERM

The term of this award shall be for a period of two years.

25 WAGES

(1)(a)

Tradesperson Level 4
Tradesperson Level 3
Tradesperson Level 2
Tradesperson Level 1
Maintenance Employee Level 4
Maintenance Employee Level 3
Maintenance Employee Level 2
Maintenance Employee Level 1
Driver Articulated Vehicle exceeding 20 tonne capacity
Driver Motor Vehicle exceeding 7 tonne capacity

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

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

[L.S.]

13 March 2002.

PUBLIC SERVICE ARBITRATOR—Matters Dealt With—

2002 WAIRC 04819

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT *v.* DIRECTOR GENERAL, DEPARTMENT OF CONSUMER AND EMPLOYMENT PROTECTION, RESPONDENT
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DELIVERED	MONDAY, 18 FEBRUARY 2002
FILE NO.	P 43 OF 2001
CITATION NO.	2002 WAIRC 04819

Result	Application P 43 of 2001 dismissed in the public interest
Representation	
APPLICANT	MS M IN DE BRAEKT
RESPONDENT	MR R BATHURST (OF COUNSEL)

Reasons for Decision

1 This is an application to the Public Service Arbitrator which the Form 1, Notice of Application describes as being "for actions and/or decisions, and/or any related matter or thing of the respondent, specifically in relation to the substandard performance and disciplinary proceedings taken against Mr Ross Emerson, an employee of the respondent, to be reviewed, nullified, modified or varied, as the Public Service Arbitrator, in his/her jurisdiction, determines upon the hearing of the matter."

2 The applicant seeks the following orders:-

1. The disciplinary and substandard performance processes taken against Mr Emerson by the respondent, as commenced in December 2000, are hereby void ab initio.
2. The respondent is prevented from taking any such action against Mr Emerson in the future, in any way connected with the allegations made in the substandard performance and disciplinary processes commenced by the respondent against Mr Emerson, in December 2000.
3. Within 7 days of the date of this Order, the respondent is to have prominently stamped each and every page of all documents produced and or considered in relation to the abovementioned actions and processes of the respondent, and copies thereof, with the word "VOID" in red ink.
4. None of the abovementioned documents are to be kept on Mr Emerson's personal file, and there is to be no reference on Mr Emerson's personal file, to the existence of such documents.
5. All of the abovementioned documents are to be stored in one secure location in sealed and dated envelopes, and access to the files by any person is to be restricted and shall only occur in the presence of Mr Emerson and/or the Civil Service Association Inc.
6. The respondent shall within 14 days of the date of this Order, provide to Mr Emerson and the Civil Service Association Inc, by receipted delivery, with sworn affidavits that it has fully complied with all of the requirements in the abovementioned Orders.

3 On 27 November 2001, the applicant also filed an application for discovery, production and inspection of documents in relation to the disciplinary and substandard performance processes against Mr Emerson. The Arbitrator then convened a conference for the purpose of attempting to resolve the matter of discovery between the parties. During the course of the conference the respondent advised that it had in fact ceased the disciplinary and substandard performance process.

4 The parties were to have further discussions as to the issue of discovery and the applicant then requested that the matter be called on again. At a conference on 22 January 2002 for the purpose of dealing with this matter in respect of discovery, the respondent provided to the Arbitrator a copy of a letter dated 18 January 2002 addressed to Ms in de Braekt, the officer of the applicant dealing with this matter, and this letter notes—

> "As previously stated to you before the Commission, the recent disciplinary and substandard performance proceedings "**Proceedings**" against Mr Emerson were discontinued because my client had concerns that not all of the procedural steps under the Public Sector Management Act 1994 for the conducting of the Proceedings had been fully complied with.
>
> My client undertakes that no further disciplinary or substandard performance processes will be commenced or re-instigated against Mr Emerson in relation to the issues that were the subject of the Proceedings.
>
> My client further undertakes that any documents regarding the Proceedings will not be kept on Mr Emerson's personal file but will be stored separately with a notation on the file that the proceedings were discontinued and are not to be taken into account in dealings with Mr Emerson."

5 The applicant maintains that the application for discovery ought to proceed with a view to the substantive application being dealt with. On the other hand the respondent argues that the discovery application ought not proceed on the basis that further proceedings in respect of the substantive matter are not necessary or desirable in the public interest. The respondent also says that the Arbitrator ought to exercise its discretion pursuant to s.27(1)(a) to dismiss, or not hear further the substantive application in the public interest. The respondent says that the orders sought have, in effect, been met.

6 On the other hand the applicant says that what is sought by the orders is the voiding of the report and the processes, and that the respondent does not have the power to void anything. It says further, there are substantive adverse findings against Mr Emerson contained in the report which was produced as a result of the process and that "the only effective, proportionate and appropriate means of achieving any real extraction (of the knowledge of the report which is said to be embedded within the organisation's knowledge) is to have the Arbitrator make an Order voiding the processes and report." It says the decision of the Arbitrator is able to be accessed by the public whereas the respondent's undertakings are not so accessible. It says it is beneficial to the respondent to "sweep the matter under the carpet" and it is in the public interest to have such matters, in effect "see the light of day". The applicant says that there are outstanding issues which require that Mr Emerson be provided with the

opportunity of public vindication proportionate to the harm caused to him by the respondent's unlawful conduct in its undertaking of its processes. It has also said that the respondent has given no undertaking that it will publicly announce the discontinuation of the proceedings against Mr Emerson, nor is there any explanation of the respondent's neglect to properly apply the provisions of the Public Sector Management Act 1994 ("the PSM Act").

7 It is also suggested by the applicant that the report arising from the investigation is likely to be accessed by any persons in the future and that only the voiding of the process would provide the necessary conclusion. The applicant also says that discovery of the report is necessary to enable Mr Emerson to examine the accusations which have been falsely made against him.

8 The initiating Notice of Application has attached a Schedule A setting out 44 numbered grounds, 28 particulars and 6 orders sought. The applicant's application for discovery, production and inspection of documents contains 10 grounds and 8 orders sought. When the parties indicated that they sought the Arbitrator to make rulings in respect of the discovery application and the respondent's application to dismiss, the applicant indicated that it would put forward a one page submission consisting of additional points in dot point form to deal with those matters. Yet, the applicant filed a detailed, 9 page submission dealing with those matters. The respondent's submissions are brief and to the point. The applicant then provided a reply to the respondent's submission. It is not my intention to deal with each and every issue raised by these submissions, but to firstly deal with the respondent's application to dismiss on the grounds that the substance of the substantive application has been met and that it is not in the public interest to proceed with the matter further.

9 By virtue of s.80G(1) of the Industrial Relations Act 1979 ("the Act") the Arbitrator has the powers set out in s.27(1)(a) of the Act. They include—

> "(1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
>
> (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —
>
> (i) that the matter or part thereof is trivial;
>
> (ii) that further proceedings are not necessary or desirable in the public interest;
>
> (iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter; or
>
> (iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;"

10 The substance of this application is reflected in the orders sought. That is, the applicant complains about the disciplinary and substandard performance processes taken against Mr Emerson by the respondent and it seeks to have the whole process declared void. The respondent has conceded that those processes "were discontinued because of concerns that not all of the procedural steps under the Public Sector Management Act 1994 for the conducting of Proceedings had been fully complied with." The respondent has undertaken that "no further disciplinary or substandard performance processes would be commenced or re-instigated against Mr Emerson in relation to the issues that were the subject of the Proceedings." Further the respondent says it "undertook that any documents relating to the Proceedings would not be kept on Mr Emerson's personal file but would be stored separately with a notation on the file that the Proceedings were discontinued and were not to be taken into account in dealing with Mr Emerson."

11 The Arbitrator's proceedings are governed by the requirement, in accordance with s.26(1)(a) of the Act, that "it is to act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms". Although the respondent is not capable of "voiding ab initio" the disciplinary and substandard performance processes taken against Mr Emerson, what it has done and has undertaken to do in respect of those processes means that the processes have ceased and will not be re-instituted. The matter is effectively dead. The effect of these undertakings meets the purposes of orders 1 and 2 as sought.

12 The respondent has undertaken to deal with the documents associated with the processes in a manner which, to the best of its ability, has a similar effect to what is sought by orders 3, 4 and 5. Order 6 as sought is merely for confirmation of those actions.

13 In those circumstances, it is difficult to conclude that it is in the public interest for the Arbitrator to enter into an inquiry into the disciplinary and substandard performance processes taken against Mr Emerson by the respondent, with a view to reaching conclusions which the respondent appears already to have reached, and which the respondent has already dealt with. Mr Emerson may want to "clear his name" or to be vindicated but in the circumstances I am not satisfied that the effect that has been achieved by the respondent's recognition and actions in respect of that process, means that the Arbitrator ought enter into an investigation for the purpose of possibly vindicating Mr Emerson when there are no findings which have any status, such as to require that Mr Emerson be vindicated. To enter into an investigation for such a purpose would be an abuse of process which would result in considerable expenditure and waste of resources. The role of the Arbitrator is to deal with the effect of matters and not with the legal form and technicality as might arise in other jurisdictions.

14 In all of the circumstances, I conclude that the substance of the application has been met and the application ought to be dismissed in the public interest.

15 Accordingly, there will be no need to proceed with the substantive application or any of the matters which arise from it. An order shall issue for the dismissal in the public interest of the substantive application.

2002 WAIRC 04820

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT *v.* DIRECTOR GENERAL, DEPARTMENT OF CONSUMER AND EMPLOYMENT PROTECTION, RESPONDENT
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DELIVERED	MONDAY, 18 FEBRUARY 2002
FILE NO.	P 43 OF 2001
CITATION NO.	2002 WAIRC 04820

Result	Application P 43 of 2001 dismissed in the public interest

Order

HAVING heard Ms M in de Braekt on behalf of the applicant and Mr R Bathurst (of Counsel) on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders—

THAT the substantive application P 43 of 2001 be, and is hereby dismissed.

[L.S.]

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

2002 WAIRC 04814

RE LEAVE WITHOUT PAY AND PERMISSION TO UNDERTAKE OTHER EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL DEPARTMENT OF CONSUMER AND EMPLOYMENT PROTECTION, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	FRIDAY, 15 FEBRUARY 2002
FILE NO.	P 57 OF 2001
CITATION NO.	2002 WAIRC 04814

Result	Application for interim orders dismissed
Representation	
APPLICANT	MS M IN DE BRAEKT
RESPONDENT	MR R BATHURST (OF COUNSEL)

Reasons for Decision

1 The applicant seeks the following orders—

1. The respondent's decision of 18 December 2001, to deny Mr Emerson permission to undertake paid employment in the private sector, as an inquiry agent or private investigator is hereby void ab initio.
2. With immediate effect and until such time as Mr Emerson's employment may be lawfully terminated, as per s.102 of the *Public Sector Management Act 1994*, Mr Emerson shall be permitted to undertake paid employment in the private sector, as an inquiry agent or private investigator, provided that Mr Emerson avoids all reasonably known potential and actual conflicts of interest with his position as a public servant, and immediately advises the respondent in writing of the nature of paid employment that he may undertake.
3. The respondent shall not take any disciplinary or other such action against Mr Emerson which is in any way connected to the issues raised in this matter.
4. With immediate effect, Mr Emerson is permitted to be on leave without pay until 12 December 2003, unless before this date, Mr Emerson's employment should be lawfully terminated.
5. Mr Emerson's personal records are to be accordingly amended by the respondent, and a copy of these Orders and reasons for decision is to be placed and remain on his personal file by the respondent, within 7 days of the date of issuing of this Order.

2 The applicant seeks interim orders pursuant to s.32(3) of the *Industrial Relations Act 1979* ("the Act") as follows—

1. With immediate effect, and until the final hearing and determination of this matter, Mr Emerson is able to undertake paid employment in the private sector, provided that in so doing he avoids all reasonably known potential and actual conflicts of interest with his position as a public servant, and immediately advises the respondent in writing of the nature of paid employment that he may undertake; and
2. With immediate effect and until the final hearing and determination of this matter, Mr Emerson is to be considered on leave without pay, and his records are to be amended accordingly; or
3. With immediate effect and until the final hearing and determination of this matter, Mr Emerson is to be considered on sick leave without pay, and his records are to be amended accordingly; and
4. With immediate effect, the respondent is not to commence or progress any disciplinary action against Mr Emerson, until the final hearing and determination of this matter, if indeed any such action may be warranted.

3 It should be noted that there are other applications before the Public Service Arbitrator concerning disputes between the parties and between Mr Emerson and the respondent relating to difficulties in that employment relationship. Although those matters are not strictly relevant to the matters to be considered in dealing with this application for interim orders, the applicant has noted them and they provide some background to the relationship between the parties which colours this particular matter. Those matters are Applications P43, P44 and P45 of 2001.

4 Applications P44 and P45 of 2001 are essentially identical, the only real difference is that in P44 of 2001, Ross Alexander Emerson is the applicant whereas in P45 of 2001 the Civil Service Association of Western Australia Inc. is the applicant. These applications deal with an offer of voluntary severance made to Mr Emerson by his employer in October 2001, and the conditions attaching to that offer. The parties are in dispute as to the Public Service Arbitrator's jurisdiction to deal with that matter.

5 Application P43 of 2001 is an application relating to a disciplinary process undertaken by the respondent in respect of Ross Alexander Emerson. This application is currently the subject of an application by the applicant for discovery and an application by the respondent to dismiss the substantive application in the public interest.

6 In respect of the relevance of the other applications it is noted that the applicant in the particulars of claim, set out in Schedule A to this application, has set out some aspects of the history between the parties which relates to the matters raised in the other applications. The particulars of most relevance in this matter are that Mr Emerson has been the subject of a disciplinary and substandard performance process which has now ceased. Mr Emerson has been on leave from employment with the respondent for some time.

7 I note at this point, that under normal circumstances, and in accordance with the scheme, objects and requirements of the Act, the Arbitrator would deal with applications of this nature during a s.32 conference, submissions would be oral and informal in that context, and reasons for decision would be constituted by the recitals at the commencement of any order rather than be in such detail as in these reasons. However, given the nature of the application, the history of the matter and the approach taken by the applicant in this and related matters before the Arbitrator, it seemed appropriate, although less than desirable, to deal with this matter in such a formal way. I would hope that this will not be necessary in the future, and that the Commission's usual expeditious approach to resolving issues between parties will not be undermined.

8 The history of this matter is that the applicant, on behalf of Mr Emerson, requested leave without pay pursuant to Clause 24. – Leave Without Pay of the *Public Service Award 1992* (No. PSAA 4 of 1989) ("the Award"), and permission to undertake work in the private sector, pursuant to s.102 of the *Public Sector Management Act 1994* ("the PSM Act") by letter dated 13 December 2001. A copy of this letter is attached to the Notice of Application in the substantive matter. This letter deals with a request by the applicant that the respondent provide Mr Emerson and the applicant with a copy of the report into allegations of substandard performance and misconduct in relation to Mr Emerson, and written reasons why those proceedings had been discontinued. The letter also raises a dispute between the parties as to the respondent's calculation of Mr Emerson's leave entitlement, seeks that his record be checked and that the applicant be advised of the outcome of that as a matter of urgency. The letter also says—

> "… If this requested check of annual leave reveals that Mr Emerson indeed has further annual leave owing to him, Mr Emerson requests all of the outstanding annual leave to be provided to him immediately. Once such annual leave is provided to Mr Emerson, or once Mr Emerson is found to have no further outstanding annual leave entitlements, Mr Emerson then requests approval for leave without pay in accordance with Clause 24 of the *Public Service Award 1992*, to be effective from the end of such annual leave period and until 2 years thereafter. Mr Emerson also requests permission under section 102 of the *Public Sector Management Act 1994* to immediately undertake paid work in the private investigation and/or inquiry agents' industry. Of course Mr Emerson will diligently ensure, on a case by case basis that he does not place himself knowingly in situations where a conflict of interest may reasonably exist."

9 The letter sought a response by the close of business on Thursday, 20 December 2001 and also says "Please do not hesitate to contact me … if any further information or clarification is required."

10 The respondent replied by letter dated 18 December 2001—

> " … Your request for two years' leave without pay, under clause 24 of the Public Service Award 1992, has been considered and is denied.
>
> Your request for permission under section 102 of the Public Sector Management Act 1994 to undertake work in the private investigation and/or enquiry agent's industry has also been considered and is denied. Furthermore, you are instructed to provide me with written confirmation, within 7 days of the date of this letter, as to whether you have engaged in any such work without your employing authority's written consent.
>
> I note that your last medical certificate expired on 2 November 2001 and that all your paid leave expired on 11 December 2001. Given your request for permission to work elsewhere, I can only assume that you are now fit to return to your duties. You are, therefore, instructed to return to work immediately."

11 It is said that Mr Emerson is unable to return to work in the "current managerial climate" and at a conference convened by the Arbitrator on 7 January, 2002 he produced a medical certificate dated 3 January 2002, approximately two weeks after the filing of this application. That medical certificate states that from 1 November 2001 he is "unable to work at Consumer Protection due to stress. Fit to undertake alternative (sic) not related to above management."

12 Mr Emerson is unwilling to attend for any other medical assessment. Mr Emerson relies on the medical certificate of his General Practitioner. The respondent says that it is entitled to direct Mr Emerson to attend for a medical assessment. The respondent says that in the circumstances, it is appropriate to have Mr Emerson attend for a medical examination in accordance with Clause 22. – Sick Leave of the Award.

13 The applicant says that the interim orders sought are justified because the detriment "currently incurred by Mr Emerson as a result of the respondent's unlawful withholding of permission is not able to be rectified." The orders would "minimise the scope of events which would not be able to be resolved by the Commission's arbitral powers", and relieve the burden on Mr Emerson of the respondent's allegedly unlawful act, until the matter is heard and determined. The applicant also says that "the orders would assist in preventing further industrial disputes caused by the respondent's likely commencement of disciplinary proceedings against Mr Emerson." The applicant says that there is a substantial *prima facie* case to be tried being the respondent's failure to properly, lawfully and fairly apply its powers in respect of Mr Emerson.

14 The applicant says that the respondent did not attempt any communications with Mr Emerson or the applicant about the application for leave without pay and his application pursuant to s.102 of the PSM Act for permission to undertake work in the private sector, before making its decision. It says that if the respondent did not have sufficient information, the respondent was obliged to get that information before making any decision. The applicant says that the respondent took irrelevant considerations into account. It suggests that those irrelevant issues included whether Mr Emerson was fit to return to work, his state of health, the appropriateness of his working in another job when he has a permanent public service position, his recent absence on sick leave and annual leave, his defamation action against Mr Walker the respondent's Fair Trading Commissioner, the strategic advantage the respondent might obtain in other proceedings involving Mr Emerson, for example, the respondent hoped to force Mr Emerson to resign, etc. The applicant cites the employer's previous permission to Mr Emerson to work for remuneration as a cricket umpire and says the current application is unreasonably refused. The applicant refers to the respondent's denial of natural justice due to Mr Emerson's defamation claim against Mr Walker and his refusal to sign a severance deed which contained unlawful conditions, and due to other proceedings before the Arbitrator.

15 The application for interim orders is made pursuant to s.32(3)(c) of the Act. This section provides—

> "(3) Without limiting the generality of subsection (2) the Commission may, for the purposes of that subsection —
>
> …
>
> …

(c) give such directions and make such orders as will in the opinion of the Commission —

(i) prevent the deterioration of industrial relations in respect of the matter until conciliation or arbitration has resolved the matter;

(ii) enable conciliation or arbitration to resolve the matter; or

(iii) encourage the parties to exchange or divulge attitudes or information which in the opinion of the Commission would assist in the resolution of the matter;"

16 From the range of issues in dispute between the parties and between Mr Emerson and the respondent, and from my knowledge of the history of the relationship between them, and of the current situation, I conclude that industrial relations between them is far from harmonious. I have no reason to believe that granting or not granting the orders sought will make any difference to the maintenance, improvement or deterioration of that relationship.

17 The orders sought would advantage Mr Emerson. The refusal to grant interim orders 1, 2 and 3 would maintain the status quo. As to interim order 4, there is no evidence that the respondent is intending to commence or progress any disciplinary action against Mr Emerson. However, it may be fair to assume that if interim orders 1 and 2 or 3 as sought are not granted and Mr Emerson does not attend for work as directed, and does not undergo a medical examination if so directed by the respondent, some action might be taken by the respondent.

18 The question of the possibility of the deterioration of industrial relations in respect of the matter must also be considered in light of the merits and equity of the claim, and those matters are dealt with later in these reasons.

19 As to paragraph (ii) of s.32(3)(c), I am not satisfied that the issuing of the interim orders sought would enable conciliation or arbitration to resolve the matter. There seems to be no impediment to conciliation or arbitration which would be remedied by the interim orders sought. There is nothing within the orders sought which relates to paragraph (iii) of s.32(3)(c) to require consideration.

20 The decision of the Full Bench in *Thomas James Brown v The President, State School Teachers' Union of WA (Inc) & Others (*1989) 69 WAIG 1390 at 1393 sets out the tests to be applied to an application for interlocutory orders of this nature. Those tests are that—

"The applicant must therefore establish:—

(a) That as a matter of discretion, it is just and correct for (the Arbitrator) to make the order in all the circumstances.

(b) That, in fact, there is a substantial matter to be tried.

(c) That the (applicant) has a *prima facie* case for relief if the evidence on which the order is made is accepted at (hearing).

In addition, the (Arbitrator) must consider:-

(a) The damage which may be done to the respondent by granting the order as against the damage to the applicant if it is not granted.

(b) Any irreversible consequences of the granting of the order.

(c) The promptness or otherwise of the application.

(d) Any other relevant consideration."

21 As to the first set of tests contained within *Brown v The President, SSTU* (supra), I will deal with the first test as to whether it is just and correct, or equitable to make the orders sought, and the third, being whether the applicant has demonstrated a *prima facie* case for relief if the evidence on which the order is made is accepted at hearing. I think the use of the terms just and correct may also be considered to mean fair and equitable.

22 What are those circumstances, which should be considered when exercising discretion, which may make it fair and equitable to make the orders sought? The circumstances are that Mr Emerson has sought two years' leave without pay and permission to undertake paid work. The applicant provided little, if any, justification for this application to the respondent in the first instance. The applicant seeks to justify that application to the Arbitrator on the basis of what can be fairly described as a difficult relationship between Mr Emerson and his employer, based on the history between them. There is no particular justification for the period of two years being sought. The provisions of clause 24 of the Award provide the employer with discretion to grant an application for leave without pay. Subclause (2) says that every application is to be considered on its merits and may be granted provided certain conditions are met. Those conditions are that the work of the department is not inconvenienced and that all leave credits are exhausted. It is clear that there is no automatic right to leave even if the two conditions are met. The application is to be considered on its merits. It is for any employee making such an application to set out the merits of his or her application. A mere invitation to the employer to ask for further information, if required, is not adequate when the onus lays with an employee to demonstrate the merits of the application.

23 In light of the difficulties in the relationship between the employer and employee, the failure to provide any information to support the application for leave and for permission to work to enable its merits to be considered, to invite the employer to ask for any other information, and then to complain about the employer's refusal of the application and failure to seek further information and to make assumptions about the basis of the employer's refusal misunderstands, misrepresents or denies the onus which falls to the employee in making the application for leave and permission to work in the first instance.

24 As to the reference to the employer previously granting Mr Emerson leave without pay this does not overcome the difficulties faced by the applicant in this matter. There is nothing before me as to the circumstances under which any previous application was made or considered.

25 Since his employer's refusal of his application, Mr Emerson has provided a retrospective medical certificate, and he is unwilling to attend for a medical examination at his employer's instigation (See applicant's letter, undated but received by the Commission on 14 January 2002, at page 5). Yet, Mr Emerson claims that he is unable to work for the respondent because of stress associated with that work situation, due to the management of the respondent. Clause 22(3) of the Award provides for the Chief Executive Officer ("the CEO") to direct that a medical examination be undertaken. It provides—

"(3) Where the Chief Executive Officer has occasion for doubt as to the cause of the illness or the reason for the absence, the chief executive officer may arrange for a registered medical practitioner to visit and examine the officer, or may direct the officer to attend the medical practitioner for examination. If the report of the medical practitioner does not confirm that the officer is ill, or if the officer is not available for examination at the time of the visit of the medical practitioner, or fails, without reasonable cause, to attend the medical practitioner when directed to do so, the fee payable for the examination, appointment or visit shall be paid by the officer."

26 In submissions, the applicant says that "the respondent has not directed Mr Emerson to attend a "medical specialist" for assessment" but merely foreshadowed its intention to so direct Mr Emerson. The applicant denies that the respondent has a lawful ability to issue such an instruction to Mr Emerson, and has produced no evidence to justify any doubt as to Mr Emerson's medical condition. It says the respondent is obliged to put any reasons for doubt to Mr Emerson and provide him with an opportunity to respond.

27 That the respondent might have a doubt as to "the cause of the illness or the reason for the absence" would not be unexpected in the circumstances of this case. The respondent's letter of 18 December 2001 notes that Mr Emerson's last medical certificate expired on 2 November 2001. It was not until the conference of 7 January 2002 that Mr Emerson presented a medical certificate dated 3 January 2002 back dating his period of unfitness to work to 1 November 2001. Further, the applicant has already made clear Mr Emerson's unequivocal rejection of any suggestion that he attend for such an assessment.

28 The applicant says that this issue is not relevant to the matter before the Arbitrator. Having considered the context of the application for leave and permission to work and its refusal, the substantive application to the Arbitrator, the application for interim orders and the presentation of the medical certificate, I must say that this issue, and Mr Emerson's flat rejection of the respondent's proposal in respect of the medical assessment, is relevant. It goes to the merits of whether the interim orders should be issued, and particularly when interim order 3 sought is that Mr Emerson is to be considered on sick leave without pay, and his records are to be amended accordingly.

29 Given the disputes between the parties, and in the circumstances of the provision of a medical certificate back dating the period of unfitness to work, the respondent's desire for a medical examination is understandable. In the circumstances, Mr Emerson's unwillingness is unreasonable.

30 I consider these two matters to be the most significant of the issues relating, as they do, to the fairness and equity to be applied in exercising discretion and in considering whether a *prima facie* case might arise. They are to be weighed in the balance in deciding whether interim orders should issue. Those two issues do not support the applicant's claim for interim orders.

31 As to whether or not the applicant has a *prima facie* case for relief, if the evidence on which the order is made is accepted at hearing, based on the material before the Arbitrator at this point, on one hand the applicant has failed to provide any more than a bare request for leave and for permission to undertake private work, and the respondent has made a decision and has not sought further information. I am not satisfied at this point, based on the material before me, that the applicant has established on a *prima facie* basis more than that the applicant has provided no information as to the merits of the application to the respondent and the respondent has merely considered the application for leave and permission to work without further attempts to ascertain supporting material.

32 As to the third of the tests to be applied, the allegations raised in the substantive application do raise a substantial matter to be tried. It is true that the applicant has raised allegations about the respondent's conduct in its refusal to grant the request and these raise serious questions, however, for the purposes of the application for interim orders it does not overcome the considerations of fairness and equity and the *prima facie* case referred to earlier.

33 The question then arises as to any damage which may be done to the respondent by the granting of the orders as against the damage to the applicant if they are not granted. There is no evidence that the work of the respondent would be inconvenienced by the making of the orders, however, that is a matter to be weighed in the balance. What would occur is that without the orders sought, Mr Emerson is denied the opportunity to take leave and to earn an income outside his substantive employment, which employment is awaiting his return, pending the final hearing and determination of the matter. Section 102 of the PSM Act and Clause 24 of the Award provide no automatic right to the employee to be granted permission to undertake paid work outside his or her employment, or to take leave without pay and these are matters of discretion for the employer. I note at this point that one would expect that the discretion of the employer ought to be exercised in a fair, objective and rational manner. There would not be discretion to act in a capricious or arbitrary manner. So, although the employer has discretion, that discretion must be exercised in accordance with appropriate principles.

34 The granting of the application, being for interim orders, would have no irreversible consequences if Mr Emerson were to abide by the undertaking given by him. That is, that he will not engage in work which will create a conflict of interest. Such a commitment would be required in any event. However, the mere fact that no irreversible consequences would arise does not overcome the issues of merit and equity, and the *prima facie* case test.

35 As to the promptness or otherwise of the application it is quite clear that the application was filed within a matter of days of the respondent refusing the applicant's request. The Notice of Application (Form 1) was filed on 21 December 2001 and this was a matter of three days after the letter from the respondent to Mr Emerson denying his application for leave and permission to undertake other work.

36 Having taken into account all of the circumstances of this matter and applying the tests, I am not satisfied that the interim orders sought are appropriate to be issued, particularly given Mr Emerson's failure to provide the employer with more than a bare request without addressing any issue as to the merits of his application, and his unwillingness to undertake a medical examination following his provision of a back dated medical certificate after his employer refused his request.

2002WAIRC 04813

RE LEAVE WITHOUT PAY AND PERMISSION TO UNDERTAKE OTHER EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL DEPARTMENT OF CONSUMER AND EMPLOYMENT PROTECTION, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	FRIDAY, 15 FEBRUARY 2002
FILE NO.	P 57 OF 2001
CITATION NO.	2002 WAIRC 04813

Result	Application for interim orders dismissed

Order

HAVING heard Ms M in de Braekt on behalf of the applicant and Mr R Bathurst (of Counsel) on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders—

THAT the application for interim orders be, and is hereby dismissed.

[L.S.]

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

2002 WAIRC 04861

INTRODUCTION OF SHIFT WORK

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	CHIEF EXECUTIVE OFFICER, WA CENTRE FOR PATHOLOGY AND MEDICAL RESEARCH (PATHCENTRE), RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	FRIDAY, 22 FEBRUARY 2002
FILE NO.	P 51 OF 2001
CITATION NO.	2002 WAIRC 04861

Result Application pursuant to s.80E withdrawn by leave

Order

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

WHEREAS by an email to the Public Service Arbitrator dated the 21st day of February 2002 the Applicant sought to discontinue the matter;

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

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

[L.S.]

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

2002 WAIRC 04877

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INCORPORATED), APPLICANT
	v.
	VICE CHANCELLOR, UNIVERSITY OF WESTERN AUSTRALIA, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	WEDNESDAY, 27 FEBRUARY 2002
FILE NO.	P 59 OF 2001
CITATION NO.	2002 WAIRC 04877

Result Application pursuant to Section 80E withdrawn by leave

Order

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

WHEREAS by an email dated the 27th day of February 2002 the Applicant sought leave to withdraw 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.

2002 WAIRC 04897

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	CHIEF EXECUTIVE OFFICER, WATER AND RIVERS COMMISSION, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	FRIDAY, 1 MARCH 2002
FILE NO.	P 2 OF 2002
CITATION NO.	2002 WAIRC 04897

Result Application for an interim order dismissed

Order

WHEREAS this is an application pursuant to of Section 80E the Industrial Relations Act 1979, to the Public Service Arbitrator in relation to a disciplinary process involving Mr Dewan; and

WHEREAS on the 1st day of March 2002 the Public Service Arbitrator convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference, no agreement was reached; and

WHEREAS the Applicant sought an interim order in the following terms—

> With immediate effect, the respondent be prohibited from continuing any disciplinary action (including but not limited to any investigation, whether formal or informal) against Mr Dewan in relation to the allegations as stated in the respondent's correspondence to Mr Dewan on 1 June 2001;

WHEREAS the parties each addressed the orders sought, including opportunities for Mr Dewan to participate in redeployment opportunities; and

WHEREAS having considered the arguments of the parties the Public Service Arbitrator decided that the application for an interim order be dismissed on the basis that—

1. there is no obvious procedural breach in the disciplinary process undertaken to date in respect of Mr Dewan; the disputes between the parties relate to matters of fact the interpretation of the facts and matters of alleged unfairness, and those matters require assessments to be made as to credibility;
2. there is no significant detriment to Mr Dewan in the disciplinary process progressing to its conclusion because—
   a. Mr Dewan is on leave with pay; and
   b. Mr Dewan's status as a redeployee is not affected and opportunities for redeployment are still available to him, as evidenced by the Office of Energy delaying its appointment processes in respect of a position in which Mr Dewan has expressed an interest until the disciplinary processes involving Mr Dewan have been finalised;
3. in the context of there being a statutory procedure laid down for dealing with disciplinary processes. the process has yet to be concluded, and Mr Dewan has the right of appeal to the Public Service Appeal Board should the process result in adverse outcomes for him.

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders—

THAT the application for an interim order be, and is hereby dismissed.

[L.S.]

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

INDUSTRIAL MAGISTRATE—Complaints before—

THE INDUSTRIAL MAGISTRATE'S
COURT OF WESTERN AUSTRALIA
HELD AT PERTH
Claim No M 284 of 2001
Date Heard: 21 February 2002
Date Delivered: 7 March 2002
BEFORE: G. Cicchini I.M.
B E T W E E N :
The Australian Liquor, Hospitality and Miscellaneous Workers Union,
WA Branch
Claimant
and
Burswood Resort (Management) Ltd
Respondent

Appearances:

Mr J Rosales-Castaneda, *of Counsel*, appeared for the Claimant

Mr DM Jones of the *Chamber of Commerce and Industry of Western Australia (Inc) appeared as agent for the Respondent.*

Reasons for Decision.

The Facts

The Respondent is, and was at all material times, a corporation carrying on business in Western Australia. It manages the *Burswood International Resort Casino*.

The Claimant is an organisation of employees (a union) registered pursuant to the provisions of the *Industrial Relations Act 1979* (WA). The Respondent on or about 16 February 1995 employed one of its members, namely Pamela Donathy. Since 3 June 1996 she has been employed in the dry-cleaning department as a Laundry Attendant Grade 2.

At the material time (5 December 2000) Ms Donathy's employment with the Respondent was governed by the *Burswood International Resort Casino Employees Industrial Agreement 2000* (the agreement) which was registered by the *Western Australian Industrial Relations Commission* on 30 December 1999.

By letter, which is undated but transmitted by facsimile on 5 October 2000, Paul Justice, an organiser with the *"Burswood Resort Union of Employees"* (BRUE) wrote to the Respondent seeking approval to hold a paid union meeting on 5 December 2000 between the hours of 9.00 am and 12 noon. The request was purportedly made pursuant to clause 34 of the agreement.

On 16 October 2000, Mr Paul Kennedy, on behalf of the Respondent, replied in the following terms:

> *"Dear Mr Justice*
>
> *I acknowledge receipt of a facsimile transmission dated 5 October 2000 via your organisation from 'BRUE', wherein notification is purported to be given of a Union meeting on 5 December 2000 pursuant to the Burswood International Resort Casino Industrial Agreement 2000. As you are aware, 'BRUE' is not a registered party to this industrial instrument and has no standing to give such notice.*
>
> Provided the necessary requirements of Clause 34 of the Industrial Agreement are appropriately complied with, including correct notification, I have no difficulty with the date you have suggested. I trust you will advise me of your further arrangements as the date gets closer. Unfortunately, I am unable at this stage to provide a venue for this meeting.
>
> *Yours sincerely"*

On 23 October 2000, Mr Justice again wrote to the Respondent, however, this time in his capacity as an organiser with the Claimant. He said in his letter:

> *"Dear Mr. Kennedy*
>
> *I am writing in regards to the paid Union meeting that the Australian Liquor Hospitality and Miscellaneous Workers Union is entitled to under clause 34 of the Burswood International Resort Industrial Agreement 2000.*
>
> *As previously advised the Union intentions to hold the paid Union meeting on the 5th December 2000 between the hours of 9.00 am and 12.00 pm. I note in your letter dated 16th October that this date is expectable (sic) to the company. As you are unwilling at this stage to provide a venue if you cant provide this undertake by the 30th October the Union will make it's own arrangements.*
>
> *If there is anything you wish to discuss regarding the contents in this letter please contact me on 9388 5400 or fax 9382 3986"*

The Respondent did not reply.

BRUE in its capacity as *"a section of the LHMU"* advertised that a paid union meeting was to be held at G.O. Edwards Park (opposite Burswood on Great Eastern Highway) on Tuesday, 5 December 2000 between the hours of 9.00 am and 12 noon. The reason given for holding the meeting was, inter alia, to discuss the renewal of the industrial agreement.

In its flyer to employees concerning the meeting, BRUE, in its capacity of being a section of the Claimant made the following statement:

> *"All employees are encouraged to attend this important meeting.*
>
> *Employees covered by the Industrial Agreement who are rostered to work during the meeting time will be paid for attending the meeting*
>
> *BRUE wrote to Burswood asking that AWA employees who are rostered to work also be paid for attending. Burswood has refused.*
>
> *BRUE members and*
>
> *Non-members welcome."*
>
> (my emphasis added)

Employees were also advised that between 10.45 am and 12 noon there would be a sausage sizzle.

The meeting was, in fact, held on 5 December 2000 between the hours of 9.00 am and 12 noon at the place indicated. Pamela Donathy attended that meeting.

Mr Justice testified that the actual meeting time was reduced because attendees had to change from their uniforms to ordinary clothing prior to the meeting and then change back into their uniforms following the meeting. He told the Court that the formal part of the meeting, which included the delivery of speeches, concluded by 10.45 am. Thereafter union business continued in the collection of signatures for petitions whilst the sausage sizzle took place. Employees left the meeting by about 11.30 am so as to ensure that they were ready for duty at 12 noon.

At noon, Pamela Donathy returned to her workplace following the meeting. Upon her return to her workplace she went to the staff dining room in order to take her half hour lunch break. Her supervisor prevented her from doing so, and instructed her to return to work. She returned to work as instructed. She remained at work until 2.25 pm, being her normal finish time.

On the material day Ms Donathy had been rostered to work between 6.00 am and

2.25 pm. On that day as on other days when she commenced at 6.00 am she was routinely rostered to take lunch at, or reasonably close to, 11.25 am. That had been the case since at least October 1999. The lunch break was for 30 minutes in accordance with clause 16(1) of the agreement.

Pamela Donathy was paid ordinary time rate of pay for that day. She was paid her ordinary rate of pay for her work carried out between 6 am and 9 am and that carried out between 12 noon and 2:25 pm. She was also paid her ordinary rate of pay for the period 9 am to 11.25 am whilst at the meeting. She was not paid for her lunch break, which was rostered during the later part of the meeting.

Ms Donathy's attendance at the meeting occurred with the concurrence of the Respondent.

The Issues

The Claimant contends that Ms Donathy was entitled to be paid for the full 3 hours during which the meeting took place. It says that she was entitled to have her lunch break following the meeting and that the Respondent's refusal to let her have her lunch break following the meeting resulted in Ms Donathy working the full day without a lunch break. As a consequence she is entitled to be paid penalty rates in accordance with clause 16(1)(a) of the agreement for her work following the meeting.

Clause 16(1)(a) provides:

> *16. MEAL AND REST BREAKS*
>
> *(1) (a) Each employee, other than those employed in the classifications of Inspector and Croupier/Dealer, shall be entitled to an unpaid meal break of not less than 30 minutes nor more than 60 minutes which shall commence after completing not less than one hour 30 minutes and not more than 6 hours of any rostered shift. Provided that where it is not possible to grant the meal break during the above prescribed period, the said meal break shall be treated as time worked and the employee shall, in addition to ordinary time rates, be paid 50 per cent of the ordinary hourly rate applying to such employee, until such time as the employee is released for a meal, or until the completion of the rostered shift, whichever is the sooner.*
>
> (my emphasis)

The Respondent paid Pamela Donathy the ordinary rate of pay for the 2.5 hours she worked following the meeting. The Claimant says that the Respondent, in fact, paid Pamela Donathy $29.56 for that period when it should have paid her $44.33 in accordance with clause 16(1)(a) of the agreement. Accordingly it claims the difference of $14.77, which it says is owing to its member.

The Respondent denies that it has breached the agreement. It also denies that it is liable to pay the $14.77 claimed. The Respondent rejects the claim on two grounds. They are:

1. That the meeting held on 5 December 2000 was not a meeting held pursuant to clause 34(4) of the agreement. Accordingly the claim which is contingent upon the worker's right to be paid for attendance at a meeting held pursuant to clause 34(4) cannot succeed: and
2. In the alternative, if it is found that the meeting is one within the ambit of clause 34(4), that Pamela Donathy was nevertheless not entitled to a lunch break following the meeting as she had already taken her lunch break during the course of the meeting.

Determination of the Issues

I shall deal firstly with the issue of whether the meeting held on 5 December 2000 was one held pursuant to clause 34(4) of the agreement. In that regard a consideration of clause 34(4) is required. It provides:

> *34. UNION DELEGATES AND MEETINGS*
>
> *(1) ...*
>
> *(2) ...*
>
> *(3) ...*
>
> *(4) The Union shall be allowed to convene one "Union Meeting" each year, during ordinary working hours, in accordance with the following conditions:*
>
> *(a) At least fourteen days' written notice of such meeting is given to the Company by the Secretary of the Union.*
>
> *(b) The duration of the meeting shall be 3 hours as a maximum, the employees returning to duty by noon.*
>
> *(c) Payment at ordinary time rate of pay to be made for the period that employees were rostered for duty.*
>
> *(d) Such Union meetings shall be held on weekdays, on other than a Thursday or Friday.*
>
> (e) *Payment of wages shall be made only upon the Company being in receipt of satisfactory evidence of the employee's attendance at the meeting.*

A consideration of the clause in the light of the correspondence passing between the parties (as contained in exhibit 4) reveals that subparagraph (a) of clause 34(4) was not complied with. The Secretary of the union did not give written notice. There was a fundamental flaw in the process in that regard.

In his letter to Mr Justice dated 16 October 2000, Mr Kennedy, on behalf of the Respondent made it patently clear that strict compliance with the provisions of clause 34 was required. Any approval was subject to the same.

The letter to the Respondent dated 23 October 2000 from Mr Justice, in his capacity of organiser with the Claimant, did not comply with the requirements of the clause. Accordingly, there was never any approval granted to hold the union meeting.

There can be no doubt that, as a matter of fact, a meeting organised by the Claimant was held on 5 December 2000. There is also no denying that the Respondent authorised its employees to attend the meeting and that it paid them for their rostered work time spent at the meeting. However, the Respondent was never under any obligation to do so. The Respondent's act of allowing its employees to attend the meeting and paying them for their time there resulted not from any legal obligation but rather because it chose to do so.

The prerequisite requirement of proper notice to hold the meeting was never given. Accordingly, approval to hold the meeting pursuant to clause 34 was never obtained. The meeting was not held under that provision. The meeting that proceeded was not a meeting falling within the auspices of clause 34. It was a meeting held with the acquiescence of the Respondent but falling outside the agreement. Accordingly, therefore, the claim made pursuant to clause 16(1)(a) falls away given that it is contingent upon Pamela Donathy attending a meeting held pursuant to the provisions of clause 34 of the agreement

I must say that I accept generally the submissions made by the Respondent on the issue.

Even if the Respondent had not been successful on that issue, it is evident that the Claimant's claim cannot succeed in any event. I say that because clause 34(4)(c) provides that payment at ordinary time rate of pay is to be made for the period that employees were rostered.

In this case Pamela Donathy was rostered to work until 11.25 am. Her entitlement to pay was up until that time. She then took a lunch break between 11.25 am or 11.30 am until 12 noon. She chose to have her lunch at the park. She did not present herself at the Respondent's cafeteria. Had she done so, the employer would have been required to supply her with a meal free of charge pursuant to clause 17 of the agreement.

The Respondent's obligation was to pay her for such period of the meeting that she was rostered to work. Indeed that was within the contemplation of the Claimant. In its notice to employees the Claimant said:

"Employees ... who are rostered to work during the meeting time will be paid for attending the meeting".

The corollary of that is that if an employee was not rostered to work during the meeting, such employee would not be paid.

In this case, Pamela Donathy was not rostered to work for the period 11.25 am or 11.30 am to 12 noon. That was her lunch break. She was not entitled to be paid for that period. Indeed she was not paid for that period. In that regard I accept the evidence of Ms Drimatis on behalf of the Respondent. I accept her explanation with respect to exhibit 5. I accept that a close consideration of the same reveals that Pamela Donathy was not paid for the lunch period during which she attended the meeting. I accept her evidence that the payslip is partially misleading.

It follows, therefore, that on the material date Ms Donathy took her lunch break prior to her return to her workplace. Accordingly, she was not entitled to another lunch break. Further, there is no evidence to suggest that her roster had been changed and that she was entitled to take her lunch break from 12 noon to 12.30 pm. Clause 34 does not have the effect of changing or displacing the rostering arrangements.

In my view clause 34(4)(c) does not permit the interpretation sought by the Claimant.

I find that the Claimant has failed to prove its claim.

G. CICCHINI,
Industrial Magistrate.

WORKPLACE AGREEMENTS—Matters pertaining to—

2002 WAIRC 04973

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DANIA ALVAREZ-CAMEJO, GISELA BOROJEVIC, HELEN CASTILLO, APPLICANT
	v.
	READY WORKFORCE PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	TUESDAY, 12 MARCH 2002
FILE NO.	WAG 7 OF 2001
CITATION NO.	2002 WAIRC 04973

Result Discontinued

Order

WHEREAS on 7 June 2001, Dania Alvarez-Camejo and Others applied to the Commission for orders pursuant to the *Industrial Relations Act, 1979;* and

WHEREAS on 7 August and 3 September 2001 the Commission convened conciliation proceedings between the parties and following the matter was listed for hearing on 6 February 2002 at which time the decision was reserved; and

WHEREAS on 8 March 2002 the Applicants sought leave to discontinue the matter; and

WHEREAS the Commission having considered the matter has concluded that the application for discontinuance is not incompatible with submissions made on behalf of the Applicants on 6 February 2002 decided to grant leave to discontinue.

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.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2002 WAIRC 04885

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	REBECCA VALMINE ADAMIAK, APPLICANT
	v.
	ALL THINGS X-RAY PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	FRIDAY 1 MARCH 2002
FILE NO.	APPLICATION 472 OF 2001
CITATION NO.	2002 WAIRC 04885

Result	Dismissed for want of jurisdiction. Contractual benefits granted.
Representation	
Applicant	Ms R.V. Adamiak appeared on her own behalf
Respondent	Mr J. Sicard appeared on behalf of the Respondent

Reasons for Decision

1 Rebecca Valmine Adamiak (the Applicant) alleges that she was dismissed by Mr Edward Lee, Managing Director, of All Things X-Ray Pty Ltd (the Respondent) on 16 February 2001 because she would not apologise to his daughter, Kathleen Edmett or his son-in-law Sean Edmett, both of whom are employed by the Respondent. The Applicant makes application for orders pursuant to s.29 of the *Industrial Relations Act, 1979* (the Act) for compensation for the dismissal and for outstanding benefits said to be non-award entitlements which were due to her when the employment contract came to an end.

2 The Applicant claims that she commenced employment with the Respondent on 31st May 1999 under the terms of a letter of even date, the employment contract specifies that the number of duty days per week was to be three, 'by arrangement with Mrs Kathleen Edmett' (Exhibit S1).

3 A dispute arose between the Applicant and the Respondent; she claims she had worked between 31st May 1999 and 12th February 2001 on Wednesdays to Fridays while her job share partner, Mrs Kathleen Edmett worked Mondays and Tuesdays. On 24th January 2001 Mr Lee told the Applicant he was cutting her hours from six days a fortnight to five days because Mrs Edmett wanted to work more. The Applicant had objected to this, she said that in response Mr Lee had said words to the effect that if she had not miscarried a child in July 2000 she would have been going on maternity leave at about that time and his daughter was therefore expecting more hours. This exchange caused the Applicant distress.

4 She was also distressed through events which had caused her pay not to be available on the days on which it was due. An incident occurred on 25th January 2001 when to cater for a public holiday there was need to vary the pay day. As it happened there was an error with the result that on the Monday 24th January 2001 when the Applicant was shopping there were insufficient funds in her account to pay for what she had purchased, this caused her embarrassment. The Applicant admits she was angry and deeply embarrassed at the time and when she rang Mrs Edmett to try and remedy the problem her tone of voice was cross and upset however, she was not abusive in any way. Ultimately the Respondent was unable to immediately credit funds to the account and the shopping was returned to the shelves as the Applicant could not pay for it.

5 When the Applicant next went to work on Thursday, 1st February 2001 Mr Lee told her that he wanted her to apologise to Mrs Edmett. She objected because she believed she had acted reasonably, she denied she had shouted at Mrs Edmett but, on the contrary was, in the circumstances, very courteous. She also told Mr Lee that was not the first time she had to return shopping because of pay errors. He promised to investigate.

6 On 7th February 2001 the Applicant was again told by Mr Lee that she had to apologise to Mrs Edmett, this request was contained in a letter, Exhibit E1, which was handed to the Applicant. The letter, amongst other things, drew attention to alleged clerical input errors said to be the fault of the Applicant, it also told her that her grievance was not with the Respondent but with the banking corporation responsible for processing the pays. In addition the letter drew attention to outgoing and incoming emails from a personal associate of the Applicant which was said to be degrading of Mrs Edmett. Finally it was alleged that the Applicant's attitude was immature and inappropriate and she was placed on notice to improve her relations with all the staff and to carry out her duties in an efficient and courteous manner, which also included a formal apology to Kathleen Edmett and to Sean Edmett on the one hand for the so called unreasonable and outburst to Mrs Edmett and to Mr Edmett for allegedly refusing to carryout work as he directed.

7 By the letter the Applicant was also told that her hours of work would be reduced to two days a week as a part of a Company 're-organisation'. It gave her a target date of one week for evaluation of the contentions raised by the Respondent in the letter, at which time there would be a review of the Applicant's future employment with the Respondent.

8 These events left the Applicant upset again. She decided to respond in writing to the Respondent's letter dated 6th February 2001 and produced a discursive reply which was given to Mr Lee on 15th February 2001 (Exhibit A3).

9 In the letter the Applicant denied that she was solely responsible for any errors affecting stock take, she pointed to the involvement of Mrs Edmett in the preparation of those figures and said it was unreasonable that she (the Applicant) carry the blame solely. She also suggested to Mr Lee that there were clerical errors made by the rest of the staff and that in any event invoicing is done under the instruction of Sean Edmett and then checked by him prior to the posting of invoices. On these grounds she contended she was not solely responsible for errors.

10 The Applicant declined to apologise to Mrs Edmett, she says she told Mr Lee there was no reason that she should because the tone of her voice was relevant to the embarrassment she was suffering at the time, she was not abusive at all. According to her understanding Mrs Edmett was responsible to ensure all staff were paid on time, if this had have been done she would have suffered no embarrassment and therefore not spoken in a firm or stern voice to Kathleen.

11 The allegation concerning an offensive email was rejected the Applicant, on the contrary she said that the email had congratulated her on being pregnant. It was only after the email arrived that time that the term 'Company re-organisation' was used to cut her hours. It was contended by the Applicant that she had twice previously raised with Mr Lee what she considered to be unprofessional behaviour by Mrs Edmett. She told Mr Lee of telephone calls from Mrs Edmett to her home which were abusive and drew to his attention that he did nothing about her complaint.

12 Insofar as Sean Edmett was concerned the Applicant refused to apologise, she had done nothing wrong. She had been typing an email for Mr Lee and when Sean Edmett had asked for a letter to be typed, she told him that she would do it after lunch. Mr Edmett sat next to her for the whole of the time in that lunch break and made no comment at all about the letter; she typed it immediately after the lunch break.

13 The Applicant then says on the following day at 5:00pm she was called into the office by Mr Lee and handed what she described as a termination letter. The wording of the letter is important for the disposition of this application and is included, formal parts omitted, hereunder—

> *"I am in receipt of your letter dated 16th February regarding my earlier warnings to you regarding your employment with ATX and your integration with some team members.*
>
> *Having read your reply I am disappointed to hear that you are not willing to apologize to Kathy and Sean and fear that with your frustrations you are totally misconstruing the facts, including your reference to your pregnancy, that is so far out of line that I am simply flabbergasted that you could have even come with that impression.*
>
> *I therefore must give you notice that unless an apology is given to Kathy and Sean by no later than 9am Thursday 22nd February 2001 I shall have no alternative than to cease your employment with ATX from that moment."*

Exhibit A4

14 The Applicant contends that when Mr Lee gave her the letter he said words to the effect that he had no alternative but to cease her employment from that moment. She then contends that he told her to go away and think about what was in the letter and let him know her decision. She says in her evidence that she told Mr Lee she did not need to think about it, she would not be apologising to Mrs Edmett. Mr Lee then told her not to bother coming into work on Thursday, she took this to mean that she was dismissed. She then says that Mr Lee escorted her to reception, took her front door keys and she left.

15 The Applicant says she was unfairly treated because the Respondent was in breach of her contract of employment by reducing her duty days without notifying or consulting her. Nor did it inform her concerning the need to reorganise the Company's staffing which reorganisation resulted in a reduction in her work time. Mr Lee did not take any notice of her contentions regarding the disputes with Sean and Kathleen Edmett; that he required her to apologise in the circumstances was unreasonable, unwarranted and manifestly unfair and in any event should not be used for a basis for dismissal. The Applicant says that Mr Lee's judgement was clouded by his obvious favouritism for members of his family; therefore he lacked impartiality and was not neutral. He had no interest at all in dealing with the allegations that the Applicant raised concerning mistakes made by other people in the firm.

16 Evidence was received on behalf of the Applicant from an ex employee of the Respondent, Mr Shane Asplin and from the Applicant's partner Mr K Druce. The evidence of Mr Asplin in the main supported the Applicant's work ethic while that from Mr Druce was as a listener to a telephone conversation the Applicant had with Kathleen Edmett. The proceeding summary sufficiently outlines the Applicant's case.

17 The evidence of the Respondent's witnesses who were Mr Edward James Lee, Mrs Kathleen Edmett and Mr Sean Edmett is as follows.

18 The Respondent specifically refutes any allegation that the Applicant's medical condition as a result of her miscarriage had anything to do with changes to her working hours. On the contrary when the changes were made she was given opportunity to discuss them with her partner and the changes were instituted later. The Applicant had been counselled about her input errors.

19 The Respondent submitted that during the incident involving the late pay, that the Applicant had been aggressive and abusive in the telephone conversation. She was told that her conduct had been inappropriate and she was required to apologise for swearing and the unreasonableness of the way she approached the matter. At all times she refused to acknowledge that the Respondent had done all it could to ensure the pay transfer took place at the correct time.

20 In February 2001 there had been a developing tension caused by the Applicant's conduct. It was open for the Respondent to conclude that her emails to her friend in which she referred to bitches in the workplace could only refer to Mrs Edmett. What happened was a severe personality conflict developed with Mrs Edmett and this was the source of constant tension in the workplace. To defuse the situation, Mr Lee offered to conduct a meeting between the two women to address the issues but the Applicant refused to take part. In his evidence Mr Lee says there was never ever aggressive behaviour towards the Applicant, what he was trying to do was resolve the personnel problems within his operation so that it could operate in a normal way.

21 The Applicant was given a letter outlining the concerns that the Respondent had about her and was told that each of those would be reviewed in one week. She was again told of the need to apologise to the Edmetts.

22 There were good and substantial reasons for the business to reorganise how it was deploying its workforce. Amongst which was the need for Mrs Edmett to have additional time to rectify errors which were made by the Applicant in use of the computer.

23 The Respondent says there is no evidence at all that there was a continual delay in pays, in fact to resolve the situation it offered to pay the Applicant by cheque, which she declined. It was unreasonable of the Applicant, according to the Respondent, to continue to blame it for errors in bank transfers.

24 There was a second letter of warning given to the Applicant on 16th February 2001 which clearly advised her that her job was in jeopardy because of her behaviour. In order to remediate tension in the workforce the Applicant was given a week to apologise to the Edmetts or face termination. Mr Lee says that he met with the Applicant after the receipt of her letter of 15th February 2001 in which she did not acknowledge any of the Respondent's concerns. He had drafted up a letter designed to give her a further week to consider her position. He did not regard the letter as a termination letter, it was a notice to her that unless she apologised to the Edmetts by Thursday, 22nd February 2001 that is another week on, the Respondent would have no alternative than to cease her employment.

25 When the Applicant was told this she said she would not be apologising and she went down into the workshop yelling at other employees that she had been sacked. Mr Lee did not ask her to leave immediately, she did so at her own volition, he did not ask for her keys, he picked those up from her desk after she left them there.

26 It is the Respondent's contention that there is no dismissal at all, the Applicant did not accept the Respondent's instruction that she be given a week to apologise, she removed herself from the workplace and there was therefore no unfairness in what happened to her. This was particularly so given that Mr Lee was at pains to tell her not to make a quick decision. In addition he called the Applicant after she left, hoping she had settled down and might review her position. However she did not take the opportunity to do so.

27 Under s.29 (1) of the Act an industrial matter may be referred to the Commission, in the case of a claim by an employee that he/she has been harshly, oppressively or unfairly dismissed from his/her employment or that he/she has not been allowed by the employer a benefit, not being a benefit under an award or order to which he/she is entitled under the contract of service. It

follows for the Commission to deal with the matter under s.29(1)(b)(i) that is a matter relating to an unfair dismissal, that there must have been a dismissal. It is therefore a condition precedent to the exercise of the jurisdiction that an employee who seeks to exercise their right to refer the industrial matter to the Commission to establish there was such a dismissal.

28 This provision of the Act is important in this matter because there is a dispute that a dismissal has taken place. Setting aside all of the events which led up to the meeting between the Applicant and Mr Lee on 17th February 2001, for the Applicant to be able to proceed with her claim for unfair dismissal she has to establish there was a dismissal on that day.

29 Whether there was or not depends upon the Commission's finding, on the balance of probabilities, which version of the events offered by the respective parties most likely occurred. As there are no direct witnesses to this, findings of credibility of witnesses are important.

30 The Commission heard from the Applicant in person. It must be said that in the conduct of her case she was impressive and calm and seemed to have a good grasp of the issues she needed to expose to the Commission. She appeared to be a determined woman who would pursue with vigour what she thought to be right at the same time she appeared to be very closely and emotionally involved with the events which had befallen her during her employment with the Respondent. While it would be wrong to draw the conclusion that she deliberately constructed a story to support the contentions that she advanced to the Commission it is easy to understand that in her pursuit to achieve what she thinks to be justice she may well have forgotten some of the precise details of some critical events.

31 The evidence that was adduced to the Commission by her two witnesses does not add much to the Commission's knowledge about the crucial issues to be decided in this case.

32 On behalf of the Respondent evidence was heard from the principal, Mr Edward James Lee, I have no reason to doubt the veracity of the evidence he gave the Commission. The evidence from Kathleen Edmett reveals tension between the two women although I cannot find anything in her evidence which indicates she is deliberately trying to mislead the Commission. The evidence of Sean Edmett is not impressive; he appeared to be a person of considerable lack of energy, although there is nothing in his evidence which would indicate that he tried to deliberately mislead the Commission. Whether his evidence could be relied upon to establish the course of events without any doubt is another question.

33 What the Commission has to determine is whether there has been a fair go all round, this test is set out in *Federated Miscellaneous Workers Union v Undercliffe Nursing Home (1985) 65WAIRG385* and is the seminal test albeit not the only matter which needs to be taken into consideration. For instance the employer is entitled to run their business in the way they think appropriate as long as they do that fairly, when affecting a dismissal it should not be done in the heat of the moment. An employer should ensure that when tension is involved in a situation of dismissal that the employee involved has time to think the matter through. The decision to be made must be made on balance and usually no one reason, except in cases of involving gross misconduct, is sufficient to ground a dismissal.

34 In this matter what happened at the end of the relationship is of fundamental importance because the circumstances raise questions as to whether the Commission has jurisdiction to deal with the application. Although it is open to find on the chronology of events that the Applicant was employed on a part time basis, the evidence indicates that it was open to the Respondent to employ the Applicant on a varying number of days per week and this occurred over the life of the contract (Exhibit S1). It in my view was open to the Respondent to vary the hours and when it did although the Applicant did not like it she nevertheless accepted it. It is also open to find that there commenced a tension between the Applicant and Kathleen Edmett and this tension became worse, whether it was exacerbated by Mrs Edmett being the boss' daughter is a matter on which the Commission cannot rule on with any certainty. However it was clear that Mr Lee regarded his daughter as having an important role to play in the Company, because she was his daughter though, in times when there were arguments with the Applicant it would not be strange that he would support the contentions advanced by his daughter about the cause of those tensions.

35 Whether Mr Lee was right or wrong in his assessment of the Applicant's work, he nevertheless did what he was required to do by the law in drawing the matters to her attention and he did so in writing. It is clear that she should have been aware that he was concerned about the way she went about the Respondent's business when she received the letter. As she is entitled, the Applicant responded, but she did so in a way that rejected all of the issues the employer raised with her. A stance from which she never retreated.

36 It is understandable that the Applicant had some difficulties with the conduct of Kathleen and Sean Edmett, for instance the request for her from Mr Lee to apologise to Sean Edmett seems to be erected on a spurious base that the Applicant did not do some typing from Mr Edmett when he asked her, that is she did not do it immediately. It is strange that if that is the case why Mr Edmett sat next to her during the luncheon break without mentioning the matter, which I find that he did. It is therefore not difficult to understand that the Applicant was somewhat puzzled by the requirement to apologise to this man for whom she clearly had little respect and who clearly had done little to earn respect.

37 Notwithstanding the Applicant's difficulties with the requirement to apologise as her employer had asked her to do so, she continued to refuse, this refusal to apologise became the centre piece of the argument between the parties and by the time the Applicant and Mr Lee met on 17th February 2001 it was an issue fundamental to Mr Lee to maintain the discipline in his organisation.

38 As to the events that occurred on that day I find that that the story advanced by Mr Lee is more likely, on the balance of probabilities, to be correct. His version is supported by the contemporary writing which is set out in Exhibit A4. It is clear from the letter, which is cited earlier in these Reasons, that the Applicant was given another week to apologise. If the Applicant had taken that week there was the opportunity during it to have further discussions with Mr Lee about the efficacy of that apology and whether it should be unconditional, however she did not avail herself of that opportunity.

39 It is open to find that by the time this meeting took place the Applicant had it firmly set in her mind that she was being poorly treated by Mr Lee, the apology became an emotional issue for her. She thought it was wrong that she had to apologise and when she saw this was still a condition precedent for her for the continuation of her employment it is open to conclude and I do, that it was too much for her. She either did not listen to Mr Lee carefully or certainly did not read the letter carefully because she took it that she had been given a week's notice. That is why I believe she asked the question about the payment of notice to Mr Lee. It is open to find that the Applicant was upset and I think her recollection of the events is more likely to be clouded by that upset than the recollection of Mr Lee and I conclude that his version of events is more likely than not the correct one.

40 The Applicant was also given the opportunity, if she wanted it, to have further discussion about the matter but she did not take it up, I think because in her mind she felt she already had been dismissed. That conclusion was incorrect, but it is not inconsistent with her refusal to have discussions with Mr Lee, Kathleen and Sean earlier on, those discussions might well have resolved the difficulty between the parties, but they never occurred so one can only speculate about that.

41 None of the notions which underlie constructive dismissal as they are described in *The Attorney General –v- Western Australian Prison Officers' Union of Workers [1995] 75 WAIG3166* arise here, this is a situation where the Applicant has

taken a course of action which brought the contract of employment to an end at her behest, there is therefore no jurisdiction for the matter to be referred to the Commission to be dealt with as an unfair dismissal and that part of the application will be dismissed.

42 It is clear though if that is correct then the Applicant should have been given some payment for notice. Mr Sicard (of Counsel) who appeared for the Respondent makes a concession in this respect and I am of the view that concession is properly made. As a contractual benefit the Applicant is entitled to refer the matter under s.29 (1)(b)(ii) of the Act she has not been paid for notice. That should have happened in the circumstances and an order will issue that she be paid two weeks pay. This will be in sum of six days at $97.92 gross per day, making an amount of $587.52 gross, these figures are extracted from Schedule B of the Applicant's application for denied contractual benefits. The other contractual benefits have not been made out and the claims for them will be dismissed.

43 These findings should not be taken to mean that the Applicant was not justified in raising a number of the issues that she did. For instance the Respondent can not hide behind a bank for its failure to pay its employees on time. It should have a contingency arrangement to ensure employees are paid as they are entitled under their contract of employment. Nor should it be thought that Kathleen Edmett was a blameless innocent in these events. Why the applicant had to apologise to Sean Edmett is also hard to follow. Unfortunately all of these problems, which on the face of it were resolvable by adults sitting down and discussing them, were not resolved because the Applicant removed herself from the employment contract.

44 Orders will issue that there has been no dismissal, that part of the application will be dismissed for want of jurisdiction. The claim for contractual benefits is made out to the extent two weeks pay will be granted for notice and an order in the sum of $587.52 will be issued in favour of the Applicant.

2002 WAIRC 04908

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	REBECCA VALMINE ADAMIAK, APPLICANT
	v.
	ALL THINGS X-RAY PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	MONDAY 5 MARCH 2002
FILE NO.	APPLICATION 472 OF 2001
CITATION NO.	2002 WAIRC 04908

Result	Dismissed for want of jurisdiction. Contractual benefits granted.

Order

HAVING heard Ms R.V. Adamiak on her own behalf and Mr J. Sicard (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 jurisdiction.
2. THAT the Respondent pay the Applicant the sum of $587.52.

[L.S.]

(Sgd.) J. F. GREGOR,
Commissioner.

2002 WAIRC 04925

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TYRON PAUL BARTELL, APPLICANT
	v.
	KENNETH GAZIUDDIN SHAIK T/A OUTDOOR SHADES WANGARA, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	TUESDAY, 5 MARCH 2002
FILE NO.	APPLICATION 1998 OF 2001
CITATION NO.	2002 WAIRC 04925

Result	Application alleging unfair dismissal granted and for denied contractual benefits dismissed.
Representation	
Applicant	Mr T.P. Bartell
Respondent	No appearance

Reasons for Decision

(Extemporaneous)

1 Mr Bartell has brought to the Commission a claim that he was unfairly dismissed and that he has been denied benefits under his contract of employment. In his application he identified his employer as Outdoor Shades Wangara, but I am satisfied from the evidence that the correct identity of his employer is Kenneth Gaziuddin Shaik (who Mr Bartell describes as the proprietor of Outdoor Shades Wangara). Mr Bartell has requested that the name of the respondent be amended accordingly and I grant that claim. Mr Bartell's claim is therefore amended accordingly.

2 Mr Bartell has given evidence under oath in this matter. I have no reason not to believe his evidence. Mr Bartell gave his evidence without a great deal of hesitation and there is nothing in the material, either on the file or which he has provided, which suggests that his evidence is in any way inaccurate. I am satisfied from Mr Bartell's evidence that he was employed by the respondent from 1 April 2001 as an Office Administrator and as a Design/Drafter. I am also satisfied, and I find accordingly, that Mr Bartell was employed at a salary of $360.00 per week for a 40 hour week and I accept his evidence that this was paid weekly to him and in cash.

3 If I turn to the day of his dismissal, I accept Mr Bartell's evidence that on 23 October 2001 he arrived at work 15 minutes late. He gives as his reason traffic delays and also that the lock on the gate had jammed. Whilst he was attempting to get through the gate, the telephone rang and when he finally made it to the telephone, it was Mr Shaik. He asked Mr Bartell for the reasons for his delay. Mr Bartell explained the reasons and I accept Mr Bartell's evidence that, firstly, after that explanation Mr Shaik did not at that stage dismiss him for being late and, further, I accept Mr Bartell's evidence that over the course of his employment he had not been late on any other occasion.

4 It appears from Mr Bartell's evidence that the reason for the dismissal stemmed from something of an abusive attitude on the part of his employer on that day over the telephone regarding Mr Bartell's inability to find the name or telephone number of a particular client. From Mr Bartell's evidence, he states that the identity of the client was not apparent to him from Mr Shaik's description and he was not able to provide the name or telephone number. After an exchange of some language, Mr Bartell was ordered to leave the premises and he did so by handing in his keys in at the factory to Mr Shaik's wife.

5 Mr Bartell claims that his dismissal was unfair and after giving the matter some consideration, I conclude that it was. On Mr Bartell's evidence, and in the absence of the respondent there is no countervailing evidence, Mr Shaik had asked Mr Bartell to provide the telephone number of a client. It was not apparent to Mr Bartell to which client Mr Shaik referred and there was no telephone number on the message book near where Mr Bartell was standing.

6 In those circumstances, I can see no reason why Mr Shaik was entitled to dismiss Mr Bartell. In all other respects, on the information that I have available to me, Mr Bartell has performed his work satisfactorily and there is no suggestion from Mr Bartell, who has given his evidence under oath, that he had been warned regarding any aspect of his employment.

7 Accordingly, on the information available to me, I can see no reason why Mr Bartell ought to have been dismissed and accordingly I find that his dismissal was unfair.

8 I turn to consider what is to be done about that and I find that Mr Bartell does not seek reinstatement, however he does seek compensation in lieu of his dismissal. He states in his application that he is seeking compensation to recover costs of his debt and to cover some loss of income.

9 In addressing the issue of compensation, it is necessary to find what loss Mr Bartell suffered. Mr Bartell has not given any evidence of any costs or debts and I cannot make any finding in that regard. Mr Bartell however did give evidence, and I accept that evidence, that he was unemployed for a period of some two and a half months. Further, if this dismissal had not occurred, it is likely on Mr Bartell's own evidence that he would have left the respondent's employment in a month or two because he would have actively sought alternative employment. On the information that I have available to me therefore, it appears that Mr Bartell's loss is the loss of the wages he would have otherwise earned for the two and a half month period between the date of his dismissal and him finding alternative employment. I am also satisfied that Mr Bartell does not have any ongoing loss, as the employment that he has found is at a greater salary than the salary he was earning at Outdoor Shades Wangara. Accordingly, the loss for which it is appropriate to compensate Mr Bartell, is the wages that he would have earned for the 10 weeks from his dismissal until the commencement by him of his current employment. I assess that loss as being the sum of $3,600.00 being the sum of $360.00 per week by 10 weeks.

10 Accordingly, I propose to compensate Mr Bartell for that loss and would issue an Order that requires Mr Kenneth Gaziuddin Shaik forthwith to pay Mr Tyron Paul Bartell the sum of $3,600.00 as compensation for the dismissal of Mr Bartell.

11 The other aspect of Mr Bartell's claim is in two parts. Comprising of a claim for two weeks' annual leave, which he has calculated as being $740.00 and an amount of $370.00 being one week's severance pay.

12 There are two matters. Firstly, I have not been able to reconcile the arithmetic of his claim. According to Mr Bartell's evidence, his salary was $360.00 and on that basis his arithmetic would be out by some $10.00 per week. However, I am satisfied from the evidence that Mr Bartell's entitlement to annual leave is merely the entitlement that he had pursuant to the *Minimum Conditions of Employment Act 1993.* His evidence is that the discussion that he had with Mr Shaik was that he would receive four weeks' annual leave. The *Minimum Conditions of Employment Act 1993* is by virtue of its terms implied into every contract of employment and there is nothing in Mr Bartell's evidence that suggests that his arrangements regarding annual leave were any greater than the minimum conditions. I am of the view that as the enforcement of the *Minimum Conditions of Employment Act 1993* is a matter for an Industrial Magistrate. I do not have the jurisdiction to order that Mr Bartell be paid the proportion of annual leave which remained to his credit at the conclusion of his employment, so the first part of Mr Bartell's claim is dismissed for want of jurisdiction.

13 The second claim is for one week's severance pay. A more accurate description for this is one week's pay in lieu of notice. This is already encompassed within the compensation that is ordered for the unfair dismissal and accordingly the second part of the claim is dismissed.

2002 WAIRC 04926

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	TYRON PAUL BARTELL, APPLICANT
	v.
	KENNETH GAZIUDDIN SHAIK T/A OUTDOOR SHADES WANGARA, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 7 MARCH 2002
FILE NO.	APPLICATION 1998 OF 2001
CITATION NO.	2002 WAIRC 04926

Result	Application alleging unfair dismissal granted and for denied contractual benefits dismissed.
Representation	
Applicant	Mr T.P. Bartell
Respondent	No appearance

Order

HAVING HEARD Mr T.P. Bartell on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders—

(1) THAT Kenneth Gaziuddin Shaik forthwith pay Tyron Paul Bartell the sum of $3,600.00 as compensation for the dismissal of Tyron Paul Bartell.

(2) THAT the claim by Tyron Paul Bartell that he is entitled to proportionate annual leave as a benefit due to him under his contract of employment be dismissed for want of jurisdiction.

(3) THAT the claim by Tyron Paul Bartell that he is entitled to "one week's severance" pay as a benefit due to him under his contract of employment be dismissed.

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

2002 WAIRC 04979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JAMES BOYLE, APPLICANT
	v.
	WA FORK TRUCK DISTRIBUTORS PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	WEDNESDAY, 13 MARCH 2002
FILE NO.	APPLICATION 1195 OF 2001
CITATION NO.	2002 WAIRC 04979

Result	Dismissed for want of jurisdiction
Representation	
Applicant	Mr A Gill (of Counsel) appeared on behalf of the Applicant
Respondent	Ms J Auerbach appeared on behalf of the Respondent

Reasons for Decision

1 James Boyle (the Applicant) claims that he was unfairly dismissed by WA Fork Truck Distributors Pty Ltd (the Respondent) on 11 June 2001 from the position of Transport Manager. The Applicant told the Commission that he was employed as a Transport Manager controlling and co-ordinating all transport sales, hire and service of machines for the Respondent. He contends that the dismissal was unfair and seeks compensation.

2 The matter was heard by the Commission on the 7 February 2001. During the proceedings, after hearing the evidence of the Applicant, the Commission advised Mr A Gill (of Council) for the Applicant that it was in a position to make a decision on the matter but, for an abundance of caution, it would allow the Respondent to call it's witnesses in order that they be available for cross examination by the Applicant. Mr Gill invited the Commission to make its decision. Acting on that invitation the Commission at page 37 of the transcript said "…If I was invited to do this now, I think the evidence is overwhelming that your client is (not an employee) for the purposes of the act and I have (no jurisdiction) to deal with that matter. That will be my decision I will reserve it though to put that decision in writing and explain the reasons for it. I will apply the indicia that are set out in Vabu's case."

3 The evidence of the Applicant is that he was the Transport Manager for the Respondent as well as which he had his own business; Perth Tilt Tray Services Pty Ltd (Perth Tilt Tray). He had at times employed up to three sub contractors. When he commenced in the industry he owned one truck, as the business expanded he put on more trucks and sub contractors. In the year 2000 around September he was asked by Mr Craig Putty who is, apparently, a Principal of the Respondent to take over the position of Transport Manager. The Respondent's business is in the state-wide hire, sale and service of fork trucks. When the Applicant started with the Respondent they had two trucks and drivers of their own and his operations supplemented the fleet.

4 The Applicant gave evidence that the Respondent had recognised that it did not have sufficient skills in management of transport and eventually he had been asked to buy their two trucks and take over the organisation of their drivers. Prior to this the arrangement was he would manage the Respondent's two trucks with which he would integrate his own trucks. For this he was to get a salary of $30,000 plus benefits including a mobile phone. As a result of the arrangement the Applicant no longer drove a truck. He employed another person to do so. He also employed a clerical/secretarial person to help him in the office.

5 Various duties the Applicant undertook were explained. They included organisation of deliveries of machinery all around the country. This involved obtaining quotes and detailed scheduling. The Applicant claimed he usually started work around 5.00 in the morning including Saturdays and Sundays if the need arose.

6 The Applicant explained the use of the Exhibit G1, an Invoice and Statement book in which various amounts are shown which include GST. In effect he invoiced the Respondent for his weekly payments. This according to the Applicant was at the direction of the Respondent's Financial Controller. Allegedly this was necessary because it would not be appropriate for the payments to be recorded in the Respondent's wage records because it would be 'classed as a second job and [the Applicant] was already paying his own tax'.

7 There is little more in the evidence in chief of the Applicant about the arrangements however he was subject to extensive cross examination by Ms Auerbach who appeared for the Respondent. During the cross examination considerably more information about the parties contractual arrangements was revealed. In response to questions from Ms Auerbach the Applicant said that he or his organisation worked on a contracting basis. He had various clients for a number of years before being offered the position of Transport Manager with the Respondent. His organisation, Perth Tilt Tray is run in partnership with his wife. He splits income with her. The details of the Applicant's financial statements are before the Commission in Exhibit A3.

8 The Applicant had worked as the main sub contractor for the Respondent up until 1999. He gave evidence that his 'wage' was $538.00 a week + GST.

9 The Applicant answered various questions how he came to have use of the Respondent's utility. He also admitted he put several proposals together as to how the Respondent's transport operation could operate differently (see Exhibits A1 and A2). The Applicant admitted that he did work for WA Access Pty Ltd, another organisation operating from the same site, assisting in dealing with quotes which came into the office from time to time. He employed an assistant who did invoicing and helped out generally, answering the telephones for the different sides of the company, taking messages and orders. The secretary was employed by Perth Tilt Tray the Applicant's company.

10 During the cross examination the Applicant conceded that the arrangement was complicated but he said that he knew that the Respondent was not going to give him an assistant, they had hired Perth Tilt Tray i.e his company to run the management therefore he had to hire his assistant. The Applicant never signed a contract of employment. He had a hand shake, did not work any fixed hours, if work needed to be done he did it. He was available any time over the weekends to take the pressure off sales representatives.

11 The Applicant described the priority in which work would be allocated. The trucks belonging to the Respondent would be used, then his and after that he would outsource work. He had sub contractors working who were paid by Perth Tilt Tray at whatever rate he had negotiated with them.

12 The Applicant was shown Exhibit A2, a document headed D C Burrows Perth Tilt Tray Transport Account, which showed all of the work had been done by Mr Burrows during that month together with the time, the price and the GST. The Applicant confirmed that Exhibit A3 sets out his Company's financial statements for the year ending 20 June 2001. The Commission also received in Exhibit A6 a large number of remittance advices. The Applicant also gave evidence about propositions he put to the Respondent concerning various proposals to operate the transport side of the business. He admitted in cross examination that his current employment arrangements are completely different to the ones he had with the Respondent.

13 The proceeding is a sufficient summary of the evidence for the purposes of these Reasons for Decision. Recently the Commission, in the *WA Builders Labour Painters and Plasterers Union v Geltray Pty Ltd trading as Roy Hart Steel Fixing* (Decision issued on 12 February 2000 are Unreported) I reviewed the law to be applied. I include hereunder what I then wrote. Nothing I have heard in these proceedings has persuaded me to an alternate opinion.

> "15. The authorities to be applied in a case such as this are well known, for instance the various tests are described in the High Court in *Stevens v Broderick Sawmill & Co Pty Ltd (1996) 160 CLR 16* and in *The Australian Builders' Labourers' Federated Union of Workers, Western Australian Branch v PB and KA Brajkovich Pty Ltd (1991) 71 WAIG 23* and *Gary John Hollis v Vabu Pty Ltd t/as Chris Courier (2001) HCA 44*.
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> 16. Very little attention was given to this last authority by the advocates, this case is of interest as it indicates a departure from the High Court from the classical test for employee/employer relations which as McHugh J pointed out in His Reasons is:
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> > "…likely to unsettle many established business arrangements and have far reaching consequences for industrial relations, for workers compensation law, for working conditions, for the obligations of employers to make superannuation contributions and group tax deductions and for the payment of annual and long service leave and taxes such as payroll tax. It would be likely to make employers retrospectively guilty of a number of statutory offences. It is also arguable that departing from the classical tests or their ordinary application might bring within s51(xxxv) of the Constitution workers who have traditionally been regarded as outside that power."
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> 17. This case involved a claim by a pedestrian injured by the negligence of bike courier engaged by *Vabu*. At first instance a trial judge held that the courier was an independent contractor and therefore that *Vabu* was not liable for negligence of the courier.
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> 18. The trial judge considered he was bound by an earlier decision on New South Wales Court of Appeal which had concluded that couriers engaged by Vabu were independent contractors for the purposes of the superannuation levy imposed on employers. In that case the Court of Appeal had heard evidence with respect to motor vehicle and motorbike drivers engaged by *Vabu* but not bike couriers. However the Court of Appeal appeared to reach a decision applicable differently to all couriers engaged by *Vabu*.
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> 19. The decision on the trial judge finding that *Vabu* was not liable for negligence of the courier was upheld on appeal with the Court of Appeal. The decision of the Court of Appeal was overturned on appeal to the High Court which held that the courier was in fact an employee of *Vabu* and *Vabu* was therefore vicariously liable for the courier's negligence.
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> 20. In its decision the High Court examined a number of indicia they are: written or oral terms of engagement, skills and training, leave entitlements, provision and equipment of tools, remuneration, control and business enterprise, public perception and policy considerations.
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> 21. Concerning written and oral terms the High Court said "it should be noted that the relationship between parties for the purposes of this litigation is to be found not merely in [the] contractual terms." The system which was operated there under and the work practices imposed by *Vabu* go to establishing "the totality of the relationship" between the parties and this is what is to be considered (emphasis added).
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> 22. As to the skills and training it was held that the skilled labour or labour which required special qualifications would be indicative of an independent contract relationship however in *Vabu* the skills required did not require any special training. As for tools and equipment the couriers provided their own bicycles and bear running expenses, supply their own accessories and bear the costs of replacing any equipment. The High Court found the Court of Appeal gave this factor greater weight than it deserved. The High Court pointed out that the capital outlay required for couriers was relatively small and the equipment, in this case the bicycle, was also a means of personal transport and a means of recreation.

23. As for remuneration there was no scope for the couriers to bargain the rate of remuneration and it had not changed for four years. *Vabu* did not withhold tax, or pay superannuation entitlements, couriers were paid per delivery rather than the time period. *Vabu* withheld final pay until debts to it were repaid. According to the High Court payment by results is not particularly indicative of an independent contract or relationship but was instead "… *the natural means to remunerate employees whose sole duty is to perform deliveries not least for the ease of calculation and to provide an incentive more efficiently to make deliveries*."

24. Also far as control was concerned the High Court said that the lack of courier's ability to have independence to conduct the operations can be contrasted with situations where an individual "…accepted only that degree of control and supervision necessary for the efficient and profitable conduct of the business he was running on his own account as an independent contractor". As I understand it the control test has historically been an important criterion to consider when determining employment status, according to the decision of the High Court in *Vabu* it is important to view not only the Principal's contractual control but also the control the Principal applies in practice to "contractors" when determining employment status.

25. Insofar as the business enterprise indicia was concerned the couriers were unable to make an independent career as freelancers and could not generate goodwill as a courier. The High Court gave considerable weight to evidence as to whether the couriers could be said to operating their business; this is in my view a departure from the classical tests of employment status.

26. The final indicium which needs to be commented upon for the purpose of these Reasons is public perception. In *Vabu* the couriers wore company uniforms and advertising and were the face of the company. *Vabu* made little or no attempt to make the couriers personally identifiable. The only other employees were based in despatch and had limited public contact. The Court commented that the couriers were central to *Vabu's* business and not form a supplemental part "*...In this way Vabu's business involved marshalling and direction of labour of the couriers, whose efforts comprised the very essence of the public manifestation of Vabu's business. It was not case that the couriers supplemented or performed part of the work undertaken by Vabu or aided from time to time; as two the documents relating to work practices suggest, to its customers they were Vabu and effectively performed all of Vabu's operations in the outside world."* The use of these indicia is also a departure from the classical tests of employment status; it indicates the importance of differentiating contractors from employees."

14 I summarise the indicia to be applied as follows. They appear in paragraph 20 in the citation above and are written or oral terms of engagement, skills and training, leave entitlements, provision of equipment of tools, remuneration control and business enterprise, public perception and policies considerations.

15 I need to apply these indicia to the facts in this matter. I will make findings on the fact as I do so.

16 There were no written terms of agreement. There is no written contract between the parties. The Applicant said the arrangements were on a hand shake. The question to be asked is what the totality of the relationship was and that is to be discovered by examining the arrangements the parties had made between them. First of all dealing with salary, the Applicant himself described his salary on a weekly basis as being a sum of money less GST. This is a very strange way for an employee to describe their wage. In his tax return as shown in exhibit A3 the earnings for Perth Tilt Tray are shown as transport income. There is no separate amount showing income in the form of wages, except under the heading other income which was profit on sale of non current assets. However the accounts show that the Applicant's company paid salaries or wages in the sum of approximately $68,000 per year. The Applicant operated with no fixed hours; he worked when it was required. He allocated work both to the Respondent's drivers and to his own and outsourced work when he needed too. In Exhibit A5 he produced as a result of an invitation given to him by the Respondent a number of proposals to run the transport side of the Respondent's business. The third of those proposals was for him to remain an employee of the Respondent as Transport Manager with salary and benefits to be negotiated. There are other indicators in the evidence that I do not need to highlight that made it abundantly clear that the totality of the relationship here is not one that is normally described as one of employee and employer.

17 The Applicant brought with him years of skill and training in the management of the transport operation. It could be found on the evidence that the reason he was in the position that he was because of the skills that he had in managing his own company. He provided sophisticated equipment in the form of trucks which according to his financial statements were either owned or leased by his company Perth Tilt Tray.

18 As for remuneration the $30,000 fee appears to be fixed but it is clear from the Applicant's answers in cross examination that hourly rates for the use of trucks could vary considerably. This was not a circumstance as in *Vabu's* case that payment was "*The natural means to remunerate employees who sole duty is to perform deliveries not for least ease of calculation and to provide an incentive for more efficiently to make deliveries."* The way remuneration was organised in this case is fundamentally distinguishable. Even so although the High Court said in *Vabu* payment by results is not particularly indicative of an independent contact or relationship it did not say that payment by results excludes an independent contract.

19 It is open to find in the exercise of the so called manager's position by the Applicant that there was no control by the Respondent at all over what he did. For instance he alone determined prioritisation whose trucks would be used. This situation is truly one where control was accepted "*Only to that degree of control was supervision necessary for the efficient and profitable conduct of the business he was running on his own account as an independent contractor" (see Vabu)*. The important thing is to view not only the principal's contractual control but also the control the principal applies in practise. When that is done there is an absence of evidence of control by the Respondent in this matter of the Applicant in his day to day activities.

20 In *Vabu* the High Court gave considerable weight to evidence as to whether the couriers in that case were operating their business. An examination of the issues reviewed in *Vabu* if applied in this case lead to only be one conclusion and that is that the Applicant was operating his own business at all times. Certainly he may have been co-ordinating the business of the Respondent but that was only part of the total arrangement and was the subject of a contract between them not being a contract of service.

21 Finally this is the case where if one looks at the public perception of the Applicant's work where anything other than that he operated the business would be apparent. As an illustration his trucks were in the livery of his company Perth Tilt Tray. It is clear that he operated them as an owner operator. There is no room in the total relationship between these parties do describe it as one of employer and employee and I so find on the indicia to be applied.

22 I find the Applicant is an independent contractor. He is unable to access the Commission through section 29(b)(1) of the *Industrial Relations Act 1979* for that reason the Commission has no jurisdiction to deal with the claim and it will be dismissed.

2002 WAIRC 04978

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	JAMES BOYLE, APPLICANT
	v.
	WA FORK TRUCK DISTRIBUTORS PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	WEDNESDAY, 13 MARCH 2002
FILE NO.	APPLICATION 1195 OF 2001
CITATION NO.	2002 WAIRC 04978

Result	Dismissed for want of jurisdiction

Order

HAVING heard Mr A. Gill (of Counsel) on behalf of the Applicant and Ms J. Auerbach. 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 for want of jurisdiction.

[L.S.]

(Sgd.) J. F. GREGOR,
Commissioner.

2002 WAIRC 04930

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	LYNN DIANE DAVIS, APPLICANT
	v.
	BLAXLAND PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	FRIDAY 8 MARCH 2002
FILE NO.	APPLICATION 1074 OF 2001
CITATION NO.	2002 WAIRC 04930

Result	Dismissed
Representation	
Applicant	Mr R. Clohessy appeared on behalf of the Applicant
Respondent	Ms J. Auerbach appeared on behalf of the Respondent

Reasons for Decision
(given extempore as edited by the Commission)

1 On the 8th of June 2001 Lynn Diane Davis applied to the Commission for orders pursuant to section 29(1)(b)(ii) on the basis that at the completion of her contract of employment with Blaxland Pty Ltd (the Respondent) there were outstanding benefits available to her which had not been paid.

2 The essence of this dispute is that the Applicant contends that she was to be paid a commission based income, commission based bonus payments and, where applicable, rent and referral fees payable on a pro rata basis. Commission was to be paid at the rate of 50% of gross earnings on sales, not reducible by any deductions made by the employer for superannuation or in fact for any other reason.

3 Under the contract of employment her taxable income was a flat 50% of the gross commission received by the Respondent; her superannuation entitlements were additional to such payment. That is the essence of what she says.

4 As I understand, what the Respondent says, it agrees that the taxable income consisted of a commission based income, bonus payments, rent and referral fees. It made superannuation contributions in accordance with the Superannuation Guarantee Administration Act, 1992 into a nominated fund for the benefit of the Applicant, and when the Act prescribed higher superannuation contributions her rate of commission was decreased to take account of those.

5 The Commission has before it a number of documents that have been supplied by the parties. Before I examine the Applicant's verbal evidence I will review the documentary evidence.

6 It is open to find, and I do, that when the Applicant commenced work in 1993 that the remuneration was as described in a memorandum dated the 5th of August 1993 (Exhibit A1). Under the heading 'General Sales Commission Scales' the document contains a schedule based on quarterly sales receipts. For instance, if the sales receipts are between zero and $25,000 then the amount of payment on that was 47%. There is an ascending scale of sales and an ascending scale of earnings up to $60,000.

7 The document provides that a superannuation contribution of 3% would be paid and a 10% advertising allowance and a bonus at the end of the quarter. The document also sets out property management referrals which constituted the other earnings to which I referred and which I do not need to canvas for the purpose of this application. However, it is clear from the document that the 50% of gross sales consists of 47% to be paid on the sales receipts with a superannuation of 3% making a total of 50%.

8 If it needed to be made any clearer that is how the pay advices are set out. Exhibit C1 shows how that is done quite clearly. Exhibits A1 and C1 both show the same form of contractual arrangement.

9 During the life of the contract, say in 1996, there was another document which described the remuneration. It is in much the same style except that the amount of superannuation contribution paid is increased to 6% and the balance, the commission paid to the Applicant, has been reduced to 44%. That is consistent with the contention of the Respondent that as the superannuation guarantee increased there was a corresponding reduction in the amount of superannuation paid.

10 There is further evidence in Exhibit A5 that the same method of payment continued through into the year 2000. In a document dated the 1st of July 2000 the Applicant was advised, confirmed by her signature on the bottom of the document, that the next level of superannuation, which was then 8%, was to be applied to commissions from the 1st of July. There was then a calculation method, example provided to the Applicant using as an example 100% commission based on a sales figure of $2000. This clearly shows that the total staff benefit of 50% of the commission which would have been $1000 in total consisted of an amount of $926 payable to the staff member, in this case the Applicant, and a levy sum of $74.08 which was payable to the fund.

11 The sales staff were invited to make requests concerning salary sacrifice level and apparently that happened, at least on the Applicant's part, because on the 28th of July 2000 (Exhibit A6) she wrote to Cheryl, who is mentioned in the letter of the 1st of July 2000, and described her understanding of the example. Clearly that example shows how the $1000 on the example was to be divided and it showed how the Applicant wanted to have her tax deducted. These documents indicate a clear understanding of the contractual structure at that time.

12 I have had the benefit of hearing the Applicant give evidence-in-chief and in cross-examination. I say without any hesitation I think she was a perfectly honest witness. I believe what she told me. She was frank about how she understood the contract as she was about her understanding of what the contract meant.

13 It is difficult sometimes for a lay person to appreciate the legal niceties of these contractual arrangements and what I gather from the Applicant is that she freely admitted that she understood the structure of the arrangement between her and the Respondent, but as time went by she thought it was unfair and she raised that issue of unfairness on a number of times with Mr Bolton. Mr Bolton did not give evidence but I accept the evidence of the Applicant when she said she raised it, and that she was concerned about the fairness of the arrangement. However, the concern about the fairness or not did not result in the arrangement ever being changed.

14 The Applicant certainly did not give any evidence that it had and the documentation which creates a trail through the employment relationship does not show a change which would constitute a variation to the contract so that it was in the form that this application alleges. The Applicant's own evidence clearly establishes that there was a form of contract which provided that of the 50% commission a varying amount was deducted from superannuation with the balance being paid to the Applicant. That is the clear position on the contract.

15 The law to be applied is set out in *Simmons v Business Computers (1985 65 WAIG 2039)*. When acting under this section of the Act, the Commission is to act judicially, it is to discover the terms of the contract as a matter of law, and give effect to those terms, by issuing orders in favour of an Applicant, if it finds that there has been entitlement which has not been paid.

16 Specifically in embarking upon that task, the Commission does not look at the fairness of the contract. It is not similar to the jurisdiction which resides in, say, the Industrial Commission in New South Wales where the fairness of employment contracts can be tested.

17 I need to touch upon the issue concerning the professional indemnity. I accept the evidence from the Applicant that prior to January 2000 the Respondent paid all of the professional indemnity. There seems to be no doubt about that, and I accept what she says.

18 The Applicant, though, on the 11th of January received a memorandum from "all staff" which told of changes to professional indemnity insurance (Exhibit A7). Why that was originated appears to be because of a letter from an insurance broker. On the information before the Commission, that was not a letter which went to the Respondent as a letter from a broker to a client. It was a letter sent to all Real Estate Institute of Western Australia ('REIWA') members giving them advice about professional indemnity insurance renewal and explaining to them that the scheme insurer, HIH, was no longer prepared to tolerate continual losses. In due course, of course, that became more than obvious, and they wanted to increase the premium pool from $950,000 to $1,500,000. The advice to REIWA was that the way that could best be done was by sharing the cost between the member companies and the individual's representatives. I also think it was done because of some cases where individuals had been sued and had not been subject to cover, and in order that the insurance companies did not exercise subrogation against those uninsured individuals, that was a good idea if they insured themselves.

19 That the preceding is a fair reading of the advice can be seen from Exhibit A7 in the page which has been signed by Neil Pozzi, where it shows that the Respondent was required to pay $3124.15 to cover the company premium of the indemnity, whereas the individual employees were to pay $272.16 to give the firm a total cover of $2 million.

20 This letter was presented to the Applicant. Her evidence is she felt she had to pay it, and she did. She later had some advice from somebody whom she did not identify, that she should not have done so. As result she tried to raise with the Respondent her concern about the unfairness of her having to pay the money.

21 I find when on the 11th of January 2000, the Applicant made a notation on a memo to Cheryl in the form of: "Will pay this via personal cheque when the next commission is paid." that constituted a variation to the contract, and she accepted that she would pay the individual premium.

22 Whether she should have or not is a matter for people wise in hindsight. One could have said to her: "Well, your best advice would have been to say: 'I'm not going to do that even though you require me to do it.'", and that would have been sorted out at the time. However, as a matter of law I find that the contract was varied so that there was a shared pay of the indemnity.

23 I will find that the Applicant's claims have not been made out. I am required to dismiss the application. I specifically refrain from making any comment on what I might think the situation is with the Superannuation Guarantee Act.

24 An Order to dismiss the application will be issued.

2002 WAIRC 04929

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LYNN DIANE DAVIS, APPLICANT
	v.
	BLAXLAND PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	FRIDAY, 8 MARCH 2002
FILE NO.	APPLICATION 1074 OF 2001
CITATION NO.	2002 WAIRC 04929

Result	Dismissed

Order

HAVING heard Mr R Clohessy for the applicant and Ms J Auerbach for the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders—

THAT the application for contractual entitlements be, and is hereby, dismissed.

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

2002 WAIRC 04862

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEPHEN HITCHMAN, APPLICANT
	v.
	986 CORPORATION PTY LTD, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 21 FEBRUARY 2002
FILE NO.	APPLICATION 1198 OF 2001
CITATION NO.	2002 WAIRC 04862

Result	Application for denied contractual entitlements granted.
Representation	
Applicant	Mr S. Hitchman
Respondent	No appearance

Reasons for Decision

(Extemporaneous)

1 The claim that I have before me, which I have previously referred to at the commencement of these proceedings, is a claim by Mr Hitchman that, he was an employee of a company known as 986 Corporation Pty Ltd. His terms and conditions of employment were such that, for the months of March, April, May and June of 2001 he should be paid the salary that he has claimed and for the three quarters ending in June 2001, he should be paid the incentive payments that he has claimed.

2 Mr Hitchman has given evidence and in the absence of the respondent to cross-examine him, I have paid particular attention to his evidence and I can state for the purposes of the record that I have no difficulty in accepting Mr Hitchman's evidence. Not only has he presented his evidence in a clear and, I find, credible way, he has also provided documents which without any question, support that evidence. Accordingly, I find as follows.

3 Mr Hitchman was employed by a company known as 986 Corporation Pty Ltd ACN number 074 154 279. I am satisfied from exhibit 1 that he was employed as a management consultant and, relevantly for this matter, he was to be paid an annual salary package of $100,000 to be paid monthly in arrears. I am also satisfied that he is entitled to be paid an incentive equal to 15% of the fees charged for the work done by him, billed to the customer.

4 I am also satisfied from Mr Hitchman's evidence that certainly for the months that he has claimed, they being March, April, May and June 2001, he has not been paid all or in some cases any, of the salary that he is due. I am satisfied from Mr Hitchman's evidence that he has attended work and performed work in accordance with his contract of employment over that period of time. I am also satisfied that he has not been paid, which is supported by the evidence of exhibit 4. Exhibit 4 being the e-mails sent between himself and the respondent which cover the fact that not only is he not being paid, but that the respondent had cash flow difficulties.

5 Accordingly, I am quite satisfied that Mr Hitchman has made out his claim. I am also satisfied that for the two components of his claim, they being salary and bonus, he has accurately calculated what is due. The first amount being for March, which I am satisfied from his evidence, is a lesser amount than he would otherwise have claimed as it was a part payment. I am also satisfied that the amounts for the remaining three months (being $7,917.00 each month) makes the salary he is due. This being the salary effectively divided by 52 and less a certain amount which he has described as being an amount by way of salary sacrifice.

6 I am satisfied then that an Order should now issue that requires 986 Corporation Pty Ltd to pay Mr Hitchman one amount of $1,743.00 and then three amounts of $7,917.00, being by way of salary that is due to him under his contract of employment which has been denied him by 986 Corporation Pty Ltd. I am further satisfied that the three amounts claimed by him (being incentive payments for the three quarters ending 30 June 2001) are calculated in accordance with the manner in which his incentive has been calculated. Accordingly I am satisfied that an Order should also issue that he also be paid amounts of

$7,382.00, $119.00 and $1,800.00 being the incentive payments that are applicable to him for those three months. In each case those payments are gross and they add up as I find to an amount of $36,793.00.

7 Therefore an Order ought now be issued requiring 986 Corporation Pty Ltd to pay forthwith Mr Hitchman the sum of $36,793.00 gross; that being all entitlements due to him under his contract of employment which has been denied him by 986 Corporation Pty Ltd.

8 Order accordingly.

2002 WAIRC 04882

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEPHEN HITCHMAN, APPLICANT
	v.
	986 CORPORATION PTY LTD, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 28 FEBRUARY 2002
FILE NO.	APPLICATION 1198 OF 2001
CITATION NO.	2002 WAIRC 04882

Result	Application for denied contractual entitlements granted.
Representation	
Applicant	Mr S. Hitchman
Respondent	No appearance

Order

HAVING HEARD Mr S. Hitchman on his own behalf as the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT 986 Corporation Pty Ltd forthwith pay Stephen Hitchman the sum of $36,793.00 gross, being entitlements due to him as wages and incentive payments under his contract of employment which it has not paid.

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

2002 WAIRC 04816

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NOEL LEONARD KNIGHT, APPLICANT
	v.
	ALINTAGAS LIMITED, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	15 FEBRUARY 2002
FILE NO/S.	APPLICATION 1248 OF 2001
CITATION NO.	2002 WAIRC 04816

Result	Claim for contractual benefits dismissed
Representation	
Applicant	Mr G McCorry (as agent)
Respondent	Mr R Le Miere QC and Mr D Sash (of counsel)

Reasons for Decision

1 This is an application made under s.29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act"). Noel Leonard Knight ("the Applicant") claims that he is owed benefits to which he is entitled under a contract of employment, not being of benefit under an award or an order. The Applicant claims that he is owed benefits accrued as compensation for time not worked from 2 June 2001 until 16 October 2002. The benefits claimed are—

(a) $3,500.00 pro rata for long service leave;

(b) $8,167.00 pro rata annual leave;

(c) $12,791.00 being superannuation contributions.

2 The Applicant's employment with AlintaGas Limited ("the Respondent") ceased on 1 June 2001. The Applicant argues that he is owed the aforementioned sums pursuant to express terms of his contract of employment, which guaranteed him employment until 16 October 2002 or compensation to be assessed as if he worked until 16 October, 2002. It is common ground that when the Applicant's employment ceased on 1 June 2001 he was paid 71.60 weeks salary, calculated at the rate of his base salary that he would have received if he had worked from 2 June 2001 until 16 October 2002. He was also paid 205.97 hours pay as pro rata long service leave and 846.25 hours pay as accrued annual leave. Payments for pro rata long service leave and accrued annual leave were calculated and paid until the date his employment terminated, namely 1 June 2001.

Background

3 The Respondent and its predecessors, the Gas Corporation and the State Energy Commission of Western Australia, employed the Applicant from 5 December 1966 to 1 June 2001. At the time the Applicant's employment ceased he was engaged as a gas

supply administrator. Whilst employed by the Respondent and its predecessors the Applicant was a party to more than one common law employment agreement. In 1999 the Applicant was employed by the Gas Corporation, which traded as "AlintaGas". On 31 January 1999 the Applicant entered into an employment agreement, titled "AlintaGas Employment Agreement 1999" ("the 1999 Agreement").

4 Pursuant to Clause 29.3(c) of the 1999 Agreement the following payments were required to be paid to the Applicant in the event he was to be made redundant. Clause 29.3(c) provided—

> "(c) If the Employee's employment is terminated due to redundancy, the redundancy payment will be calculated as follows—
>
> (i) twelve weeks pay, in lieu of notice plus three weeks pay for each completed year of continuous service (also taking into account previous continuous service with SECWA if the Employee transferred to AlintaGas from SECWA);
>
> (ii) calculations will be based on the Employee's substantive classified ordinary rate of pay at the date of termination; and
>
> (iii) all accrued annual leave and long service leave will be paid out, including pro rata entitlements based on the Employee's substantive classified ordinary rate of pay at the date of termination. If the Employee has less than three years of service the Employee will not be eligible for pro rata long service leave entitlements."

5 Sometime after the 1999 Agreement was entered into, a process was instituted for the "transfer" of employees from the Gas Corporation to the Respondent when AlintaGas became a public company. In a "News Brief", employees of AlintaGas were notified that an agreement had been reached in principle between representatives from AlintaGas and the Unions for transitional arrangements to "transfer" employees to the new corporation. These arrangements were to cover all permanent employees, including the Applicant. Part of the agreed transitional arrangements was—

> "A two-year employment guarantee from the point of sale with a redundancy package of twelve weeks in lieu of notice plus three weeks for each year of service uncapped. The two-year employment guarantee will be couched in the same terms as the DBNGP employment guarantee;"

6 It is common ground that the DBNGP Employment Guarantee is the "Dampier to Bunbury Natural Gas Pipeline Agreement 1997", an agreement certified pursuant to the *Workplace Relations Act 1996* by Senior Deputy President Polites on 19 February 1998. Clause 7.3 of the Certified Agreement provided—

> "If an employee is terminated by the Employer for any reason, other than a valid reason relating to the employee's capacity or conduct, before the period of two years guaranteed employment has been completed, the Employer will compensate the employee on a pro rata basis for the remainder of the period not employed. The compensation will include any salary and work related allowances the employee would otherwise have earned and the provisions of Clause 13 of this Agreement shall apply."

Clause 13 of the Certified Agreement provided:

> "When an employee is terminated due to redundancy, the employee shall be entitled to 12 weeks pay inclusive of the prescribed period of notice and an additional three weeks severance pay for each completed year of service.
>
> The payment provided herein shall be in addition to any payment for accrued annual leave, long service leave, or superannuation that may be due."

7 Sometime prior to June 2000, the Applicant and other permanent employees of the Gas Corporation were provided with a draft of the proposed contract of employment with the Respondent. Clause 4 of the proposed agreement provided—

> "4.1 This Clause shall apply to employees previously employed by the Gas Corporation, and who have subsequently accepted the offer of employment to transfer to AlintaGas Limited prior to the sale of the Gas Corporation. Employees employed after the sale completion date are not affected by this Clause.
>
> 4.2 Subject to a termination of employment based on a valid reason relating to the Employee's capacity or conduct, each Employee is guaranteed two years employment from the date of sale in their current position and their current terms and conditions of employment.
>
> 4.3 If an Employee is terminated by AlintaGas for any reason, other than a valid reason relating to the Employee's capacity or conduct, before the period of two years guaranteed employment has been completed, AlintaGas will compensate the Employee on a pro rata basis for the remainder of the period not employed. The compensation will include any salary the Employee would otherwise have earned and the provisions of Clause 30 - Redundancy shall apply.
>
> 4.4 For redundancy, calculations will, for all purposes be based on the assumption the Employee had worked the full two year period from the sale completion date, in addition to the previous continuous service provided with the State Electricity Commission (SEC), the State Energy Commission of Western Australia (SECWA) and the Gas Corporation."

Clause 30.3(c) of the proposed agreement set out the formula for payment of redundancy pay. Clause 30.3(c) contained the same terms as Clause 29.3(c) of the 1999 Agreement (see paragraph 4 of these reasons).

8 The Applicant together with a number of other employees in the Trading Division of AlintaGas wrote a letter dated 2 June 2000 to Mr Kevin Bishop, Acting General Manager of Trading raising a number of issues in respect of the proposed contract. Mr J Cahill, Acting Chief Executive Officer of AlintaGas responded on 6 June 2000 and advised the Applicant and the other employees that it was neither practical nor appropriate to attempt to negotiate individual employment contracts with employees at the time whilst the transition from government to public ownership was ongoing. He stated that was a matter that could be reviewed after the sale process was completed. In a letter dated 14 June 2000 the Applicant and the other employees attached a paper setting out a number of issues including a suggested re-draft of Clause 4.3 of the proposed agreement. In a paper provided to Mr J Cahill dated 14 June 2000 and titled "Issues Associated with Offer of Employment", the employees suggested that the last sentence of Clause 4.3 of the contract be replaced with the following—

> "The compensation will include any salary the Employee would otherwise have earned and all entitlements, including annual leave and long service leave, that would have accrued had the Employee been employed continuously up to the date that this employment guarantee lapses. The provisions of Clause 30 – Redundancy shall also apply."

9 Mr James Hennessy, General Manager, Regulatory Affairs, Supply and Strategy met with the Applicant and other members of the Trading Division on 30 June 2000. At that meeting Mr Nigel Philip, the General Manager of the Trading Division, advised the Applicant that he had a directive from the Respondent that it would not agree to amend the contract to include any of the

amendments proposed by the employees. The Applicant testified that Mr Philip said that (Clause 4) "was only a salary guarantee". The Applicant also testified that Mr Hennessy made a similar comment at that meeting but that he (Mr Hennessy) also said that "the employees, the way it's written, have a very good case that it's not written as if it's an employee guarantee, this is actually more than that, and if the employees wanted to take it further then they would have very good grounds to do so. And that was Mr Hennessy's comment, so I was more than happy to sign it on that basis." Mr Hennessy testified that he recalled telling the Applicant that there would be no changes to the contract and he (the Applicant) would have to sign the contract or not at all. After the meeting the Applicant executed a contract in the form proposed by the Respondent.

10 The AlintaGas Limited Employment Agreement 2000 ("the 2000 Agreement") executed by the Applicant, expressly stated in Clause 2.1 that the 2000 Agreement arises from the sale of the Gas Corporation. Further that in anticipation of the sale, agreement had been reached between the parties on employee transitional arrangements. Except for some minor changes to the operation of the agreement in Clause 2 and Clause 4, the 2000 Agreement contained the same terms as the 1999 Agreement.

11 The Respondent sought to adduce evidence through Mr Gregory Larkin, Human Resource consultant as to what the Respondent intended by the words used in Clause 4.3 and 4.4 of the 2000 Agreement. The Applicant objected to the admissibility of the evidence. The evidence was led on the basis that the Commission would rule on its admissibility at the conclusion of the case. The Applicant also made a similar objection to the evidence given by Mr Hennessy in respect of the pre-contract negotiations, in particular the Applicant objected to the admissibility of the contents of the document titled "Issues Associated with the Offer of Employment" and the matters raised at the meeting on 30 June 2000.

12 Mr Larkin stated in relation to Clause 4 of the 2000 Agreement—

> "I drafted the wording of Clause 4 to specifically refer only to "*salary*" and not to any superannuation.
>
> I also did not intend the words *"for all purposes"* in Clause 4.4 to be read into Clause 30.3(iii). The words "*for all purposes*" were only ever to refer to the redundancy payment in Clause 30.3(c)(i).
>
> The wording of Clause 30.3 was intended to stand on its own and the reference to the words "*termination date*" was meant to reflect the actual date of termination.
>
> When I used the words "*for all purposes*" I meant that to include the addition of days for shift work allowances as well as notice pay and the severance pay component of the calculation."

Submissions

13 In relation to admissibility of the evidence the Applicant makes the following submissions—

1) Clause 2.2 of the 2000 Agreement provides that the agreement represents the entire agreement between the parties and supersedes and replaces all other contracts, understandings or arrangements.

2) The Respondent does not argue that the employment agreement does not represent the entire agreement.

3) When a court considers a document which is alleged to contain the terms of a contract that have been agreed upon by the parties, it will attempt to give effect to that agreement in the light of their apparent intentions as expressed in that document (see *Preston v Luck (1884) 27 ChD 497* at 506-507 approved by Isaacs J in *Life Insurance Co of Australia Ltd v Philips (1925) 36 CLR 60* at 77).

4) As long as a written contract is capable of meaning, it will ultimately bear that meaning which the courts decide upon; the question then becomes one of construction, of ascertaining the intention of the parties, and of applying it (see per Barwick CJ in *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd (1968)118 CLR 429* at 436-437).

5) Having taken the trouble to produce a written contract, it is not permissible to have regard to the surrounding circumstances to contradict the terms of that contract (see: *Secured Income Real Estate (Australia) Ltd v. St Martin's Investments Pty Ltd (1979) 144 CLR 596*).

6) It is only permissible to have regard to those circumstances to resolve any ambiguity in the document itself. As said by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337* at page 352, the rule is—

> *"*...that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning. Generally speaking facts existing when the contact was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties although, as we have seen, if the facts are notorious knowledge of them will be presumed.
>
> It is here that a difficulty arises with respect to the evidence of prior negotiations. Obviously the prior negotiation will tend to establish objective background facts which were known to both parties and the subject matter of the contract. To the extent to which they have this tendency they are admissible. But in so far as they consist of statement and actions of the parties which are reflective of their actual intentions and expectations they are not receivable. The point is that such statements and actions reveal the terms of the contact which the parties intended or hoped to make. They are superseded by, and merged in, the contract itself. The object of the parol evidence rule is to exclude them, the prior oral agreement of the parties being inadmissible in aid of construction, though admissible in an action for rectification.
>
> Consequently when the issue is which of two or more possible meanings is to be given to a contractual provision we look, not to the actual intentions, aspirations or expectations of the parties before or at the time of the contact, except in so far as they are expressed in the contract, but to the objective framework of facts within which the contract came into existence, and to the parties' presumed intention in this setting. We do not take into account the actual intentions of the parties and for the very good reason that an investigation of those matters would not only be time consuming but it would also be unrewarding as it would tend to give too much weight to these factors at the expense of the actual language of the written contract."

7) The language of the employment agreement is not ambiguous. Clause 4.4 expressly provides that for redundancy, calculations will for all purposes be based on the assumption the Applicant had worked the entire guaranteed two year period of employment. Annual leave and long service leave are express redundancy provisions in the employment agreement.

8) Evidence of the course of dealing between the parties prior to the execution of the employment agreement cannot contradict the plain meaning of the expression and the relevance and admissibility of any such evidence

is expressly rebutted by a statement made by the Applicant on 4 July 2000 when he returned to the Respondent a copy of the executed 2000 Agreement. In a letter dated 4 July 2000 he stated—

> "As you are aware, I have had some reservations about committing to the offer without an understanding of the terms and conditions of my employment. However, the channels that AlintaGas has used to answer questions and provide information – News Briefs, letters from the CEO and discussions with AlintaGas management – mean that I now understand the conditions under which AlintaGas Limited will employ me."

14 Mr Le Miere submitted that the Commission should approach the task of interpreting the 2000 Agreement by applying the well known principles of interpretation of contract, in particular the following principles set out by the learned authors of *Cheshire & Fifoot's Law of Contract* (1997) (7th ed) at 10.33 & 10.34 should be applied in this matter—

> "The court approaches the task of ascertaining the meaning of the parties' expressions from an objective point of view. So in the case of a disputed clause in a commercial agreement 'the essential question is what would reasonable business people in the position of the parties have taken the clause to mean'. The parties may therefore be bound by the meaning reasonably to be inferred in the circumstances, even if it does not confirm to the interpretation advanced by either.
>
> …
>
> In interpreting the expressions of the parties, the court will consider them in their context. Except to the extent to which evidence is inadmissible, the court will as a matter of course take into account the objective background of the transaction, that is, its factual matrix, genesis and aim, and the common assumptions of the parties."

15 Mr Le Miere QC on behalf of the Respondent also pointed out that Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (op cit) at pages 352–353 in a paragraph that followed the passage quoted above went on to say—

> "There may perhaps be one situation in which evidence of the actual intention of the parties should be allowed to prevail over their presumed intention. If it transpires that the parties have refused to include in the contract a provision which would give effect to the presumed intention of persons in their position it may be proper to receive evidence of that refusal. After all, the court is interpreting the contract which the parties have made and in that exercise the court takes into account what reasonable men in that situation would have intended to convey by the words chosen. …"

16 Mr McCorry on behalf of the Applicant conceded that if the Commission finds that Clause 4.3 or 4.4 to be ambiguous, the Commission may have regard to the evidence about the amendments proposed by the Applicant and the other employees to Clause 4 of the 2000 Agreement as this evidence raises facts known to both parties. However in relation to the evidence of Mr Larkin set out in paragraph 12 of these reasons, Mr McCorry contends on behalf of the Applicant, Mr Larkin's evidence is inadmissible even if I were to find Clause 4.3 or 4.4 ambiguous, as his evidence relates to facts not known to the Applicant and is reflective of actual intention and expectations of the Respondent.

Is there ambiguity?

17 Both parties contend Clause 4.3 and 4.4 are not ambiguous. The Applicant contends that the plain meaning of Clause 4.3 and 4.4 is to place the Applicant in the position that he would have been if he had been employed until 16 October 2000. It is argued that if the Commission was to accept the Respondent's argument that Clause 4.3 only creates a salary guarantee Clause 4.4 would be rendered redundant, as Clause 4.3 specifies that redundancy calculations are to be made in accordance with Clause 30. It is contended on behalf of the Applicant that the words in Clause 4.4 "for redundancy, calculations will, for all purposes be based on the assumption the employee had worked the full two year period from the sale completion date", when read together with Clause 4.3 the words "compensation will include" mean that entitlements to pro rata annual leave and long service leave is to be calculated as if the Applicant's employment ceased on 16 October 2002. If the Applicant's argument is accepted then the words in Clause 30.3(c)(iii), "all accrued annual leave and long service leave will be paid out, including pro rata entitlements … at the date of termination" must be read subject to Clause 4.4 in that the calculations are to be made as if the date of termination of employment was 16 October 2002 and not 1 July 2001.

18 The Respondent contends that—

(a) Clause 4.2 provides that an employee was guaranteed two years employment from the date of sale of the Gas Corporation;

(b) Clause 4.3 provides for compensation if an employee is terminated by AlintaGas for any reason other than relating to the employee's capacity or conduct, then AlintaGas will compensate the employee on a pro rata base for the remainder of the period not employed. Compensation is to be the salary the employee would have earned and the benefits in Clause 30;

(c) by the use of the words "The compensation will include any salary the employee would have earned", does not mean that matters that are not specified in payments or benefits in the Clause are to be included. In particular the words "will include" mean "shall consist of".

(d) the words in Clause 4.4 referring to "for all purposes be based on the assumption the employee had worked the full two year period … in addition to the previous continuous service provided with … SEC … SECWA and the Gas Corporation" means that the Applicant is to be treated for the purposes of redundancy pay to have another extra year of service for the purposes of Clause 30.3(c)(i).

19 In the alternative, the Respondent contends that if the Commission is to find that Clause 4.3 or 4.4 is ambiguous the evidence referred to in paragraphs 7 and 8 admissible to prove that the parties refused to include in the contract a provision that would give effect to the interpretation advocated by the Applicant. In particular the dealings between the parties prior to the execution of the 2000 Agreement show that the parties did not intend Clause 4 to have the effect advocated by the Applicant.

20 In *YZ Finance Co Pty Ltd v Cummings* (1964) 109 CLR 395 at 401-2 Kitto J observed in a case concerning interpretation of a statutory provision—

> " … Unlike the verb "means", "includes" has no exclusive force of its own. It indicates that the whole of its object is within its subject, but not that its object is the whole of its subject. Whether its object is the whole of its subject is a question of the true construction of the entire provision in which the word appears. …"

In this matter, the word "includes" in Clause 4.3 is imprecise as it gives no clear indication of what is included, other than salary and the provisions of Clause 30. Clause 4.4 does not further clarify what is included. I also note that the application of Clause 30 is cast in mandatory terms in that Clause 4.3 provides, "and the provisions of Clause 30 - Redundancy shall apply". Further, in my view there is a conflict between Clause 4.4 and Clause 30.3(iii), in that prima facie the words "calculations will, for all purposes be based on the assumption the employee had worked the two year period" were to have the effect that (leaving aside any superannuation payments), all payments made on cessation of employment, that is all payments of salary, annual leave, long service leave are to be calculated as if the Applicant terminated his employment on 16 October 2002.

However this construction is at odds with the express terms of Clause 30.3(iii) (which is incorporated into Clause 4.3). Clause 30.3(iii) clearly provides that as part of redundancy pay, all accrued annual leave and long service leave including pro rata entitlements will be paid out, including pro rata entitlements based on the employee's ordinary rate of pay at the date of termination.

21 Accordingly I have reached the view that Clauses 4.3 and 4.4 are ambiguous and the evidence set out in paragraphs 8 and 9 of these reasons is admissible. This evidence shows that the Respondent rejected the suggestion made by the Applicant and fellow employees that in the event of redundancy, employees who are parties to the 2000 Agreement would be paid pro rata annual leave and pro rata long service leave until 16 October 2002. I accept the submission made on behalf of the Applicant that the evidence of Mr Cahill set out in paragraph 12 of these reasons is inadmissible.

22 If I am wrong in holding that Clause 4.3 and 4.4 are ambiguous and that the Applicant's argument as to the meaning of Clause 4.3 and 4.4 is the proper construction, I am of the view that the Applicant is unable to make out a case that he is owed pro rata annual leave. As Mr Le Miere points out an entitlement to annual leave is an entitlement to take paid leave within a period of service. The Applicant has not made out a case that he would have taken no leave from the beginning of June 2001 until 16 October 2002. The evidence establishes that but for the redundancy in June 2001, he would have taken 10 days leave. Although he testified that he accrued a substantial amount of annual leave he gave no evidence as whether (but for being made redundant) he had intended or not intended to take further annual leave in 2001 or in 2002. I would however have allowed his claim for pro rata long service leave as the facts establish that even if the Applicant had worked until 16 October 2002 he had no entitlement to take long service leave, as such paid leave had not accrued.

23 Mr McCorry advised the Commission that basis for the Applicant's claim for superannuation arises out of special condition 13 of the 2000 Agreement. Special Condition 1 and 13 provided—

> "1. The entire annual remuneration for the term of this agreement, for—
>
> - all hours worked during a 12 month period including without limitation all penalties and allowance or both; and
> - being continuously available when on roster,
>
> is equivalent to the salary applicable to Level 8 step 3 as adjusted from time to time, plus 12%. The Level 8 step 3 rate is currently $73,111 per annum. In addition to this amount, the Employee shall be entitled to the increases described in Clause 25.3(b) and 25.3(d) of this Agreement.
>
> 13. Where the Employee contributes 5% of his salary to a superannuation fund, AlintaGas will be required to contribute an additional 12% of the Employee's salary to the superannuation fund."

24 It is argued on behalf of the Applicant that the employer superannuation contributions of 12% are "salary" within the meaning of Clause 4.3 of the 2000 Agreement. The Applicant testified that until his employment was terminated he contributed 10% of his salary to the AlintaGas superannuation fund. It was conceded on behalf of the Applicant that by operation of law the nature of the AlintaGas superannuation fund is that no employer or employee contributions can be made to the fund after the date the Applicant's employment was terminated. It is contended that the Commissioner should make an order that the Respondent pay the Applicant a sum of money equivalent to 12% contributions (being $12,791) that would have been made by the employer if the Applicant had worked until 16 October 2002.

25 In support of the Applicant's argument Mr McCorry referred to *The Totalisator Agency Board_v Fisher* (1997) 77 WAIG 1889 in which the Industrial Appeal Court held that a "commission only employee" was not paid a "salary", so as to be regarded as a "salaried employee" within the meaning of the *Government Officers Salaries and Conditions Award*. Justice Anderson with whom Scott J agreed observed at page 1891—

> "If resort is had to case law to ascertain the ordinary meaning of the word salary, I can find nothing in the cases to which we have been referred including the cases mentioned above, which would support the conclusion that the commission and other entitlements provided for in this Agency Agreement are salary. Both parties relied on the case of *In Re Shine, Ex parte Shine (supra)* in support of their opposite contentions. In my opinion the judgements provide no support for the respondent's case. At 529 Bowen LJ said –
>
> 'Salary, I think must mean a definite payment for personal services arising under some contract, and (to borrow an expression of my brother Fry) computed by time.'
>
> As I have tried to point out the agency commission is anything but a "definite payment for personal services … computed by time". In that same case Fry LJ said at 531—
>
> 'Whenever a sum of money has these four characteristics – first, that it is paid for services rendered; secondly, that it is paid under some contract or appointment; thirdly, that it is computed by time; and fourthly, that it is payable at a fixed time – I am inclined to think that it is a salary, and not the less so because it is liable to determination at the will of the payer, or that it is liable to deductions.'
>
> Once again, as I have tried to explain, the agency commission in this case is not an amount paid for services rendered computed by time."

26 However as Scott J points out—

> "As the reasons of Anderson J reveal, the word "salary" is used in many different statutes and in different contexts. It is not possible to discern a singular meaning of the word which would apply to all of the statutory contexts in which the word appears. The judgement of Fry LJ in *In Re Shine; Ex parte Shine* [1982] 1 QB 522 gives an indication of the criteria that may be looked at in determining whether or not a particular payment is a "salary". The four characteristics to which Fry LJ refers at 531 are a valuable guide in determining whether or not any payment is a "salary" for the purpose of a particular statute."

27 In this matter the Commission is not concerned with interpreting a statute or an award. It is necessary to have regard to whether the meaning of salary can be ascertained from the express terms of the contract. In my view when regard is had to Special Conditions 1 and 13 of the 2000 Agreement it is clear that the Applicant's "salary" is an amount equal to the rates of pay in Clause 25 of the 2000 Agreement for Level 8, Step 3 plus 12%. The amount to be paid by the Respondent as superannuation was an additional amount of 12% and did not form part of the Applicant's salary within the meaning of Special Condition 1 or Clause 4.3.

28 The Application will be dismissed.

2002 WAIRC 04817

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NOEL LEONARD KNIGHT, APPLICANT
	v.
	ALINTAGAS LIMITED, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	FRIDAY, 15 FEBRUARY 2002
FILE NO/S.	APPLICATION 1248 OF 2001
CITATION NO.	2002 WAIRC 04817

Result	Claim for contractual benefits dismissed
Representation	
Applicant	Mr G McCorry (as agent)
Respondent	Mr R Le Miere QC and Mr D Sash (of counsel)

Order

HAVING heard Mr G McCorry on behalf of the Applicant and Mr R Le Miere QC and Mr D Sash 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 this matter be, and is hereby dismissed.

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

2002 WAIRC 04828

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT WILLIAMSON, APPLICANT
	v.
	YULELLA FABRICATIONS ABORIGINAL CORPORATION, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	MONDAY, 4 FEBRUARY 2002
FILE NO/S.	APPLICATION 746 OF 2001
CITATION NO.	2002 WAIRC 04828

Result	Application dismissed. Order issued.
Representation	
Applicant	Mr R Williamson on his own behalf
Respondent	Mr L Pilgrim as agent

Reasons for Decision

(Given extemporaneously at the conclusion of the proceedings, taken from the transcript as edited by the Commission)

1 This is a claim pursuant to s 29(1)(b)(i) and (ii) of the Industrial Relations Act, 1979 ("the Act") by Mr Robert Williamson ("the applicant") against Yulella Fabrications Aboriginal Corporation ("the respondent"). The applicant alleges that he was unfairly dismissed by the respondent corporation on or about 4 April 2001 and, moreover, he says that he was denied a contractual benefit on termination of employment, that being payment of the sum of about $12,500.00, which represents a period of employment which he says was denied, from 1 April 2001 to 30 June 2001.

2 The applicant says that this arises from an agreement between him and the respondent employer to extend what was otherwise a fixed term arrangement for 12 months between 4 April 2000 and 3 April 2001 to the latter period of 30 June 2001.

3 The respondent corporation, represented by Mr Pilgrim as agent, takes issue with both limbs of the applicant's claims. It says by its notice of answer and counter proposal that the applicant was employed by the respondent from 4 April 2000 to on or about 4 April 2001 on a 12 month fixed term contract. It further says that the applicant's employment was at all material times funded by the Department of Commerce and Trade, a department of the Western Australian Government, and the Aboriginal and Torres Strait Islander Commission. It is said that both of those organisations made funds available to the respondent to enable it to employ the applicant. I should also observe that the applicant's employment was in the position of a client-based business planner, which according to the applicant involved various things, not the least of which was assisting in the business development of the respondent corporation.

4 The respondent also says in defence of the applicant's claim that the applicant's contract of employment simply came to an end on or about 4 April 2001 by virtue of the expiry of that fixed term contract without any termination of employment having occurred at the initiative of the employer. In essence, the respondent says that the applicant's contract of employment came to an end by an effluxion of time.

5 In its answer, the respondent further alleges that the applicant's engagement was subject to funding by the Department of Commerce and Trade and the Aboriginal and Torres Strait Islander Commissioner, and as there was no further funding made available to the respondent to continue the applicant's engagement, there can be no basis, on the respondent's submission, to the applicant's claim for a further period of employment from April to June 2001.

6 On those bases the respondent therefore submits that the Commission has no jurisdiction to deal with the claim, firstly, on the basis that there was no termination of employment by it, that being there was no dismissal for the purposes of s 29(1)(b)(i) of the Act, and, secondly, and in any event, there is no contractual entitlement because there was no such contract entered into between the applicant and the respondent.

The Facts

7 The applicant gave evidence on his own behalf and I think it is fair to say, based upon all of the materials before the Commission, including the applicant's sworn testimony and the bundles of documents tendered as exhibit A1, which include various pieces of correspondence passing between the applicant, the respondent and the Department of Commerce and Trade, and, secondly, exhibit R1, again a bundle of documents tendered by the respondent, setting out the arrangements between the various parties to these transactions, that there is considerable common ground between the parties. The contentious issue is what was to occur on and from 4 April 2001 in terms of the applicant's contract of employment.

8 Mr Williamson testified that he was engaged on a fixed term contract of 12 months in the position of client-based business planner. He was required by the terms of that contract, which were reduced to writing and are contained in the bundle of documents as exhibit R1, to work at Meekatharra in the position for which he was contracted to occupy.

9 The material terms of the contract of employment are set out on the second page of the contract documents, firstly under the heading, "Term of this Contract", of which there is two paragraphs. It is made plain by that term of the agreement that the contract of employment is for a period of one year. It does provide that the contract may be extended by a further period, depending upon the approval of the employer and the employee.

10 However, and importantly, the contract document also provides that notwithstanding anything elsewhere contained in the previous paragraphs of the instrument, that the employer, that is the respondent, is funded by the Aboriginal and Torres Strait Islander Commission and should the said funding cease so would the employee's employment as the business planner/development officer. It is common ground that the Commission should infer that the word "ceases" should be read as part of that arrangement. Indeed that is consistent with the applicant's evidence, which to his credit, I might say, was that he always understood that his employment and ongoing employment was conditional upon there being ongoing funding provided to the respondent.

11 The applicant testified that he duly commenced employment in his position and worked in that capacity through the period up until relevant events occurred, most specifically, in about February 2001. At about that time it is the applicant's evidence that there was a meeting which took place between representatives of the respondent and representatives of the Department of Commerce and Trade to discuss a proposal put forward by the respondent corporation, presumably on the applicant's behalf, for an extension, in effect, of the applicant's fixed term contract of employment through to the period ending 30 June 2001.

12 In that regard the applicant referred the Commission to a letter dated 14 February 2001 from a Mr Stan Hill, the chairperson, as the Commission understands it, of the respondent corporation. Attached to that letter are various other documents including a budget submission in support of the application for an extension of the applicant's employment.

13 The applicant testified that as a consequence of that meeting that took place involving representatives of the respondent and the Department of Commerce and Trade, on 26 February 2001, there was an approval given for the extension of funding for the applicant's position with the respondent. It was the applicant's evidence that a representative of the department, a Mr Gill, indicated that funding would be forthcoming. I pause to observe that this was challenged by the respondent, albeit that the respondent has elected to call no evidence in support of its defence of the applicant's claim. Be that as it may, the applicant then said that he returned to Meekatharra and undertook continuation of his duties on the assumption that his employment arrangements with the respondent had been extended as he thought they had been.

14 Subsequently, on the evidence, it appears by correspondence from the Department of Commerce and Trade dated 21 March 2001, that after consideration of the respondent's proposal for further funding in the sum of $18,200.00, which apparently on the evidence is in accordance with the client-based business planner scheme, the department had declined to confirm that funding arrangement. In the letter of 21 March 2001 the executive director, Office of Aboriginal Economic Development, Mr Rick Grounds, advised the chairperson of the respondent corporation to this effect.

15 Various reasons are advanced by the Department of Commerce and Trade for its decision to decline to provide further financial support. However, those reasons are not relevant for the purposes of disposing of these proceedings.

16 It is also the evidence that in response to that letter the respondent corporation again under, apparently, the signature of Mr Stan Hill, the chairperson of the respondent, wrote back to the Department of Commerce and Trade seeking a reconsideration of its decision as announced in its letter of the same day, 21 March 2001.

17 It appears to be also common ground between the parties that the Department of Commerce and Trade replied the next day on 22 March 2001, again under the hand of Mr Grounds, the executive director, Office of Aboriginal Economic Development, confirming its decision not to provide further funding but offering some other smaller amount of funds for other purposes.

18 Also in evidence before the Commission is a statement from Mr Darryl Curley. That statement is an unsworn statement dated 23rd March 2001, and described Mr Curley as "CDEP manager" of the respondent, at least at the time the statement was made, although Mr Williamson testified that at the material time of the meeting on the 26 February 2001, he was the acting chief executive officer of the respondent corporation.

19 That statement, which has not been able to be tested in evidence indicates that there was consideration of the respondent's request for funding, and confirms Mr Williamson's evidence that a Mr Gill, on behalf of, or purporting to act on behalf of the Department of Commerce and Trade, orally indicated that there had been approval of funding for $18,000.00 for the continued engagement of Mr Williamson until 30 June 2001.

20 It is common ground, however, that despite various subsequent urgings by both the applicant and the respondent, that the decision of the Department of Commerce and Trade was not revisited, and that the applicant left the employment of the respondent and left the accommodation he was occupying at Meekatharra on or about 6 April 2001. It is also common ground that the applicant performed no further services on behalf of the respondent from the date of the expiry of the original contract, that being on or about 4 April 2001. According to the applicant, he stayed on in Meekatharra for a few days to arrange his affairs.

21 The applicant also told the Commission in evidence that subsequent to him leaving Meekatharra he had unsuccessfully sought alternative employment, and in that regard, tendered as exhibit A2, a Centrelink job seeker diary which evidences his attempts in that regard. Since on or about July 2001 the applicant told the Commission in evidence that he has sought to establish a business venture on his own behalf.

22 I should also add that the applicant conceded in his evidence in cross-examination that he clearly understood that it was a condition of his engagement and ongoing employment with the respondent that funding arrangements be put in place and that those funding arrangements be continued. In that regard the Commission refers to two documents, firstly a letter from the Department of Commerce and Trade dated 20 December 1999 from, again, Mr Rick Grounds, the executive director Office of Aboriginal Economic Development.

23 In that letter, which it is common ground, confirmed the funding for the applicant's original appointment in the sum of some $50,000.00 from the Department of Commerce and Trade, it is a condition of grant, as condition one, that the grant funds of $50,000.00 are offered for the engagement of a full-time business planner for an approved grant period of 12 months. The second sentence of paragraph one of the conditions of grant also says that the period of 12 months will not be extended or varied except by written authorisation of the executive director of OAED, being, as the Commission understands it, the Office of Aboriginal Economic Development, as a part of the Department of Commerce and Trade, and at all material times that office was occupied by Mr Rick Grounds, as the correspondence in evidence makes clear.

24 The Commission also had its attention drawn to a document also contained in exhibit R1, that being a document headed up, "Acceptance of grant funding for a client-based business planner", which it was common ground between the parties, was the funding arrangement for the applicant's initial term of employment of 12 months with the respondent pursuant to his written contract of employment to which I have already referred.

25 Again in that document, which is a document executed between the respondent corporation and the Department of Commerce and Trade in respect of the $50,000.00 grant, it is a condition of grant, at paragraph one of the conditions, that the grant funds are accepted for the engagement of the business planner position for an approved period of 12 months, again with that period not being extended or varied except by written authorisation of the executive director of OAED.

26 I also pause to observe at this point in time that, again to his credit, the applicant testified that at no time during the course of his employment with the respondent was such written authorisation of the executive director of OAED, that being Mr Rick Grounds, forthcoming. The applicant relies, however, on the content of the meeting of 26 February 2001, in respect of his claim. For present purposes that is a sufficient summary of the evidence before the Commission in dealing with these matters.

Findings and Conclusions

27 Now I turn to my findings and conclusions in relation to the applicant's claims. It is trite to observe that in relation to an unfair dismissal claim brought pursuant to section 29(1)(b)(i) of the Act, it is incumbent upon an applicant, on the balance of probabilities, to establish that he or she has been dismissed by the employer to attract the Commission's jurisdiction. The meaning of "dismissal" is well established in this jurisdiction. Suffice to say that it does not, for the purposes of an application pursuant to s 29(1)(b)(i), mean a refusal to employ. It must be established that the employer has "sent the employee away from the employment", as the authorities make clear.

28 Secondly, for the applicant to establish his claim to a denied contractual benefit it is incumbent upon him to establish on balance that the benefit to which he says he was entitled was a term of his contract of employment. That is essentially a judicial process which requires the Commission to ascertain the terms of the contract by which the applicant says he was employed and, secondly, having determined the terms of the contract, to determine whether or not, as a matter of fact and law, the applicant has been denied a benefit arising under that contract as it has been found to be.

29 In my opinion, having regard to all of the evidence before the Commission, whilst I have some sympathy for the circumstance in which the applicant has found himself, I am not persuaded either that the applicant has been dismissed by the respondent as a matter of law to found jurisdiction in relation to his unfair dismissal claim, nor am I persuaded, on balance, that the applicant has established a contractual entitlement to three months wages or salary from 1 April to 30 June 2001. As I say, I have reached that conclusion not without some considerable sympathy for the circumstances in which the applicant finds himself.

30 I am satisfied on the evidence, and I find, that the applicant's contract of employment with the respondent was for a fixed term, for 12 months commencing, as the written instrument makes clear, on 3 April 2000, that contract of employment to run for a period of 12 months from that time.

31 I am also satisfied on the evidence, and I find, that it was a term of the applicant's contract of employment, both evidenced by the written contract document itself, which I have already referred to in these reasons for decision, and the letter from the Department of Commerce and Trade, dated 20 December 1999, and from the acceptance of grant funding for a client-based business planner document, that it was well understood by the applicant and the respondent and, for that matter, those funding the applicant's employment, that his employment, and ongoing employment, was always subject to and contingent upon the provision of appropriate funding.

32 The evidence before the Commission is that towards the end of the applicant's 12 month term representations were made by the respondent to the Department of Commerce and Trade requesting an extension of funding for the applicant's employment with it to 30 June 2001.

33 I am also satisfied on the evidence, and I find, that there was a meeting that took place on or about 26 February 2001, attended by the applicant and representatives of the Department of Commerce and Trade and also a further representative of the respondent, a Mr Curley. I accept that at that meeting the respondent's proposal was discussed, that proposal being to extend the applicant's employment. I have already noted that the content of that meeting in relation to an alleged agreed extension of time from the respondent to the applicant in terms of his contract of employment is in issue. It is also put in issue by the respondent that Mr Gill made the offer that he is alleged to have made to extend the funding for the applicant's employment.

34 Be that as it may, it is unnecessary for me to resolve that conflict even in light of the fact that there was no evidence adduced from the respondent from representatives either of it or from the Department of Commerce and Trade, and I say that because I am satisfied, on balance, that it was at all material times a condition of the applicant's contract of employment that the funding for his appointment be approved in writing by the executive director of the Office of Aboriginal Economic Development.

35 I have had regard in these reasons, to the various instruments, including the applicant's written contract of service. I am satisfied on the evidence, and I find, that despite the expectations, no doubt, engendered from the meeting on 26 February 2001 and subsequent discussions between the parties, that written approval from the Department of Commerce and Trade was never forthcoming and, indeed, the evidence is before the Commission to the contrary, and that in letters of 21 March 2001 and, further, a letter of 22 March 2001, the Department of Commerce and Trade in writing declined to provide any further funding for the applicant's ongoing employment with the respondent.

36 On that basis, and on that basis alone, in my opinion, it being the fact that an essential condition of the applicant's contract of employment was not fulfilled to sustain the ongoing arrangement to 30 June 2001, that the applicant has not discharged the onus of establishing that there was, either an extension of the contract of employment to that date or, alternatively, there was an offer and acceptance of a fresh contract of employment between 4 April 2001 or thereabouts, and 30 June 2001 or thereabouts.

37 For the very same reason as I have concluded in relation to the applicant's contractual claim, I am not persuaded that the applicant was dismissed in that his dismissal was the action of the respondent employer. Having concluded that the contract of employment for a fixed term of one year came to an end on or about the agreed period of expiry, that being 4 April 2001, the only conclusion that the Commission can come to on all of the authorities is that the contract of employment of the applicant came to an end by the effluxion of time, that is, its expiry in the ordinary course, the 12 month period having elapsed and there being no contractually effective extension or entry into a new contract of employment.

38 Additionally, there may also be, if one looks at the matter from the point of view of a fresh contract from April to June 2001, a respectable argument that, in any event, there was no offer and acceptance of a new contract between those dates, an essential condition, that being the written authorisation of the Department of Commerce and Trade, having been absent. Indeed, as Mr Pilgrim has said in his submissions, it may also well be, if that was the case, that the applicant's claim in that regard, at least insofar as his dismissal claim is concerned, amounts to no more than a refusal to employ. But I do not need to reach a concluded view on that for the reasons which I have expressed.

39 In having reached those conclusions, the Commission must, on the evidence and the findings of fact that I have made, dismiss the applicant's claims.

2002 WAIRC 04829

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT WILLIAMSON, APPLICANT
	v.
	YULELLA FABRICATIONS ABORIGINAL CORPORATION, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	MONDAY, 4 FEBRUARY 2002
FILE NO/S.	APPLICATION 746 OF 2001
CITATION NO.	2002 WAIRC 04829

Result	Application dismissed. Order issued.
Representation	
Applicant	Mr R Williamson on his own behalf
Respondent	Mr L Pilgrim as agent

Order

HAVING heard Mr R Williamson on his own behalf and Mr L Pilgrim as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed.

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

SECTION 29 (1)(b)—Notation of—

	Parties	Number	Commissioner	Result
Aitken WK	Rocla Quarry Products - WA	859/2001	KENNER C	Discontinued
Albert H	BHP Billiton	1859/2001	KENNER C	Order Issued
Amoroso A	West End Steelworks a Division of Westend Holdings	1887/2001	GREGOR C	Discontinued
Antonucci G	BGC Blokpave Pty Ltd	2280/2001	BEECH C	Discontinued
Apathy BJ	Rick Hart Hi-Fi Corporation	1403/2001	SMITH C	Discontinued
Appleton MT	Beaurepairs Tyres	135/2002	KENNER C	Discontinued
Ashley G	Bridge Pump Company Pty Ltd (ACN 009 332 790)	1208/2000	SCOTT C	Discontinued
Bailey KJ	JW & LL Enterprises Pty Ltd	2325/2001	BEECH C	Discontinued
Berardini S	Kalgoorlie Consolidated Gold Mines Pty Ltd	2343/2001	GREGOR C	Discontinued
Beres J	Polar Group	2035/2001	SCOTT C	Dismissed
Bresser PA	Pinetec Pty Ltd	1860/2001	BEECH C	Discontinued
Bullock E	Rio Tinto Exploration Pty Ltd	1728/2001	SMITH C	Discontinued

	Parties	Number	Commissioner	Result
Care J	Westral Home Improvements	1516/2001	BEECH C	Dismissed
Cassey CA	Sunrise Publishers	2227/2001	SCOTT C	Dismissed
Cherry DE	Limestone Supplies Lake Clifton	1776/2001	GREGOR C	Order Issued
Clark MP	Barry Davis - Sign-a-Rama	1069/2001	SCOTT C	Discontinued
Clark SM	Goodchild Abattoirs Pty Ltd	2290/2001	SMITH C	Discontinued
Clarke S	Ecton Pty Ltd (ACN 082998258) & Others	1913/2001	GREGOR C	Discontinued
Collins DP	Normandy Yandai Operations, Bronzewing Operation	2035/2001	GREGOR C	Dismissed
Connell PA	Glengarry Tavern	9/2002	SCOTT C	Discontinued
Connor NJ	Salesforce Australia Pty Ltd ACN006 688 955	1330/2000	SMITH C	Discontinued
Considine TM	Honda North	13/2002	BEECH C	Discontinued
Cox K	Town of Claremont	1576/2001	SMITH C	Discontinued
Cunneen JT	Sea View Golf Club (Inc)	870/2001	BEECH C	Discontinued
D'Amico P	YHA Western Australia	1782/2001	SMITH C	Discontinued
Davidson SM	Mounts Bay Sailing Club Inc.	1971/2001	KENNER C	Discontinued
De Freitas G	Youanmi Site Service Road Train Bulk Haulage	1283/2001	BEECH C	Dismissed
De Leo RL	Rentokil Initial Pty Ltd	2034/2001	KENNER C	Discontinued
Dedman R	Sons of Gwalia Ltd	2114/2000	KENNER C	Discontinued
Dpaiva R	Jetset Travel Cloisters	2014/2001	SCOTT C	Discontinued
Ferry HE	Boat Torque Cruises P/L	1492/2001	SCOTT C	Discontinued
Flemming D	D'Orsogna Limited	1578/2001	WOOD C	Dismissed
Galbraith SN	G.T. and V Deadman	2228/2001	SCOTT C	Discontinued
George E	Tox Free Solutions	2037/2001	GREGOR C	Order Issued
George MR	MMR Unit Trust t/a Swagman Roadhouse	2170/2001	WOOD C	Dismissed
Hartnell NJ	Community Vision Inc	1775/2001	SCOTT C	Discontinued
Haynes JW	Pine Discount Furniture	1684/2001	GREGOR C	Dismissed
Head JR	Gary Holland, AISS t/a Hardware Café	1984/2001	SCOTT C	Dismissed
Head M	Gary Holland, AISS t/a Hardware Café	1985/2001	SCOTT C	Dismissed
Howson SA	Daydel Holdings Pty Ltd Trading As Rangeway Landscaping	2084/2001	SCOTT C	Discontinued
Huege de Serville C	Coles Supermarkets Australia Pty Ltd	53/2002	KENNER C	Discontinued
Hutchins S	Marie Stopes International Australia & Others	1722/2001	KENNER C	Discontinued
Irons LS	Export Corporation (Australia) Pty Ltd	1990/2001	KENNER C	Discontinued
Kennedy LG	Rolliston Engineering	2100/2001	GREGOR C	Discontinued
Knowles LJ	Rod Henderson	1781/2001	COLEMAN CC	Dismissed
Kristen SBM	Sangca Pty Ltd t/as Ray White Port Hedland	1418/2001	COLEMAN CC	Dismissed
Leigh WE	Graziella Croce t/a Ella Hair and Beauty	1472/2001	KENNER C	Order Issued
Linton J	Scarcella D	1906/2000	COLEMAN CC	Dismissed
Linton J	Scarcella D	1908/2000	COLEMAN CC	Dismissed
Mader J	Merridin Curtin & Decor	1997/2001	BEECH C	Discontinued
Manley RJ	Darling Earth Movers	566/2001	KENNER C	Dismissed
Marks PH	Hi-Fi (WA) Pty Ltd t/a Rick Hart Discounts	1376/2001	SMITH C	Discontinued
Marquett KA	Cook's Construction Pty Ltd	2185/2001	KENNER C	Discontinued
Mason K I	Pizza Haven Kelmscott	1841/2001	KENNER C	Discontinued
McKay JJ	Darowa Corporation	1076/2001	SCOTT C	Discontinued
Menz G	Ground and Foundation Supports Pty Ltd	198/1999	BEECH C	Withdrawn
Moulatsiatis NN	Sumner Nominees Pty Ltd T/A Smales Jewellers	42/2001	GREGOR C	Discontinued
Munday EM	Department of Education	2251/2001	GREGOR C	Discontinued
Murray A	Sir Charles Gairdner Hospital	1252/2001	SCOTT C	Order Issued
Ng ST	Finance Relationship Consultants Pty Ltd	2013/2001	SMITH C	Discontinued
Nicholson RJ	Hutchinson's Telecommunications (Australia) Ltd t/a Orange Australia	1476/2001	GREGOR C	Discontinued
Oswald SA	Joseph Smits, Andrew Mitchell Hairdressing	57/2002	KENNER C	Discontinued
Palmer S	John Delavrant of Novus Windscreens	1741/2001	COLEMAN CC	Order Issued
Perrett-Clapham C	Night Owl Services Pty Ltd	2027/2001	SCOTT C	Discontinued
Perry RJ	Rookley's Gourmet Cafe	2337/2001	SCOTT C	Discontinued
Rachpaul R	Atria Group Pty Limited	1517/2001	GREGOR C	Discontinued
Ramage AR	DJ Carmichael Pty Ltd	1689/2001	BEECH C	Discontinued

	Parties	Number	Commissioner	Result
Ramsell PH	Stoneage Ceramics (Aust) Pty Ltd	1946/2001	GREGOR C	Discontinued
Reith AD	Alinta Gas Ltd	2127/2001	GREGOR C	Discontinued
Reilly ME	Dunsborough and Districts Country Club	2255/2001	SMITH C	Discontinued
Richards BA	AR Richards Eng t/as Trailit Trailers	130/2001	SMITH C	Discontinued
Roberts CL	Greenfield Project Development Services Pty Ltd	2042/2001	GREGOR C	Order Issued
Smith FFG	Ian Berwick State Manager NSK Australia Pty Ltd	2244/2001	BEECH C	Discontinued
Smith LC	Home Inspirations Quality Furniture	2241/2001	BEECH C	Discontinued
Smith SA	Johannes Kap trading as Lock-it Locksmiths	1550/2001	SMITH C	Discontinued
Swingler DG	Methodist Ladies College	1525/2001	SMITH C	Order Issued
Thomas AR	Kevin James Kelly	1156/2001	SCOTT C	Discontinued
Thomas NA	Marvel Loch Central Store	63/2002	GREGOR C	Order Issued
Topka ZM	Returned Services League (WA) Incorporated	22/2002	KENNER C	Discontinued
Tucker MF	Good Earth Hotel	2083/2001	GREGOR C	Discontinued
Tulloch RK	Laverton Sport Club INC	15/2002	GREGOR C	Discontinued
Van Saarloos P	Q-Vis Limited (ACN 009 234 173)	1839/2000	SCOTT C	Discontinued
Verboon RM	Northbridge Enterprises Pty Ltd T/A Aberdeen Hotel	2048/2001	GREGOR C	Dismissed
Viljoen VM	Oceanfast Pty Ltd	755/2001	GREGOR C	Discontinued
Walton DR	Fremantle Commodity Traders	1664/2001	GREGOR C	Discontinued
Williams S	Robert John Coleman trading as Maritana Dental Clinic	45/2002	GREGOR C	Discontinued
Wood G	Scarcella D	1907/2000	COLEMAN CC	Dismissed

CONFERENCES—Matters arising out of—

2002 WAIRC 04827

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, APPLICANT

v.

BHP BILLITON (BHP IRON ORE), RESPONDENT

CORAM COMMISSIONER S J KENNER

DELIVERED TUESDAY, 19 FEBRUARY 2002

FILE NO/S. C 18 OF 2002

CITATION NO. 2002 WAIRC 04827

Result Order issued.

Representation

Applicant Mr T Kucera of counsel

Respondent Mr R Lilburne of counsel

Interim Order

WHEREAS on 29 January 2002 the applicant made application for an urgent compulsory conference pursuant to s 44 of the Industrial Relations Act, 1979 ("the Act");

AND WHEREAS the Commission convened a compulsory conference between the parties to this application on 5 February 2002;

AND WHEREAS the Commission was advised at the conference that the parties were in dispute as to changes to the start and finish times for maintenance employees at the respondent's Finucane Island operations in Port Hedland;

AND WHEREAS the Commission by recommendation dated 5 February 2002 determined that having heard the parties and having endeavoured to assist the parties to reach agreement on the matters in dispute and having considered the issues it was of the view that in all the circumstances, it would issue a recommendation to the parties in order to assist the expeditious resolution of the dispute and to prevent the deterioration of industrial relations in respect of the matters in dispute;

AND WHEREAS the recommendation was to the effect that the proposed change be implemented subject to a trial period of two months at the conclusion of which the Commission would determine any outstanding issues;

AND WHEREAS the respondent undertook to defer the implementation of the proposal until 11 February 2002 to enable the applicant to advise its members of the recommendation;

AND WHEREAS a meeting of the applicant's members was held to consider the recommendation on 8 February 2002 as a result of which the recommendation was not accepted by the employees concerned and the employees resolved to attend for work at 6.00am and not 7.00am as contained in the proposed change;

AND WHEREAS the applicant sought the re-listing of the application for a further conference pursuant to s 44 of the Act which was convened on 18 February 2002;

AND WHEREAS the Commission was advised at that conference that the applicant's members had not accepted the Commission's recommendation, that the respondent had changed the start and finish times for maintenance employees at the respondent's Finucane Island operations in Port Hedland in accordance with the recommendation and that the parties were still in dispute as to the matter;

AND WHEREAS the Commission, after having regard to all of the matters raised by the parties in their submissions and having endeavoured to assist the parties to reach agreement on the matters in dispute and having considered the issues is of the opinion that there will be a deterioration in industrial relations between the parties in the event that an interim order does not issue until arbitration resolves the issues in dispute;

NOW THEREFORE the Commission, having regard for the interests of the parties directly involved and to prevent the deterioration of industrial relations in respect of the matters in question, in accordance with the provisions of the Act hereby orders—

1. THAT with effect on and from 20 February 2002 the day maintenance employees at Finucane Island start their ordinary hours of work at 7.00am in accordance with the respondent's change to start times, pending the hearing and determination of the applicant's claim by the Commission.
2. THAT the respondent take no action of a disciplinary nature in respect of the employees the subject of this dispute who may not have attended for work at 7.00am in the period 11 February to 20 February 2002.
3. THAT there be liberty to apply to any party on 24 hours notice to the other to vary, revoke or otherwise set aside the terms of this order.

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

2002 WAIRC 04779

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE WESTERN AUSTRALIAN BUILDERS' LABOURERS, PAINTERS & PLASTERERS UNION OF WORKERS, APPLICANT
	v.
	GELTRAY PTY LTD TRADING AS REOFAST STEEL FIXING, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	TUESDAY, 12 FEBRUARY 2002
FILE NO.	C 156 OF 2001
CITATION NO.	2002 WAIRC 04779

Result	No jurisdiction. The Commission declined to refer matter for hearing.
Representation	
Applicant	Mr A. Gill (of Counsel) on behalf of the Applicant
Respondent	Mr O. Moon on behalf of the Respondent

Reasons for Decision

1 The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers (the Applicant Union) applied to the Commission for a compulsory conference pursuant to s.44 of the *Industrial Relations Act, 1979* (the Act) on 25th June 2001. The conference was held on 4th July 2001. During the conference an issue arose as to the status of the employment contract of the union member the subject of the application by Applicant Union. It was alleged that the Union member, Mr William Ranga, had been employed as a steel fixer by Geltray Pty Ltd t/as Reofast Steel Fixing (the Respondent) and had been dismissed because he had complained about late payments. The Applicant Union sought to settle the dispute in an s.44 proceeding.

2 On behalf of the Respondent, its Principal, Mr Derry said that Mr Ranga had been engaged as a subcontractor, at all times he had invoiced the Respondent, his invoices included GST, no PAYE tax was deducted. He sometimes worked with his own employees and sometimes by himself, in any event there was no work available and the Respondent could not reinstate Mr Ranga.

3 At the conclusion of the conference the Applicant Union asked that the matter be referred for hearing and determination pursuant to s44 (9) of the Act. The Commission advised that it would consider whether a referral would be made. In due course the Commission had cause to advise the Applicant Union that there were considerable doubts whether Mr Ranga was an employee, so much so that a reference could not be made without determining his status and in those circumstances the Applicant Union consider whether it may wish to pursue the matter by way of notification of a contractual benefit claim under s.29 (1)(b)(ii) of the Act.

4 On 18th July 2001 the Commission was advised that the Applicant Union believed that there was at least a good chance of establishing that Mr Ranga was an employee. Having considered the response Commission decided to list the matter. The

Union was advised of the issue that would be determined by letter on 3rd August 2001, a copy of the, letter formal parts omitted, appears hereunder—

"APPLICATION NO. C156 of 2001

THE WESTERN AUSTRALIAN BUILDERS' LABOURERS', PAINTERS AND PLASTERERS UNION OF WORKERS –v- GELTRAY PTY LTD T/AS REOFAST STEEL FIXING

Commissioner Gregor has asked me to respond on his behalf to your letter of 1st August 2001. The Commissioner has instructed me to advise you that at the conclusion of the conference held on 4 July 2001 there was no sufficient identification of any question, dispute or disagreement in relation to an industrial matter which had not been settled between the parties. In the absence of such identification the power vested in the Commission under s.44 (9) was not available to it.

If you assert that there is a question, dispute or disagreement in relation to an industrial matter between the union and the respondent in this matter as opposed to a disagreement on a matter of common law contract between William Ranga and the respondent the Commission is prepared to hear you. If you wish to be heard a date and time will be fixed when you will be required to show cause that there is an industrial matter, that William Ranga is an employee as contemplated by clause 7 Definitions of the Act and that there is a question, dispute or disagreement in relation to an industrial matter about which the Commission ought exercise its discretion to make a reference to hear and determine the issue.

If you wish to proceed in this matter please let me know.

Yours faithfully"

5 The Commission heard from the parties on 24th January 2002. Mr Ranga told the Commission that he had been a steel fixer for ten years, he had worked for at least a dozen employers over the ten or fifteen years he had been in Western Australia. He told the Commission that the Respondent had phoned him regarding work on a job site in Muchea which required a steel fixer who could read plans. His employer agreed to release him for a couple of days as long as that would not interfere with the work. In due course Mr Ranga did not return to his old employer because Mr Derry made it clear he needed someone with his ability, knowledge and experience.

6 Mr Ranga arrived on the job and commenced work. He did not see Mr Derry until the second day. Eventually they agreed that the Applicant would be paid $35.00 per hour. Mr Ranga says he assumed that would be on a wages basis, which included superannuation. He thought that to be the case because he did not know of too many employers paying them $35.00 per hour clear as a subcontractor. His evidence was that he would have been the highest paid person in town in that line of work.

7 Mr Ranga told the Commission that he was supervised by Mr Derry who provided plans and tools; there was no point in him working for anyone else because he was quite happy working for the Respondent. He was paid on a weekly basis and when he received his pay slip he worked out how much Mr Derry needed to deduct from his wages for superannuation. He would fill in a time sheet and fax it to the Respondent.

8 In his evidence Mr Ranga told the Commission that he was a Director of a company, WMR Construction Pty Ltd. but he did not use that business name when working for the Respondent because he did not need to. He would have used his company name if he was on a genuine subcontract; he had worked as a subcontractor on many occasions before.

9 Mr Ranga admitted to the Commission that he employed other persons and had done so while the relationship had existed with the Respondent. That had occurred in circumstances where Mr Derry had offered him a chance to work on a tonnage rate. According to Mr Ranga he paid his own tax because he thought that he was supposed to, he admitted that no taxation was deducted from monies paid by the Respondent. He says that the relationship came to an end concerning late payment of invoices.

10 Mr Ranga was subject to an extensive cross examination by Mr Moon, who appeared on behalf of the Respondent. I will deal with the responses he received from Mr Ranga during that cross examination in the analysis that follows later in these Reasons.

11 Evidence was called from Mr Brendon Derry on behalf of the Respondent; he told the Commission that he contacted Mr Ranga who said he was interested in work. This was on the basis that Mr Ranga would come and give a hand then the parties would go on from there, they had no discussions about payment at that time. The relationship was to be on a job by job basis, on the basis that if the Respondent had work it would use Mr Ranga. The arrangement was that Mr Ranga would submit an invoice and in due course he did so. Insofar as instructions are concerned Mr Derry's evidence was when they were working on the same job he would give procedural instructions and then leave Mr Ranga to carry out those instructions. There were occasions when Mr Ranga would go with his own employees and he would look after the job. Even then those jobs still had to be done according to specifications. Mr Ranga was responsible and that included supervising the people he had employed. On those jobs Mr Derry would not attend at all. Mr Derry gave evidence about the arrangement between the Respondent and Mr Ranga where he would pay the employees of Mr Ranga and then those payments would be deducted from the invoice submitted.

12 The Commission received Exhibits G1 and M1 documents which were submitted to assist to identify the true relationship between the Mr Ranga and the Respondent.

13 Insofar as the credibility of witnesses is concerned I have no doubt the Mr Derry thought he entered into a subcontract arrangement with Mr Ranga and I have no reason to disbelieve his evidence. I am not so comfortable with the evidence of Mr Ranga, I believe he was less than frank about the type of relationship he had with the Respondent, it was not until he was pressed during cross examination did he explain the numbers of invoices which showed that he had employees with him on jobs from time to time and nor did he voluntarily provide documentary evidence of those relationships. The documentary evidence was submitted through copies of invoices supplied by the Respondent. It is relevant to note too that each of the documents is headed "Tax Invoice" with an ABN number; Mr Ranga admitted the ABN number was that assigned to a proprietary limited company of which he is a Director. It is fair to say that Mr Ranga was coy about the formal relationship between the parties and how payments were arranged, he asserted that his wife did all of the bookwork and that he did not really know or understand the detail of the relationship.

14 I find it hard to accept that to be a full and frank disclosure of Mr Ranga's knowledge about the relationship, on the contrary I believe on the evidence that I have heard that it would be unsafe to rely upon his testimony as to the relationship.

15 The authorities to be applied in a case such as this are well known, for instance the various tests are described in the High Court in *Stevens v Broderick Sawmill & Co Pty Ltd (1996) 160 CLR 16* and in *The Australian Builders' Labourers' Federated Union of Workers, Western Australian Branch v PB and KA Brajkovich Pty Ltd (1991) 71 WAIG 23* and *Gary John Hollis v Vabu Pty Ltd t/as Chris Courier (2001) HCA 44*.

16 Very little attention was given to this last authority by the advocates, this case is of interest as it indicates a departure from the High Court from the classical test for employee/employer relations which as McHugh J pointed out in His Reasons is:

> "*…likely to unsettle many established business arrangements and have far reaching consequences for industrial relations, for workers compensation law, for working conditions, for the obligations of employers to make superannuation contributions and group tax deductions and for the payment of annual and long service leave and taxes such as payroll tax. It would be likely to make employers retrospectively guilty of a number of statutory offences. It is also arguable that departing from the classical tests or their ordinary application might bring within s51 (xxxv) of the Constitution workers who have traditionally been regarded as outside that power."*

17 This case involved a claim by a pedestrian injured by the negligence of bike courier engaged by Vabu. At first instance a trial judge held that the courier was an independent contractor and therefore that Vabu was not liable for negligence of the courier.

18 The trial judge considered he was bound by an earlier decision on New South Wales Court of Appeal which had concluded that couriers engaged by Vabu were independent contractors for the purposes of the superannuation levy imposed on employers. In that case the Court of Appeal had heard evidence with respect to motor vehicle and motor bike drivers engaged by Vabu but not bike couriers. However the Court of Appeal appeared to reach a decision applicable differently to all couriers engaged by Vabu.

19 The decision on the trial judge finding that Vabu was not liable for negligence of the courier was upheld on appeal with the Court of Appeal. The decision of the Court of Appeal was overturned on appeal to the High Court which held that the courier was in fact an employee of Vabu and Vabu was therefore vicariously liable for the courier's negligence.

20 In its decision the High Court examined a number of indicia they are: written or oral terms of engagement, skills and training, leave entitlements, provision and equipment of tools, remuneration, control and business enterprise, public perception and policy considerations.

21 Concerning written and oral terms the High Court said "*it should be noted that the relationship between parties for the purposes of this litigation is to be found not merely in [the] contractual terms*." The system which was operated thereunder and the work practices imposed by Vabu go to establishing "*the totality of the relationship*" between the parties and this is what is to be considered.(Emphasis added)

22 As to the skills and training it was held that the skilled labour or labour which required special qualifications would be indicative of an independent contract relationship however in Vabu the skills required did not require any special training. As for tools and equipment the couriers provided their own bicycles and bear running expenses, supply their own accessories and bear the costs of replacing any equipment. The High Court found the Court of Appeal gave this factor greater weight than it deserved. The High Court pointed out that the capital outlay required for couriers was relatively small and the equipment, in this case the bicycle, was also a means of personal transport and a means of recreation.

23 As for remuneration there was no scope for the couriers to bargain the rate of remuneration and it had not changed for four years. Vabu did not withhold tax, or pay superannuation entitlements, couriers were paid per delivery rather than the time period. Vabu withheld final pay until debts to it were repaid. According to the High Court payment by results is not particularly indicative of an independent contract or relationship but was instead … "*the natural means to remunerate employees whose sole duty is to perform deliveries not least for the ease of calculation and to provide an incentive more efficiently to make deliveries*."

24 Also far as control was concerned the High Court said that the lack of courier's ability to have independence to conduct the operations can be contrasted with situations where an individual "*…accepted only that degree of control and supervision necessary for the efficient and profitable conduct of the business he was running on his own account as an independent contractor"*. As I understand it the control test has historically been an important criterion to consider when determining employment status, according to the decision of the High Court in Vabu it is important to view not only the Principal's contractual control but also the control the Principal applies in practice to "contractors" when determining employment status.

25 Insofar as the business enterprise indicia was concerned the couriers were unable to make an independent career as freelancers and could not generate goodwill as a courier. The High Court gave considerable weight to evidence as to whether the couriers could be said to operating their business; this is in my view a departure from the classical tests of employment status.

26 The final indicium which needs to be commented upon for the purpose of these Reasons is public perception. In Vabu the couriers wore company uniforms and advertising and were the face of the company. Vabu made little or no attempt to make the couriers personally identifiable. The only other employees were based in despatch and had limited public contact. The Court commented that the couriers were central to Vabu's business and did not form a supplemental part "*...In this way Vabu's business involved marshalling and direction of labour of the couriers, whose efforts comprised the very essence of the public manifestation of Vabu's business. It was not case that the couriers supplemented or performed part of the work undertaken by Vabu or aided from time to time; as two the documents relating to work practices suggest, to its customers they were Vabu and effectively performed all of Vabu's operations in the outside world."* The use of these indicia is also a departure from the classical tests of employment status; it indicates the importance of differentiating contractors from employees.

27 I apply these tests to the factors involved in this case.

28 There were no written terms of engagement, all of the arrangements were oral. What can be said about them is that they do not indicate what could be described as a normal type of relationship where an employee may fill in a time card or punch a time clock. The documents presented to the Commission in Exhibits G1 and M1 are clearly not of that nature, some of them show numbers of hours worked with a total fee with an amount described as a total fee plus GST. Nowhere on the documents is there a clear indication that these are claims for wages. Further each of the documents contains an ABN number which Mr Ranga admits is that assigned to his proprietary company. Further the documents indicate clearly that there is not a consistent amount of hours worked at regular times and further they show that Mr Ranga employed other persons to assist him do the work. The invoice for 29th May 2001 is particularly descriptive of this. Considered in its totality the documents and the evidence of Mr Derry which I accept in preference that of Mr Ranga is not indicative, when considered in its totality, of the relationship of employer and employee.

29 As for skills and training, there are particular skills for a steel fixer, those skills are clearly compatible with an independent contractor relationship. Insofar as provision of tools is concerned steel fixing, on the evidence, does not require complex equipment and therefore in terms of assisting in determining the status of this relationship that indicia is weak. In Vabu payment by results was not indicative of the independent contractor relationship, but it was found by the High Court to be the natural means to remunerate the employees who had a particular sole duty to perform deliveries, the value of which could easily be the calculated by counting them. It is clear that the employment arrangements were not determinative of the employee status but when the payments are coupled with the decision not to pay tax or superannuation payments this puts a different character on the relationship and one which must be considered in the balance in determining whether there was an employer/employee relationship.

30 Insofar as control is concerned the only control exhibited by Mr Derry and accepted by Mr Ranga was that degree of control and supervision necessary for the efficient and probable conduct of the business Mr Ranga was running on his own account as an independent contractor. On the evidence in this case there are not strong indicators of control of the activities of Mr Ranga by Mr Derry, in fact on the occasions when he was on jobs by himself employing his own workers there was none at all.

31 I comment lastly on a public perception. There can be no finding that if one observed Mr Ranga at work on a building site it would be assumed that it was the Respondent at work. There was no identification whatsoever on the evidence given to the Commission that Mr Ranga worked under the sign of or in the livery of the Respondent.

32 Having reviewed the evidence presented to the Commission in this matter I have come to the conclusion, notwithstanding the relaxation of the traditional tests for the identification of independent contactors arising from the pronouncements of the High Court in Vabu that on balance the relationship between William Ranga and the Respondent was one of an independent contractor, and even if I am wrong about that it is clear on the evidence before the Commission that at the end of the relationship as evidenced in document exhibit M1 of 29th May 2000 on that day any semblance of an employee/employer relationship if indeed there were one, had gone.

33 For these reasons the Commission will decline to exercise its discretion residing in s.44 (9) of the Act to refer the dispute for a hearing and determination on the grounds that there is no jurisdiction for it to do so.

2002 WAIRC 04815

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE WESTERN AUSTRALIAN BUILDERS' LABOURERS, PAINTERS & PLASTERERS UNION OF WORKERS, APPLICANT
	v.
	GELTRAY PTY LTD TRADING AS REOFAST STEEL FIXING, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	MONDAY, 18 FEBRUARY 2002
FILE NO.	C 156 OF 2001
CITATION NO.	2002 WAIRC 04815

Result No jurisdiction. The Commission declined to refer matter for hearing

Declaration

HAVING heard Mr A. Gill (of Counsel) 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 Commission will decline to exercise its discretion residing in s.44(9) of the Act to refer the dispute for a hearing and determination on the grounds that there is no jurisdiction for it to do so.

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

CONFERENCES—Matters referred—

2002 WAIRC 04944

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA - WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	ABB ENGINEERING CONSTRUCTION PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	TUESDAY, 12 MARCH 2002
FILE NO.	CR 115 OF 2001
CITATION NO.	2002 WAIRC 04944

Result	Dismissed for want of jurisdiction
Representation	
Applicant	Mr A Gill of Counsel
Respondent	Mr S Ellis of Counsel

Reasons for Decision

1. The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia – Western Australian Branch, (the union), applied to the Commission for a compulsory conference under Section 44 of the *Industrial Relations Act 1979* (the Act) on 15 May 2001. The schedule to that application described the dispute between the parties in the following terms.

   "*The union is in dispute with ABB Engineering Construction Pty Ltd (the respondent) over the redundancy of Mr Guiseppe Tornatora, after 34 years of service. The union believes insufficient redundancy payments have been made and that Guiseppe's length of service has been miscalculated. Accordingly, the union seeks the assistance of the Commission in resolving this dispute. The relevant award: is the Engine Drivers' (Building & Steel Construction) Award No 20 of 1973*."

2. The Commission convened a conference between parties on 24 May 2001 at which representatives of ABB Engineering Construction Pty Ltd (the Respondent) attended. That conference was unsuccessful in resolving the matter and a further conference took place on 2 August 2001. That conference was also unsuccessful at resolving the dispute and the matter became the subject of a Memorandum of Matters for Hearing and determination under Section 44 of the Act, the Schedule to which is incorporated below and it describes the dispute in detail...

   "The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia – Western Australian Branch (the Union) allege that a member, Mr Guiseppe Tornatora was dismissed by the ABB Engineering Construction Pty Ltd (the Respondent) after 34 years service and at that time was not paid a sufficient redundancy payment.

   It is asserted by the Union—

   The employment of Mr Tornatora was subject to the Engine Drivers' (Building and Construction) Award (No 20 of 1987) (the Award)

   Mr Tornatora should have received the equivalent of two weeks' pay per year for each year for each period of service;

   He received 14 weeks pay in total

   And therefore the Union claim an additional 46 weeks pay should be paid to him by order of the Commission.

   The Respondent alleges that—

   Mr Tornatora was employed under the ABB Service Pty Ltd Western Australia Alcoa Maintenance, Local Services and Minor Projects Agreement 2000-2001 (ABB Service Agreement) certified in accordance with s.170LT the Workplace Relations Act 1999 Commonwealth which governs his employment.

   The ABB Service Agreement contains, inter alia, provisions providing for a dispute resolution procedure before the Australian Industrial Relations Commission for conciliation and where necessary arbitration of such a matter. Further the Agreement specifically deals with the matter of redundancy and the amount of severance payments. Mr Tornatora was made redundant and paid redundancy and severance entitlements stipulated in the ABB Service Agreement therefore the Respondent contends that the provisions of the Industrial Relations Act 1979 are invalid insofar as they purport to enable the Western Australia Industrial Relations Commission to hear disputes in relation to Mr Tornatora's entitlement. The Commission is therefore unable or unauthorised to make orders or awards in relation to Mr Tornatora's employment by virtue of s. 106 of the Constitution and s. 170LZ of the Workplace Relations Act 1996.

   The Respondent also contends that, if (contrary to the primary position of the Respondent)—

   the employment of Mr Tornatora is governed by the Award and not by the ABB Service Agreement; or

   alternatively the ABB Service Agreement does not operate to deprive the Commission of jurisdiction

   then the Commission does not have jurisdiction to inquire as to the adequacy or otherwise of the redundancy payment, because the adequacy and fairness or otherwise of the redundancy payment must be determined by reference to the provisions of the applicable industrial instruments i.e. the ABB Service Agreement or, alternatively, the Award.

   For these reasons the Respondent says that the Commission is without jurisdiction to make the order sought or any orders at all in relation to the employment of Mr Tornatora by the Respondent and the claim should be dismissed for want of jurisdiction.

3. During the conferences it became clear that there were issues of jurisdiction to be determined and by consent the Commission listed them at the hearing on 14 February 2002. The nub of this matter is that the union claims that Mr Guiseppe Tornatora, a person who had been employed by the Respondent for approximately 34 years, had received insufficient redundancy payments on termination of his contact of employment. According to the submissions of Mr Ellis, of Counsel, who appeared for the Respondent, Mr Tornatora had received in excess of $40,000 when he was retrenched on 30 April 2001 from his employment as a crane driver on the Respondent's work at the Alcoa site at Wagerup.

4. It is common ground between the parties that Mr Tornatora was employed under the ABB Service Pty Ltd W.A Alcoa Maintenance, Local Services and Minor Projects Agreement 2000-2001 (ABB Service Agreement) an agreement which had been certified in accordance with Section 170LT Workplace Relations Act 1996 (Cth) (WR Act) and which at the time of the termination was in force.

5. The union's Counsel Mr Gill, claims that even if Mr Tornatora's employment were covered by the ABB Service Agreement at the time of termination never the less the terms and conditions of employment were governed in general by the Engine Drivers (Building and Steel Construction Award No 20 1973 an award of this Commission). Pursuant to this award he had accrued rights and privileges and those rights and privileges can not be taken away from him because they are akin to rights accrued under repealed or expired acts under Section 8 of Acts Interpretation Act 1901 (Cth) and Section 37 of the Interpretation Act 1984 (WA). As for the argument of the Respondent that the provisions of the Act are invalid in that they purport to enable this Commission to hear disputes in relation to Mr Tornatora's employment, the union says relying upon the decision in *City of Mandurah v Hull*. [(2000) 80 WAIG 4319], that the argument is wrong.

6. During his submissions Mr Ellis examined the ABB Service Agreement. He drew attention to the fact it is to be read in conjunction with a number of awards and orders of this Commission and that where there is consistency, the agreement prevails. Severance entitlements are defined in clause 22 of the ABB Service Agreement by reference to clause 14 of The Metal Trades Award except for an additional payment of $30.00 per week of service during the operation of the ABB Service Agreement.

7. Also and relevant to the disposition of this matter, the ABB Service Agreement requires by clause 16 that any dispute not resolved between the parties is to be referred to the Australian Industrial Relations Commission for conciliation and, where necessary, arbitration of that matter.

8. When the services of Mr Tornatora were brought to a close he was paid out in redundancy entitlements in accordance with the ABB Service Agreement.

9. The Respondent contends that the detailed and extensive provisions of the ABB Service Agreement cover the field in relation to terms and conditions of employment particularly those under dispute here relating to redundancy. The WR Act through Section 170LZ (1) operates so that a certified agreement prevails over the terms and conditions of employment in a State law to the extent that they are inconsistent.

10. As to direct inconsistencies between the provisions of the ABB Service Agreement and that of the Act, it is argued that the Act functions on the basis that industrial disputes will be brought to this Commission but the ABB Service Agreement provides that disputes shall be referred to the Australian Industrial Relations Commission. There is no comfort for the claimant in relying for the *City of Mandurah v Hull (ibid)* because the provisions of the Commonwealth law applicable in this case are converse to those considered by the Industrial Appeals Court in *Hull* In any event the law as it stated in *Hull* depends upon the provisions of Section 170LZ (3) of the WR Act which clearly provides for an exception when State laws deal with harsh and unjust or unreasonable terminations.

11. I have considered the competing arguments and conclude as follows.

12. The ABB Service Agreement contains two provisions which are crucial to the determination of this matter. First it provides a dispute procedure which requires that any unresolved matter shall be referred to the Australian Industrial Relations Commission for conciliation and where necessary arbitration of that matter Second it has provisions which deal expressly with the manner in which redundancies may be made in the quantum of severance payments when that happens.

13. For the claimants argument to be sustained the Commission would have to find that the Engine Drivers Building and Steel Construction Award No 20 1973 continued to have effect not withstanding the operation of the ABB Service Agreement.

14. This argument clearly cannot survive the operation of Section 170LZ (1) of the WR Act which provides that a certified agreement prevails over the terms and conditions of employment specified in State law, State award or State employment agreement to the extent of any inconsistency. The provisions of the Section 109 of the Constitution operate so as that the WR Act prevails over this state law.

15. This is so unless there is exclusion. The only exclusion is contained in Section 170LZ (3) which does not exclude the operation of State unfair dismissal laws. This exclusion does not apply here. The claim is not an unfair dismissal claim and the Union's reliance on *Hull* is misplaced in the context of the current argument.

16. The union argues that there are some residual rights pursuant to the Engine Drivers Building and Steel Construction Award No 20 of 1973 to which Mr Tornatora has access. As to this argument first there was no effort made to establish as a matter of law that the Engine Drivers Building and Steel Construction Award No 20 of 1973 applies to the Respondent but even if it did its clear that at some time the employment contract has been regulated by a series of agreements amongst which was the ABB Service Agreement which clearly ousts the operation of any State award. In the absence of a collateral contract to the contrary I know of no legal concept which would say in such circumstances that accrued entitlements under legal instruments which are no longer binding on the parties and can be accessed by the employee.

17. This employment relationship was governed by a certified agreement of the Australian Industrial Relations Commission. The ABB Service Agreement was properly made. It regulated the relationship between the parties. The dispute between the parties must be solved in accordance with the dispute settlement procedures therein and within the jurisdiction which gives life to the agreement.

18. This Commission is therefore unable to exercise any powers in the matter and for that reason the application will be dismissed for want of jurisdiction.

2002 WAIRC 04942

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA - WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	ABB ENGINEERING CONSTRUCTION PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	TUESDAY, 12 MARCH 2002
FILE NO.	CR 115 OF 2001
CITATION NO.	2002 WAIRC 04942

Result Dismissed for want of jurisdiction

Order

HAVING heard Mr A. Gill (of Counsel) on behalf of the Applicant and Mr S. Ellis (of Counsel) on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the Application be and is hereby dismissed for want of jurisdiction.

(Sgd.) J. F. GREGOR,
Commissioner.

[L.S.]

CONFERENCES—Notation of—

PARTIES		COMMISSIONER/ CONF. NO.	DATES	MATTER	RESULT
Australian Workers' Union	Cargill Salt Limited	KENNER C C228/2001	27/09/2001 22/10/2001 22/02/2002	Sick leave entitlements	Concluded
Australian Workers' Union	Cockburn Cement Ltd	GREGOR C C25/2002	N/A	Annual leave	Concluded
Australian Workers' Union	Extraman (WA) Pty Ltd	KENNER C CR183/2001	01/03/2002	Termination of union member	Order Issued
Australian Workers' Union	Hedland Sampling Services	KENNER C CR30/2001	01/03/2002	Alleged unfair dismissals	Order Issued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	ASIA Metals Pty Ltd t/a Aussie Waste Recycling and Aussie Metals	GREGOR C C174/2001	16/08/2001 15/02/2002	Alleged failure to pay employee's wages on time	Concluded
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	BHP Billiton (BHP Iron Ore)	KENNER C C18/2002	5/02/2002 18/02/2002	Changes to start and finish times for maintenance workers.	Referred
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Imperial Office Equipment	GREGOR C C270/2001	3/12/2001 28/02/2002	Entitlements for employee	Concluded
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Midland Brick Co Pty Ltd	KENNER C C337/1999	28/02/2002	Agreement negotiations	Concluded
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Midland Brick Company Pty Ltd	KENNER C C331/1999	28/02/2002	Access to site	Concluded
Builders' Labourers, Painters & Plasterers Union	Geltray Pty Ltd trading as Reofast Steel Fixing	GREGOR C C156/2001	4/07/2001 24/01/2002 12/02/2002	Termination, late payment of wages & non-payment of entitlements	Concluded
Civil Service Association	Director General, Department of Health	SCOTT C PSAC3/2002	N/A	Continue contract of employment	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union	Midland Brick Co. Pty Ltd & Others	KENNER C C45/2000	27/02/2002	Finalising the content of an Enterprise Bargaining Agreement	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union	Midland Brick Pty Ltd	GREGOR C CR120/2001	23/08/2001 21/02/2002 12/03/2002	Reduction of classification and remuneration	Discontinued
Construction, Forestry, Mining & Energy Union	Aluxite Aluminium Scaffolding Pty Ltd	GREGOR C C35/2002	20/02/2002 12/03/2002	Dispute over alleged alteration of a member's employment conditions	Concluded
Construction, Forestry, Mining & Energy Union	Derwent Construction	GREGOR C C34/2002	N/A	Dispute over alleged failure to provide time and wages records in relation to applicant union member	Concluded
Construction, Forestry, Mining & Energy Union	Marble & Cement Work (WA) Pty Ltd	GREGOR C C274/2001	N/A	Time and wages record	Concluded
Construction, Forestry, Mining & Energy Union	Reginald Leslie Kernaghan and Margreta Aline Kernaghan trading as Kernaghan's Joinery and Cabinet Makers	GREGOR C C28/2002	11/03/2002	Employment records	Concluded
Construction, Forestry, Mining and Energy Union (Federal Union)	Silent Vector Pty Ltd t/a Sizer Builders	GREGOR C C26/2002	7/02/2002	The Respondent has instructed its members to take industrial action against the Applicant in contravention of the secondary boycott provisions of the Trades Practices Act 1974	Concluded
Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union	ABB Engineering Construction Pty Ltd	GREGOR C C115/2001	24/05/2001 2/08/2001 7/09/2001	Redundancy	Referred

PARTIES		COMMISSIONER/ CONF. NO.	DATES	MATTER	RESULT
Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union	BHP Iron Ore Ltd	KENNER C CR65/2001	9/11/2001 20/11/2002	Voluntary redundancy	Order Issued
Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union	BHP Iron Ore Pty Ltd	KENNER C C143/2001	22/06/2001	Dispute re unfair and unwarranted final warning	Concluded
Independent Schools Salaried Officers' Association	Mrs Elizabeth Marcus, Principle, Riverlands School Whiteman Park	KENNER C C29/2001	16/02/2001	The Applicant union seeks to determine what contractual entitlements are due to the applicant member.	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Brumby's Waikiki	BEECH C C292/2001	17/01/2002 22/02/2002	Dismissal	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	City of Joondalup	SCOTT C C293/2001	3/01/2002 6/03/2002	Dispute over alleged pay dispute of applicant union member	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Fred Margaria Cleaning Service	SCOTT C C234/2001	29/10/2001	Unfair dismissal	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Lord Forrest Hotel	WOOD C C8/2002	14/02/2002	Alleged unfair dismissal	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Lord Forrest Hotel	WOOD C CR237/2001	N/A	Proposed variation to contract	Discontinued
Liquor, Hospitality and Miscellaneous Workers Union	Minister for Education	KENNER C C22/2002	11/02/2002 21/02/2002	Alleged reduction of hours	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Mirrabooka Tavern	WOOD C C32/2002	15/02/2002	Alleged unfair dismissal	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Water Corporation	SCOTT C C29/2002	15/02/2002	Alleged unfair dismissal	Concluded

CORRECTIONS—

APPENDIX XIV

Organisation of Employees and Organisation of Employers registered under the Industrial Relations Act, 1979.

As at 31 December 2001

Organisation of Employees and Employers with names of the Primary Contact and Addresses.

Reg. No. I.R. Act.	No. of Members		Name of Union, Association or Organisation	Primary Contact	Registered Office	Section 71 Declarations Reference	
	Emp-loyers	Workers				Vol	Page
255	125	...	Association of Independent Schools of Western Australia, Union of Employers (Inc)	A. Jackson	41 Walters Drive, Herdsman Business Park, Osborne Park 601		
260	...	140	Association of Professional Engineers, Australia (Western Australian Branch), Organisation of Employees	I. Johnstone	Suite 1, 12-14 Thelma Street, West Perth 6005	73	2665
263	...	2,989	Australian Medical Association Incorporated The Western Australian Branch of the	P. C. Boyatzis	14 Stirling Highway, Nedlands 6009		
265	…	1,006	Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch - The	R. Wells	2/10 Nash Street, Perth 6000		
158	…	4,624	Australian Workers' Union, West Australian Branch, Industrial Union of Workers – The	T.P. Daly	Cnr Wellington & Lord Streets, Perth 6000	61	631
259	…	11,970	Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch - The	J. Ferguson	1111 Hay Street, West Perth 6005		
107	21	…	Baking Industry Employers' Association of Western Australia	D. Nissan	26 Drake Street, Osborne Park 6017		
9	...	109	Boot Trade of Western Australia, Union of Workers, - The	No Current Official	110 Charles Street, Perth 6000		
167	...	185	Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia – The	R.J. Murphy	11/64 Bannister Road, Canning Vale 6155		

Reg. No. I.R. Act.	No. of Members		Name of Union, Association or Organisation	Primary Contact	Registered Office	Section 71 Declarations Reference	
	Emp-loyers	Workers				Vol	Page
53	...	84	Brick, Tile and Pottery Industrial Union of Australia (Union of Workers) Western Australian Branch – The Federated	J.R. Bainbridge	14 Prospect Road, Armadale 6112		
22	868	...	Builders' Association of Western Australia (Union of Employers) – Master	M.G. McLean	35-37 Havelock Street, West Perth 6005		
…	…	…	Builders' Labourers, Painters and Plasterers Union of Workers – The Western Australian (See Construction, Forestry, Mining, and Energy Union of Workers - The)	…	…		
194	...	3	Building Trades Association of Unions of Western Australia (Association of Workers)	K.N. Reynolds	27 Moore Street, East Perth 6004		
246	...	13,170	Civil Service Association of Western Australia Incorporated – The	D.A. Robinson	445 Hay Street, Perth 6000	73	2931
20	...	220	Clothing and Allied Trades' Industrial Union of Workers - The Western Australian	J.W. Bullock	5th Floor, 25 Barrack Street, Perth 6000		
2	...	362	Coal Miners' Industrial Union of Workers of Western Australia, Collie – The	G.N. Wood	c/- Mineworkers Institute, 75 Throssell Street, Collie 6225	73 73	231, 1918
252	...	62	Collieries' Staff Association, Western Australian Branch - The Australian	C.F. Pullan	45 Deakin Street, Collie 6225		
249	...	4,180	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, W.A. Branch	W.E. Game	1st Floor, 401-403 Oxford Street, Mt Hawthorn 6016	75	2693
248	9	...	Construction Contractors Association of Western Australian	H.S. McLeod	9/11 Airlie Street, Claremont 6010		
267	…	8,382	Construction, Forestry, Mining, and Energy Union of Workers – The (Previously The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia, Western Australian Branch and The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers)	K N Reynolds	27 Moore Street East Perth WA 6004		
…	…	…	Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia, Western Australian Branch – The (See Construction, Forestry, Mining, and Energy Union of Workers - The)	…	…		
16	...	21	Dental Technicians' and Employees' Union of Workers – W.A.	D.P. Hill	8 Coolgardie Terrace, East Perth 6004		
244	...	3,503	Disabled Workers' Union of Western Australia - The	G. Cassidy	82 Beaufort Street, Perth 6000		
226	417	...	Electrical Contractors' Association of Western Australia (Union of Employers) - The	R.J. Hale	22 Prowse Street, West Perth 6005		
137	...	114	Electrical Trades Union of Workers of Australia (Western Australian Goldfields Sub-Branch), Kalgoorlie	No Current Official	Suite 102, 82 Beaufort Street, Perth 6000		
233	...	866	Firefighters Union of Western Australia - United	A. Drewett	63 Railway Parade, Mt. Lawley 6050	73	2341
219	...	567	Food Preservers' Union of Western Australia, Union of Workers – The	J.W. Bullock	5th Floor, 25 Barrack Street, Perth 6000		
164	18	...	Footwear Repairers' Association of W.A. (Union of Employers) – The	R.K. Cann	Suite 18, 2nd Floor, 25 Walters Drive, Osborne Park 6017		
262	...	996	Forest Products, Furnishing and Allied Industries Industrial Union of Workers, W.A. – The	T.P. Daly	Wellington Fair, Cnr Wellington & Lord Sts, Perth 6000		
183	...	26	Gold and Nickel Mines Supervisors Association Industrial Union of Workers - The Western Australian	No Current Official	18 Sturt Pea Crescent, Kambalda West 6444		

Reg. No. I.R. Act.	No. of Members		Name of Union, Association or Organisation	Primary Contact	Registered Office	Section 71 Declarations Reference	
	Emp-loyers	Workers				Vol	Page
195	...	157	Grain Handling Salaried Officers Association (Union of Workers) - Western Australian	K.A. Gray	Room G07, 22 Delhi Street, West Perth 6005		
165	48	...	Hairdressers' Association of Western Australia Industrial Union of Employers – Master	G. Ridolfo	PO Box 95, Kwinana 6167		
131	276	...	Hairdressers' Industrial Union of Employers of W.A. - The Master Ladies'	L.J. Marshall	11th Floor, International House, 26 St George's Terrace, Perth 6000		
42	...	139	Hairdressers' and Wigmakers' Employees' Union of Workers - The West Australian	J.W. Bullock	5th Floor, 25 Barrack Street, Perth 6000		
189	...	2,745	Hospital Salaried Officers Association of Western Australia (Union of Workers)	D.P. Hill	8 Coolgardie Terrace, Perth 6004		
238	549	...	Hotels and Hospitality Association Incorporated (Union of Employers) - Western Australian	B. Woods	38 Parliament Place, West Perth 6005		
198	...	2,785	Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers - The	T.I. Howe	143 Edward Street, Perth 6000		
209	...	408	Institute of Marine and Power Engineers, Western Australian Union of Workers – Australian	R. McDonald	28 Mouat Street, Fremantle 6160		
230	...	126	Licensed Car Salesmen's Association, Union of Workers of Western Australia	No Current Official	9-11 Brewer Street, East Perth 6004		
266	...	17,551	Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - The Australian	H. Creed	61 Thomas Street, Subiaco 6008	76	1699
173	206	...	Meat and Allied Trades Federation of Australia (Western Australian Division) Union of Employers	M.J. Darcy	4/170 Burswood Road, Victoria Park 6100		
23	...	1,510	Meat Industry Employees' Union, Industrial Union of Workers, Perth - West Australian Branch, Australasian	D. Hopperton	1st Floor, Unity House, 79 Stirling Street, Perth 6000	61	631
264	...	2,100	Media, Entertainment and Arts Alliance of Western Australia (Union of Employees) – The (MEAAWA)	M. Saxon	123 Claisebrook Road, East Perth 6004		
135	...	769	Merchant Service Guild of Australia, Western Australian Branch, Union of Workers	R.W. Ashmore	28 Mouat Street, Fremantle 6160		
59	47	...	Metal Industries Association (Industrial Union of Employers) of W.A.	No Current Official	190 Hay Street, East Perth 6004		
93	125	...	Milk Vendors Union of Employers – Amalgamated	C.N. Constatine	50 Collis Road Wattleup 6166		
39	...	198	Millers and Mill Employees' Union of Workers of Western Australia - The Federated	No Current Official	110 Charles Street, Perth 6000		
237	...	9	Mining Unions Association of Employees of Western Australia (Iron Ore Industry) – The	D. Bartlam	PO Box 6289, East Perth 6004		
87	...	5,423	Municipal, Administrative, Clerical and Services Union of Employees, WA Clerical and Administrative Branch - Australian	P. Burlinson	102 East Parade, East Perth 6004	65	1097
79	...	2,267	Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers - Western Australian	A.F. Bennett	112 Charles Street, West Perth 6005		
241	...	284	Murdoch University Academic Staff Association	D. Holloway	Murdoch University, South Street, Murdoch 6150		
63	...	332	Nurses' Association (Union of Workers) – West Australian Psychiatric	L.K. MacLeod	Suite 3, Labor Centre, 82 Beaufort Street, Perth 6000		
133	...	7,540	Nursing Federation Industrial Union of Workers Perth - The Australian	M.A. Olsen	260 Pier Street, Perth 6000	60	1057
89	141	...	Painters, Decorators and Signwriters Association of Western Australia (Industrial Union of Employers) The Master	S.I. Henry	106 Caledonian Avenue, Maylands 6051		

Reg. No. I.R. Act.	No. of Members		Name of Union, Association or Organisation	Primary Contact	Registered Office	Section 71 Declarations Reference	
	Emp-loyers	Workers				Vol	Page
17	26	...	Plasterers' Association of Western Australia Union of Employers - Master	K.J. Spalding	67 Hubert Street, East Victoria Park 6101		
10	...	1,257	Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers - The	M. Mitchell	401-403 Oxford Street, Mt Hawthorn 6016	76	4149
200	306	...	Plumbers' and Mechanical Services Association of Western Australia (Union of Employers) - The Master	S.I. Henry	106 Caledonian Avenue, Maylands 6051		
110	...	4,604	Police Union of Workers - Western Australian	K.J. See	73 Burswood Road Victoria Park WA 6100		
100	136	...	Printing and Allied Trades Employers' Association of Western Australia (Union of Employers) - The	P. Nieuwhof	111-113 Burswood Road, Victoria Park 6100		
129	...	1,406	Prison Officers' Union of Workers – Western Australian	S.J. Smith	63 Railway Parade, Mt Lawley 6050		
239	...	207	Railways Officers' Union - West Australian	N.R. Pearson	Kenafick House, 102 East Parade, East Perth 6004		
254	...	137	Real Estate Salespersons Association of Western Australia (Inc)	J.W. Chambers	215 Hay Street, Subiaco 6008		
207	...	40	Salaried Pharmacists' Association Western Australian Union of Workers	D.P. Hill	8 Coolgardie Terrace, Perth 6000		
176	...	44	Sales Representatives' and Commercial Travellers' Guild of W.A., Industrial Union of Workers	J.W. Bullock	5th Floor, 25 Barrack Street, Perth 6000		
215	...	650	Seamen's Union of Australia, West Australia Branch	W.J. Pritchard	2nd Floor, 2/4 Kwong Alley, North Fremantle 6159	67	482
60	...	22,456	Shop, Distributive and Allied Employees' Association of Western Australia - The	J.W. Bullock	5th Floor, 25 Barrack Street, Perth 6000		
240	...	12,217	State School Teachers Union of W.A. Incorporated- The	D.A. Kelly	150-152 Adelaide, Terrace, East Perth 6004		
35	4	...	Steamship Owners' Association Industrial Union of Employers (Fremantle) - The Western Australian Branch of the Commonwealth	A.J. Chapple	1a Pakenham Street, Fremantle 6160		
218	...	13	Stevedoring Supervisors of Western Australia (Union of Workers) - The Society of	D.E. Williams	87 Coogee Road, Ardross 6153		
96	...	154	Transport Trust Officers' Union of Workers, Perth - The Metropolitan (Perth) Passenger	No Current Official	Suite 5, Labour Centre, 82 Beaufort Street, Perth 6000		
114	...	8,943	Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	J.L. McGiveron	Suite 302, 3rd Floor, 82 Beaufort Street, Perth 6000	61	1501
242	...	851	Union of Australian College Academics, Western Australian Branch, Industrial Union of Workers	S. Errington	Curtin University, GPO Box U1987, Perth 6845		
243	...	424	University of Western Australia Academic Staff Association	Dr. S.M. Bunt	W2 Winthrop Tower, University of Western Australia, Nedlands 6907		

2002 WAIRC 04917

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BURSWOOD RESORT (MANAGEMENT) LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	FRIDAY, 22 FEBRUARY 2002
FILE NO/S.	APPLICATION 1031 OF 2001
CITATION NO.	2002 WAIRC 04917

Result	Correction Order
Representation	
Applicant	Ms D MacTiernan
Respondent	Ms N Thomson

Correction Order

WHEREAS an error occurred in the Order dated 8 January 2002 issued in Application 1031 of 2001, the Commission, in order to correct this error and pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Schedule attached to the Order dated 8 January 2002 in Application 1031 of 2001 to vary the Burswood Island Resort Employees Award (No. A 23 of 1985 and A 25 of 1985) be amended in the terms of the following Schedule.

(Sgd.) W. S. COLEMAN,
[L.S.] Chief Commissioner.

SCHEDULE

1. Clause 17. – Meal Money: Delete subclause (2) of this Clause and insert the following in lieu thereof—

(2) Any employee who is required to work overtime for two hours or more shall be supplied with a meal free of charge to be consumed in the employee cafeteria. Provided that where the Company does not supply such a meal the employee shall be paid $6.67 meal money.

2. Clause 26. – Uniforms and Laundering: Delete this Clause and insert the following in lieu thereof—

(1) Where the Company requires an employee to wear a special uniform in the performance of their duties such special uniform shall be provided by the Company and shall at all times remain the Company's property. A special uniform shall consist of such articles of clothing as monogrammed or coloured jackets, dresses, blouses, overalls, aprons, caps collars, cuffs, or other special apparel which the Company may require an employee to wear whilst on duty; provided that the ordinary apparel usually worn by Waiters and Stewards shall not be deemed to be special uniforms within the meaning of this clause.

(2) Where a cook wears the ordinary apparel usually worn by cooks, such as black and white check or white trousers, white coats, white shirt, white apron and cap, such garments shall be laundered at the Company's expense or otherwise the employee shall be paid $8.68 per fortnight as laundry allowance.

(3) Subject to subclause (2) hereof, where the Company requires any of the articles of clothing to be worn as described in subclause (1) of this clause, then such clothing shall be laundered at the Company's expense or otherwise the employee shall be paid $5.69 per fortnight as a laundry allowance.

(4) Where such special uniforms are supplied, employees shall be obliged to wear special uniforms at all times and in line with Company standards.

PROCEDURAL DIRECTIONS AND ORDERS—

2002 WAIRC 04873

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALAN TOMLINSON, APPLICANT
	v.
	JAMES HARDIE AUSTRALIA PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	FRIDAY, 22 FEBRUARY 2002
FILE NO/S.	APPLICATION 692 OF 2001
CITATION NO.	2002 WAIRC 04873

Result	Direction issued.
Representation	
Applicant	Mr A Randles of counsel
Respondent	Mr D Jones as agent

Direction

HAVING heard Mr A Randles of counsel for the applicant and Mr D Jones as agent for the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

1. THAT the direction of the Commission in respect of the herein matter issued on 9 November 2001 be and is hereby revoked.
2. THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.
3. THAT the applicant file and serve any signed witness statements upon which he intends to rely by 5 April 2002.
4. THAT the respondent file and serve any signed witness statements upon which it intends to rely by 12 April 2002.
5. THAT the applicant file and serve any signed witness statements in reply upon which he intends to rely by 19 April 2002.
6. THAT the parties give notice to one another of witnesses they require to attend at the proceedings for the purposes of cross-examination no later than 7 days prior to the date of hearing.

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

2002 WAIRC 04853

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	GARY JOHN HENERY, APPLICANT
	v.
	JOOROOK NGARNI ABORIGINAL CORPORATION, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	THURSDAY, 21 FEBRUARY 2002
FILE NO.	APPLICATION 750 OF 2001
CITATION NO.	2002 WAIRC 04853

Result	Discovery of documents granted ex parte

Order

WHEREAS on 14 February 2002 the Respondent, Joorook Ngarni Aboriginal Corporation, applied to the Commission for discovery of documents relating to the claim lodged by Gary John Henery, the Applicant; and

WHEREAS on 15 February 2002 solicitors for the Applicant were advised of the application for discovery of documents by email and a request for their response was made; and

WHEREAS on 19 February 2002 solicitors for the Applicant were requested by email to respond to the email of 15 February 2002 and a telephone message was received from the solicitors for the Applicant on 20 February 2002 to advise that a response would be made on the following day; and

WHEREAS there being no response by 21 February 2002, solicitors for the Applicant were requested by email to respond by 2.00 pm on 21 February 2002 and if no response was received an order would be issued ex parte for discovery.

NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act, 1979,* the Commission, hereby orders:

THAT the Applicant provide discovery of all details of the bank accounts of Mr Gary John Henery during the time that he was at Joorook Ngarni Aboriginal Corporation, forthwith, to the Respondent.

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

2002 WAIRC 04932

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	PAM ALDERSON, APPLICANT
	v.
	ST COLUMBA - KINGSWOOD COLLEGE, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	WEDNESDAY, 6 MARCH 2002
FILE NO.	APPLICATION 901 OF 2001
CITATION NO.	2002 WAIRC 04932

Result	Application for an Order for discovery considered.
Representation	
APPLICANT	MR I. MORRISON (OF COUNSEL)
RESPONDENT	MR L. TISAKNIS AND WITH HIM MR R. KELLY (BOTH OF COUNSEL)

Reasons for Decision

(Extemporaneous)

1 The purpose of these proceedings is to consider the application which is lodged on behalf of Ms Alderson for an Order which is described as being for general discovery. In my view, the application is to be approached as follows.

2 The substantive application before the Commission has been outlined by Mr Morrison and without doing his words a disservice, in general terms the substantive claim before the Commission is a dispute by Ms Alderson regarding the genuineness of the reason given for her dismissal (that reason being redundancy), the quantum of the redundancy payment and the manner of her dismissal. Ms Alderson also seeks certain benefits which she says are benefits to which she is entitled under her contract of employment they being, as I would categorise them, whether she has been underpaid (I think that is the word used in the application), that if that is the case, there ought to be a recalculation of certain entitlements; that she has an entitlement to be paid for accrued sick leave; an entitlement to a redundancy payment and also what is put as a claim for damages on the basis that it was a term of her contract that she be employed to age 65.

3 The first point that I would note is that although it does not strike me that each of those claims is of themselves necessarily complex, I appreciate that the substantive matter before the Commission involves something at least along the lines of 6 or perhaps 7 individual claims. I also note that Ms Alderson's length of service being approximately 20 years as I have calculated it, might also mean that over the length of her period of employment, a substantial number of documents may have been created not only about her employment but also about the position that she held.

4 In my view, the purpose of discovery goes beyond merely preventing ambush for the purposes of the hearing. It gives access to documents that are of relevance to the issues that are in possession of the other side and, in my view, the circumstances of the substantive claim before the Commission is such that given the period of time involved, Ms Alderson would in principle be entitled to an order for discovery.

5 However, as the Full Bench has indicated in the decision to which I was referred by Mr Tisaknis (*ALHMWU v. Burswood Resort Management Ltd* (1995) 75 WAIG at 1805), discovery in civil proceedings is confined to what is in issue on the pleadings. If I put that into the language which is used in this Commission, discovery is confined to what is set out in the Notice of Application and the Notice of Answer and Counter Proposal. Thus, I consider it would be just to grant an order for discovery to the extent of documents that may be in the possession of the respondent that go to claims in the substantive matter and I would be prepared to do so. For example, if I turn to the document that is headed "Request for Discover". If I issued an Order it would cover (1) "the report of Professor Allbrook dated 28 July 1980 recommending amalgamation" because the redundancy issue comes out of the amalgamation of two colleges. I might have a query about the relevance of the date. I am not sure how relevant that is.

6 However, I would not, for example, be prepared to make an Order if it covered what is in category (2), that being "all correspondence between the Reverend C. Honey and the Synod By-Laws Committee" because in my view to make an Order in those terms would go beyond, or have the potential to go beyond, the issues set out in the Notice of Application and the Notice Answer and Counter Proposal and would not be just. I merely give that by way of illustration.

7 In my view the submission of the respondent that an Order for general discovery may be oppressive would appear to me to have some justification to it given the fact that the documents seemingly to be covered by such an order go back possibly some 20 years.

8 In summary, to the extent that the Order sought is an Order for general discovery, I would refuse it for the reasons that I have given.

9 However, I foreshadow that if an application was made for an Order for discovery of documents that are relevant, or related, to the specific claims in the substantive application then subject to any particular issue such as the dates of documents, I would think that an application for such an Order would be irresistible.

10 Decision Accordingly.

2002 WAIRC 04983

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT BOND CAMERON, APPLICANT
	v.
	DODSLEY PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	TUESDAY, 12 MARCH 2002
FILE NO/S.	APPLICATION 1566 OF 2001
CITATION NO.	2002 WAIRC 04983

Result Application for Further and Better Particulars granted

Order

WHEREAS on 28 February 2002, Dodsley Pty Ltd, the Respondent, applied to the Commission for further and better particulars relating to the claim lodged by Robert Bond Cameron, the Applicant; and

WHEREAS the Commission ex parte, having considered the issues concluded that the application would be granted.

NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act, 1979,* the Commission, hereby orders—

THAT the Applicant

1. Particularise what circumstances surrounding the dismissal are considered to be unfair.
2. Particularise what contractual benefits are claimed.
3. Particularise the contractual terms on which the claim is based.
4. Further and better particulars to be provided within 7 days of the date hereof.

(Sgd.) J. F. GREGOR,
Commissioner.

[L.S.]

2002 WAIRC 04789

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL FOSTER, APPLICANT
	v.
	ALCOA OF AUSTRALIA PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	FRIDAY, 8 FEBRUARY 2002
FILE NO/S.	APPLICATION 1601 OF 2001
CITATION NO.	2002 WAIRC 04789

Result	Direction issued.
Representation	
Applicant	Mr M Llewellyn
Respondent	Mr R Kelly of counsel

Direction

HAVING heard Mr M Llewellyn on behalf of the applicant and Mr R Kelly of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

(1) THAT the parties exchange copies of documents upon which they intend to rely at the hearing of this matter by no later than 1 March 2002.

(2) THAT the matter be listed for hearing for 1 day.

(3) THAT the parties have liberty to apply on short notice.

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

2002 WAIRC 04985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RACHAEL TUMELTY, APPLICANT
	v.
	AON RISK SERVICES AUSTRALIA LIMITED, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	TUESDAY, 12 MARCH 2002
FILE NO.	APPLICATION 1727 OF 2001
CITATION NO.	2002 WAIRC 04985

Result	Discovery Ordered
Representation	
Applicant	Mr D Sash, of Counsel
Respondent	Mr I Curlewis, of Counsel

Order

WHEREAS the applicant made application on 25 February 2002 for an order pursuant to regulation 80 of the Industrial Relations Commission Regulations 1985 for documents relating to Mr Michael Woodward and Mr David Pulver; and

WHEREAS the application was heard by the Commission on 8 March 2002; and

WHEREAS the Commission has determined that the contracts of Mr Michael Woodward and Mr David Pulver with the respondent may be relevant to the claim; and

WHEREAS the Commission has determined that the commissions paid to Mr Michael Woodward and Mr David Pulver by the respondent, during the period 14 February 2000 to 20 July 2001, relating to former clients of Zeullig Credit Insurance Brokers Ltd may be relevant to the claim;

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

THAT on or before the 18th of March 2002 the respondent does make available to the applicant's solicitor for inspection documents which are or have been in the power, possession or custody of the respondent and which relate to the matters in question in this application, including but not limited to

a) the contracts of Mr Michael Woodward and Mr David Pulver with the respondent and

b) all correspondence, file notes, memoranda and emails for the period 14 February 2000 to 20 July 2001 relating to the payment of commission by AON Risk Services Australia Limited to Mr Michael Woodward and Mr David Pulver in respect of any former clients of Zeullig Credit Insurance Brokers Limited.

(Sgd.) S. WOOD,
[L.S.] Commissioner.

2002 WAIRC 04905

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS—WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	ANODISERS W.A. AND OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	FRIDAY, 1 MARCH 2002
FILE NO/S.	APPLICATION 1756 OF 2001
CITATION NO.	2002 WAIRC 04905

Result	Matter divided
Representation	
Applicant	Mr T Kucera
Respondent	Mr M Borlase

Order

HAVING HEARD Mr T Kucera on behalf of the applicant and Mr M Borlase 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 this matter be divided into Parts A and B pursuant to section 27(1)(s) of the Act.

(Sgd.) W. S. COLEMAN,
[L.S.] Chief Commissioner.

2002 WAIRC 04921

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CATHERINE ELIZABETH NASH, APPLICANT
	v.
	SMS MANAGEMENT & TECHNOLOGY LIMITED & OTHER, RESPONDENT
PARTIES	KATE MAHER, APPLICANT
	v.
	SMS MANAGEMENT & TECHNOLOGY LIMITED & OTHER, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	FRIDAY, 1 MARCH 2002
FILE NO/S.	APPLICATION 1772 OF 2001, APPLICATION 1773 OF 2001
CITATION NO.	2002 WAIRC 04921

Result	Direction issued.
Representation	
Applicant	Mr A Randles of counsel
Respondent	Mr A Fairweather of counsel

Direction

HAVING heard Mr A Randles of counsel on behalf of the applicant and Mr A Fairweather of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

1. THAT the matters be joined and heard and determined together.
2. THAT each party shall give an informal discovery by serving its list of documents no later than 14 days prior to the date of hearing.
3. THAT inspection of documents shall be completed by no later than seven days prior to the date of hearing.
4. THAT the parties have liberty to apply on short notice

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

2002 WAIRC 04872

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN BONGIORNO, APPLICANT
	v.
	CARGILL SALT LIMITED, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	FRIDAY, 22 FEBRUARY 2002
FILE NO/S.	APPLICATION 1881 OF 2001
CITATION NO.	2002 WAIRC 04872

Result	Direction issued.
Representation	
Applicant	Mr M Llewellyn as agent
Respondent	Mr S Ellis of counsel

Direction

HAVING heard Mr M Llewellyn as agent on behalf of the applicant and Mr S Ellis of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

1. THAT the applicant shall respond to the respondent's application for further and better particulars dated 5 February 2002 by 15 March 2002.
2. THAT the applicant shall give an informal discovery by serving its list of documents by 15 March 2002.

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

2002 WAIRC 04931

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DANIAL TROY MCMAUGH, APPLICANT
	v.
	HEALTH PROFESSIONALS AGENCY PTY LTD , RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 7 MARCH 2002
FILE NO.	APPLICATION 1863 OF 2001
CITATION NO.	2002 WAIRC 04931

Result	Application for an Order for Discovery dismissed.
Representation	
Applicant	Mr B. McMaugh (as agent)
Respondent	Ms H. Ketley (of counsel)

Order

WHEREAS the Commission has before it an application by the respondent for the applicant to produce certain documents;

AND WHEREAS this matter was heard by the Commission in Chambers on 7 March 2002;

AND WHEREAS the documents requested were provided to the respondent at that time and the applicant stated that there are no letters or concession cards as referred to in the Notice of Application;

AND WHEREAS the Commission is satisfied that the matters sought in the Notice of Application have been met and that there is no further need to consider the application;

AND HAVING HEARD Mr B. McMaugh (as agent) on behalf of the applicant and Ms H. Ketley (of counsel) on behalf of the respondent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order –

THAT the Notice of Application dated 1 March 2002 for discovery of documents be dismissed.

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

2002 WAIRC 04919

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WENDY LEATH BIANCHI, APPLICANT
	v.
	HOMESTAKE GOLD OF AUSTRALIA LIMITED, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	FRIDAY, 1 MARCH 2002
FILE NO/S.	APPLICATION 1948 OF 2001
CITATION NO.	2002 WAIRC 04919

Result	Direction issued.
Representation	
Applicant	Ms L Tudori of counsel
Respondent	Mr D Parker of counsel

Direction

HAVING heard Ms L Tudori of counsel on behalf of the applicant and Mr D Parker of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs—

1. THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.
2. THAT the applicant file and serve signed witness statements upon which she intends to rely no later than four weeks prior to the date of hearing.
3. THAT the respondent file and serve signed witness statements upon which it intends to rely no later than three weeks prior to the date of hearing.
4. THAT the applicant file and serve any signed witness statements in reply upon which she intends to rely no later than two weeks prior to the date of hearing.
5. THAT the matter be listed for hearing for one day.
6. THAT the parties have liberty to apply on short notice.

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

2002 WAIRC 04982

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTOPHER LANCE ROBERTS, APPLICANT
	v.
	GREENFIELD PROJECT DEVELOPMENT SERVICES PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	WEDNESDAY, 20 FEBRUARY 2002
FILE NO.	APPLICATION 2042 OF 2001
CITATION NO.	2002 WAIRC 04838

Result	Application granted

Order

WHEREAS on 8 February 2002, Greenfield Project Development Services, the Respondent, applied to the Commission for further and better particulars relating to the claim lodged by Christopher Lance Roberts, the Applicant; and

WHEREAS on 19 February 2002 a conference was held in this matter; and

WHEREAS the Commission having heard from Mr G Marshall for the Respondent and

Mr C Roberts, the Applicant, and having considered the issues concluded that the application would be granted.

NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act, 1979,* the Commission, hereby orders:

THAT the Applicant

1. List each component part of "Amount owed to me" in the sum claimed of $586.40 and the basis upon which that component part is calculated.
2. Provide the legal basis upon which the "Daily allowance $30.00 per day for 48 days" in the sum claimed of $1440.
3. Provide the legal basis upon which the "Amounts claimed by me in the sum claimed of $853.60.
4. Further and better particulars to be provided within 7 days of the date hereof.

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

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Decision	Finalisation Date
PSA 6 of 2001	Roger Dallas	Sir Charles Gairdner Hospital	Dismissed	26/02/2002
PSA 7 of 2001	Simon Ormes Smith	Sir Charles Gairdner Hospital	Dismissed	26/02/2002
PSA 1 of 2002	Alan Sidebottom	Sir Charles Gairdner Hospital	Dismissed	26/02/2002