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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2004 WAIRC 12163

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DELRON CLEANING PTY LTD T/A DELRON HOSPITALITY MANAGEMENT **APPELLANT** **-and-** THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH **RESPONDENT**
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY SENIOR COMMISSIONER A R BEECH COMMISSIONER S J KENNER
DELIVERED	FRIDAY, 30TH JULY 2004
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Catchwords	Industrial Law (WA) – Appeal against the decision of a single Commissioner – Appeal against a finding – Public interest – Appeal should lie – Application for common rule industrial award – Award coverage – Interpretation and construction of eligibility rules – Rules of cancelled organisation of no assistance – Discussion of employment "in" or "in connection with" an industry – Contractor provided integral part of Government Railway Services – Direct engagement in the industry by contract company – Respondent organisation has constitutional coverage of the employees of the appellant – No error at first instance – Appeal dismissed - *Industrial Relations Act* (1979) (as amended), s7, s27(1)(k), s34, s49(2a), s72(1) and (2) – *Government Railways Act* 1904, s2, s5, s8, s13 – *Public Transport Authority Act* 2003, s3, s4, s12(1), s13(2)(b) – *Rail Freight System Act* 2000, s3.
Decision	Appeal dismissed
Appearances	
Appellant	Mr P G Robertson, as agent
Respondent	Mr G Ferguson, Industrial Officer

Reasons for Decision

THE PRESIDENT:

INTRODUCTION

1 This is an appeal by the above-named employer (hereinafter called "Delron") against the decision of the Commission, constituted by a single Commissioner, dated Thursday, 19 February 2004 in matter No A10 of 2003. The appeal is against the whole of the decision. The decision appealed against is constituted by a declaration (see page 41 of the appeal book (hereinafter referred to as "AB")). The declaration by the Commissioner is that the above-named respondent has constitutional coverage of employees employed as passenger assistants on the Prospector and Avon linked rail services (see page 41 (AB)).

GROUNDS OF APPEAL

2 The appeal is on the following grounds:-

"1. The Commission erred in law and exceeded its jurisdiction in interpreting the rules of the Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch ("RTBU").

Particulars

(a) The Commission erred in determining that employed "in the Western Australian Government Railways Services" does not mean employed "in and by the Western Australian Government Railways Services".

2. The Commission erred in law and exceeded its jurisdiction in interpreting the eligibility rule of the RTBU.

Particulars

(a) The Commission erred by failing to give the eligibility rule of the RTBU, and the eligibility rule of one of the unions that amalgamated to form the RBTU namely the Australian Railways Union of Workers (WA Branch) ("ARU"), meanings consistent with the intention of the draftspersons of those rules and their contemplated coverage at the times they were formed.

3. The Commission erred in law and exceeded its jurisdiction in interpreting the eligibility rule of the ARU.

Particulars

(a) The Commission erred in finding that the words "a Western Australian Government Railway employee" should be read down when considering the meaning of the words "employed in the Western Australian Government Railways Services". The proviso should be interpreted narrowly and technically rather that liberally.

4. The Commission erred in law and exceeded its jurisdiction in determining the meaning of the phrase "Western Australian Government Railways Services".

Particulars

(a) The phrase is uncertain and ambiguous. The Commission should have read down the meaning of that phrase in the context of the clear meaning of "a Western Australian Government Railway employee".

Public Interest

5. If the decision is held to be a finding, the appeal raises matters that are of such importance that the Full Bench can form an opinion that in the public interest leave to appeal should be granted.

Particulars

(a) The nature of this challenge to the Commission's jurisdiction should, prima facie, excite the public interest.

(b) The impact of the decision potentially extends to every existing and future Public Transport Authority contract for services that relates to Transperth Train Operations or Transwa or Metrorail.

(c) The question of whether the rules of a union should be interpreted as at the time that they were created or whether they should be interpreted as a living document (so to speak) has not previously been determined by a Full Bench.

(d) If the appeal is upheld, further potentially lengthy proceedings before the Commission will be averted.

Order Sought on Appeal

6. The Appellant seeks orders from the Full Bench that;

(a) The appeal is upheld.

(b) The decision of the Commission in matter No Al0 of 2004 (sic) given on 19 February 2004 be and is hereby varied by deleting the declaration in its entirety and substituting therefor an order that Application A10 of 2004 be dismissed for want of jurisdiction."

PUBLIC INTEREST

3 The decision appealed against was a "finding" as that term is defined in s7 of the *Industrial Relations Act* 1979 (as amended) (hereinafter called "*the Act*") because the decision did not finally decide, determine or dispose of the matter to which the proceedings relate. Those proceedings are an application for an award to issue. The decision merely determined whether it was within the capacity of the above-named respondent, as applicant at first instance, to apply for an award to cover the employees whom it sought to cover.

4 This was clearly a matter in which, in my opinion, the Full Bench was entitled to form an opinion that the matter was of such importance that in the public interest an appeal should lie. The matter certainly relates to the coverage of employees working for contractors to the Public Transport Authority (hereinafter called "the Authority") in its rail operations. The question of their award coverage is important for the industry. That question is one which has the potential to effect the Government Rail Services in whatever capacity those services are provided given the right of the Authority to contract for the provision of services to other persons or entities.

5 That is a matter therefore which is so important that in the public interest an appeal should lie in my opinion (see s49(2a) of *the Act*).

BACKGROUND

6 The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch ("the ARTBIU") is an organisation as that term is defined in s7 of *the Act*. It is an organisation of employees. It is an organisation which came into existence by virtue of an order of the Full Bench made pursuant to s72 of *the Act* on 12 March 1999 ((1999) 79 WAIG 975).

7 It should be noted the applicants, namely the amalgamating organisations whose registration was cancelled by operation of *the Act* after the registration of the ARTBIU, were the Australian Railways Union of Workers, (WA Branch) ("the ARU") and The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers ("the WALEDFCU").

8 It should also be noted that on and from the date of registration of the ARTBIU, the registration of the two amalgamating organisations were cancelled by operation of *the Act* (see s72(5)). The order to which I refer was made after a hearing by the Full Bench. The Full Bench determined, inter alia, that the requirements of s72 had been complied with.

9 S72(1), which was most relevant, reads as follows:-

> "Where 2 or more organisations (in this section referred to as the amalgamating organisations) apply for the registration of a new organisation and the rules of the proposed new organisation are such that the only persons eligible for membership of the new organisation will be persons who, if the amalgamating organisations had remained in being, would have been eligible for membership of at least one of the amalgamating organisations, the new organisation may be registered by authority of the Full Bench."

10 The ARTBIU has applied to the Commission for an award to apply to persons employed as passenger assistants on the Prospector Rail Service which runs between Perth and Kalgoorlie and the Avon Link service which runs between Perth and Northam. Although the application stated that the ARTBIU sought the issuing of a common rule industrial award, the application attached a draft award which sought only to bind the ARTBIU and Delron. Delron by its notice of answer and counterproposal raised a preliminary issue. That issue was whether the Commission was able to entertain the ARTBIU's claims since the ARTBIU did not have constitutional coverage of the employees of Delron. That question was determined by the Commissioner and the declaration appealed against was made.

11 The Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch ("the ALMHWU") filed an application for leave to intervene under s27(1)(k) of *the Act*. In support of that application it stated in the schedule thereto that the ALHMWU has constitutional coverage of employees employed in or in with connection with the hospitality and cleaning industries and that the employees are covered by the *Restaurant, Tearoom and Catering Workers' Award* 1979. However, that opposition was withdrawn at the hearing by Mr Winters on behalf of the ALHMWU and that organisation was granted leave to withdraw from the proceedings.

12 The *Public Transport Authority Act* 2003 (hereinafter called "*the PTA Act*") came into operation on 1 July 2003. Before that, the *Government Railways Act* 1904 (hereinafter called "*the GR Act*") provided that all government railways were vested in the Minister on behalf of Her Majesty (see s4 of *the GR Act*).

13 The Western Australian Government Railways Commission was established as a government department and the Commission consisted of the Commissioner of the Western Australian Government Railways (see s8 of *the GR Act*).

14 On the coming into operation of *the PTA Act*, the government railways were vested in the Authority (see s13 of *the GR Act*). *The GR Act* was amended to provide accordingly.

15 The employees sought to be covered by the ARTBIU's application were and are engaged in the provision of service to travellers on the two train services which are owned by the Western Australian government. Delron is an employer which supplies provisions to the Authority on each of the train services, such as pillows, cutlery. It also provides labour. The employees of Delron carry out the same duties as passenger assistants employed to work the Australind service which is wholly operated by the Authority and which employs the passenger assistants who work on that service. Before Delron won the tender to provide cleaning, catering and other services on the Prospector and Avon Link services, these services were carried out by employees of the Western Australian Government Railways Commission, the statutory predecessors of the Authority. The terms of their employment was covered by the provisions of the *Railway Employee's Award* No 18 of 1969.

16 The Commissioner at first instance found that the employees sought to be covered by this application are engaged in various duties which include collection of revenue, serving meals and drinks to passengers, dealing with customer complaints and carrying out emergency procedures. They work with the train drivers who are employed by the Authority. That finding is not challenged on this appeal.

17 Rule 5 of the ARTBIU rules, the eligibility rule, provides:-

> "Any person employed in the Western Australian Government Railways Services, who is an employee within the meaning of the Industrial Relations Act 1979 (WA) as amended or replaced from time to time may be admitted as a member.
>
> No person shall be a member of this Union except in the capacity of an honorary member, who is not an employee within the meaning of the Industrial Relations Act 1979 (WA) as amended or replaced from time to time.
>
> Not withstanding the above provision, a person who is admitted to membership pursuant to these provisions and who subsequently is elected as a paid Office Bearer of the Union or becomes an employee of the Union, shall be entitled to remain as a member while holding such office or engaged in such employment."

18 The ARU rules, before the cancellation of that organisation to which I have referred above, contained the following eligibility rule:-

> "Any person employed in the WA Government Railway Services, who is an employee within the meaning of the *Industrial Relations Act 1979* (WA), as amended or replaced from time to time, and is not under fourteen years of age, may be admitted as a member provided he is not eligible to become a member of the West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers, and provided that he is properly proposed by one and seconded by another financial member, and the majority of the members present vote in his favour at any regular meeting of the Union and membership to date from the date the entrance fee is paid. No person shall be a member of this Union, except in the capacity of an honorary member, who is not employee within the meaning of the *Industrial Relations Act 1979* (WA) as amended or replaced from time to time. Except as hereinafter provided, any member who ceases to be a WA Government Railway employee shall no longer be a member. The State President, State Vice-President, State Junior Vice-President, State Secretary, Assistant State Secretary and State Organiser shall be members of the Union."

19 In case it is necessary to say so, the WALEDFCU did not have constitutional coverage of persons who were employed by an employer other than the Western Australian Government Railways Commission.

20 Delron submitted that the ARTBIU does not have constitutional coverage of Delron's employees employed on the two rail services because their coverage is limited to persons employed by the Authority, as the words "employed in the Western Australian Government Railway Services" are confined to persons employed by the Authority and no other body. Delron, however, also says that rule 5 of the rules of the ARTBIU must be interpreted by having regard to the history of the ARTBIU, which was formed in 1999 by the amalgamation of the ARU and the WALEDFCU.

21 The ARTBIU conceded at first instance that the WALEDFCU did not have constitutional coverage in respect of persons who were employed by an employer other than the Western Australian Government Railways Commission. Delron contended that the rules of the ARU, like the rules of the WALEDFCU, only covered persons employed by the Western Australian Government Railways Commission and did not cover any persons employed in rail services by an employer other than that Commission.

22 This was said to be the case because the proviso to rule 3 of the ARU provided that a member who ceases to be a Western Australian Government Railway employee was prohibited from being a member.

23 In the proceedings before the Full Bench pursuant to s72 of *the* Act, upon the application to amalgamate in *Australian Railway Union of Workers, WA Branch and the Western Australian Locomotive, Engine Drivers, Firemen's and Cleaners Union of Workers* (1999) 79 WAIG 972, Mr Wells, on behalf of the ARU, informed the Full Bench that the proposed eligibility rules of the ARTBIU did not expand the eligibility rules of the two organisations. The President so held at page 972 of the report. The ARTBIU contended to the Commissioner that it did have constitutional coverage, and, in particular, in construing the words "employed in the Western Australian Government Railway Services" that it is not a requirement that a person be an employee of the government, only that the person be an employee who works in the Government Railway Service.

24 The ARTBIU contended that the word "service" in rule 5 should be construed in light of the entire "industry" of the Western Australian Government Railway Services as it stands today, that is, a service that is delivered partly by those employed by the government and partly by those who are employed by contractors, and the rules should not today be construed by reference to the conditions of the past when services were only delivered by employees directly employed by the Western Australian Government Railways Commission.

FINDINGS OF THE COMMISSIONER

25 The Commissioner at first instance made the following findings.

26 By reference to *R v Aird; Ex parte AWU* [1973] 129 CLR 654, an authority followed and applied on many occasions in this Commission, that, having regard to the authorities and reading the ARTBIU rules as a whole, and also having regard to rule 4(b) of the objects, it was plain that rule 5 described the Western Australian Government Railway Services as an industry so that if persons are employed in that industry they are eligible to be members of the ARTBIU. The Western Australian Government Railway Services industry encompass all those who are engaged as employees to work on rail services that are vested in the Authority. Therefore, the Commissioner concluded that that category of employer included employers of contractors who provided labour to the Authority to work on rail services. This was not ultra vires s72 of *the Act*. The rules of the ARU excluded members who ceased to be a Western Australian Government Railway employee. The rule did not state that members who cease to be employed by the Western Australian Government Railways Commission were excluded from membership. This proviso was to be construed objectively, (ie) "ceases to be a Western Australian Government Railway employee" and had to be considered in the light of the entire eligibility clause, in particular the opening words "person employed in the Western Australian Government Railways Services". Therefore, the Commissioner held that when the proviso is read together with the opening words, it is apparent that ceasing to be a "Western Australian Government Railway employee" has to be considered in the light of the words "persons employed in" the Western Australian Government Railway Services. Accordingly, the Commissioner determined to declare, as she in fact did.

ISSUES AND CONCLUSIONS

27 The crux of this appeal is that the Commissioner at first instance did not correctly interpret the rules of the ARU, and, hence, did not correctly interpret the rules of the above-named respondent, the ARTBIU, in deciding that the ARTBIU has coverage of the employees concerned.

28 The first branch of the appeal was that the constitutional coverage of the ARTBIU, which is an organisation created by order of the Full Bench sought by two amalgamating unions under s72 of *the Act*, cannot have wider constitutional coverage than the two applicant organisations enjoy by virtue of their eligibility rules. We were referred to s72(1) of *the Act*, which I have reproduced above.

29 The submission was, as I understand it, that since the eligibility rule of one of the applicants, pursuant to s72, ensured that the employees who were not or ceased to be employees of the Western Australia Government Railways could not be members of the ARU, then that rule prevented, by the operation of s72(1), the new organisation, namely the ARTBIU, from enrolling as members employees of a contractor to the Western Australian Government Railways or its successor, the Authority.

30 S72(1) of *the Act* operates only where two or more organisations apply for the registration of a new organisation. S72(1) requires that there be an application by two or more organisations as the first condition to registration. The second condition is that the rules of the proposed new organisation are such that the only persons eligible for membership of the new organisations will be persons who, if the amalgamating organisations had remained in being, would have been eligible for membership of at least one of the amalgamating organisations.

31 Once the Full Bench is satisfied with that those conditions have been complied with (subject to s72(2) and (3) of *the Act*), then the new organisation may be registered. Thus, in this case, the ARU no longer exists, having been cancelled by the operation of s72(5). It is not "an organisation" as defined in s7 of *the Act*.

32 S72 does not and could not apply to the proceedings at first instance. Once the Full Bench is satisfied pursuant to s72, that is an end to the matter. The only rules required to be interpreted in this matter were the rules of the "organisation" seeking the award, namely the respondent, the ARTBIU. The rules of a cancelled organisation are of no assistance.

33 Further, s34 of *the Act* prohibits the sort of challenge or review or calling into question of the Full Bench's decision, which is, in fact, what Delron seeks by this submission.

34 That branch of the appeal is not made out for those reasons.

35 I now turn to the second branch of the appeal.

36 The substance of the appeal is that the Commissioner at first instance misconstrued the eligibility rule.

37 Of course, as rule 5 prescribes, a person who is not an "employee" as defined in s7 of *the Act* is not eligible for membership. That is not a point of controversy in this matter.

38 The crucial part of rule 5 is that which reads "Any person employed <u>in</u> the Western Australian Government Railways Services" (my emphasis). It does not say "by". As the Commissioner correctly held, the words "employed in" are much wider that the words "employed by" (see *J and J H Moora t/a AAA Cleaning Services v HEIU* (1977) 57 WAIG 1679 (IAC)). Thus,

the rule encompasses more than one employer engaged in the Government Railway Services of Western Australia. It is to be noted that the rule refers to more than one service.

39 The Commissioner at first instance had regard to the objects clause of the rules of the ARTBIU which, in clause 4(a), provides that an object of the ARTBIU is "to uphold the rights of combination of labour, to maximise the amount of labour employed within the rail, tram and bus industry and to improve, protect and foster the best interests of its members". It was submitted that that rule should not have been referred to by the Commissioner, but it does constitute a signpost to the industry or industries referred to in the rule without being any real determinant of the construction to be placed on rule 5.

40 A union's eligibility rule is to be interpreted not only liberally but in context (see *R v Aird; Ex parte AWU* (op cit)), given that it will have been drawn, more likely than not, by union officials more familiar with the practical affairs of industry than with the niceties or subtle nuances of language. The purpose of the clause is to define, in brief terms, industries or callings relevant to the representative character of the union, but granted this generosity of approach, the question of the meaning of the words remains a legal question to be determined as such (see *R v Aird; Ex parte AWU* (op cit), per Barwick CJ at page 659).

41 A union's eligibility rule is ordinarily interpreted, however, broadly and in context.

42 Tribunals are entitled to have regard to relevant determinations, awards, reports and general industrial usage as aids to interpretation (see *R v Hickman; Ex parte Fox* [1945] 70 CLR 598). (As to the general approach see also Mason J in *R v Cohen; Ex parte Motor Accidents Insurance Board* [1979] 141 CLR 577).

43 The context of the words themselves used in the eligibility (or constitutional) rule should not be assigned a restrictive but rather a broad meaning, and, indeed, should be interpreted and applied in accordance with their ordinary and popular denotation rather than with some formal or narrow construction.

44 Thus, in this case, the question of whether the employees are employed in the Western Australian Government Railway Services is required to be construed in that manner (see *R v Cohen; Ex parte Motor Accidents Insurance Board* (op cit)).

45 There is also very substantial reliance by the courts on giving meaning to words within an eligibility rule upon industrial practices and understandings about such terminology. Such an approach properly used can allow the impact of industrial realities and acceptance by the industrial community of particular concepts or segments of industry to have an impact on the legal outcome (see also *Co-operative Bulk Handling Ltd v Waterside Workers Federation of Australia* [1980] 49 FLR 355 (FC FC)) (see also J W Shaw QC (as he then was) "*Interpreting Trade Union Constitution Rules*" (1988) 62 ALJ 691 at 692, and see this very helpful article generally).

46 A court will give a meaning to the words of an eligibility rule, however, which is harmonious with the rule as a whole (see *R v Gough; Ex parte Municipal Officers' Association* [1975] 133 CLR 59 at 69 and *R v McKenzie; Ex parte Actors and Announcers' Equity* [1982] 148 CLR 573).

47 A construction will be avoided where possible which renders expressions in the constitution rule nugatory (see *R v Holmes; Ex parte Public Service Association of NSW and Another* [1977] 140 CLR 63 at 73 and *R v Watson; Ex parte AWU* [1972] 128 CLR 77 at 79).

48 Like the eligibility rule in this case, a number of eligibility rules link qualification for membership of the organisation with engagement or work "in" or "in connection with" a particular industry. The former is obviously a more restrictive concept than the latter. A person is engaged "in" that industry when he or she is directly engaged in that industry and not merely engaged in a related activity (see *R v Neil; Ex parte Cinema International Corporation Pty Ltd* [1976] 134 CLR 27). I refer also to my observations above about the even narrower preposition "by".

49 By comparison and interestingly the term "in connection with" is of wider impact. Nevertheless, it still necessitates a nexus between the employment actually performed and the activity specified. Thus, where that work is fundamentally different in nature to the designated activity, for example, catering and cleaning workers providing services to iron mining enterprises have been held by the High Court not to be engaged in connection with metalliferous mining (see *Re Moore; Ex parte AWU* (1976) 11 ALR 449 and also *R v Watson; Ex parte AWU* (op cit), and *R v Moore; Ex parte FMWU* [1978] 140 CLR 470), then there will not be a sufficiently direct link to establish coverage by the rule over the employees concerned. The question whether an employee is employed "in" or "in connection with" an industry is substantially a question of fact (see *R v Isaac; Ex parte TWU* [1985] 159 CLR 323 per Gibbs J).

50 Next, of course, it is clear that the meaning of the words in a trade union constitution rule are not static and the search for true interpretation of such a rule should not be confined to the meaning of the words when they were first placed into the rule or first certified (see *Co-operative Bulk Handling Ltd v Waterside Workers Federation of Australia* (FC FC) (op cit)). (Note, however, that there are authorities which are to the contrary).

51 However, in this case the words of rule 5 were registered along with all of the other rules in 1999 and are required to be read having regard to the legislation which came into operation after that date and which affects the nature of the industry defined. This is an illustration of the fact that the words in a trade union constitution rule are not static. Sometimes an eligibility clause which refers to workers being engaged in or in connection with industries or callings should be construed as relating to the industry of the employer. That is clearly, on the plain words of the eligibility rule in this case, the case.

52 This is a case, clearly, where the Authority is an employer by virtue of the amendments effected to *the GR Act* by *the PTA Act*. The Authority is charged with the responsibility of carrying on the business of rail transport in this state (see *the GR Act*, s2 and s13). In the Authority, in lieu of the Western Australian Government Railways Commission, there is vested the management, maintenance and control of every government railway (s13).

53 A "railway" or "government railway" is defined in s2 of *the GR Act* as follows:-

> "Means any railway belonging to Her Majesty in Western Australia which has been or may be hereafter declared open for traffic by notice in the *Government Gazette*, and includes-
>
> (1) all land belonging to Her Majesty upon which the railway is constructed, or which is or is reputed to be held or used in connection with or for the purpose of a railway; and also
>
> (2) all branch lines, sidings, buildings, erections, wharves, jetties, works, locomotives, motor cars, motor and other vehicles, rolling-stock, plant, machinery, goods, chattels, and other fixed or movable property of every description or king belonging to Her Majesty, and situate on such land, or held or used or reputed to be held or used in connection with or for the purposes of a railway,

> except that it does not include any railway or portion of a railway that is for the time being declared under section 66A not to be a Government railway for the purposes of this Act:
>
> Provided that, for the purposes of sections 16 and 17, **"railway"** means a railway as defined in section 95 of the *Public Works Act 1902*, the construction whereof has been authorised in accordance with section 96 of such Act, but which has not become a railway or a Government railway as herein defined".

54 It is to be noted that all locomotives are to be managed by the Authority; that is the Authority established by that *Act*, s5.

55 All locomotives and rolling stock are defined under the definition of "government railway" or "railway" in s2 of *the GR Act*.

56 It is to be noted that the Authority is an agent of the State and has the status, the immunities and privileges of the State. There is no definition in *the PTA Act* or *the GR Act* or the rules of the phrase "the Western Australian Government Railways Services" as it appears in rule 5. However, by the use of "services" in the plural and the clear power invested in the Authority to contract rail services out, "Government Railways Services" is an industry carried out by more than one employer or which can be carried out by more than one employer. In this case, however, the contractor, "Delron", provides services and labour to an employer which conducts the actual rail service. However, for the reasons which appear hereinafter, that makes no difference to a proper interpretation of the rule.

57 The eligibility rule clearly identifies, by the name of the employer or employers, the industry in which employees are engaged. The employer or employers is or are that person or persons, including the body which provides passenger or freight rail transport services. This is so whether it is done directly as in the case of the Authority, or indirectly in the case of a person or corporation who enters into an agreement with the Authority to, with the approval of the Minister, use a railway or portion of a railway for the purpose of operating a rail service other than a public passenger service.

58 What then is the industry in which an employee is employed so as to be eligible for coverage pursuant to the ARTBIU rules? The main function of the Authority is to provide and operate safe and reliable public transport (as defined in s12(1) of *the PTA Act*). This includes, inter alia, railway transport (see s3 and the definition of "prescribed means of public passenger transport"). The Authority also has the responsibility of providing rail systems to carry goods in this State.

59 Under the *Rail Freight System Act* 2000, the rail freight business is defined in s3 as follows:-

> "**"Authority's rail freight business"** means the business and operations of the Authority involved in the carriage of freight by rail and the provision and maintenance of facilities for the operation of railways for the carriage of freight, and it includes the carriage of freight by road and other activities of the Authority that the business and operations involve."

60 Thus, the Government Railway Services may by virtue of those provisions be defined as those services authorised to be provided by the Authority by virtue of the powers conferred under and by *the GR Act*, *the PTA Act* and the *Rail Freight System Act* 2000 by way of passenger transport or goods transport services by rail whether such services are provided by the Authority itself and/or by another person, corporation, authority or body by agreement made under s13(2)(b) of *the PTA Act*.

61 It follows that any person employed by such a person in the industry so defined to perform work for the purposes thereof is an "employee" eligible for membership of the ARTBIU pursuant to rule 5 of that organisation's rules.

62 Of course, in this case, the rail passenger service on Avon Link and the Prospector line is directly provided and managed not by a contractor but by the Authority.

63 This case is one limited to whether employees of persons contracting to provide services to the Authority are covered by the eligibility rule. The case is further limited by the fact that these employees are employed by contractors engaged by the Authority to perform tasks on or in relation to the running of passenger trains on two railway lines. Those tasks, which include collection of revenue, serving meals and drinks to passengers, dealing with customer complaints etc are, it is noteworthy, tasks which were carried out by direct employees of the Authority before this contract was entered into with Delron and also are performed on the Australind line by direct employees of the Authority. The question is whether these persons are employed in the Government Railway Services. The question, which is one of fact, is whether those persons are employed by a contractor in or in support of trains, their management and running by a government agent, the Authority and are therefore directly engaged in the running, conduct and management of rail passenger services. That is the industry defined by rule 5, as the word is defined in s7 of *the Act*. The question is whether they are also merely engaged in a related activity. The answer is that the contractor contracts to provide an integral part of government railway services on the train, for the train passengers, in the collection of revenue and in the provision of services to passengers on the trains which are directly related to the running of the train. That is a direct engagement in the industry. The trains themselves cannot be run or run in any normal or accepted way without those services being provided. The contractor's employees provide, as part of the service provided by the Authority's own employees on the Australind train, the same services on the Avon Link and the Prospector. This is part of the Authority's management and conduct of railways passenger services pursuant to the statutory authority conferred upon it. It is a service which it is statutorily required and empowered to provide. Delron's employees are clearly employed "in" the Government Railway Services, whoever is there employer. Indeed, in any event, their employer is an integral part of the provision of Government Railway Services on the Avon Link and Prospector lines.

64 That finding is a finding properly made in the context of the rule as a matter of valid legal construction giving consideration to the industry usage, to which I have referred. This is a matter entirely distinguishable from *FLAIEU; Ex parte AWU* (1976) 51 ALJR 266 ("the Poon Brothers Case") where the employees in question were not, by performing cleaning and catering duties, engaged directly in metalliferous mining. In this case, the tasks performed by the employees directly assist and enable the proper and efficient running of passenger trains which are part of the Government Railway Services themselves and without which the rail services could not be properly provided or indeed provided.

65 It was therefore correct for the Commissioner to find that there was coverage pursuant to rule 5 for these employees for those reasons. They were clearly employed in the Government Railway Services within the meaning of rule 5.

66 I would add this. The employees of Delron have been found, and as the Commissioner found, correctly, to have carried on work within the industry, namely the Government Railway Services, as their predecessors who were directly employed by the Authority did.

67 I agree, for the reasons which I have expressed above, that the words "employed in" are much wider than "employed by", and that that difference is very significant. The rule does not provide that the employees have to be employed by the Government Railway Services, but that clearly and unequivocally they must be employed in those services by whomsoever the services are provided. These employees are so employed. It was correct to so find.

68 For the reasons which I have expressed, rule 5 describes the Western Australian Government Railway Services (in the plural) as an industry. The industry, for those reasons which I have expressed, and as the Commissioner correctly found, encompasses all of those who are engaged as employees to work in rail services vested in or managed by the Authority pursuant to *the PTA Act* which these services are and were, as well as railway services provided by other employers.

69 In any event, too, the ARU rule, even if it should have been considered, which in my opinion it was not permissible to do, did not exclude from membership a person employed in the Government Railway Services. It did not indeed exclude a person from membership who was employed as a Western Australian Government Railway employee, whatever that was. The ARU rule only excluded a person from membership who ceased to be a Western Australian Government Railway employee, but not a person who was at any time employed in the Western Australian Government Railway Services. Therefore, persons employed in the Western Australian Government Railway Services were the persons covered by the ARU rules and they remain covered by rule 5 of the ARTBIU rules.

70 There was no error established in the Commissioner's decision or the reasons therefore.

71 For all of those reasons, no ground of appeal in my opinion is made out and I would dismiss the appeal.

SENIOR COMMISSIONER A R BEECH:

72 I agree with the Reasons for Decision of His Honour, the President and have nothing to add.

COMMISSIONER S J KENNER:

73 I have had the benefit of reading the Reasons for Decision of His Honour, the President. I agree and have nothing to add.

THE PRESIDENT:

74 For those reasons the Full Bench dismissed the appeal.

Order Accordingly

2004 WAIRC 12162

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DELRON CLEANING PTY LTD T/A DELRON HOSPITALITY MANAGEMENT **APPELLANT** **-and-** THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH **RESPONDENT**
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY SENIOR COMMISSIONER A R BEECH COMMISSIONER S J KENNER
DELIVERED	FRIDAY, 30 JULY 2004
FILE NO/S	FBA 10 OF 2004
CITATION NO.	2004 WAIRC 12162

Decision	Appeal dismissed
Appearances	
Appellant	Mr P G Robertson, as agent
Respondent	Mr G Ferguson, Industrial Officer

Order

This appeal having come on for hearing before the Full Bench on Friday, the 21st day of May 2004, and having heard Mr P G Robertson, as agent, on behalf of the appellant, and Mr G Ferguson, Industrial Officer, on behalf of the respondent organisation, and the Full Bench having reserved its decision in the matter, and reasons for decision being delivered on the 30th day of July 2004 wherein it was determined that the appeal should be dismissed, it is this day, the 30th day of July 2004 ordered that appeal No. FBA 10 of 2004 be and is hereby dismissed.

By the Full Bench

[L.S.]

(Sgd.) P J SHARKEY,
President.

COMMISSION IN COURT SESSION—Matters dealt with—

2004 WAIRC 12139

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRADES AND LABOR COUNCIL OF WESTERN AUSTRALIA **APPLICANT** **-v-** MINISTER FOR CONSUMER AND EMPLOYMENT PROTECTION, CHAMBER OF COMMERCE AND INDUSTRY INC AND AUSTRALIAN MINES & METALS ASSOCIATION (INC) **RESPONDENTS**
CORAM	COMMISSION IN COURT SESSION CHIEF COMMISSIONER W S COLEMAN SENIOR COMMISSIONER A R BEECH COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 28 JULY 2004
FILE NO/S	APPLICATION 784 OF 2004
CITATION NO.	2004 WAIRC 12139

Result	Directions issued
Representation	
Applicant	Mr D. Schapper and with him Ms C. Ozich (both of counsel)
Respondents	Mr P. Wilding on behalf of the Minister for Consumer and Employment Protection Mr G. Blyth on behalf of the Chamber of Commerce and Industry of Western Australia Inc Mr R. Gifford on behalf of the Australian Mines and Metals Association (Inc)
Intervenors	Mr J. Stewart and with him Ms J. Rees on behalf of the Department of Employment and Workplace Relations acting as agent for the Minister of Employment and Workplace Relations

Directions

WHEREAS the Commission in Court Session has before it an application pursuant to s 50(2) of the Act;

AND WHEREAS the Commission in Court Session considers the following directions are necessary for the just hearing and determination of the application having regard to ss 22B and 27(1) of the Act;

AND HAVING HEARD Mr D. Schapper and with him Ms C. Ozich (both of counsel) on behalf of the Trades and Labor Council of WA ("the TLC"), Mr P. Wilding on behalf of the Minister for Consumer and Employment Protection ("the Minister"), Mr G. Blyth on behalf of the Chamber of Commerce and Industry of Western Australia Inc ("the CCIWA"), Mr R. Gifford on behalf of the Australian Mines and Metals Association (Inc) ("AMMA"), Mr J. Stewart and with him Ms J. Rees on behalf of the Department of Employment and Workplace Relations acting as agent for the Minister of Employment and Workplace Relations ("the Federal Minister"), the Commission in Court Session, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby directs -

(1) THAT the CCIWA shall, by 11 August 2004, file and serve full and complete particulars of those parts of the application referred to in paragraphs 2, 3, 4, 11, 12, and 13 of its Notice of Answer.

(2) THAT the Minister shall, by 11 August 2004, file and serve full and complete particulars of his Notice of Answer.

(3) THAT the TLC shall file and serve on the Minister, the Federal Minister, the CCIWA and AMMA its witness statements and materials upon which it intends to rely by 8 September 2004.

(4) THAT the Minister, the Federal Minister, the CCIWA and AMMA shall file and serve their witness statements and materials upon which they intend to rely by 13 October 2004.

(5) THAT the TLC shall file and serve on the Minister, the Federal Minister, the CCIWA and AMMA its witness statements and materials in reply by 27 October 2004.

(6) THAT the TLC shall file its outline of submissions and list of witnesses to be made available for cross-examination by 3 November 2004.

(7) THAT the Minister, the Federal Minister, the CCIWA and AMMA shall file their outline of submissions and list of witnesses to be made available for cross-examination by 10 November 2004.

(8) THAT no evidence shall be adduced which is not contained in any witness statement filed in accordance with this order without leave of the Commission.

(9) THAT where a party refers the Commission to an exhibit in related proceedings before another industrial tribunal and that exhibit is available on the website of the tribunal, a copy need not be provided to the Commission but the party will state with particularity the parts of the exhibit on which it intends to rely.

(10) THAT the matter be set down for hearing commencing 22 November 2004 until 3 December 2004 and, if necessary, 6 December to 10 December 2004.

(11) THAT there be liberty to apply to the parties in relation to these directions.

(Sgd.) W S COLEMAN,
[L.S.] Commission In Court Session.

2004 WAIRC 12151

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRADES AND LABOR COUNCIL OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	MINISTER FOR CONSUMER AND EMPLOYMENT PROTECTION, WESTERN AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY INC AND AUSTRALIAN MINES & METALS ASSOCIATION (INC)
	RESPONDENTS
CORAM	COMMISSION IN COURT SESSION CHIEF COMMISSIONER W S COLEMAN SENIOR COMMISSIONER A R BEECH COMMISSIONER J F GREGOR
DATE	THURSDAY, 29 JULY 2004
FILE NO/S	APPLICATION 784 OF 2004
CITATION NO.	2004 WAIRC 12151

Result	Order issued
Representation	
Applicant	Mr D. Schapper and with him Ms C. Ozich (both of counsel)
Respondent	Mr P. Wilding on behalf of the Minister for Consumer and Employment Protection Mr G. Blyth on behalf of the Chamber of Commerce and Industry of Western Australia Inc Mr R. Gifford on behalf of the Australian Mines and Metals Association (Inc)
Intervenors	Mr J. Stewart and with him Ms J. Rees on behalf of the Department of Employment and Workplace Relations acting as agent for the Minister of Employment and Workplace Relations

Order

WHEREAS the Commission in Court Session has before it an application pursuant to s 50(2) of the Act;

AND HAVING HEARD Mr D. Schapper and with him Ms C. Ozich (both of counsel) on behalf of the applicant, Mr P. Wilding on behalf of the Minister for Consumer and Employment Protection, Mr G. Blyth on behalf of the Chamber of Commerce and Industry of Western Australia Inc Mr R. Gifford on behalf of the Australian Mines and Metals Association (Inc), Mr J. Stewart and with him Ms J. Rees on behalf of the Department of Employment and Workplace Relations acting as agent for the Minister of Employment and Workplace Relations, the Commission in Court Session, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders -

(1) THAT the Notice of Application stamped on 15 June 2004 be amended by inserting the words "such order to apply generally to employees throughout the State whether or not they are employed under and subject to awards or industrial agreements" such that the Notice of Application reads:

"TO: Minister for Consumer and Employment Protection and Others (see Schedule A)

TAKE NOTICE THAT: Trades & Labor Council of Western Australia of 79 Stirling Street, Perth has this day applied to the Western Australian Industrial Relations Commission for a General Order pursuant to section 50(2) of the Act such order to apply generally to employees throughout the State whether or not they are employed under and subject to awards or industrial agreements: see Schedule B

The grounds on which the application is made are contained in the attached Schedule C."

(2) THAT the Minister of Employment and Workplace Relations be given leave to intervene in relation to Clause 4 in Schedule B attached to the Notice of Application as amended.

(Sgd.) W S COLEMAN,
[L.S.] Commission In Court Session.

AWARDS/AGREEMENTS—Application for—

2004 WAIRC 12131

PUBLIC SERVICE GENERAL AGREEMENT 2004

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, DEPARTMENT OF INDIGENOUS AFFAIRS AND OTHERS
	APPLICANTS
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DATE	WEDNESDAY, 28 JULY 2004
FILE NO	PSAAG 2 OF 2004
CITATION NO.	2004 WAIRC 12131

Catchwords	Agreement – Registration of Agreement – Parties agree to Public Service Arbitrator making orders as to terms of Agreement – Relevant principles to be applied – Application of terms of Act – Industrial Relations Act 1979 (WA) s 6, s 26, s42G
	Level of salary increase – Increase in productivity – Management of work load – Statement of Principles – Relevance of comparative wage movements – The state of the national economy and the Western Australian economy – Relevant economic indicators to be considered – National and State Wage Case Decisions – Whether flat rate component be included – Gender equity – Industrial Relations Act 1979 (WA) s 6, s 26, s42G – Labour Relations Reform Act 2002, s 133 – Minimum Conditions of Employment Act 1993 (WA)
	Cashing out of annual leave – Purpose of annual leave – Minimum Conditions of Employment Act 1993 (WA) s 8
	Commuted allowance – unique role and responsibilities of unions in negotiations
Result	Level of salary increase determined
	Cashing out of annual leave dismissed
	Union participation in negotiations required
Representation	Mr J Dasey and Ms J Gaines and later Mr M Finnegan for the Civil Service Association of Western Australia, Incorporated
	Mr J Ridley and Mr R De Blank for the Department of Indigenous Affairs and Others

Reasons for Decision

1 This is an application for the registration of the Public Service General Agreement ("the 2004 Agreement") between the Civil Service Association of Western Australia, Incorporated ("the CSA") and the Department of Indigenous Affairs and Others ("the Government") pursuant to s.41 of the Industrial Relations Act 1979 ("the IR Act") in respect of employees covered by the Public Service Award (No. PSAA 4 of 1989) ("the Award"). The parties also seek that the Arbitrator determine a number of issues pursuant to s.42G of the IR Act in what they describe as consent arbitration, which is not subject to the appeal provisions of the IR Act. The three issues for determination are:

1. The level of salary increase to apply to each of the 2 years of the 2004 Agreement. The Government says that 3.3 percent for each year is appropriate. The CSA says that $60.00 per week or 6 per cent, whichever is greater, each year is appropriate.
2. The capacity for individual employees to apply for and be granted a cash payment in lieu of a proportion of accrued annual leave.
3. The inclusion of a provision allowing the employer to negotiate a commuted allowance for overtime or penalties directly with a group of employees without the necessity for the CSA's involvement.

2 The arbitrated outcomes of the three matters in dispute will then form part of the 2004 Agreement to be registered. There are also consequential amendments for the Award to apply on the same date as the date of operation of the 2004 Agreement. The operative dates of the 2004 Agreement and the 2 salary increases have been agreed.

3 The evidence presented was in the form of witness statements, with attachments. The parties submitted witness statements in reply to each others' statements, and then their further responses to those. No witnesses gave oral evidence or were subject to cross examination. The CSA's main evidence was given by Toni Beverley Walkington whose witness statements included 84 attachments. The CSA presented a further 17 witnesses. The Government's main witness was John Nickolas Serich whose statement attached 46 documents. In addition, the Government produced witness statements from a further 28 witnesses. This is in addition to the various authorities referred to by the parties.

4 I acknowledge the significant amount of material presented by the parties and the work they have put into ensuring the smooth conduct of the hearing of this matter, which although it was initially listed for 3 days, took 6 days to complete.

5 The evidence presented in this matter was not limited to the circumstances applying to employees covered by the 2004 Agreement as the parties intend to take the Arbitrator's decision into account when finalising their agreements in respect of other employees. According to government figures there are approximately 34,000 employees occupying approximately 30,100 full time equivalent ("FTE") positions affected by this matter.

6 The parties agree that the Wage Fixation Principles do not bind the Arbitrator in the circumstances of this matter. The CSA says that if the parties are wrong in that regard, then the only relevant, although not binding, principle is Principle 10, and the requirement to address those matters contained in s.26 of the IR Act. In any event, the parties believe that the objects of the IR Act and the requirements of s.26 are relevant considerations.

SALARY INCREASES

THE CSA CASE

7 The CSA says that there have been 2 serious injustices to its members over the last decade which require rectification:

1. The building pressure of work load, public expectations, increased scrutiny, and the regular and massive organisational upheaval. It refers to structural changes, functional reviews and the changes through the Machinery of Government which it says was described by the Premier as the single biggest change in the history of the State's biggest organisation. The CSA describes these as enforced productivity improvements.
2. The erosion of the value of CSA covered employees' salaries relative to other significant groups of public sector workers vis nurses, teachers and police, and the undervaluing of the crucial role played by CSA covered employees in the provision of health, education and law enforcement services, as well as the multitude of other areas of service provision in this State.

Productivity Improvements

8 In respect of enforced productivity improvements, the CSA says that these have arisen in the jobs of the employees through increased work load pressures. These are not productivity improvements which have been agreed to or worked out in any structured way but are the response of dedicated workers to the increased demands placed on them in the circumstances of reduced resources. The CSA says that the Arbitrator should take account of the significant savings already made by the Government through its various reviews and restructures which have resulted in this enforced productivity and other savings which are planned.

9 The CSA describes the essence of its case as being that it can show, across the sector, the effect of increased work load, the pressure on public sector employees, increased media scrutiny, increased public expectations regarding service delivery and the protection of community standards, significant legislative amendments and an environment of significant organisational change. It says that this will lead to the conclusion that people are doing more, justifying proper reward which would be closer to 6 per cent than the 3.3 per cent increase proposed by the Government.

10 The enforced productivity comes from increased work load pressures on all public sector workers within the CSA's area of coverage. The evidence is said to be from a broad cross-section of public sector agencies, demonstrating the increased work load generally without commensurate increases in resources and, in particular, FTE. This has resulted in increases in productivity of the workers through a gradual, exponential process. While the CSA says that the full solution to these issues is increases in staffing, and the 2004 Agreement to be considered for registration includes provision for addressing work load issues, appropriate pay increases would recognise the increased productivity.

11 In the last 10 years, according to the CSA, there has been a steady reduction in the workforce within its area of coverage. Public sector employee numbers have increased overall but the increase has been largely in additional nurses, teachers and police. The reduction in CSA covered employees is despite an increase in the population of Western Australia.

12 Government reviews and voluntary redundancy processes over the last 3 years have led to a significant reduction in jobs in CSA areas with those which have been costed providing realised or projected savings in excess of $1.26 billion over a 4 year period.

13 Pay equity was not fully realised over the public sector from the Public Service General Agreement 2002 (PSA AG 24 of 2002), ("the 2002 General Agreement") due to the varying effects on actual pay levels of employees. Through the era of enterprise bargaining, employees in different agencies received different levels of pay increases and contributed different measures of improved productivity. Some employees, who have faired badly through enterprise bargaining, received significant increases to bring them up to the bench mark rate set in the 2002 General Agreement, while others received small or insignificant increases, and others received none. Although the 2002 General Agreement provided increases of 3 per cent + 3 per cent + 1.5 per cent, the real average effect on salaries was 4.7 per cent. With the final increase in the 2002 General Agreement, 86 per cent of employees met the bench mark rate. The remaining 14 per cent did not receive a pay rise from the 2002 General Agreement. An increase of 6 per cent in the first year of the 2004 Agreement would bring all but 96 employees within the bench mark, and a further 6 per cent would resolve the disparity in salary levels which arose due to agency level bargaining and set all employees on the same rates.

General Community Outcomes

14 The Arbitrator is also asked to consider the general community wages outcomes of bargaining and of other decisions across the country and in this State, including those applying to significant groups in the Western Australian public sector.

15 The CSA refers to widely utilised indicia which it says demonstrate that 3.3 per cent is below community standards, and a number of those indicia support 6 per cent, with almost all supporting more than 3.3 per cent.

16 The CSA seeks that the Arbitrator consider wages outcomes of significant groups in the public sector, vis nurses, teachers and police, all of whom have been offered higher amounts by the Government than has been offered to the CSA. Those other negotiations have been carried out under the same government wages policy as applied to the CSA negotiations and this, the CSA says, demonstrates inequity in the application of the policy. The CSA says that granting the claim will not fully restore the relative position of the CSA covered employees as to those in other groups.

17 As to the impact of this matter on any other public sector employees, the CSA says that it will not have any negative effect as most of the negotiations involving the current round have been concluded.

18 The CSA claims that efficiencies and cost savings arising from the many restructures, re-organisations and other changes in the operations of government can be utilised to cover the cost of the salary increases. This includes that employment arrangements in the public sector, including the inappropriate use of contracts and labour hire firms, and that the proper use of these arrangements would provide savings and efficiencies. The CSA says that there is no argument that the Government has the financial capacity to pay and that this is evident from budget documents and other material produced by the Government, which demonstrate that the State is in a sound financial position. There are current and projected surpluses and an unexpected windfall increase in revenue in the financial year. The CSA says that its expert witness's evidence demonstrates that the claim can be met without jeopardising the State's financial position or its AAA credit rating.

Flat Rate Component

19 The CSA says that pay equity will be served by meeting its claim, by awarding a flat rate increase to mitigate the inherent inequities in the current broad-banded pay structure. Those inequities are said to fall very heavily on female members of the work force, who are clustered at the lowest salary levels.

20 According to the CSA, the existing relativities in the broad banded structure are part of an incomplete process, and under-value the lower classifications within the Award. The broad banding process originally envisaged that competencies would be developed and introduced as a second stage, however, this second stage was never completed. Because of this the broad banded structure does not have validity for the purposes of being maintained as any authoritative, established ratio. Thus the relativities have no inherent status.

21 The CSA has surveyed its members and delegates who strongly support a flat rate component to the increase in salaries. The Arbitrator should take account of those views.

Evidence of T B Walkington

22 The CSA brought evidence from a significant number of witnesses from a range of departments and agencies. As noted earlier, its primary witness was Toni Beverly Walkington, the General Secretary of the CSA. Her evidence dealt with a range of issues associated with the claim:

(a) Changes in staffing levels in the public sector - she has relied upon a number of documents provided by government agencies including the *Profile of Western Australia State Government Workforce 2003* produced by the Public Sector Management Office. This shows a reduction from 96,000 FTE in 1988 to 89,143 FTE in 1996, in spite of there being an increase in FTE in early 2001 due to extra staffing in health, education and training i.e. nurses and teachers. Other documents are said to demonstrate a reduction in public sector staffing levels.

(b) The public sector has not grown at the same rate as the Western Australian population.

(c) The CSA coverage, public accountability and work load - expectations of public accountability in the performance of the vast array of functions performed within the public sector has increased dramatically over recent years witnessed by:

(i) government commissions of inquiry including the *WA Inc Royal Commission* (October 2000); the *Gunning Committee of Inquiry into the Finance Brokers Advisory Board* (September 2000); *Machinery of Government* (June 2001); *Royal Commission into the Finance Broking Industry* (February 2002); *Gordon Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse In Aboriginal Communities* (August 2002); and the *Police Royal Commission* (25 February 2003).

(ii) inquiries conducted by agencies in respect of their own performance and expectations. Reference was also made to the requirements for submission of annual reports to Parliament and auditing by the Auditor General, and to surveys conducted by the CSA of its members and delegates regarding employment security and work load. Ms Walkington also refers to the announcement by the Minister for Consumer and Employment Protection of a panel to investigate working hours (May 2003).

(d) Structural and Functional Reviews and Changes:

(i) *Machinery of Government* - established to examine how best to reduce the number of departments and agencies. Its report in 2001 resulted in the Premier announcing "radical changes to the structure of Government" would begin to take effect from 1 July 2001. There were 55 recommendations for change, including a Government commitment to reduce the Senior Executive Service by 60 positions. However, Ms Walkington notes that one of the aims of the process was to reduce duplication i.e. "an outcome likely to lead to a decrease in staffing levels."

(ii) The voluntary redundancy package 30 June 2002 - the announcement by the Deputy Premier and Treasurer on 12 April 2002 of an enhanced voluntary redundancy scheme aimed at shedding more than 400 staff from the public sector, which was available until 30 June 2002. At the end of process, 251 voluntary severances were effected in the health sector prior to the organisational structure being finalised and the decision made about the future roles and functions. In July 2002, the Deputy Premier announced that 732 voluntary packages had been taken up, of which 376 were centrally funded and 356 were funded by agencies from within their own resources to facilitate "restructuring and staff renewal". This was intended to provide savings of more than $50m over 4 years. The Deputy Premier also indicated that of the 251 redundancies taken up in the health industry only 3 were nurses. The final number of voluntary redundancies was significantly more than was proposed.

(iii) *Functional Review* - this review, established by the Government in 2002, resulted in substantial changes, the first being announced on 3 January 2003, being a merger between the Department of Education and the Department of Training to form a new Department of Education and Training. The merger was expected to see some 200 head office jobs shed, freeing up more than $100m over 4 years. The CSA says that more than 200 jobs targeted were from CSA covered areas. The Department of Industry and Technology was transferred to the Department of Minerals and Petroleum Resources to create a new department, saving $24m over 4 years and seeing 80 positions shed within that period. Government announced plans to consolidate its procurement processes into one entity, expecting savings of $230m over 4 years, with a significant number of positions to be lost. The Premier also announced a continuing assessment of the concept of sharing corporate services between agencies. The CSA notes that the Premier claimed that the Government had created an additional 100 jobs in nursing, teaching and police. In the Budget lockup briefing for unions and community organisations on 7 May 2003, the Treasurer is said to have outlined the expected results from the Functional Review providing budget savings of approximately $750m over the next 4 financial years and significant down-sizing of corporate service areas of government. The *Functional Review Implementation Team* ("FRIT") was then formed to continue the functional review process. It proposed the creation of 5 corporate services cluster centres each providing corporate services for identified groups of agencies, one was to be dedicated to health, one for education and training and the final 3 for all other public sector agencies.

(e) Use of Contract Work and Labour Hire Companies - the CSA refers to the Auditor General's *Third Public Sector Performance Report 2001* in which the Auditor General examined the use of contract staff in 4 agencies and found that "all 4 agencies reviewed routinely engaged fixed term and temporary contracts for extended periods in contravention of legislation and government policy on redeployment, merit selection and equity, the consequences of which (is) higher cost to government and the inability to demonstrate the employment of the best available person" (paragraph 52 of Toni Walkington). This inappropriate use of contract and labour hire company labour contained potential risks of inappropriate engagement and higher staffing costs, engagement of unsuitable persons and at least a perception of patronage in appointments, workforce inflexibility, and a lack of necessary skills or expertise within the public sector. As at June 2000, permanent staff within the public sector represented 71 per cent of the workforce, down from 81 per cent in 1995. When the current government was elected, it established the *Modes of Employment* policy, including the conversion process for fixed term contract employees. As a result of agencies' failure to comply with the *Modes of Employment* policy, this issue has become a matter of concern to the CSA and consequently, the *Modes of Employment* policy is to be included in the Award and in General Agreements. Ms Walkington says that there is wide-spread anecdotal evidence that many government agencies are in breach of this policy. Ms Walkington also noted that the Auditor General stated that the use of contract for service arrangements comes at a high cost to the community.

(f) Further cost saving measures - Ms Walkington says that she is aware that agencies are required to return an efficiency dividend to government and many government agencies are required to maintain a FTE vacancy rate, with both measures having a combined effect of reducing the number of employees available to perform the work of Government.

(g) Pay equity in the public sector:

(i) Ms Walkington also refers to the Government Wages and Parity Policy which supports the principle of common conditions and pay enhancing efficiencies across the sector. The difficulties associated with and consequent upon the previous government's policy of enterprise bargaining by different agencies resulted in a disparity in the rates of pay across the sector. These difficulties were associated with transfers and promotions, there was a disincentive to mobility in the sector and it was a source of dissatisfaction among employees. The 2002 General Agreements in the public sector between the CSA and the Government created a common pay structure, which set the bench mark rates, paid to approximately 86 per cent of CSA covered employees. When the final increase under the 2002 General Agreement occurred on 1 January 2003 approximately 14 per cent of workers covered by the 2002 General Agreement were still above the bench mark rate of pay. As part of the issue of parity in rates of pay increases, Ms Walkington referred to the December 2003 decision of the Salaries and Allowances Tribunal.

(ii) Ms Walkington also gave evidence as to the basis of the CSA's survey which demonstrates discontent amongst members with those previous disparate arrangements and strongly supports a flat rate component within the pay increases sought.

(iii) Ms Walkington refers to the genesis of the current broad banded salary and classification structure. She says that the competency standards which were intended to be developed as a consequence of the broad banding process were not subsequently finalised and implemented. The job evaluations and classifications tools had been criticised as perpetuating gender bias and were referred to in the Equal Opportunity Commission's 1989 report "*Discrimination in Government Policies and Practices* - (S.82b Report No. 4, Job Evaluation and Broadbanding in the Western Australian Public Service" (TBW 39)). In 1990 the Equal Opportunity Review Committee commissioned Dr Christine Short to review equal opportunity in the Western Australian public service classification system. Further, in March 2004, the Minister for Consumer and Employment Protection announced a review of gender pay discrimination in Western Australia citing that women employees are still earning significantly less than male employees in this State. The CSA says that this differential exists between males and females in the public sector. The *Profile of Western Australian State Government Workforce June 2003* demonstrates that female employees in the Western Australian public sector are clustered in the lower salary ranges. A flat rate pay increase would assist in addressing some of the gender equity deficit at the lower levels.

(h) Ms Walkington refers to recent wage negotiations between the Queensland public sector union and the Queensland State Government which provided for 3.8 per cent or $25.00 per week (whichever is the greater) in each year 1 June 2003, 1 July 2004 and 1 August 2005.

(i) Comparisons with other Western Australian public sector workers - Ms Walkington refers to the total wage movements for public servants versus teachers, police and nurses between 1993/4 and January 2004. (see TBW 42, 43, 44 and 45). The CSA says that this demonstrates that public sector employees have not been treated equitably across that period of time and that nurses, teachers and police have received far better outcomes than those public sector employees who are within the CSA's area of coverage.

(j) Comparisons with community wage movements - Comparisons between level 1.1 public service classifications; Minimum Wage and other reported wage movements, eg. Australian Bureau of Statistics' - Average Weekly Ordinary Time Earnings ("AWOTE") figures between 1993 and 2003; the Minimum Conditions of Employment Act 1993 ("MCE Act") - Minimum Wages between 1993 and 2003; and movements in wages monitored and reported on by a number of organisations including the Western Australian Labour Market, September quarter 2003 (issue number 4) produced by the *Department of Consumer and Employment Protection*, and the *Agreements Database And Monitor Report* ("ADAM") no.38 September 2003 produced by ACIRRT are also said to support the CSA's claim.

23 The CSA also produced witness statements from the following officers:

- Rosemary Rippon - Pathcentre,
- Brian Dodds - Department for Community Development,
- Lindsay Collins - Department of Land Information,
- Clinton Floate, Steven Farrell and Tania Shilcock - Department for Planning and Infrastructure,
- Jan Mason - Department of Industry and Resources,
- Bruce Hawkins - Department of Consumer and Employment Protection,
- Brendan Hewson - Department of Environment,
- Brian Ellis - Department of Justice,
- Phil McGuiness and Shannon Ellsson - Police,
- Hilary West and Phil Brough - Department of Education and Training,
- Kelvin Leek - Swan and Central TAFEs and
- Jonathon Gordon - Racing and Gaming WA.

24 The evidence from these witnesses covers particular areas of change which they say have occurred, work load issues which have been or need to be recognised, the demands of public expectations, and the changes brought by internal and external reviews, all of which they say demonstrate that productivity has increased. I do not intend to traverse all of the evidence in this regard however, I refer to some of the evidence as to a number of departments and agencies. Their evidence also covered issues relating to the 2 other matters for determination, being the cashing out of annual leave and issues relating to commuted allowances.

25 In respect of the Department of Justice, Mr Ellis has given evidence about the work of the Public Advocate, the Community Justice Services and the Prisons division. Mr Ellis referred to the Justice Reform Programme dealing with reducing imprisonment rates, the closure of prison units, a decrease in services and the work associated with prison assessments. Mr Ellis says proposed reductions in imprisonment rates were not ultimately realised, or did not occur to the extent predicted. He said there was then a need to make changes and adjustments when the planned reduced work load did not eventuate.

26 The evidence of Hilary West, an employee of the Department of Education and Training, made reference to a report by Mercer, Human Resource Consulting, in December 2002, entitled "*School Support Staff - Classification and Workload Review, Western Australian Department of Education*"("the *Mercer Report*"). In this document the reporters examined the work load and work value of school support staff and found changes in a range of areas including:

- Devolution of accountability from head office,
- Technology Change,
- Educational Changes,
- School Specific Factors, and
- Community Factors.

27 In its examination of the issues, the *Mercer Report* distinguished between those changes with a work load impact and those with a work value impact. In respect of work load findings, a number of areas were identified including that:

"• Most school support officers are working unpaid overtime each week – sometimes up to 15 hours.
- Some school support staff work during the school holidays to catch up on the back log of work.
- Some school support staff regularly take work home.
- Almost all catch up on required reading at home.
- The overtime is necessary because skilled relief staff are almost impossible to find or keep."

28 The *Mercer Report* noted that a 53 per cent increase in FTE is needed to cope with the existing work load (Chapter 6, page 80). It recommended a number of aspects of change relating to work value findings including the reclassification of a number of positions.

29 It also made recommendations to deal with each of the areas of additional work load identified. Changes were recommended in reallocation of resources, management structures, finance related activities, physical assets, technological changes, educational changes and in respect of the allocation and use of discretionary days and FTE. Other recommendations included the better management of working hours, noting that:

> "Operating schools on a basis where staff regularly work longer than allocated hours for no pay or other recognition (such as time in lieu) is unsustainable in the long term and needs to be addressed."
>
> (Recommendation 15, page 87).

30 The evidence indicates that the CSA took up this matter with the Minister for Education and Training. His response to the CSA of 6 March 2004 included that:

> "Following on from (a meeting with the CSA) I have discussed the issues raised with the Director General of Education, Mr Paul Albert. He has confirmed, as you indicated in the meeting, that the department is currently working with your union to address acknowledged workload issue (sic) where possible. While you have indicated that you believe efforts to reduce the workload have been largely exhausted, I do think that there is more that can be done and I have asked the department to further pursue this issue.
>
> I confirm however that there is no budgetary provision for the measures you seek. I have asked the Director General to examine further possibilities including some targeted expenditure to reduce crucial workload issue (sic) with your members."
>
> (HRW 6)

31 Ms West says that in spite of the Mercer Report and the discussions with the Minister, there are still not sufficient resources to meet the work load identified.

32 Brendon Harley Hewson has given evidence in respect of the bringing together of the Waters and Rivers Commission and the Department of Environmental Protection to create the new Department of Environment. He has also referred in particular to the work load-created stress which lead to the establishment of the "Stress Focus Group". The Stress Focus Group produced a report in May 2003 which identified a range of resource issues as well as problems within the planning processes of the Department. Mr Hewson also notes that the spreading of record keeping, finance, procurement, personnel and payroll functions to officers at all levels in addition to their other duties has increased their work load.

33 Mr Hewson also referred to the Auditor General's Report (September 2003) - Public Sector Performance which recognised difficulties in proper resourcing of the Waters and Rivers Commission.

34 In respect of the Police Department, Phillip Ralph McGuiness has given evidence that an increased number of sworn police officers not accompanied by increased unsworn numbers, has led to an increase in work load for unsworn officers. There is also reference to 2 internal reviews, the Central Area Review and the Administrative Functions Review. The latter shows that savings made in the administrative area have been redirected to fund pay rises for police officers. Mr McGuiness's evidence also refers to disgruntlement amongst unsworn staff over the Government's preparedness to grant higher pay increases to police officers than to public servants.

35 Mr McGuiness also refers to the Royal Commission Into Whether There Has Been Corrupt or Criminal Conduct By Any Western Australian Police Officer which noted the need to give priority to "making up the extra personnel with civilians" to release police officers for operational duties. Mr McGuiness also refers to increased community expectations on staff.

36 Brian John Dodds has given evidence regarding a range of resourcing and work load issues at the Department for Community Development. One such issue is being dealt with by the Joint CSA/DCD Workload Management Project aimed at managing the work of the Department within allocated resources.

37 These witness statements have provided the flavour of the evidence generally as to increased work load, frustration at a lack of progress in this regard, various reviews, amalgamations and restructures which the witnesses say have resulted in increased work load for public servants without additional resources, or reduced numbers for the same or, in some cases, increased work.

Economic Arguments

38 The CSA brought expert evidence from Dr Tyrone Carlin dealing with the economic environment and the financial impact of the claim. Dr Carlin currently holds the position of Senior Lecturer in Management at the Macquarie Graduate School of Management. He has substantial academic and professional qualifications in law and commerce and has undertaken consultancy work in the public and private sectors.

39 Dr Carlin's written statements addressed the Western Australian budget situation, in particular focusing on the WA 2003-04 budget papers and the approach taken by the Government to "line strategy with accrual resource allocations and performance defined in terms of outputs" (paragraph 14 of Dr Carlin's statement 28 March 2004). He notes the redefining of performance in the recent decade to focus not only on compliance with appropriations of public funds but also on achievement of objectives, and most recently on measurement and reporting of financial information on budget papers of the Government's desired outcomes. He refers to the budget process as "a fiscal strategy that aims to maintain the financial position of the Western Australian public service within tolerable ranges". This includes an increase in services while restraining growth of Government spending to 3 per cent. He says that this appears to be in line with the expected Consumer Price Index ("CPI").

40 Dr Carlin says that the Government's tight budget strategy for the next 3 budget cycles aims at significant budget surpluses being produced. He describes this as conservative fiscal policy aimed at the retention of the AAA Credit Rating, to be achieved by capping expense growth and allowing for increases in expenses up to but not exceeding the combined growth in population and inflation.

41 Dr Carlin notes that as well as the expected surpluses, the Government has received a recent windfall bonus of an extra $453m in Commonwealth Grants, and the new distribution of those grants is to persist for 5 years. Dr Carlin also notes in reference to the revised estimates for the 2004-05 financial year "with every other variable held constant the expected operating balance should fall in the range of $821m" plus the other windfalls.

42 As to the general government sector wages growth, Dr Carlin says that since salaries make up a highly material share of aggregate expenses, the government would therefore attempt to restrain growth in that area. He notes, though, that the WA 2003-04 Budget Paper No. 3 recognises that salaries are the government's largest operating expense, accounting for around 40 per cent of that total and that the wages bill is expected to increase by 5 per cent in 2003-04 because of increased numbers of government workers such as through the recruitment of additional doctors, nurses and allied health professionals, the establishment of the new Corruption and Crime Commission and the response to the Gordon Inquiry.

43 Dr Carlin notes that the Government's estimates are based on each 1 per cent wage increase across the general government sector costing approximately $46m for each year. He says though that this does not take account of the expense savings to be realised through the FRIT and the expenditure reductions associated with that for each agency. He notes that provision has been made for wage increases of 3 per cent a year, where 1 per cent of that increase in salary is to be funded by agencies improving their efficiency.

44 As a means of elaborating on his analysis, Dr Carlin has examined the financial position and performance of 2 large agencies being the Department of Justice and Legal Affairs and the Department for Planning and Infrastructure. In respect of the Department for Planning and Infrastructure he notes that "administrative costs represent a key area of controllable cost within a department. These costs are controlled in part by human agency, as a result of innovation and continuous improvement processes initiated by departmental staff. Therefore, one view, even where employee related expenses grow at a faster rate than administrative expenses, this growth may be characterised by a partial dividend accruing to departmental employees as a result of their efforts to improve the organisation" (paragraph 39 Carlin 28 March 2004).

45 Dr Carlin says that if there is an assumption built into the Forward Estimates that labour cost growth will be constrained to approximately 3 per cent per year (the relative expense burden share data contained within his Table 8, which sets out budgeted and forward estimates of different categories of expenses which include employee expenses), this level could be increased without materially increasing the relative proportion of cost represented by labour in the Department for Planning and Infrastructure over the forward estimate horizon. I take this to mean that he is of the view that even if employee expenses constituted a greater percentage rise than had been budgeted for, this would not materially affect the relative proportion of the cost of labour within the Department compared to other costs. He also notes that employee related expenses appear to have fallen in the relevant periods and appear set for further decline in the next forecasted estimates periods.

46 In summary, Dr Carlin says that:

> "Overall the analysis of expense trends suggest that employee related expenses within the Department of (sic) Planning and Infrastructure have been well controlled during the past several periods, and it appears that even with some growth in employee related expenses over forecast periods at levels in excess of those factored into current forward estimates, growth would still lie within sustainable levels, particularly given savings apparently achieved in relation to administrative expenses within the department".
>
> (paragraph 45 Carlin 28 March 2004).

47 Dr Carlin has undertaken a similar analysis in respect of the Department of Justice and Legal Affairs and found that notwithstanding FTE growth, the Department's employee expenses have been constrained on an actual basis and into the forward estimated periods. He says that the data suggests constrained overall deflated employee related expense growth.

48 As a general proposition in respect of the approach taken by Government to financial analysis and the budgetary processes, Dr Carlin says:

> "it is not appropriate to view the planned budgetary stance as a series of interlinked propositions as to fiscal capacity, nor even as the boundary of fiscal sustainability. Rather, it is simply to be viewed as the product of a series of choices which have been made with respect to desired resource allocation outcomes for the foreseeable future."
>
> (paragraph 50 Carlin 28 March 2004).

49 He notes that budgets reflect a series of choices and tradeoffs made at particular points in time and that there is no absolute requirement for those allocations to be set in concrete.

50 Importantly, Dr Carlin says that based on his analysis, the gross impact of salary increases for government employees in the order of 6 per cent each year for 2 years, based on 1 per cent increase in salary levels in the first year equating to $46m increase in salary outlays:

> "on salary expenses of 6 per cent in salaries would total approximately $276m. Allowing for compounding, the second year impact of a further 1 per cent increase in salary costs would be in the order of $48.7m, suggesting second year total impact in the vicinity of $292m, and a combined impact across the two year time frame in the order of $568m."
>
> (paragraph 51 Carlin 28 March 2004).

51 He notes too that the revenue forward estimates have been prepared on a prudent and conservative basis and that the impact of salary increases of 6 per cent would be lower than 2.3 per cent of forecast general government sector revenue for the financial years 2004-05 and 2005-06.

52 Importantly, he says that granting of the CSA's claim of 6 per cent each year for 2 years would not be likely to threaten the retention of the State's AAA credit status.

53 Dr Carlin has also examined the situation of the State's budget as it would be were 6 per cent pay rises granted and its AAA rating, by reference to analysis of a large sample study of United States corporations. He examined a number of different measures including cash flow and total debt ratio, long term debt and capital ratio, and capacity to service debt via interest costs to earnings. By comparing those measures between those corporations and the State Government, Dr Carlin concluded that the Government ratios "stood at a level commensurate with a AAA rating" (paragraph 59 Carlin 28 March 2004). Dr Carlin concluded that, although he has not attempted to engage in a complete analysis of the financial position and performance of the Western Australian general government sector, he was of the opinion that the State's AAA rating would, "in the absence of material changes to other operational and financial parameters, comfortably be retained" if salary increases of 6 per cent each year over the 2 years of the 2004 Agreement were applied.

THE GOVERNMENT CASE

54 The Government says that in dealing with this matter pursuant to s.42G of the IR Act, the Arbitrator ought to take into account the totality of the 2004 Agreement and that there has been a significant expansion of the benefits to employees and a comprehensive package of terms and conditions for CSA covered areas as a consequence of the application of 2001/2003 Government policies.

55 The Government seeks that the Arbitrator recognise that it has a right to determine and implement policy. It does not argue incapacity to pay but rather that the Government has established policy which ought be reviewed, in context, and maintained.

56 The rationale for the Government's view that its proposed 3.3 per cent for each of the 2 years is appropriate is as follows:

- That it should be seen as part of a substantial package of terms and conditions.
- It neither leads nor lags the rate of increase generally, but maintains the relative position with comparable groups in the jurisdiction.
- It is economically and fiscally responsible, taking account of the current industrial relations climate and the economic outlook for the State.
- There is an achievement of productivity gains as a consequence of the budget-driven process.
- It will maintain the real value of wages.
- It sits happily by reference to movements in the CPI and underlying wages growth.
- There are guaranteed salary increases with specified dates of payment.
- There is no onus on employees to justify and seek increases at the commencement of or during the term of the agreement.

57 The 2004 Agreement should provide for 3.3 per cent in the first and second years and it already provides for up to 2 per cent in the form of an allowance from the beginning of the first pay period commencing on or after 26 February 2005 for those who have had their salaries maintained. The rationale for the 2 per cent payment is that up to 2001, the application of the then current wages policy resulted in disparities in pay and conditions between agencies and within occupational groups. That disparity was up to 30 per cent. Employment conditions varied significantly due to conditions being traded for pay increases. There was a significant disparity in hours of work, leave entitlements and access to other conditions such as higher duties allowance. In 2001, the Government recognised that this situation was untenable as it adversely affected labour relations within agencies, and compromised the effectiveness of operational and strategic management in the public sector. The Government's Wages and Parity Policy of 2001/2003 was for the restoration of parity of pay and conditions amongst like employees. This had implications for increases of up to 20.96 per cent depending upon the relativity to the 2002 General Agreement rates of pay. Following the January 2003 salary increases under the 2002 General Agreement, the Government says that 2,415 FTE (or 8 per cent of the current 30,100 FTE) remained in receipt of salaries in excess of the 2002 General Agreement rates of pay and had their higher salaries maintained. Conditions of employment were brought back to a standard across the sector. As a result, employees who had traded off conditions for pay increases had those conditions returned to them at no reduction in salary. The value to employees of returned conditions was up to 10.5 per cent with an average value of 7 per cent. This is comprised of a reduction of weekly hours from 40 to 37.5, days in lieu of public service holidays, 3 days' short leave, 7 year accrual of long service leave and return of annual leave loading. For those employees who cashed out long service leave valued at 9.28 days per annum, the increase through the return of conditions could be as much as 13.4 per cent. The Government says that in the first year of the 2004 Agreement, with an increase of 3.3 per cent, 1,168 FTE of the employees who are salary maintained will have their salaries increased with the new 2004 Agreement rate, and after a second year increase of 3.3 per cent all but 90 FTE will be in receipt of the 2004 Agreement rate of pay (see Exhibit Book 3 documents 3, 4 and 5).

58 The Government says that the productivity improvements remain a significant factor in the measurement of agency performance. A major shift in the 2001-03 policy from previous policies was the removal of the requirement that wage increases be contingent on productivity bargaining at an individual agency level. The Government took the view that agency efficiency is a budget driven process monitored by the Department of Treasury and Finance, and the transition to centralised negotiations is to provide the opportunity for agencies to concentrate resources on organisational reform rather than on measuring individual employee productivity at a micro level. The disparity in conditions of employment associated with the previous policies and agency-level bargaining involving disparate wage outcomes between different occupational groups was considered unacceptable. There was said to be disparity in wages in the vicinity of around 30 per cent or $18,700 per annum of the average salary. This was inequitable and unfair, agencies were competing with each other for employees, there was administrative inefficiency associated with resources being diverted into justifying productivity based increases, and redeployment and/or mobilising resources across the public sector to areas of most need was becoming increasingly difficult. The policy contained principles of fair and equitable outcomes in occupational groups, the restoration and parity of wages and employment conditions and the establishment of bench marks. Wages and conditions were to be negotiated centrally and core conditions of employment and wages were to be established amongst like employees. The policy also had the objectives of facilitating the containment of wages growth to within government defined parameters and providing for wages outcomes that neither lead nor lag the rates generally.

59 According to the Government, its 2003/05 Wages Policy comprises of a package of reforms and expanded benefits including award modernisation, the conclusion of the 2004 Agreement and consequential award variations. The Government identified the changes to conditions of employment associated with the 2004 Agreement including flexible working arrangements, personal leave, purchased leave, higher duties, days in lieu of public service holidays etc. The wages outcomes ought to be

viewed together with the current policy package. Issues associated with the collective bargaining policy statement include the Fixed Term Contract Conversion Policy. The Government also notes the Labour Relations Reform Act 2002 which focused on related matters.

Government to Determine and Implement Policy

60 The Government maintains that it does not assert incapacity to pay but says that it has a right to determine and implement policies of its choosing, balancing competing requirements of public interest and financial sustainability. It has taken its position to balance public interest and wages outcomes so as not to jeopardise the economic outlook of the State. The Government says that there is a need to take into consideration all the circumstances in determining how it is going to allocate skills and resources within the public sector and that while decisions may attract criticisms, that is a matter for the Government subject to the electoral cycle. For example, the Government has determined what savings it seeks to implement from the FRIT shared services cluster corporate services reform initiative and other such changes, and to channel savings back into key policy priorities such as health, education and law and order in accordance with its commitments. The Government says that savings belong to government and government has a right to determine how it prioritises its expenditure.

61 In Civil Service Association of Western Australia Inc v Attorney General and Director General of Ministry of Justice ("the Ministry of Justice case") (1999) 80 WAIG 193 at 207 the Commission in Court Session referred to a decision of the Full Court of the Federal Court in Drake v The Minister for Immigration and Ethnic Affairs 24 ALR 577 at 608 in which Bowen CJ and Dean J noted:

> "In a matter such as the present where is it permissible for the decision–maker to take into account relevant government policy in making his decision, but where the tribunal is not on statutory duty to regard itself of being bound by the policy, the tribunal is entitled to treat the government policies as a relevant factor in the determination in an application for review of the decision."

62 Brennan J re-affirmed that position in Re Drake (No. 2) (1979) 2 ALD 634.

63 In this context, the Government says the Arbitrator should treat government policy as a relevant factor in determining wages outcomes, that it is not appropriate to ignore government's proposed distribution of potential savings and allocate them primarily to CSA covered employees. The Government says that significant weight ought to be given to its policies as opposed to the CSA's case where the focus is only on wages outcomes for its members. Government policy settings are broadly based and have to have regard to the public interest as well as the interest of employees, economic considerations and financial imperatives. The future savings generated by government policy implementation should be able to be earmarked by government for expenditure on those areas of priority.

64 The Government notes that there has been no nexus for public servants with any other occupational groups and the terms and conditions of Western Australian public servants are to be viewed as a comprehensive package and enhanced over time without any recourse to tradeoffs.

65 The Government referred to the various increases and salary rates which apply in other States and noted that Western Australia has historically sat fifth and sixth amongst the states. Currently it sits at approximately sixth. Salary increases of 6 per cent or $60.00 would rank it No.1 in the year 2005.

Community Movements

66 The Government believes that the CSA's reference to the ADAM data produced by ACIRRT, is unhelpful because it contains a number of short comings. These include that the category of "public administration sector" is far broader than administration of both central and state government policy, regulation and services. The public sector category as defined by ACIRRT includes non-profit organisations undertaking welfare and community development work which are primarily funded by federal, state or local government. It also includes government trading enterprises. Accordingly, the Government says that this category is least useful as an indicator of average wage increases awarded to federal and state public servants.

67 The Government also noted that focusing on the quantum of percentage increases alone fails to recognise that there may have been trade offs in allowances and conditions to fund increases. It also notes that the ADAM data ignores other factors such as when employees last received a pay increase.

Minimum Wage Rates

68 The Government notes that legislation at the state and federal levels recognise that the role of the award is to form the safety net, and distinguishes between the setting of minimum wages for the safety net and increases arrived at through enterprise bargaining. The Government notes that the award safety net review is focused on the low paid whereas agreement increases are tailored to suit the needs of the employer and the employees at a particular workplace or in a particular industry. The rates of pay received by public servants through enterprise bargaining arrangements are well above the award safety net. There is no nexus between the wage increases provided to employees through award safety net adjustments and those resulting from enterprise bargaining. This absence of nexus is said to be evidenced by the growing gap between award rates of pay and those provided in registered and certified agreements. The Government's support for a $20.00 increase to the federal award safety net is said to have no relevance to the wage increase offered to Western Australian public servants through collective bargaining.

Flat Dollar Component

69 The Government says, by reference to a number of submissions to the Australian Industrial Relations Commission's National Wage Case May 2004, that for the purposes of a flat rate increase the low paid are generally found in the private sector, and that in the CSA's claim of a flat $60.00 per week increase or 6 per cent, the flat rate increase would end at the top of the Level 4, with a salary in the vicinity of $49,293. This does not constitute a low paid classification by any measure. In the public service, any consideration of low paid classifications might be at the very lower levels, at Level 1.1 and 1.2, within the context that there are no low paid workers per se within the public sector.

70 The Government says that the internal set of classification relativities have changed markedly over time as a consequence of flat dollar increases and have been compressed. In the period prior to productivity bargaining that compaction slowed down. A flat increase of $60.00 would dramatically change the relativities from those created some time ago and certainly from those which are relevant today.

71 The Government disagrees with the CSA's assertion that the classification system entrenches gender bias, and its reliance upon the Equal Opportunity Commission Report of 1989 and Dr Christine Short's research in relation to the broad banded structure. The Government says that broad banding involved rolling into Level 1 of the broad banded structure many of those lower entry-level positions which were predominantly occupied by females. The broad banded structure then provided greater access

to higher levels of the rates of pay by automatic progression without the need for promotion, thus remedying some of the issues associated with gender bias which were a feature of the previous classification structure. Qualification barriers have been removed providing all base grade officers with access to the complete Level 1 scale.

72 Further, the Government says that the existing classifications and rates of pay have been established over many years of negotiations, by consent and through the use of bench marks and work value considerations.

73 The Government also refers to the decision in the Ministry of Justice case (supra), where the CSA argued that due to the disproportionate number of females in the lower classifications, the Commission should rectify the indirect discriminatory effect of awarding a percentage increase to lower classifications by granting a flat dollar increase. In that case the Commission determined that there was simply inadequate evidence to grant a flat dollar increase on that basis. The Government says that the CSA's case in this matter has less validity than it did in the Ministry of Justice case (supra). The Human Resources Minimum Obligatory Information Requirement data ("the HR MOIR data") gathered from agencies reporting to the Department of the Premier and Cabinet, while demonstrating that women fall at the lower salary levels, does not take account of the number of women in part time or less than full time work. Even though there might be an over representation of women in receipt of lower salaries, the HR MOIR data does not identify whether that is by reference to part time (or less than full time) work or by reference to classification level.

Productivity

74 Government says that there is no satisfactory measure of labour productivity for the Western Australian public sector, and refers to the findings of Kelly et al in "Workforce Beyond 2000 … Workforce Projections 2002 – 2022 - Population Ageing and the Western Australian Public Sector Workforce" (The Centre for Labour Market Research, 2003). The Government says that a commonly used definition of productivity is "the rate at which goods or services are produced" or "output per unit of labour". It says that this definition can be applied to industries or activities that lend themselves to being quantified and where there is no requirement to factor in a quality criterion. Such a definition is said to be meaningless in a service based organisation and this difficulty is enhanced in the public sector.

75 The Government brought witness evidence to rebut much of the CSA's evidence. The Government's view is that the CSA's witness statements came from only 12 agencies out of 114. Those 12 agencies comprise around 12,000 to 13,000 CSA covered employees which, although a significant proportion, still is not a majority of the more than 30,000 or so public servants and government officers employed in the 114 agencies. The affidavit evidence is also confined to relatively small areas within each of those agencies. The bulk of the CSA's witnesses provide anecdotal information and mere expression of opinion. The Government says that these witnesses may genuinely have views and beliefs about their workplaces but they are views and opinions not necessarily borne out by the facts. For example, a number of the witnesses have given evidence using terms such as "work load", "productivity" or "work value" without defining the meanings of those terms. The Government says that there is no universal or generally accepted definition that those witnesses have applied and therefore they should be treated with some degree of caution.

76 There was some criticism of the CSA witnesses' statements on the basis that some provide little or no useful direct substantiation of the assertions made or credible back drop to the "litany of woes that the CSA members claim that beset the public sector" (transcript page 268). The Government says that some of the affidavits contain statements of pettiness, irrelevance and trivia. This they compare with the statements provided by Government witnesses "aware of their accountability and obligations associated with the nature of their responses".

77 However, the Government says that an analysis of the statements provides some general trends or themes in the following categories:

> "Work loads, funding, work value or changes in the nature of work, changes in organisational change, increase in pressures or stress and increased output."

78 The Government's affidavits have come from the Departments of Education and Training, Environment, Community Development, Justice, Land Information, Planning and Infrastructure, Western Australian Police Force, Consumer and Employment Protection, Racing, Gaming and Liquor, and Industry and Resources. There is also evidence in respect of Government Officers Salaried, Allowances and Conditions Award 1989 covered officers at Central TAFE and the Pathcentre together with general, central responses from the Department of the Premier and Cabinet and the Department of Treasury and Finance. The Government says that the mere lack of direct rebuttal by Government witnesses to statements or assertions in CSA witness statements does not mean that those statements are accepted. Rather they might be viewed as unverified information about which assumptions, fallacious or otherwise, have been made.

79 However, there is particular challenge to Ms Walkington's statement at paragraph 61 of a requirement on many government agencies to maintain an FTE vacancy rate. Geoffrey Alexander Hay from the Department of the Premier and Cabinet says that central government agencies have no knowledge of such a requirement, and that agencies are funded to provide services and determine their appropriate staffing requirements.

80 While the CSA deals with a question of population growth and a ratio of public servants to population, Mr Hay says that this is not relevant, rather staffing levels need to be determined according to the range of services to be provided by government.

81 As to particular areas of alleged work load problems in the CSA's witness statements the Government made particular reference to its own witnesses' responses including in respect of the Department for Community Development. The Government says that Mr Intini's evidence recognises that there were resource and work load issues, however, they are being addressed. There have been increased resources to deal with particular areas of priority and work load, for example the Government's response to the Gordon Inquiry included the creation of additional positions which have been filled, and the Department has proposed an additional $12m in its budget submission. It says that the Joint CSA/DCD Workload Management Project is a continuation of those principles and that work load is being managed in a fair, consistent and strategic manner.

82 The Department for Planning and Infrastructure's Licensing Centre has increased staffing and restructured the call-centre to meet the demands of the work load and the needs of the staff. It is said that this, however, does not provide evidence that there had been an increase in the output required of individual employees, or an increase in productivity. John Mercadante, the Director Human Resources for the Department, says also that there is no difficulty in recruiting planners as alleged by Clinton Floate for the CSA. He says that there has been a backlog of some applications to the Department and strategies have been developed for it to be managed, including recruitment of additional planners. There have been periodic voluntary, structured and paid overtime sessions.

83 There was also evidence from Amanda Lee Hurt and Alan Ray Gregory from the Department dealing with the changes which have occurred, which challenge some of the evidence of Tania Debra Shilcock and Stephen James Farrell.

84 There was also evidence in respect of the Department of Employment and Consumer Protection receiving additional funding and an additional 61 FTE to meet the focus on areas of compliance and regulation.

85 The Department of Justice's witnesses Michael Shane Cardy, Terence William Simpson, Travis Lang, Christine Anne Laird, Michael Herbert Johnson and Leslie Harrison have also dealt with the matters raised by Mr Ellis in his evidence. Mr Cardy says CSA covered Prison Division staff is 471, not 300 as reported by Mr Ellis. Mr Simpson says that there has been a decrease in FTE consistent with a reduction in work. Ms Harrison set out a range of strategies being considered by the Department to deal with excessive hours worked by prison counselling staff. Michelle Scott, the Public Advocate, gave evidence of measures to address the work load in her office, including an increase in FTE. Mr Johnson, the General Manager of Community Justice Services, provided a statement in which he reported the development of a Case Assessment and Management Model, which has been piloted. It will be rolled out state-wide and will assist staff in managing their work loads. Amongst other things, he refers to a report dealing with improving stability of staff and providing a new level of professional case practice oversight over a relatively short period of time.

86 Brendan James Richard O'Neil, the Acting Director Corporate Services of the Department of Environment, says in response to Mr Hewson's statement, that additional resources have been allocated to the Department from 215 FTE in September 2001 to 438 FTE in March 2004. He says that further funding increases have been provided to deal with deficiencies identified by the Auditor General's September 2003 - Public Sector Performance Report - Management of Water Resources in Western Australia.

87 The issue of work load and resources within the Department for Community Development as detailed in the CSA's evidence seems to be acknowledged by Mino Franco Intini, who is the Executive Director Business Services of the Department, in that he notes that there have been significant pressures on existing resources, and that "funding for additional field staff in the 2002/03 budget was sought, however, a decision by Treasury was deferred pending the findings of the Gordon Inquiry", and that "the Department's budget for 2004/05 contains proposals for additional funding for $23m for 30 Protection and Care Workers."

88 The Government also says that issues of work load can be dealt through a co-operative process, and that there is a demonstration that this has the capacity to resolve issues. The provision in the 2004 Agreement will provide a process whereby agencies can responsibly and meaningfully deal with issues of work load and work towards resolving them in a co-ordinated and co-operative manner.

89 The Government says that work load issues have historically arisen from time to time and it envisages that the current issues will be resolved.

90 In summary, the Government says that the CSA's evidence has been confined to a small fraction of the employees in each of the limited number of agencies covered by the 2004 Agreement and that even if the CSA's evidence was unequivocally accepted, it relates only to generalisations about particular sections of some agencies. Some of it is not verifiable, and some of the statements in respect of work loads are highly subjective, assume different definitions and are being used as a tenuous basis for justifying a wage increase. It says that none of the evidence seeks to demonstrate in an objective or quantifiable way actual change from one point in time to another. Rather there is a universal assertion that work load is forever building, is non-cyclical and is demonstrably different from the past, whereas there is no clear, incontrovertible evidence of those things. However, the Government noted that it values and endorses public servants who are dedicated and conscientious, and acknowledges their commitment and effort.

91 In respect of allegations of reductions in funding, changes in staffing or re-organisation of arrangements, the Government says that there has not been a reduction in funding but rather there might be a change in the mix of services which results in a need to transfer resources away from some areas into others. However, as a result of the wages policy of 2001/2003 and 2003/2005, consistent with the comments made by Mr Hay, the number of public servants and government officers has dramatically increased since December 2000. The Government also noted the difficulty in defining and measuring productivity in the public sector by reference to the evidence of Professor Guthrie in the Ministry of Justice case (supra).

92 In respect of the future productivity on account of the establishment and the implementation of shared service clusters through FRIT, the Government says that prospective productivity cannot be attributable across all CSA covered employees and is realisable only in years to come, not in terms of the agreement under consideration. The number of staff affected in any event, is a relatively small percentage of the more than 30,000 CSA covered employees. This would mitigate against any claims that the CSA have already raised. The Government says that the CSA would have to demonstrate that the savings were generated by the productivity of the affected employees and not by technology, improved processes, reduction of duplication or other factors not directly attributable to the employees concerned. The employees themselves will not be doing anything significantly different and it would not constitute a change in work value. It may result in cost savings and efficiencies deriving from outside the control of the individuals concerned through things such as aggregation, reduction in the wide diversity of processes and systems across the public sector, an increase in the scale of service delivery to raise efficiency, removing duplication of the overheads, standardisation etc. However, it is not about fewer employees doing more work.

93 The Government says that there is no formula for sharing the gains from productivity improvements and that this was accepted by the CSA in the Western Australian Public Sector (Civil Service Association) Enterprise Bargaining Framework Agreement 1995 which stated:

> "(c) Sharing Gains from Productivity Improvement
>
> The parties accept that there is no precise formula for the sharing of gains from productivity improvements, but in any agreement, in addition to employee benefits, there must be a clear and specific return to the Government. Productivity improvements may be related to work practices or arrangements, subject to acceptance that where capital expenditure requires changes in work methods and/or the number of employees and the changes are of a nature that enhances the investment, it shall qualify as a productivity improvement, provided that there is a net benefit to the agency.
>
> Agreements should not rely primarily on improvements which are merely the result of good management, new technology or financial reforms/initiatives. For example, in the case of capital investment (technology), changes arising from capital expenditure, for which the agency takes the risk and which require a reasonable return on the funds invested, do not necessarily count as a productivity improvement.
>
> The treatment of improved efficiency arising from major capital expenditure is to be agreed by the parties to each agency agreement.

> Where employees repackage or sacrifice employment conditions, eg. extra public holidays, this can be considered as salary packaging and all or most of the saving or productivity improvement made by the agency can be returned to the employees."
>
> (75 WAIG 2500 at 2501)

94 The Government also referred to the 1991 National Wage Case Decision (Print K0300) where it was noted that:

> "We are not expressing an opinion that wage earners have no claim to benefit from growth in productivity due to other causes such as the general advance of technology and the growth in capital. It should be recognised however, that the distribution of all benefits of productivity in growth at the enterprise level would lead to inequity and ultimately to a distorted and unsustainable wage structure. Such a situation is not compatible with either a flexible labour market or industrial peace."

95 The Government also notes that the decision in the Ministry of Justice case (supra) at page 27 stated that models which measure productivity do not necessarily transfer to wage increases in any scientific way; ultimately that is a matter for the parties to negotiate. It also recognised the difficulty in assessing the worth of those productivity outcomes (page 39). Further, the Government emphasises that there has been a change, a new era now in wage fixation, that the period of the enterprise agreements from 1995 through to 2001 is now ended and productivity needs to be dealt with in a different manner.

Work Value Change

96 The Government says that the CSA is seeking to use work value as a basis for its claim and that this is not allowable in the current context of an across the board pay rise for all levels. It has not demonstrated that the current classification system actually undervalues the lower classifications in particular, and there is no inherit undervaluing at any level. The concept of Work Value contained in the Statement of Principles pre-dates its incorporation into those Principles and was a common basis for increased rates of pay prior to the current era. However, the incorporation of the test within the Principles and the fact that the Principles do not apply to this arbitration does not remove the necessity in such a claim to meet the requirements of the Work Value test, whether embodied in the Principles or not.

97 The Public Sector Management Act 1994 and Approved Procedures have the effect of giving the work value concept or principle primacy in the classification system. In the application of the Work Value test, it cannot simply be that a change in work load or volume, nor organisational restructuring or departmental amalgamation, would automatically constitute a significant net addition to work requirements. In fact, those changes may not substantially alter the work requirements of any position. If the CSA is seeking wage increases for all classifications, it has the onus of demonstrating a significant net addition to the work in respect of each classification.

98 The Government denies that the broad banding process has not been completed and says that there is no justification for that view or the view that the classification structure undervalues the work of classifications, especially at the lower levels.

Wage Comparisons

99 The Government says that there can be no direct comparison between public servants and government officers in Western Australia with any other public servants or occupational groups in this State or elsewhere. Outcomes of agreements in other areas are simply not comparable and are irrelevant. Each of those outcomes has been as a consequence of particular circumstances and the merits of each set of negotiations.

100 As to the CSA's comparative schedules (TBW 42, 43 and 44) in respect of the relative positions of CSA officers to nurses, teachers and police from 1993, the Government says that these percentage differences had no rationale or status at the time and no nexus exists between those groups. There is no rational basis for any comparison between those positions and CSA officers and the fact that they have different relativities now is of no real consequence. There is no nexus with police, nurses and teachers and the wage increases for each of the groups is determined on its own merits, taking account of the different claims, packages and circumstances, all of which are different for each group.

101 The Government also takes a different view of the calculation of the average percentage increase across CSA covered areas since July 2001 in that according to Mr Sims' affidavit, it is 4.7 per cent whereas Government says that it is 5.42 per cent and takes account of the 2 per cent allowance including the return of terms and conditions with a value in the vicinity of 10.57 per cent.

Economic Argument

102 The Government says that by reference to the statements of Timothy Michael Marney, from the Department of Treasury and Finance, the economy is performing satisfactorily and can afford a salary increase for public sector employees provided that it is moderate, and that excessive wage increases will put the economy at risk. Mr Marney provided statements dealing with general economic indicators within Australia and Western Australia and an overview of the State's economy including Gross State Profit, employment, wages growth and the CPI.

103 Gross State Product increased by 5.9 per cent in 2001-02 and 3.9 per cent in 2002-03. The Government *Mid Year Financial Projection Statement* ("MYFPS") of 19 December 2003, forecasts strong Gross State Product growth at 4.54 per cent for 2003-04 and a slight drop in 2004-05 to 4.25 per cent. Conditions in Australia's labour market have strengthened after a relatively weak patch in the middle of 2003, however, unemployment remains unacceptably high at around 6 per cent, and, in March 2004 at 5.5 per cent and there has been employment growth in recent times. The outlook for employment in Western Australia is positive and business confidence is running at high levels, with slow growth in the labour force, forecasting employment to increase by 2 per cent in 2003-04 and 1.75 per cent in 2004-05.

104 The Wage Cost Index ("WCI") for Western Australia generally grew an average of 3.5 per cent over 2003 with the Government's MYFPS of 3.25 per cent in 2003-04, and 3 per cent in 2004-05. Over 2003, the WCI for public sector employees increased on average of 3.9 per cent while the CPI increased by 2.2 per cent. The CPI is forecast to increase by 2.5 per cent in 2003-04 and 2004-05. Real wages in the public sector have increased faster than the CPI and this will continue.

105 There is a dispute between Mr Marney and Dr Carlin as to what might constitute excessive wages growth which might exacerbate inflationary pressures. Mr Marney was critical of Average Weekly Earnings ("AWE") as a measure of underlying wages growth saying that it has serious methodological problems. The WCI is to be preferred as a measure of wages growth. He says that the Australian Bureau of Statistics notes that the AWE does not provide a reliable indicator of changes in wage rates as it is significantly affected by compositional shifts in the workforce and does not take into account the number of hours worked or of employees' promotions to positions with higher rates of pay and different responsibilities. Users who require a reliable measure of change in wage and salary rates should refer to the quarterly WCI series which directly measures changes in wage and salary rates each quarter. However, the WCI series is a "price index which measures changes over time in wage and salary costs per employee jobs, unaffected by changes in the quality and quantity of the work performed". (ABS,

catalogue number 6345.0, December 2003, page 18) For a number of reasons associated with the broad statistical measures of the WCI series, Mr Marney says it is the more useful index.

106 Mr Marney says that wage increases in excess of the MYFPS are likely to put at risk the economic outlook for the State, noting that "wage increases granted to CSA covered employees traditionally impact on the outcomes for other occupational groups within the public sector and also influence expectations of wage outcomes in the private sector." Of particular concern would be the adverse implications for inflation and interest rates and for the State's attractiveness as an investment destination. He also notes that excessive wages growth exacerbates inflationary pressures including the prospect of increased interest rates which could affect both highly geared households and business investments and have a substantial adverse consequence for the economy. He noted that excessive wages growth could contribute to the wage – price spiral.

107 In an analysis of the affidavits of Dr Carlin and Mr Marney, the Government seeks to downplay the significance of Dr Carlin's conclusions on the basis that Dr Carlin says that he did not seek to replicate comprehensively the full ratings methodology to examine whether or not the State's AAA rating might be jeopardised in any way by the granting of the CSA's claim in its current form, that his analysis is a theoretical one which does not take account of the realities of providing a budget and forecasts in the real world content.

Estimate of Numbers Covered by the Agreement and Cost

108 The Government has put forward its best estimate of the numbers of officers or FTEs who will be covered by the 2004 Agreement at around 30,100 FTE in 114 agencies. The CSA accepts these figures as being the best estimate but there are some differences between the parties as to the number of FTE in each level and increment. The Government's estimates of cost have assumed that 70 per cent of officers in each level would be at the top increment point. Given those assumptions as to total numbers of employees, and the percentages within each classification and level, according to the Government's calculations, the additional cost of the Government's proposed 3.3 per cent each year is, for 2004, $41,678,531 and for 2005, $43,053,923. By comparison, the CSA's proposal of $60 or 6 per cent each year is, for 2004, $97,304,268 and for 2005, $98,419,615.

CSA RESPONSE

109 In respect of productivity being budget driven, the CSA says that this means that the amount of money allocated to an agency drives efficiencies, or the amount of resources it has dictates the achieving of productivity, and that this fits with the evidence the CSA has presented about increasing work pressure and enforced productivity. The CSA would say that this in fact constitutes budget enforced productivity.

110 As to the terms of the 2004 Agreement, the CSA says that many of the changes in the package of conditions do not constitute any significant improvement in conditions of employment but rather a re-arrangement of benefits and the way in which they are taken. In respect of the Work Load Management clause, the CSA says that this is a good start towards dealing with the work load but the CSA's experience through the Department of Education and Training and the Department for Community Development is that the issues will not be automatically addressed and that they are likely to require disputation and struggle by the workers involved. The inclusion of the clause itself does not resolve the problem. Nothing will change by the registration of the 2004 Agreement. It simply provides an opportunity for a process to be put in place to address issues.

111 The CSA denies that it is suggesting that certain particular comparisons have weight beyond forming part of the matrix of information which would inform the Commission in the process of decision making. Further, the CSA says that the rates of pay in the other state public services are not relevant because some have implemented competency based classifications whereas others are out of date. The levels from state to state are not necessarily comparable and therefore an attempt at comparison is not able to adduce any worthwhile results.

112 In terms of looking at the situation for teachers, nurses and police, the CSA is simply demonstrating the environment of bargaining in which the parties operate and that, while those agreements have reached a particular outcome under the same policy, the policy is being applied selectively and differently by the Government. It also notes that new classifications were arrived at in the Teachers' Agreement, and the Police Agreement contains something called "relativity adjustments".

113 The CSA also says that it has provided data from a range of sources covering a range of indicators for the purpose of assisting the Arbitrator to decide the current bargaining environment and what constitutes low, average and high outcomes for the purpose of putting into context what might be appropriate for the CSA covered areas. The CSA refers to the decision in the South Australian teachers' case, (The Australian Education Union v the Department of Education, Training and Employment - Print T 1383) and notes that it describes the approach that the CSA wishes to be taken. At paragraph 51, the Full Bench of the Australian Industrial Relations Commission made reference to the Tasmanian teachers' case, quoting from that decision, and making its own following comments:

> ""The information in these exhibits (covering interstate comparisons and the Tasmanian teachers' case) does not lend us to the view that we should fix the salaries of Tasmanian teachers at the same level as those in any other State or in either Territory. It does, however, assist us considerably in determining the salaries claim as it provides a broad picture of teachers (sic) salaries across Australia during the 1990s."
>
> Likewise, the information before us provides a similar broad picture, not only as to salaries but also as to conditions of employment, particularly, those relating to work load. We have found this information generally assistance and have taken into account in reaching our decision."" (paragraph 52)

114 As to the maintenance of relativities versus the issue of flat rate increases, the CSA says that by awarding the amount it seeks, for example, the relativity for Level 1.5 would move from 33.04 per cent of the Level 9.2 rate, to 34.29 per cent in the first instance and to 35.30 per cent in the second instance. This would not constitute a significant flattening of the structure in the scheme of things.

115 The CSA says that it is not its intention to attempt to re-establish relativities at a later time by claiming that they have been compacted by flat rate increases. Any attempt to re-establish relativities would need to be on the basis of a proper analysis of the classification structure and associated matters. In any event, the CSA says that the basis of its claim for a flat rate is in the context of percentage movements where the higher level is maintained in the relativities but that a combination of a flat rate at the lower levels and a percentage increase maintains a middle ground.

116 As to the 2 per cent additional allowance, the CSA says that that should not be taken into account in determining the appropriate level of salary increases. That is a matter which comes from attempting to provide a solution to the inequities which arose from the variable outcomes and disparities applying across the public sector due to enterprise bargaining and workplace agreements.

National Wage Case Decision

117 The Arbitrator asked the parties to address the relevance of the National Wage Case Decision of 5 May 2004. The CSA says that this has no absolute application to this matter for a number of reasons. The first is that the National Wage Case affected all industries as opposed to the Commission looking at the particular circumstances of this case. Further, the National Wage Case is award-based not agreement-based so there are different environmental considerations. However, the CSA notes that the National Wage bench has been happy to apply flat rate increases for some time although sometimes they are in steps. The National Wage bench does not appear to be overly concerned about the maintenance of relativities in the application of flat rate increases.

118 Where the National Wage bench agreed with the Commonwealth that the WCI data was the most useful direct measure of changes in wages costs for a particular position and therefore the most useful indicator for its purposes, the CSA says that the Arbitrator's purpose in this case is a different one than that in the National Wage Decision. The National Wage Case looks at the situation across all industry across the country, in respect of the safety net, in which case sector comparisons or interstate comparisons are said to have less relevance. Rather the CSA says that it is necessary to take account of all factors in the Commission's considerations in this matter.

119 In the Government's view, the National Wage Case flat dollar increases are for the purpose of ensuring safety net adjustments are made to award-based employees as opposed to enterprise bargaining outcomes. Otherwise, the Government says that consideration of this matter does not require consideration of the National Wage Case Decision.

CONCLUSIONS

120 This arbitration is undertaken in an entirely new era of wage fixing in this State. It occurs by virtue of the amendments to the IR Act by the insertion of provisions dealing with the processes and outcomes of agreement–making between parties. S.42G is part of the set of amendments bought in by the Labour Relations Reform Act 2002, in this case, by s.133. It provides:

> **"42G. Parties may agree to Commission making orders as to terms of agreement**
>
> (1) This section applies where —
>
> (a) negotiating parties have reached agreement on some, but not all, of the provisions of a proposed agreement;
>
> (b) an application is made to the Commission for registration of the agreement as an industrial agreement, the agreement to include any further provisions specified by an order referred to in subsection (2); and
>
> (c) an application is made to the Commission by the negotiating parties for an order as to specified matters on which agreement has not been reached.
>
> (2) When registering the agreement, the Commission may order that the agreement include provisions specified by the Commission.
>
> (3) An order referred to in subsection (2) may only be made in relation to matters specified by the negotiating parties in an application referred to in subsection (1)(c).
>
> (4) In deciding the terms of an order the Commission may have regard to any matter it considers relevant.
>
> (5) When an order referred to in subsection (2) is made, the provisions specified by the Commission are, by force of this section, included in the agreement registered by the Commission.
>
> (6) Despite section 49, no appeal lies from an order referred to in subsection (2)."

121 In the past, parties and the Commission have been bound by the limitations of the Statement of Principles arising from the various State Wage Decisions. Consideration was to be given to the state of the award safety net. Where parties were unable to reach agreement on one or more aspects of an otherwise agreed set of conditions for an enterprise agreement, the arbitration of that dispute could not occur other than by reference to the Statement of Principles.

122 In this case, the Arbitrator is able to consider a significant issue of dispute between the parties and incorporate the outcome in the 2004 Agreement for registration. In determining the dispute, the Arbitrator is to determine only the matters which the parties seek to be determined, taking account of the range of possible outcomes in the area of dispute. The considerations include the objects of the IR Act, as set out in s.6, and the provisions of s.26. In this case, the dispute between the parties as to the levels of salary increase provides for 2 issues to be determined:

1. The percentage increase, between the limits set by the parties' own positions, in this case between 3.3 per cent and 6 per cent for each of 2 years; and
2. Whether there should be a flat rate component.

123 The parties are agreed that the Arbitrator's decision should be within the limits of that range of outcomes. Neither party suggests that the other's position ought be exceeded by going above or below it, notwithstanding that the provision of s.42G(4) provides that the Commission may have regard to any matter it considers relevant. The parties were unable to agree on the factors upon which their respective positions of 6 per cent + 6 per cent or 3.3 per cent + 3.3 per cent should be based. They take different approaches. Furthermore, neither party is able to identify in particular terms why their position "adds up", why it is worth 6 per cent + 6 per cent or 3.3 per cent + 3.3 per cent.

124 Notwithstanding the provisions of s.42G(4), it is clear that s.26 of the IR Act contains matters which the Arbitrator is nonetheless bound to take into account.

The Evidence

125 A significant amount of evidence was provided by the CSA from employees in a range of departments and agencies relating to reduced resources and increased work load. The CSA described the combined effect of these factors as enforced productivity improvement.

126 The evidence demonstrates that over the last decade in particular, in those sections of the agencies about which evidence has been provided there have been ongoing or recurring processes of review and enquiries about the focus, services and functions to be and which are being provided by those agencies. These have resulted in a range of different types of restructures, including amalgamation of departments, outsourcing, privatisations, and in some cases, the break up of departments. The functions and services provided by the Government have changed in a number of ways including that additional and new services or functions are undertaken, some cease, and others are no longer performed by Government, or are not performed in the name of the Government.

127 There is no particular report which provides, on an agency by agency basis, any analysis of changes in service provision by the introduction of new services, the modification or deletion of existing services, outsourcing or contracting out, or competition with the private sector and compares that with the changing levels of and allocation of resources over time. Further, there is no analysis of the benefits of changed technology, amalgamations, and rationalisations which might explain any perceived increase in work load, work value or productivity. There is no way of comprehending the total impact on staff numbers and resources of each of these changes, the effect on the amount of work to be done by public service officers, and the number of hours of work attaching to that. It is simply not possible then, across the board, to establish a balance sheet to prove or disprove any or any particular amount of so called enforced productivity improvement. It is only possible to say that the work of government has changed in many ways over the years as to the nature, volume and manner in which the work is performed. The public service responds to government initiatives in the most effective, efficient and productive manner, as part of the ongoing review and re-assessment of how the community can receive value for money from the public service.

128 Based on the evidence, it is clear that in recent years the public sector workforce has decreased overall. There was an increase in 2001, however, it has not been within the areas covered by the 2004 Agreement. Additional numbers have been in nurses, police officers and in associated areas. (see *Profile of Western Australian State Government Workforce 2003*). That increase reflects government's priorities. Government is entitled to establish its priorities. In any event, total numbers of employees is only relevant when it can be allocated to particular amounts of work to be done, and to particular methods of performing that work. It needs to be viewed in context. That context includes whether some of that work is no longer to be performed, or is to be performed by the private sector. For this reason, total numbers and ratios as to population are not helpful or indicative in determining either actual work load per employee or productivity.

129 Governments, as do all employers, determine by the allocation of resources, the priorities in terms of functions and services to be performed. The employer has the right to determine those priorities and the amount and type of goods or services to be produced or provided. If the employer chooses not to produce a particular good or service, that is the employer's choice. Similarly, if the employer chooses to provide a different good or service, or provide it in a different way than it formerly had been provided, that too is the employer's right. It is not the role or responsibility of the employees to make such a decision, although they may perceive, from their no doubt experience–based views, that a product or service ought to be or continue to be provided and produced, and in a particular manner. This is the role of the employer. Having made its decision as to the nature or type of product or service and how it is to be produced or provided, it is up to the employer to provide the mechanism, structure and resources to achieve that purpose. For employees to decide to put in extra resources by the working of uncalled for hours of work may be counterproductive. If the employer fails to provide adequate resources for the execution of its decisions such that employees are required to make an unpaid or unrewarded but nonetheless expected contribution, such a requirement is exploitative. When resources do not match the requirements for the tasks and functions within the required timeframes, a range of problems result. These include adverse effects on employees, their health, and on their families.

130 If employees work overtime in accordance with a request or direction from their employer, then they have a right to be paid in accordance with their award or agreement provisions.

131 In the case before the Arbitrator, there is a significant amount of evidence of an anecdotal nature, and evidence of individuals' experiences and perceptions, which indicates that many government officers have good reason to believe that, in a range of departments and agencies, there has been a real and significant increase in work load, and a reduction in resources allocated to that work load. The evidence demonstrates that many employees have a commitment to the performance of their work which they say sees them working harder and longer than their employers compensate them for. This is not so much that they are required by their employers to perform additional work, but they choose to do so for a variety of reasons. Those reasons include the commitment to the achievement of their employer's goals, a belief that the work needs to be done, a lack of direction not to perform the additional work, and in some cases, tacit approval by the employer or supervisors, with an understanding that no overtime will be paid.

132 This is not the appropriate manner of managing excessive work load. The appropriate manner is the proper allocation of resources to the work which the employer requires to be done. That includes appropriate structures, people, materials and technology.

133 It is appropriate that employers properly recompense employees for their efforts. It is also important that employers choose which areas and what tasks and functions will be allocated resources, and the time frames for performance of those tasks and functions.

134 The evidence in this case has not simply been of an anecdotal or subjective type, purely from the perspective of the employees. There are independent reports which support some of their evidence about excessive work load, eg. the *Mercer Report* and the *Auditor General's Report (September 2003) – Public Sector Performance Report on Management of Water Resources in Western Australia.*. The need for additional people has clearly been recognised by some of the departments and agencies, in some sections of those departments and agencies, and is in the process of being addressed. There is also evidence of some difficulties in the allocation of resources to address some of the work load issues.

135 The parties to the 2004 Agreement have recognised work load as an issue which needs to be addressed, and they have provided a mechanism for work load issues to be raised and addressed. Clause 26. – Workload Management of the 2004 Agreement provides as follows:

> **"26. WORKLOAD MANAGEMENT**
>
> 26.1 Employers are committed to providing a safe and healthy work environment and will not require employees to undertake an unreasonable workload in the ordinary discharge of their duties.
>
> 26.2 The objective of this principle is to ensure workload allocation is fair, manageable and without risk to health and safety.
>
> 26.3 Employers shall take reasonable steps to ensure that employees:
>
> (a) do not work excessive or unreasonable hours;
>
> (b) are able to clear annual leave; and
>
> (c) are paid or otherwise recompensed for work as provided for under the Award and this General Agreement.
>
> 26.4 Employees are required to perform, attain or sustain a standard of work that may be reasonably expected of them.

26.5 All relevant indicators of workload should be monitored. Indicators may include:

(a) nature of work;

(b) work patterns;

(c) environment in which work is performed;

(d) volume of work;

(e) level of performance;

(f) turnover;

(g) accident rate;

(h) incidence of workers compensation;

(i) sickness absence;

(j) early retirement records;

(k) referral rates and general feedback from counsellors; and

(l) exit information.

26.6 Where employee performance issues are identified these will be managed in accordance with an agency's performance management policy and should take into account:

(a) training and development;

(b) application of skill and competencies;

(c) capacity to perform at a required level;

(d) individual accountability; and

(e) communication and feedback.

26.7 Workload issues may be dealt with as a function of the agency joint consultative committee.

26.8 With the exception of employee performance related issues, where workload issues are identified a review team agreed by the parties will be convened within 21 days of a written request from either party. Broader consultation of the findings of the review team can be undertaken through the joint consultative committee."

136 The remedy for an inappropriate work load is the recognition of the problem and its rectification. It is not, in the long term, appropriate to remedy work load by increasing rates of pay. Certainly an increase in the rates of pay may act as some sort of recognition and reward to employees, but it is the resolution and rectification of the problem which is needed. As I have noted, the parties have provided for that situation. If the implementation of the provisions of the clause does not resolve the issue, then there are other mechanisms in place including recourse to the Commission for the issues of work load to be addressed. I would urge employees to utilise the mechanism set out in the 2004 Agreement to raise and attempt to resolve the issues they have identified in evidence.

137 The employees covered by the 2004 Agreement perform important work in the operation of the State, including in some key areas of health, education and policing services, where the Government has chosen to direct more resources and higher pay for nurses, teachers and police officers but not for administrative or support staff. I acknowledge and recognise that there are many employees whose commitment to their jobs in the face of limited resources means that they have worked above and beyond the hours of their engagement and without additional remuneration. However, it should not be and cannot be the basis for an across the board increase in salaries which will forever elevate the whole salary scale. Rather, the work to be performed must be determined by the employer and the appropriate resources applied to the work.

138 If the CSA's claim of enforced increased productivity due to work load pressures were based on the concept of increased work value, then, the concept of a significant net addition to the value of the work, and the attendant conditions, applies. Although the Wage Principles per se do not apply to an arbitration of this nature pursuant to s.42G of the IR Act, the concept of work value assessment is one which has been in use for many years prior to its inclusion in the Principles. Increased work volume does not of itself constitute increased work value. In this case, the effect of the granting of the claim based on any concept of work volume or work load pressures which may be addressed, and thereby not continue, would have the effect of "ratcheting up" the whole of the salaries structure across the board, as it relates to all employees. In those circumstances, such an increase would not be justifiable.

139 The CSA also relies on increased scrutiny and public expectations to justify its position. These are features of most work environments in contemporary society and are not exclusive to or more onerous on the CSA's area of coverage. They may add to work pressures, but not to productivity or work value.

140 Accordingly, I find that the basis on which the CSA has constructed its claim, of enforced productivity improvements arising from increased pressure of work load, public expectation, increased scrutiny and organisational structural changes, is not able to sustain the claim it has made. That is not to say that there has not been an increase in productivity. Clearly, over the last 2 decades in which the wage fixing system has linked pay rises to Restructuring and Efficiency (67 WAIG 435), Structural Efficiency (68 WAIG 2412), and through enterprise bargaining on the achievement of particular productivity gains, there have been significant improvements in the way in which work has produced results. Past productivity has, throughout the period, not been able to be accommodated by the Principles, and rightly so. In addition to the particular contribution made by employees, Government has made changes to the mechanisms by which its goals and priorities are met, by way of restructuring of departments and agencies, outsourcing, privatising and contracting out by the application of different work arrangements and changes in technology.

141 Employees have been rewarded by increases in their rates of pay on account of those improvements in productivity much of which has arisen not simply by them working harder or longer, but also by them performing their work more effectively and efficiently through the application to their work of advances in technology and better structural and procedural arrangements.

142 The employees are to be rewarded for their contribution to the increase in productivity, and the employer is to reap the benefits also. However, generally speaking, there is no way to distinguish between the improvements in efficiency and productivity brought about by employees' efforts alone and those which are attached to changed work methods, changed structures and the application of technology. It was stated by the Australian Industrial Relations Commission in the National Wage Case

decision of 30 October 1991 that employees have a claim to some of the benefits of growth in productivity "justified by and commensurate with employees' contribution to enterprise efficiency and productivity".

143 The question arises as to how to measure productivity. There are many definitions of productivity, however its measurement in the public sector is problematic. Kelly et al in *Workforce Beyond 2000* (supra) noted:

> **"Labour Productivity**
>
> Economists are often concerned with measuring the growth in labour productivity, taken as the growth in output per unit of labour input for a given unit of time. Changes in this measure of productivity result from improvements in labour efficiency, technological change and other factor inputs such as capital. Typically, it is estimated using real gross domestic product per hour worked, or as the ratio of value added to full-time equivalent workers. It is difficult to find estimates of labour productivity growth for the public sector because of a lack of sound measurement techniques for the estimation of output or value added.
>
> A 'consensus' estimate derived from the literature would suggest labour productivity growth for the Australian economy as a whole will lie somewhere around 1.76 over the next two decades. Table 6.2 shows the growth rates in the population, the public sector workforce and the ratio of population to public sector employees for selected States. For the five mainland States the population is growing at a faster annual rate than public sector employment. Thus, the rate of increase in the ratio of population to public sector employees is also positive. At first glance this appears to be a reasonable proxy for labour productivity growth, however, some caution needs to be exercised. Over the period in question the public sector has embraced outsourcing to the private sector on an unprecedented scale and has also cast off various services to the private sector, or allowed for private operators to compete with the public sector in delivery of services. There is also no indication of the value of the output in question. With these caveats in mind the data for Western Australia suggest an increase in productivity, averaged across the sector, of around 1.6 per cent per annum since 1983.
>
> **Table 6.2:** Growth Rates of Public Sector and Population, 1983-2002

	Growth Rates			Population Per Public Servant	
	Population	**Public Sector Employment**	**Population Per Public Servant**	**1983**	**2002**
New South Wales	1.09%	0.04%	1.05%	15.1	18.6
Victoria	0.95%	-0.73%	1.68%	14.4	20.2
Queensland	2.03%	1.63%	0.39%	14.5	15.6
South Australia	0.63%	-0.62%	1.25%	13.3	17.0
Western Australia	**1.73%**	**0.14%**	**1.59%**	**11.9**	**16.4**

> Source: ABS Cat no. 6248 "Wage and Salary Earners, Public Sector, Australia, table 3; ABS Cat no. 3101.0 Australian Demographic Statistics"
>
> (pages 31-32)

144 Therefore, according to Kelly et al, the yearly average increase in productivity would be around 1.6 per cent each year since 1983. However, I note the difficulties in measuring productivity in the public sector. As noted earlier, I am not satisfied that population per public servant as a measure is, according to Kelly et al, "a reasonable proxy for labour productivity growth" in Western Australia.

145 However, there have been pay rises since 1983 which well and truly account for such increases in productivity at the level of 1.6 per cent each year. Having said that, some of those pay rises accounted for trade offs in conditions. Some of those trade offs have been returned through recent general agreements and as part of the parity of conditions arrangements. It is not now appropriate to go back, as this claim does, and seek to identify and measure productivity improvements said to have arisen by force through the lack of application of resources, and distinguish those from increases in productivity which have been rewarded through enterprise agreements. In that context, it is inappropriate to award salary increases on the basis claimed.

146 The question arises though, in the current, and new era of wage fixing as to how to reward employees for their ongoing efforts, for their maintained and continuing improvements in productivity and to ensure that their rates of pay keep pace with those applicable to the workforce generally, and in a manner appropriate to sustain the economy generally, their industry sector and their employment.

147 As far as the Government's alternative basis for establishing an appropriate rate is concerned, I must express some serious reservations about the basis of setting rates of increases in salaries through a process involving productivity being "budget driven". It is true that government has the right and indeed the responsibility to establish its priorities and to set a budget to meet those priorities. As with any organisation, from a household to a major corporation, from a small business to a national government, priorities are set and resources found to meet them. Sometimes it is necessary to defer particular goals, or to borrow to achieve them. Sometimes there are windfall gains which enable the earlier achievement of some goals, or the enhancement of some arrangements. Unexpected expenses arise which also must be met.

148 The current round of wage negotiations is a case in point. The Government set its wages policy which included budgeted provisions for specific pay increase percentages. Yet, where particular cases were seen to warrant their being excepted from the generally applicable policy, higher pay increases were agreed, eg. The Western Australian Police Service Enterprise Agreement for Police Act Employees 2003 (No. PSA AG 45 of 2003).

149 Government policy is a matter for weighing in the balance with many other issues in the setting of salaries. The budget-driven process should not be taken to mean that a rigid adherence to the budget set by government is necessary for the equitable resolution of this matter. In fact, the Government, in submitting to this arbitration, has accepted that this is so.

150 Budget driven productivity improvements can result in a process where meeting the budget becomes the focus and aim, rather than a tool for and a constraint upon the achievement of the priorities of government, being the provision of services. It has the potential to lead to an ever increasing demand on employees through continuing reductions in resources allocated to the

achievement of the provision of services by the application of budgetary constraints. This would lead to the sorts of complaints raised in the CSA's witnesses' evidence, eg. regarding school support staff and in the Department for Community Development. Although such situations must ultimately be recognised and addressed, there may be a period of inadequate resourcing brought about by continued reductions in personnel before such situations are identified and addressed.

151 As to the expert witness evidence of Dr Carlin and Mr Marney, Dr Carlin says that, based on what might be described as a theoretical analysis, with all other things being equal, the CSA's claim of 2 annual increases of 6 per cent is viable according to the State's financial position, and would have no real prospect of an adverse impact upon the State's credit rating. Dr Carlin also says that the budgeted forward estimates do not constitute a set of figures based on fixed assumptions which will necessarily hold true. Rather he says that budgets are fixed according to a set of priorities and are adjusted according to practicalities and exigencies as they arise. On the other hand, Mr Marney says that the State's budgets and forecasts have been established taking account of the principles and priorities of the Government, taking account of particular objectives, and increases of the magnitude sought by the CSA have the potential, taken with other uncontrollable factors, to affect the State's financial position and its rating by external agencies. This has the potential to create negative impacts including on this State's future borrowing arrangements.

152 Mr Marney says that a wage outcome at a higher level than that provided for in the MYPFS would result in an unacceptable risk of an adverse economic impact. Dr Carlin says that Mr Marney's statement does not provide any demonstration as to why wages growth at or below the levels countenanced by the MYPFS would be safe or acceptable. Dr Carlin says that this challenges the credibility of Mr Marney's statement in that regard. Mr Marney, in response to Dr Carlin's statement, concludes that given the manner in which Dr Carlin has undertaken his analysis, he believes that rating agencies would draw a different conclusion than Dr Carlin as to the State's net debt position. Further, Mr Marney is critical of Dr Carlin's reference to a windfall bonus of an extra $453m on the basis that "the increase in Goods and Services Tax (GST) grants to Western Australia in 2004-05 relative to the 2003-04 Mid Year Review (MYR)) due to the change in the Grants Commission distribution formula is actually $284m. The remainder of it is natural growth in the GST revenue, of which all states obtain a share". Mr Marney also notes that since the MYR, the Australian dollar/US dollar exchange rate has changed significantly reducing the royalty revenue by about $13.5m for each one cent increase. Also, the sale of the gas pipeline has not yet occurred and therefore no stamp duty on the sale has been achieved. Mr Marney comments also on the State's sources of revenue limiting the budgetary benefits of a strong domestic economy due to the fact that the State's own sources of revenue will constitute only about 50 per cent of its income. He says that "historically only State taxation revenue (which is only around 30 per cent of total revenues) bears any consistent relationship to growth in the State's economy and budget benefits for the State from royalty revenue growth are, over time, largely lost through the Commonwealth Grants Commission redistribution process" (paragraph 16, Marney, April 2004).

153 Mr Marney also draws attention to Dr Carlin's analysis being based on holding constant all other variables, and that this assumption is overly simplistic because it ignores the inevitable pressures that adversely impact on the State's finance such as the impact of a steeper than projected decline in housing activity on stamp duty and other matters. Mr Marney also says that Dr Carlin's statement that a risk associated with the implementation of a capital charging regime is the over inflation of cost aggregates at a whole government agency and output level, is factually incorrect. He says that the capital user charge does not add to the growth and whole of government expense levels due to the fact that it is an internal government transfer between the Department of Treasury and Finance and agencies that is taken out of the whole of government aggregates.

154 Each of these 2 witnesses takes a different approach to the analysis of the budget and forward estimates and to the certainty or otherwise provided by the budget driven wages policy of the Government.

155 It is clear from the economic information available, that the State's financial situation is sound. There is no challenge to whether the Government's position could be met without adverse impact on the state of the Western Australian economy. Mr Marney does not suggest that the CSA's claim could not be met, but argues against it on the basis that it may have adverse consequences to the overall budget and for the State's credit rating.

156 The issue remains as to what is reasonable given the expectation of ongoing productivity of the employees concerned, the effect of the outcome on the State's finances and the maintenance of a reasonable level of salaries taking account of general and, particularly public sector, wage movements as well as the cost of living.

157 It is fair to say that a good deal of progress has been made between the parties in this and the 2002 General Agreement to return the public sector to a situation where employees are treated equitably across the sector by the setting of bench marks and the equalisation of conditions. That process has involved some employees both maintaining their higher rates of pay and benefiting from the re-introduction of conditions for which they had previously received their higher rates of pay. The Government, as well as the employees, has and will continue to benefit from the move towards the restoration of parity.

158 The need to facilitate the efficient organisation and performance of work in accordance with the needs of an industry and enterprise within it, balanced with fairness to the employees in the industry or enterprise is one of the most significant aspects of this case. The question which is raised by this application, at this time in the wage fixing history as it has evolved over the last decade or so, is what is the value to be applied to the continuing efforts and future work towards the efficient organisation and performance of work by the public service according to the needs of the Government balanced with fairness to employees in that employment. This involves a consideration of the value to be ascribed to the continuing productive efforts of the public service as a whole in Western Australia, not at the level of individual agencies but across the board. That measurement could come from a range of considerations including:

(a) the amount the parties could reasonably have agreed between themselves;

(b) the value the Government has placed on the work of the public service through its budget processes;

(c) the value of the existing and future levels of productivity which will continue to be affected by the requirement on governments to deliver changing and increasing benefits to the community (i.e. present and future productivity). These arrangements are in accordance with the employer's prerogative to initiate more efficient work methods and the employees' acceptance of the need to accommodate changes brought about in aid of those new methods; and

(d) the valued of work considered within the context of community movements measured by reference to increases agreed or awarded in other public sector employment and in the community generally.

159 The amount the parties could have agreed is, in the context of agreements reached in the private and public sectors in recent times, relatively broad. I think it is fair to say that the amount of 6 per cent with a minimum of $60.00 per week is unrealistically and extremely high given a range of considerations including what has been agreed elsewhere, which I shall deal with later. Any amount in excess of 4.5 per cent in each of the 2 years of the 2004 Agreement would still be at the high

end of the range. Also taking account of the overall context of agreement-making in the Government and private sectors, 3.3 per cent is at the lower end of that range, although I note that some government sector agreements provide a lower increase eg. the Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2004 (PSA AG 3 of 2004). In its budget processes the Government has, through its general wages policy, allowed for an even lower amount than that, at 3 per cent. Yet, clearly that amount has been exceeded by the Government in other negotiations to which I shall refer later.

160 As to community movements, caution must be exercised. Comparative wage justice is not available as a basis for salary increases. One cannot use any particular individual or group of bargaining outcomes external to this group as the basis of a salary increase for this group for a number of reasons. The first consideration is that each set of negotiations brings with it unique circumstances. These include the history of bargaining for that group and whether it took account of structural or classification changes, work value, or adjustments to conditions as part of a total package. For example, one agreement might focus on costly adjustments to conditions applicable to a large group at a particular location, and another may aim to provide greater benefits to a group at the lower levels of classification according to their numbers. Another consideration might recognise a higher qualification, and yet another might need to take account of attraction and retention issues. The terms of an agreement and the timing of it may also be considerations. The realities of negotiations often mean that one segment of employees within the group has a greater need than another. A satisfactory outcome to any particular set of negotiations often involves pragmatic considerations which may not be able to be assessed by an external party attempting to apply quantitative measurements.

161 Further, applying a ranking system to demonstrate where within a group a particular outcome might fall can be significantly affected by the timing of the examination of the group within a wage cycle. While this arbitration may come at the end of the bargaining round and therefore not have much precedent or impact in this round it is the case that in any set of negotiations the parties look at their own previous negotiations outcomes and compare them with others in arriving at their conclusions about what is reasonable. If they believe they did not do as well as other groups last time, they will factor that into their considerations.

162 However, a large enough sample of the outcomes of negotiations may provide some indicator of the trends, and the context rather than the basis of an adjustment. There are a number of measures of the outcomes of bargaining which can give an indicator of what might be appropriate for the employees covered by the 2004 Agreement.

163 The *ADAM* data produced by ACIRRT includes a public administration sector. This sector averaged 4.3 per cent increase in Average Annual Wage Increases in agreements certified in 2003. The highest increase was 5.1 per cent. It should be noted that the public administration sector includes a far broader range of types of organisations than are covered by the 2004 Agreement. It includes some non-profit organisations which receive government funding, and also includes government trading enterprises, both of which have somewhat different approaches to salaries and conditions when compared to the departments and agencies covered by this agreement. However, this does not mean that as part of the overall mix of indicators, this should be excluded.

164 The Commonwealth Department of Employment and Workplace Relations reports that public sector pay rises from federally registered public sector agreements contained an average 4.8 per cent increase per year in the March quarter 2004, with private sector increases being around 3.9 per cent per annum.

165 I note the dispute between the parties as to the use of either the WCI or the AWOTE as measures of pay increases in the labour market. I accept Mr Marney's argument that due to the composition of the AWOTE sample, the WCI is a more appropriate measure. The WCI for Australia for the public sector has increased by 4.3 per cent per annum to the March quarter 2004 (ABS Wage Cost Index 6345.0 Key Figures Tables 1 and 2). For Australia, in private and public sectors combined, the increase was 3.5 per cent. For Western Australia, in the combined private and public sectors, it was 3.1 per cent.

166 The total picture would not be complete without the outcomes for other state government employees. In the case of police, the recently registered Western Australian Police Service Enterprise Agreement for Police Act Employees 2003 provided for a 3 per cent increase in salaries for each year 1 July 2003, 2004 and 2005. In addition, each year there are undefined "relativity adjustments" of 1.2 per cent, 1 per cent and 2 per cent respectively. This provides total increases in salaries of 4.2 per cent, 4 per cent and 5 per cent respectively.

167 The Government School Teachers and School Administrators Certified Agreement 2004 provided for 3 per cent per annum from 1 January 2004, 2005 and 2006. In addition, classroom teachers level 3, school administrators, school psychologists, education officers and school development officers, directors - schools and directors – schools and services, and area directors all receive 3.3 per cent. A new senior teacher classification has been introduced and this will apply to 9,800 teachers. Six thousand two hundred will receive an increase of 5.74 per cent and 3,600 will receive 4.56 per cent.

168 I note that in respect of nurses, the Minister for Health, on the commencement of negotiations for a replacement enterprise bargaining agreement administratively applied an increase of 3.4 per cent to be paid on the expiration of the then current agreement, from 1 May 2004. As already noted, AMA agreements resulted in 3 per cent increases each year. The Health Services Union of Western Australia (Union of Workers) agreements which cover, amongst other classifications, administrative and clerical officers who do similar work to CSA covered areas, provide for $28.60 per week or 3.4 per cent which ever is higher for 2004, and 3.5 per cent for 2005.

169 Consideration also needs to be given to the CPI. The CPI for the 8 capital cities rose by 2 per cent per annum and for Perth by 1.6 per cent per annum to the March quarter 2004 (ABS Consumer Price Index Australia. 6401.0, Tables 1 and 2). Unemployment in Australia is relatively low at 5.5 per cent and 5.0 per cent in Western Australia, seasonally adjusted for May 2004 (ABS Labour Force Australia 6202. Table 12).

170 As to the State and National Wage Case Decisions, and the adjustment of the Minimum Award Wage and the Minimum Wage pursuant to the MCE Act, these are rates set in quite a different context to that which applies in the negotiation of agreements. They are minima applying in the award and legislated safety net situations. However, they also have a place, albeit a very limited one, in the mix. The State Wage Case decision of 3 June 2004 provided an award safety net increase of $19.00 per week, and the same to the Minimum Award and MCE Act Minimum Wages, which constituted a 4.23 per cent increase from 4 June 2004.

171 The economic indicators of State Gross Product, unemployment, WCI for WA generally and for the public sector, and the CPI all tend to the prospect that 2005 will bring slightly lower State Gross Product, employment and WCI. In those circumstances a slightly lower salary increase in 2005 is appropriate.

172 Taking account of all of these matters including the objects of the Act and s.26 considerations, in the context of the broader public sector and the range of employees and agencies, an increase of 3.8 per cent in the first year and 3.6 per cent in the

second year of the 2004 Agreement would be reasonable to account for all the factors identified above, and would not be excessive. According to information provided by the Government, such an increase would cost approximately $47,993,000 in 2004 and $49,721,000 in 2005, as compared with the Government's proposal of $41,678,531 and $43,053,923 respectively. In the context of the National and State economies, this is sustainable and will not lead to adverse economic consequences. Inflation and unemployment are unlikely to be affected to any significant extent given the state of the National and State economies. Accordingly, I conclude that the 2004 Agreement should provide a salary increase of 3.8 per cent in 2004 and 3.6 per cent in 2005.

173 As to the issue of a flat rate increase, the decision of the Commission in Court Session in the Ministry of Justice case (supra) raised a number of significant issues. The argument raised by the CSA in that case was to the effect that a flat dollar increase in lieu of a percentage increase would yield benefits in respect of pay equity on the basis that any percentage increase delivered yields significantly greater amounts for officers at higher levels than those at lower levels. The Profile of Western Australian State Government Workforce as at 30 June 1998, prepared by the Ministry of Premier and Cabinet and a progress report Women In Management in the Western Australian Public Sector show a disproportionate number of women are employed at a lower level within government employment. The CSA in the Ministry of Justice case (supra) argued that this was on the basis of a lower proportion of representation of women at the higher levels and that a flat increase would address to some extent indirect discrimination on the basis of gender. The Commission in Court Session said that there was insufficient before it to assess the merits of the argument.

174 The case before me in this matter includes a similar argument. The CSA says that while it seeks a percentage increase in both years of the 2004 Agreement, that a flat rate, which would have the effect of giving a higher percentage increase to the lower classifications, would have a positive effect upon gender equity. Ms Walkington in her statement referred to the report of the Commissioner for Equal Opportunity in 1989 which held that "job evaluation could be effective in identifying and helping to eliminate wage discrimination". It also expressed the view that officers at Level 1 "were treated less favourably than those at Level 2 and above" for a number of reasons including a lack of systematic job evaluations at Level 1, and that "the introduction of a new system of classification on the basis of salary alone reinforced the position of those at the bottom of the scale – in this case, women, migrants and Aborigines" (page 10-11).

175 Ms Walkington also referred to Dr Christine Short's study of gender equity in pay scales in the public sector. Dr Short undertook a "(Review of) Equal Employment Opportunity in the WA Public Service Classification System" in October 1990. In doing so, she examined the classification system and concluded:

> "Clearly only one major conclusion can be made. There is evidence of wage discrimination within the current pay system used in the W.A. public service which can be attributed to the failure to examine the relative work value of female keyboard operators at the time of introducing equal pay for work of equal value for these officers in 1977. This is perpetuated by the current classification system which has been shown to contain few of the features the literature requires of a less biased system.
>
> If wage discrimination is to be eliminated or at least reduced within the W.A. public service, steps must be taken to improve or replace the current classification and job evaluation system. The above recommendations constitute the minimum changes that could be made to Bipers to enable Level 1 officers to be evaluated with some degree of equity. Other options apart from adapting Bipers exist, the full range is given below."
>
> (page viii Executive Summary)

176 Dr Short set out a range of options including not changing BIPERS but training classification review committee members and managers in equal employment opportunity considerations; moving to a different assessment tool such as Cullen Egan and Dell's system; and developing a new evaluation and classification system specifically for the Western Australian public service.

177 Clearly, a major issue from her report was the failure to properly identify the work value of female keyboard operators in 1977.

178 Computerisation has clearly changed the way in which work is performed in many agencies. I do not have before me any information which enables me to conclude that female keyboard operators' work value remains an issue, if such a group exists in the way it did in 1977. In fact, I have no information as to the work value of keyboard operators, or those Level 1 jobs in which females may be clustered.

179 I accept that in 1989 and 1990, it was found that the lower levels of the pay structure were contrary to gender equity requirements. However, a number of issues associated with the CSA's case in this regard cause me concern. The CSA's argument is that a flat rate increase would assist gender equity because those at the lower levels, i.e. predominantly women, would benefit. However, the arguments of the Equal Opportunity Commissioner and Dr Short point to job evaluation as being the remedy.

180 Further, to say that any amount of flat increase will take the issue in the right direction without attempting to remedy the underlying cause, and without examining the actual impact, is simplistic.

181 In addition, fourteen years has passed since Dr Short's report. I do not have before me any information about whether and why the gender proportions at particular levels have changed, whether BIPERS has been modified, whether the other recommendations made by Dr Short have been implemented, and if so, to what effect. More importantly, the matter of gender equity is to be the subject of a review to be undertaken at the instigation of the State Government, and a report is due in September 2004. The outcome of that review may have a better prospect of providing a systemic remedy, whereas a flat rate increase, with unknown effects, would be a mere bandaid, and would compress relativities without any overall benefit for gender equity.

Low Paid

182 The Government made reference to the State and Territories' Governments' submission to the Minimum Wage Case 2004 conducted by the Australian Industrial Relations Commission ("AIRC"). In dealing with the issue of what constitutes the low paid, the AIRC noted the findings of the Second Report from The State of Working Victoria Survey conducted by ACIRRT entitled "The Low-Paid in Victoria". The AIRC described it as providing "a comprehensive analysis of the number and distribution of low paid workers in Victoria. For the purposes of the survey, it defined low pay as a rate less than $12.15 an hour ($461.70 per week).

183 The AIRC noted:

"… The findings in the report are usefully summarised in the States and Territories' submission:

- low paid workers were earning on average $10.42 per hour, with an estimated 285 000 Victorian workers earning less than the lowest federal minimum hourly rate;
- women are more likely to be low paid, as are young and older workers, and workers from non-English speaking backgrounds;
- workers' qualifications are aligned to employment status, with workers holding only a high school or vocational qualification more likely to be low paid;
- non-metropolitan workers are more likely to be low paid when compared to their metropolitan counterparts;
- low paid workers are more likely to be casual and less likely to be in a union;
- low paid workers are predominantly found in the private sector and concentrated in the industries of accommodation, culture, recreation and personal services, retail trade, construction and wholesale trade;
- the low paid in occupational groups are concentrated in elementary clerical, sales and services, or tradespersons and related workers occupational groupings;
- almost one-third of all low paid workers were employed with their current employer for less than one year, with only 6 per cent of low paid workers being employed for 10 years or more; and
- low paid workers find it harder to care about their jobs and are less likely to feel pride in their organisation."

184 The AIRC "accept(ed) that differences between the economies and labour markets of several states and territories make it inappropriate to generalise directly from the report to other states and territories". It accepted that "Victoria was atypical so as to preclude generalisation of the results to Australia generally". The AIRC also accepted that "the relatively low response rate (29%) in the absence of non-response testing, suggests that results should be treated with some caution and treated as indicative rather than absolute." Nonetheless, the AIRC considered that the report provided some indications of assistance to it. Further, the AIRC went on to say:

"**[308]** As noted in the May 2003 decision, the Commission acknowledges that increases in award wages are a blunt instrument in addressing the needs of the low paid in employment. We accept that a significant number of households with minimum wage earners lie in the middle or high income bands. Moreover, we recognise that adjustments to award wages are a relatively inefficient means of increasing the disposable income of the low paid. On-costs mean that for every dollar awarded by the Commission, employers must spend more than $1, whereas the impact of tax and tax transfer arrangements means that, in many cases, the employee receives substantially less than $1 as additional disposable income. Nevertheless, increasing award wages is the only instrument that the Parliament has conferred upon the Commission in order to discharge its statutory obligation to maintain a system of enforceable awards that act as a safety net of fair minimum wages and conditions of employment in the context of living standards generally prevailing in the Australian community."

(Print PROO2004)

185 Therefore, while the description of low paid set out the "The Low Paid in Victoria" is helpful, it tends to confirm that those within the public sector covered by the 2004 Agreement are not generally considered to be low paid. An examination of the actual salaries at Level 1 shows that the 21 year old or Level 1.1 salary is $27,805 ($533.07 per week). The top of Level 1, at 1.9 is $34,748 ($666.20 per week). The National Wage Case and State Wage Case decisions in recent years have provided flat rate increases. As noted earlier in these Reasons, the State Wage Case decision of 3 June 2004 granted $19.00 per week to take the Minimum Award Wage and Minimum Wage for purposes of the MCE Act to $467.40, an increase of 4.23 per cent. $467.40 as an annual salary is $24,380. It could not reasonably be argued that the Level 1.1 at $3,425 per annum or $65 per week above the annual Minimum Wage constitutes low pay (see also Negus C in Civil Service Association of Western Australia (Incorporated) v Country High Schools Hostels Authority and Others 72 WAIG 244 at 246).

186 Accordingly, I do not find that a flat increase component is justifiable on what is before me, and at this time.

CASHING OUT OF ANNUAL LEAVE

187 The Government proposes a provision to enable employees to cash out up to 50 per cent of the accrued annual leave at the employee's initiative. The clause proposed is as follows:

1.1 The parties agree that annual leave should be utilised as time off. This clause, however, recognises that some employees may have excess and overdue annual leave. This clause provides for employees receiving payment in lieu of excess and over due annual leave.

This clause will not be taken of itself to imply that there are grounds for diminishing employee's entitlements to annual leave nor to negate the employer and employee responsibility in the accessing of and taking of annual leave.

1.2 Subject to clause 1.3, the employer and employee may agree that the employee forego part of his or her entitlement to annual leave in exchange for equivalent payment at the rate which would have applied had leave been taken. The payment is to include annual leave loading.

1.3 The following criteria applies to the cashing out of annual leave:

a) the employer agrees in writing to a request in writing by an employee to cash out annual leave; and

b) there is an annual leave entitlement that has accrued in previous years and is over due to be taken; and

c) no more than 50% of any years annual leave entitlement can be cashed out; and

d) annual leave accruing in the year the request for cashing out is made cannot be cashed out in that year.

1.4 It is the employee's responsibility to seek information on any taxation implications arising from the payout of annual leave."

188 The Government has conducted a survey of agencies and 53 such agencies responded. Seventy 2 per cent responded that they had previously made arrangements for cashing out, and a third had made provision for cashing out in an enterprise bargaining agreement. In 89 per cent of those agencies, employees actually cashed out annual leave. Seventy nine per cent of agencies which responded had received requests from employees to cash out annual leave. Sixty four per cent of all agencies which

responded had employees who had requested cashing out and this included agencies who had not previously provided such arrangements.

189 Although the agencies reported having received such requests, the survey was not able to provide statistics of the numbers of employees who had made such requests or how many had taken up the cashing out option.

190 The Government says that its proposed clause is aimed only at employee-initiated payouts and would not be for the purposes of agencies reducing any annual leave liability. It says that it recognises the need for rest and recuperation for employees in accordance with the purposes of annual leave, however, the proposed clause would provide an option to the employee for his or her own benefit.

191 The Government also notes that s.8 of the MCE Act provides for the capacity of cashing out annual leave as follows:

> ***"8. Limited contracting-out of annual leave conditions***
>
> (1) An employer and employee may agree that the employee may forgo up to 50% of his or her entitlement to annual leave under Division 3 of Part 4 if —
>
> (a) the employee is given an equivalent benefit in lieu of the entitlement; and
>
> (b) the agreement is in writing.
>
> (2) An agreement referred to in subsection (1) is of no effect if the employer's offer of employment was made on the condition that the employee would be required to enter into the agreement."

192 The Government says that the provision would not diminish community standards but would provide an enhancement to employees and at their initiative (see Exhibit Book 4 tab 44 and exhibit C).

193 The CSA opposes the cashing out of annual leave saying that:

(a) Such a provision would diminish the community standard of annual leave;

(b) Annual leave is for the purpose of rest and recreation. The impact on the physical and mental health of employees and balancing working and personal lives are important considerations. Reference was made to a number of authorities for the purpose of annual leave being for rest and recuperation and the use for leisure purposes, and not for money;

(c) The Government's motivation was demonstrated by the substantial amount of leave accrued in the public sector and employees have not been able to take leave for various reasons including that they have been discouraged by their employers from taking their entitlements (see CSA Binder 3, TBW 66 and other witness statements);

(d) Cashing out can be a more expensive alternative for the Government because for each employee who cashes out two weeks' annual leave there would be payment for 54 weeks in the year;

(e) Cashing out is helpful to the Government to reduce other difficulties such as in back filling for staff on leave and the requirement to pay higher duties allowance;

(f) The significant leave liability burden on the Government arises at least in part due to work load pressures referred to in the evidence of CSA witnesses in the salary increase part of the case, and inappropriate management practices (see Walkington paragraphs 143 onwards and responses to a survey of members who reported that they did not take leave for reasons associated with work load, the employer's refusal to approve leave and other matters beyond their control);

(g) *The Profile of the Western Australian Government Workforce 1995* prepared by the Public Sector Management Office demonstrates the increase in leave liability. In addition the Public Sector Management Office has recognised the social cost of employees not taking leave and urges managers to consider it when developing leave management strategies. It recognises the mental and physical fatigue associated with work without the appropriate leave breaks (page 34 of profile of Western Australian Government Workforce 1995); and

(h) The Public Sector Management Office has also recognised the pressure of work, the lack of skilled replacements, the lack of funds for higher duties allowance and overtime. It has also recognised the commitment of employees to their work as reasons for the need to better manage employees actually taking annual leave. The CSA says that the Public Sector Management Office has not urged as a method of managing annual leave that there by any payout of an entitlement.

194 The CSA is also critical of the Government's proposal in that while cashing out of annual leave is said to be at the employee's initiative, it requires the employer's approval for the cashing out. It is therefore not within the employee's control.

CONCLUSIONS

195 Annual leave is and has always been for the purpose of employees taking a break from their work to refresh themselves and to ensure that they are able to rest and recuperate from their work (*Hospital Employees' Industrial Union of Workers, WA v Hon. Minister for Health and Others* (CICS) (1977) 57 WAIG 282 and Beech SC in *Department of Justice v Civil Service Association of Western Australia* 82 WAIG 2178). It is true that from time to time employees might experience financial difficulties and need to obtain additional monies for various reasons. It would be desirable for a provision to enable employees to choose at their own initiative to receive a pay out for a portion of their annual leave or other entitlements to do so. The choice should be theirs alone.

196 However, given the difficulties, clearly obvious from the evidence, of employees taking annual leave, and also issues recognised by the Public Sector Management Office in its own documentation, and that of the Auditor General, I have serious reservations about providing any arrangement which might be utilised by employees under pressure in their work to not take annual leave. This would change what ought to have been genuinely at the employee's initiative and for the employee's own purposes when in reality it may not be. It would also provide a financial incentive to forego leave (see also Just Cuts (Canberra and Queanbeyan) Agreement, 2000 – 2003 FB of the AIRC (Print T3829)).

197 Although I acknowledge that there is a provision in the MCE Act which enables employees to cash out up to 50 per cent of their annual leave and that there are provisions in a small number of agreements or awards involving the CSA, I would need to be convinced that employees would then benefit from such a provision to any significant degree. I note the Government's statistics arising from the survey of agencies but also note that those agencies which have responded that they have received requests from employees or enquiries from employees about the cashing out of a proportion of their annual leave, have given no evidence of any significant level of such enquiries. I have nothing to indicate whether those agencies received a single enquiry or a multitude of them.

198 In regard to the terms of the proposed clause, subclause 1.1 "recognises that some employees may have excess and overdue annual leave". In the management of leave there is provision within Clause 23. – Annual Leave, subclause (9) of the Award for the employer to direct an employee to take accrued leave. That is within the power of the employer to manage and ought to be managed. As I noted in the Reasons for Decision earlier in respect of the salary increase, it is for the employer to manage its resources and direct the appropriate application of those resources. It is the normal practice for employees to nominate the period of leave they wish to take and to apply for leave. However, the employer retains the right to direct employees to take leave and roster them accordingly. In those circumstances, if there is a significant leave liability which any employer wishes to deal with, then the power exists to do so. It goes without saying though that leave ought be managed in such a way which is sympathetic to the employees' needs.

199 Accordingly, the proposed cashing out of annual leave clause is not to be included in the 2004 Agreement.

UNION PARTICIPATION IN COMMUTED ALLOWANCE

200 The Government seeks that employers should have the capacity to enter into an agreement with a group of employees to establish a commuted allowance for shift work and/or overtime in lieu of the present requirement to negotiate with the CSA. The employees would receive no less than the Award entitlement and the employer would provide the CSA with the full details of the agreement prior to its implementation. Provision would be made for a review of the allowance at least annually or if there is a major change in circumstances. The Government produced a draft clause as follows:

> "(a) The employer may enter into a written agreement with the group of employees effected to pay an annual commuted allowance payable fortnightly in lieu of the allowances or some of the allowances due to be paid under Clause 22 Overtime and/or Clause 21 Shift Allowance of the Award.
>
> (b) The employees shall not be paid less than the payments they would be entitled to under the award calculated over a 12-month period.
>
> (c) The employer shall review the allowance at least annually or sooner if circumstance change that leads to a significant effect on the arrangement of and quantum of the allowance as originally agreed.
>
> (d) The employer shall advise the association in writing with full details of the agreement within 21 days of the introduction of the allowance as per (a) above or any changes as a consequence of a review under (c)."

201 The Government says that the purpose of such a provision would be to facilitate the efficient organisation and performance of work. Under current award provisions there is no capacity for agencies to negotiate such allowances for groups of employees in instances where there is no CSA membership and therefore the CSA may have no interest in entering into discussions or reaching agreement with the employer. This can lead to frustration amongst the employees and the agency itself. It would also avoid unjustified delays caused by the CSA's reluctance to participate.

202 In support of its claim the Government refers to the circumstances which arose in respect of the Totalisator Agency Board ("TAB") when that agency sought to negotiate a provision which was enabled through the enterprise bargaining agreement provision. However, according to the Government's evidence, the CSA did not willingly and actively negotiate in good faith. Part of its reason appeared to be that it had no members in the agency and had decided not to enter into discussions with the employer in those circumstances. The Government says that this was contrary to the CSA's commitments contained within their enterprise agreement to engage in negotiations for such matters.

203 The Government has provided affidavits from Eric Joseph Baines, the Manager Human Resources with the former TAB and Robert Allan Heaperman, a Labour Relations Advisor with the Department of Consumer and Employment Protection, which chronicle the events from 2002 through to 2004.

204 The clause proposed by the Government is said to provide that the employee shall receive no less than he or she would have been entitled to under the Award and therefore cannot be disadvantaged. The employees cannot be required to enter into the agreement with the employer and will have the freedom to decide whether or not they wish to have their allowance commuted.

205 The Government says that the CSA was avoiding negotiating or discussing the matter with the employer, and by its actions it failed to meet its obligations. It ignored the views of the employees of the TAB in unreasonably opposing an agreement. The Government says that the current situation allows the CSA an arbitrary right of veto and that the TAB highlights the difficulties associated with an intransigent approach by the CSA.

206 The Government says that inserting a provision into the 2004 Agreement to enable negotiation with the employees directly in these circumstances would meet s.6 - Objects of the IR Act, and in reference to s.6(a) would assist in promoting good will in industry and enterprises. It would also promote the principles of Freedom of Association and the right to organise because without such a clause employees who are not members of the CSA are denied the ability to enter into a commuted allowance arrangement. It would not be any impediment or constraint on the CSA's right to organise.

207 During the course of the hearing the Arbitrator put to the Government whether its needs would be met and difficulties overcome if the CSA agreed that even if it had no members at a particular enterprise or site that it would enter into negotiations on the principle of the matter and Mr Ridley for the Government said that that would go some significant way to dealing with the issue, recognising that there were some matters of principle to which the CSA, according to its policy, could not agree.

208 The CSA takes quite a different position in respect of the TAB matter saying that the history of relations between the CSA and the TAB goes back further than the period covered by the statements of Messrs Baines and Heaperman. It provided evidence of the TAB's view of negotiating with the CSA in the era of workplace agreements.

209 The CSA takes issue with the clause as proposed by the Government in that only the employer is to review the allowance annually to see whether it is appropriate, not the employer and the employees together. Further, while the Government says that the CSA is to be advised prior to the arrangements being introduced, the last paragraph of the proposed clause provides that the CSA would be advised within 21 days of the introduction. The CSA says that that does not necessarily mean that 21 days prior to the introduction.

210 The CSA also questions what might constitute a "group" as proposed by the clause and whether it is simply 2 or more people.

211 The CSA also says that it can demonstrate a myriad of commuted allowance industrial agreements that are currently registered which demonstrates that agreements with the CSA have a greater propensity not to be misused as opposed to individual agreements. There is also a question as to whether or not the provision contained within the Government's proposed clause deals with, on average, the group not receiving less than the Award or that each individual employee is not to receive less than the Award. The Government has said that its intentions are that no individual shall receive no less than the Award. The CSA says that commuted allowances are established on the basis of an assumption as to work arrangements which provide for an averaging.

212 As to any checks on the agreement, the CSA says that it would be far more difficult to undertake an assessment of such an arrangement to ensure no disadvantage to individuals if the CSA were not involved.

213 The CSA also says that it has a demonstrated ability to negotiate industrial agreements for commuted allowances with employers and cites a number of such arrangements including through award amendments.

CONCLUSIONS

214 Through their place as parties to awards, their role in enterprise bargaining recognised by the Statement of Principles and because of their registration pursuant to the IR Act, unions have special rights and privileges (see IAC in *Ngala Family Resource Centre v ALHMWU* 77 WAIG 2251 and FB in *ALHMWU and Ngala Family Resource Centre and Others* 75 WAIG 2815). Those rights and privileges also bring with them obligations. Those obligations include to negotiate with an employer where the employer seeks to do so in accordance with commitments that have been given, as part of general industry wide negotiations. That obligation arises on the basis that the union is a party to the award or agreement, not because it has a member at a particular site. This places unions in a difficult position of being expected to negotiate where it has no members and where there is no particular interest for it. However, to refuse to negotiate with an employer on the basis that it has no members denies the employer and employees at that particular workplace the opportunity to come to some amicable arrangement which might otherwise constitute contracting out. The union's unique role enables it to act as advisers to the employees and to bring some measure of experience and expertise on behalf of the employees which might otherwise be missing. One can understand why a union would say that if there are no members at a site or enterprise then it should not be expected to expend its resources on negotiating on behalf of the employees. However, our system of industrial relations provides that awards have coverage over employees whether they are members of the union or not.

215 In this particular case, I make no judgement on the issue between the CSA and the TAB as it occurred in respect of the commuted allowance situation. The evidence appears to have been of some frustration between the parties over a period of time related to a range of issues including the employer's policy during the period of workplace agreements. One can understand a union being reluctant to enter into arrangements which might be of interest to the employer where there has been some difficulty in the past. In this particular case one can understand the CSA's reluctance to participate in the negotiating arrangement where, firstly, it had no members and, secondly, it had previously been excluded.

216 It is not my intention to grant the clause which the Government has sought on this occasion on the basis that such a clause contains a number of difficulties including that the review of any agreement reached would be at the employer's instigation and that there is no real provision for the employees concerned to instigate a review of the allowance. Further, while I do not question that the Government's intention is a proper one in respect of finding a means for negotiation to resolve an issue between an employer and a group of employees, the fact is that the system of awards and agreements is based on those matters being dealt with between the parties to the Award and the 2004 Agreement, being the employers and the CSA.

217 The objects of the IR Act include a whole array of both complementary and competing issues as they relate to this matter. However, as I have noted earlier, the CSA has a unique place which brings with it obligations. I would expect the CSA to enter into negotiations with an employer to deal with matters such as the commuted allowance notwithstanding that it has no members in the particular workplace. In doing so, I do not mean to suggest that the CSA would be so churlish as to refuse to negotiate any new future arrangements but rather to insure that there is no misunderstanding as to the obligations on both parties to the Award to enter into negotiations should one side wish to do so. Those negotiations ought to be as to the merits of the matter the other side wishes to negotiate. Parties always retain the right to disagree and to have policies of their own which might be opposed to the policies of the other party with whom they are to negotiate. However, the system of industrial relations under which awards are created enables difficulties to be resolved.

218 Accordingly, while I am not prepared to include in the 2004 Agreement a provision allowing negotiation directly with a group of employees, I trust that these Reasons for Decision will be of assistance in the resolution of any future such issues.

219 The parties are to prepare a schedule for the registration of the 2004 Agreement to incorporate these reasons.

PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

2004 WAIRC 12161

PUBLIC SERVICE AWARD 1992

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEPARTMENT OF INDIGENOUS AFFAIRS & OTHERS
	APPLICANTS
	-v-
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	MONDAY, 2 AUGUST 2004
FILE NO	P 6 OF 2004
CITATION NO.	2004 WAIRC 12161

Result Award varied

Order

HAVING heard Mr J Ridley on behalf of the applicants and Mr J Dasey on behalf of the respondent, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Public Service Award 1992 (PSA A 4 of 1989) be varied in accordance with the following Schedule and that such variation shall have effect on and from the 30th day of July 2004.

(Sgd.) P E SCOTT,
Commissioner,
[L.S.] Public Service Arbitrator.

SCHEDULE

1. Clause 2. – Arrangement: Delete this clause and insert the following in lieu thereof:

1. Title
1B. Minimum Adult Award Wage
2. Arrangement
3. Area of Operation
4. Scope
5. Term of Award
6. Definitions
7. Certificate of Service
8. Contract of Service
9. Part-Time Employment
10. Casual Employment
11. Salaries
12. Salaries Specified Callings
13. Purchased Leave - 48/52 Salary Arrangement
14. Purchased Leave - Deferred Salary Arrangement
15. Salary Packaging Arrangement
16. Supported Wage
17. Traineeships
18. Annual Increments
19. Higher Duties Allowance
20. Hours
21. Shift Work Allowance
22. Overtime Allowance
23. Annual Leave
24. Public Holidays
25. Long Service Leave
26. Sick Leave
27. Carers Leave
28. Parental Leave
29. Leave Without Pay
30. Study Leave
31. Short Leave
32. Bereavement Leave
33. Cultural/Ceremonial Leave
34. Blood/Plasma Donors Leave
35. Emergency Service Leave
36. Union Facilities for Union Representatives
37. Leave to Attend Association Business
38. Trade Union Training Leave
39. Training With Defence Force Reserves Leave
40. International Sporting Events Leave
41. Witness and Jury Service
42. Camping Allowance
43. District Allowance
44. Disturbance Allowance
45. Diving Allowance
46. Flying Allowance
47. Motor Vehicle Allowance
48. Property Allowance
49. Protective Clothing Allowance
50. Relieving Allowance
51. Removal Allowance

52. Sea Going Allowance
53. Transfer Allowance
54. Travelling Allowance
55. Weekend Absence From Residence
56. Preservation of Rights
57. Keeping of and Access to Employment Records
58. Notification of Change
59. Right of Entry and Inspection by Authorised Representatives
60. Copies of Award
61. Establishment of Consultative Mechanisms
62. Special Conditions
63. Transition
64. Dispute Settlement Procedure
65. Expired General Agreement Salaries

Schedule A Salaries
Schedule B Salaries - Specified Callings
Schedule C Camping Allowance
Schedule D District Allowance
Schedule E Motor Vehicle Allowance
Schedule F Motor Vehicle Allowance
Schedule G Motor Cycle Allowance
Schedule H Overtime
Schedule I Travelling, Transfer and Relieving Allowance
Schedule J Shift Work Allowance
Schedule K Diving, Flying and Sea Going Allowance
Schedule L Named Parties
Schedule M Expired General Agreement Salaries

2. Clause 8. – Contract of Service: Delete subclause (5) of this clause and insert the following in lieu thereof:

(5) Fixed Term Contract Employment

(a) The employer may employ officers on a fixed term contract in accordance with the Public Sector Management Act 1994.

(b) In exercising their employing authority employers may only employ a person as a fixed term contract officer in the following circumstances:

(i) covering one-off periods of relief;

(ii) work on a project with a finite life:

Where a project is substantially externally funded including multiple external funding, the employer must present a business case supporting the use of fixed term contract officers in such positions to the Peak Consultative Forum. Where external funding has been consistent on an historical basis and it can be reasonably expected to continue the employer shall assess the percentage of positions for which permanent appointment can be made;

(iii) work that is seasonal in nature;

(iv) where an officer with specific skills is not readily available in the public sector is required for a finite period; or

(v) in any other situation as is agreed between the parties to this Award.

(c) Officers appointed for a fixed term shall be advised in writing of the terms of the appointment and such advice shall specify the dates of commencement and termination of employment.

(d) The provisions of subclause (2) and (3) of this clause shall also apply to officers employed on a fixed term contract.

3. Clause 22. – Overtime Allowance: Delete this clause and insert the following in lieu thereof:

(1) For the purposes of this Clause, the following terms shall have the following meanings:

(a) "Overtime" means all work performed only at the direction of the employer or a duly authorised officer outside the prescribed hours of duty.

(b) "Emergency Duty" means: duty by an officer required to return to duty, without prior notice, to meet an emergency at a time that the officer would not ordinarily have been on duty.

(c) "Prescribed hours of duty," means an officer's normal working hours as prescribed by the employer in accordance with Clause 20. - Hours, of this Award.

(d) "Duly authorised officer" means an officer or officers appointed in writing by the employer for the purpose of authorising overtime.

(e) "A day" shall mean from midnight to midnight.

(f) "Public Holiday" means the days prescribed as Public Holidays in Clause 24. - Public Holidays of this Award.

(g) "Ordinary travelling time" means time that an officer would have ordinarily spent in travelling once daily from the officer's home to the officer's usual headquarters and home again.

(h) "Excess travelling time" means all time travelled on official business outside prescribed hours of duty and away from the officer's usual headquarters in accordance with subclause (8) of this Clause.

(i) "Fortnightly salary" means an officer's substantive salary exclusive of any allowances such as the district allowance, personal allowance, qualifications allowance, service allowance, special allowance, or higher duties allowance unless otherwise approved by the employer. Provided that a special allowance or higher duties allowance shall be included in "fortnightly salary" when overtime is worked on duties for which these allowances are specifically paid.

(j) "Commuted overtime" means an agreed allowance negotiated between the Association and the employer, paid in lieu of actual overtime worked for a group of officers occupying positions which require work to be performed consistently and regularly outside and in excess of the prescribed hours of duty.

(k) "Out of hours contact" shall include the following:

STANDBY - shall mean a written instruction or other authorised direction by the employer or a duly authorised officer to an officer to remain at the officer's place of employment during any period outside the officer's normal hours of duty, and to perform certain designated tasks periodically or on an impromptu basis. Such officer shall be provided with appropriate facilities for sleeping if attendance is overnight, and other personal needs, where practicable.

Other than in extraordinary circumstances, officers shall not be required to perform more than two periods of standby in any rostered week.

This provision shall not replace normal overtime or shift work requirements.

ON CALL - shall mean a written instruction or other authorised direction by the employer or a duly authorised officer to an officer rostered to remain at the officer's residence or to otherwise be immediately contactable by telephone or other means outside the officer's normal hours of duty in case of a call out requiring an immediate return to duty.

AVAILABILITY - shall mean a written instruction or other authorised direction by the employer or a duly authorised officer to an officer to remain contactable, but not necessarily immediately contactable by telephone or other means, outside the officer's normal hours of duty and be available and in a fit state at all such times for recall to duty.

"Availability" will not include situations in which officers carry telephones or other means or make their telephone numbers or other contact details available only in the event that they may be needed for casual contact or recall to work. Subject to subclause (4) of this Clause recall to work under such circumstances would constitute emergency duty in accordance with subclause (7) of this Clause.

(2) Reasonable Hours of Overtime

(a) An employer may require an officer to work reasonable overtime at overtime rates as specified in this clause.

(b) An officer may refuse to work overtime in circumstances where the working of such overtime would result in the officer working hours which are unreasonable having regard to:

(i) any risk to officer health and safety;

(ii) the officer’s personal circumstances including any family responsibilities;

(iii) the needs of the workplace or enterprise;

(iv) the notice (if any) given by the employer of the overtime and by the officer of his or her intention to refuse it; and

(v) any other relevant matter.

(3) Overtime

(a) An officer who works overtime for a greater period than 30 minutes, shall be entitled to payment in accordance with paragraph (d) of this subclause, or time off in lieu of payment in accordance with paragraph (b) of this subclause, or any combination of payment or time off in lieu.

(b) Time off in lieu

(i) Where the officer or the employer or the duly authorised officer, so elects in writing prior to overtime being worked, time off in lieu of payment for overtime worked may be taken in accordance with the time ratios in paragraph (d) of this subclause.

(ii) The officer shall be required to clear accumulated time off in lieu within two months of the overtime being performed, provided that by written agreement between the officer and the employer, or duly authorised officer, time off in lieu of payment for overtime may be accumulated beyond two months from the time the overtime is performed so as to be taken in conjunction with periods of approved leave.

(iii) If the department is unable to release the officer to clear such leave within two months of the overtime being performed, and no further agreement prescribed in subparagraph (ii) of this paragraph is reached, then the officer shall be paid for the overtime worked.

(c) Commuted Allowance

Any commuted allowance and/or time off in lieu of overtime, other than that provided in paragraph (b) of this subclause, shall be negotiated between the Association and the employer.

(d) Payment for Overtime

Payment for overtime shall be calculated on an hourly basis in accordance with the following formula:

(i) Weekdays

For the first three hours worked outside the prescribed hours of duty on any one weekday at the rate of time and one half:

$$\text{i.e. } \frac{\text{Fortnightly Salary}}{75} \times \frac{3}{2}$$

After the first three hours on any one week day at the rate of double time:

$$\text{i.e. } \frac{\text{Fortnightly Salary}}{75} \times \frac{2}{1}$$

(ii) Saturdays

For the first three hours on any Saturday, before 12.00 noon, at the rate of time and one half:

$$\text{i.e. } \frac{\text{Fortnightly Salary}}{75} \times \frac{3}{2}$$

After the first three hours or after 12.00 noon, whichever is the earlier, on any Saturday at the rate of double time:

$$\text{i.e. } \frac{\text{Fortnightly Salary}}{75} \times \frac{2}{1}$$

(iii) Sundays

For all hours on any Sunday, at the rate of double time:

$$\text{i.e. } \frac{\text{Fortnightly Salary}}{75} \times \frac{2}{1}$$

(iv) Public Holidays

For hours worked during prescribed hours of duty on any Public Holiday at the rate of time and one half (in addition to the normal pay for that day):

$$\text{i.e. } \frac{\text{Fortnightly Salary}}{75} \times \frac{3}{2}$$

For hours worked outside of the prescribed hours of duty on any Public Holiday at the rate of double time and a half:

$$\text{i.e. } \frac{\text{Fortnightly Salary}}{75} \times \frac{5}{2}$$

(e) Annual Leave/Long Service Leave

An officer directed to return to duty during periods of annual or long service leave shall be deemed to be no longer on leave for the duration of that period of duty.

(i) If the officer is directed to return to duty during a period of leave during prescribed hours of duty, then that officer shall be recredited with that leave for the same number of hours of duty performed.

(ii) If the officer is directed to return to duty during a period of leave outside of prescribed hours of duty, then that officer shall be entitled to payment of overtime in accordance with subclause (3) of this clause.

(f) Time Worked Past Midnight

Where an officer is required to work a continuous period of overtime which extends past midnight into the succeeding day the time worked after midnight shall be included with that worked before midnight for the purpose of calculation of payment provided for in this subclause.

(g) Minimum Periods for Return to Duty

(i) An officer, having received prior notice, who is required to return to duty:

(aa) on a Saturday, Sunday or Public Holiday, otherwise than during prescribed hours of duty, shall be entitled to payment at the rate in accordance with paragraph (d) of this subclause for a minimum of three hours;

(bb) before or after the prescribed hours of duty on a weekday shall be entitled to payment at the rate in accordance with paragraph (d) of this subclause for a minimum period of one and one half hours;

(ii) For the purpose of this subclause, where an officer is required to return to duty more than once, each duty period shall stand alone in respect to the application of minimum period payment except where the second or subsequent return to duty is within any such minimum period.

(iii) The provisions of this subparagraph shall not apply in cases where it is customary for an officer to return to the place of employment to perform a specific job outside the prescribed hours of duty, or where the overtime is continuous (subject to a meal break) with the completion or commencement of prescribed hours of duty.

(h) Overtime at a Place Other than Usual Headquarters

(i) When an officer is directed to work overtime at a place other than usual headquarters, and provided that the place where the overtime is to be worked is situated in the area within a radius of fifty (50) kilometres from usual headquarters, and the time spent in travelling to and from that place is in excess of the time which an officer would ordinarily spend in travelling to and from usual headquarters, and provided such travel is undertaken on the same day as the overtime is worked, then such excess time shall be deemed to form part of the overtime worked.

(ii) Except as provided in paragraph (e) of subclause (6) and paragraph (b) of subclause (7) of this clause, when an officer is directed to work overtime at a place other than usual headquarters, and provided that the place where the overtime is to be worked is situated outside the area within a radius of fifty (50) kilometres from usual headquarters and the time spent in travelling to and from that place is in excess of the time which the officer would ordinarily spend in travelling to and from usual headquarters, then the officer shall be granted time off in lieu of such excess time spent in actual travel in accordance with subclause (8) Excess Travelling Time of this clause.

(i) Ten Hour Break

(i) When overtime is worked, a break of not less than ten (10) hours shall be taken between the completion of work on one day and the commencement of work on the next, without loss of salary for ordinary working time occurring during such absence.

(ii) Provided that where an officer is directed to return to or continue work without the break provided in subparagraph (i) of this paragraph then the officer shall be paid at double the ordinary rate until released from duty, or until the officer has had ten consecutive hours off duty without loss of salary for ordinary working time occurring during such absence.

(iii) The provisions of subparagraphs (i) and (ii) of this paragraph, shall not apply to officers included in subclause (6) of this clause.

(4) Cases where overtime provisions do not apply

(a) Except as provided in paragraph (b) of this subclause, payment for overtime, or the granting of time off in lieu of overtime, or travelling time, shall not be approved in the following cases:

(i) Officers whose maximum salary or maximum salary and allowance in the nature of salary exceeds that as determined for Level 5 as prescribed by Clauses 11. - Salaries and 12. - Salaries Specified Callings of this Award.

(ii) Officers whose work is not subject to close supervision.

(b) (i) Where it appears just and reasonable, the employer may approve the payment of overtime or grant time off in lieu to any officer referred to in paragraph (a) of this subclause.

(ii) When an officer who is not subject to close supervision is directed by the employer to carry out specific duties involving the working of overtime, and provided such overtime can be reasonably determined by the officer's supervisor, then such officer shall be entitled to payment or time off in lieu of overtime worked in accordance with paragraphs (3)(d) or (3)(b) of this clause.

(5) Meal Allowances

(a) A break of 30 minutes shall be made for meals between 5.30 am and 7.30 am, between 12.00 noon and 2.00pm, and between 4.30 pm and 6.30 pm when overtime duty is being performed.

(b) Except in the case of emergency, an officer shall not be compelled to work more than five hours overtime duty without a meal break. At the conclusion of a meal break, the calculation of the five-hour limit recommences.

(c) An officer required to work overtime of not less than two hours, and who actually purchases a meal shall be reimbursed in accordance with Part 2 of Schedule H. - Overtime of this Award, in addition to any payment for overtime to which that officer is entitled.

(d) An officer working a continuous period of overtime who has already purchased one meal during a meal break, shall not be entitled to reimbursement for the purchase of any subsequent meal in accordance with Part 2 of Schedule H. - Overtime, of this Award until that officer has worked a further five hours overtime from the time of the last meal break.

(e) If an officer, having received prior notification of a requirement to work overtime, is no longer required to work overtime, then the officer shall be entitled, in addition to any other penalty, to reimbursement for a meal previously purchased.

(6) Out of Hours Contact

(a) Except as otherwise agreed between the employer and the Association, an officer who is required by the employer or a duly authorised officer to be on "out of hours contact" during periods off duty shall be paid an allowance in accordance with the following formulae for each hour or part thereof the officer is on "out of hours contact".

Standby Level 2 (minimum) weekly rate $\times \frac{1}{37.5} \times \frac{37.5}{100}$

On Call Level 2 (minimum) weekly rate $\times \frac{1}{37.5} \times \frac{18.75}{100}$

Availability Level 2 (minimum) weekly rate $\times \frac{1}{37.5} \times \frac{18.75}{100} \times \frac{50}{100}$

Such allowances are contained in Part 1 of Schedule H. - Overtime of this Award.

Provided that payment in accordance with this paragraph shall not be made with respect to any period for which payment is made in accordance with the provisions of subclause (3) of this clause when the officer is recalled to work.

(b) When an officer is required to be "on call" or "availability" and the means of contact is to be by land line or satellite telephone fixed at the officers residence telephone the employer shall:

(i) Where the telephone is not already installed, pay the cost of such installation.

(ii) Where an officer pays or contributes towards the payment of the rental of such telephone, pay the officer 1/52nd of the annual rental paid by the officer for each seven days or part thereof on which an officer is rostered to be "on call" or "availability".

(iii) Provided that where as a usual feature of the duties an officer is regularly rostered to be on "on call" or "availability", pay the full amount of the telephone rental.

When an officer is required to be “on call” or “available” and the means of contact is other than a landline/satellite telephone fixed at the officer’s residence, the employer shall provide the officer with the means of contact free of charge for the purposes of work related activity.

(c) An officer shall be reimbursed the cost of all telephone calls made on behalf of the employer as a result of being on out of hours contact.

(d) Where an officer rostered for "on call" or "availability" is recalled to duty during the period for which the officer is on "out of hours contact" then the officer shall receive payment for hours worked in accordance with subclause (3) of this clause.

(e) Where an officer rostered for "on call" or "availability" is recalled to duty, the time spent travelling to and from the place at which duty is to be performed, shall be included with actual duty for the purposes of overtime payment.

(f) Minimum payment provisions do not apply to an officer rostered for "out of hours contact" duty.

(g) An officer in receipt of an "out of hours contact" allowance and who is recalled to duty shall not be regarded as having performed emergency duty in accordance with subclause (7) of this clause.

(h) Officers subject to this clause shall, where practicable, be periodically relieved from any requirement to hold himself or herself on "standby", "on call" or "availability".

(i) No officer shall be on out of hours contact after the last working day preceding a period of annual leave or long service leave.

(7) Emergency Duty

(a) Where an officer is required to return to duty to meet an emergency at a time when he or she would not ordinarily have been on duty, and no notice of such call was given prior to completion of usual duty on the last day of work prior to the day on which called on duty, then if called to duty:

(i) on a Saturday, Sunday or Public Holiday, otherwise than during prescribed hours of duty he/she shall be entitled to payment at the rate in accordance with subclause (3) of this clause for a minimum period of three hours;

(ii) before or after the prescribed hours of duty on a weekday he/she shall be entitled to payment at the rate in accordance with subclause (3) of this clause for a minimum period of two and a half hours.

(b) Time spent in travelling to and from the place of duty where the officer is actually recalled to perform emergency duty shall be included with actual duty performed for the purpose of overtime payment.

(c) An officer recalled for emergency duty shall not be obliged to work for the minimum period if the work is completed in less time, provided that an officer called out more than once within any such minimum period shall not be entitled to any further payment for the time worked within that minimum period.

(d) Where an officer is required to work beyond the minimum period on the first or subsequent recall for emergency duty, the additional time worked at the conclusion of that minimum period shall be paid in accordance with the appropriate rate in subclause (3) of this clause.

(e) Where an officer is recalled for a second or subsequent period of emergency duty outside of the initial minimum period, the officer shall be entitled to payment for a new minimum period, and the provisions of this subclause shall be re-applied.

(f) For the purpose of this subclause, no claim for payment shall be allowed in respect of any emergency duty, including travelling time, which amounts to less than 30 minutes.

(8) Excess Travelling Time

An officer eligible for payment of overtime, who is required to travel on official business outside normal working hours and away from usual headquarters shall be granted time off in lieu of such actual time spent in travelling at equivalent or ordinary rates on weekdays and at time and one half rates on Saturdays, Sundays and Public Holidays, otherwise than during prescribed hours of duty, provided that:

(a) such travel is undertaken at the direction of the employer;

(b) such travel shall not include:

(i) time spent in travelling by an officer on duty at a temporary headquarters to the officer's home for weekends for the officer's own convenience;

(ii) time spent in travelling by plane between the hours of 11.00 pm and 6.00 am;

(iii) time spent in travelling by train between the hours of 11.00 pm and 6.00 am;

(iv) time spent in travelling by ship when meals and accommodation are provided;

(v) time spent in travel resulting from the permanent transfer or promotion of an officer to a new location;

(vi) time of travelling in which an officer is required by the department to drive, outside ordinary hours of duty, a departmental vehicle or to drive the officer's own motor vehicle involving the payment of mileage allowance, but such time shall be deemed to be overtime and paid in accordance with subclause (3) of this clause. Passengers, however, are entitled to the provisions of this subclause (8) of this clause;

(vii) time spent in travelling to and from the place at which overtime or emergency duty is performed, when that travelling time is already included with actual duty time for the payment of overtime.

(c) Time off in lieu will not be granted for periods of less than 30 minutes.

(d) Where such travel is undertaken on a normal working day, time off in lieu is granted only for such time spent in travelling before and/or after the usual hours of duty, which is in excess of the officer's ordinary travelling time.

(e) Where the urgent need to travel compels an officer to travel during the officer's usual lunch interval such additional travelling time is not to be taken into account in computing the number of hours of travelling time due.

(f) In the case of an officer absent from usual headquarters, not involving an overnight stay, the time spent by the officer, outside the prescribed hours of duty, in waiting between the time of arrival at place of duty and the time of commencing duty, and between the time of ceasing duty and the time of departure by the first available transport shall be deemed to be excess travelling time.

(g) In the case of an officer absent from usual headquarters that does involve an overnight stay, the time spent by the officer, outside the prescribed hours of duty, in waiting between the time of ceasing duty on the last day and the time of departure by the first available transport shall be deemed to be excess travelling time.

(9) Special Conditions

Any group of officers whose duties necessarily entail special conditions of employment shall not be subject to the prescribed hours of duty as defined in Clause 20. - Hours of this Award if the employer so determines. Provided, however, that such a determination shall not abrogate the right of the Association to make a claim or claims on behalf of such a group.

4. Clause 23. – Annual Leave: Delete subclause (10) of this clause and insert the following in lieu thereof:

(10) Annual Leave Travel Concessions

(a) Officers stationed in remote areas

(i) The travel concessions contained in the following table are provided to officers and their dependents when proceeding on annual leave to either Perth or Geraldton from headquarters situated in District Allowance Areas 3, 4, 5 and 6.

(ii) Officers are required to serve a year in these areas before qualifying for travel concessions. However, officers who have less that a years service in these areas and who are required to proceed on annual leave to suit departmental convenience will be allowed the concessions. The concession may also be given to an officer who proceeds on annual leave before completing the year's service provided that the officer returns to the area to complete the year's service at the expiration of the period of leave.

(iii) The mode of travel is to be at the discretion of the employer.

(iv) Travel concessions not utilised within twelve months of becoming due will lapse.

(v) Part-time officers are entitled to travel concessions on a pro rata basis according to the usual number of hours worked per week.

Travelling time shall be calculated on a pro rata basis according to the number of hours worked.

	Approved Mode of Travel	Travel Concession	Travelling Time
(aa)	Air	Air fare for the Officer, and partner and dependent children	One day each way
(bb)	Road	Full motor vehicle allowance rates, but reimbursement not to exceed the cost of the return air fare for the Officer, partner and dependent children, travelling in the motor vehicle.	North of 20° South Latitude - two and one half days each way. Remainder - two days each way.
(cc)	Air and Road	Full motor vehicle allowance rates for car trip, but reimbursement not to exceed the cost of the return air fare for the Officer. Air fares for the partner and dependent children.	North of 20° South Latitude - two and one half days each way. Remainder - two days each way.

(vi) Where officers are entitled to a travel concession under this subclause and the officer's headquarters is situated in District Allowance Areas 3, 4, 5 or 6, a travel concession covering the cost of airfares or motor vehicle allowance up to a maximum amount equivalent to the value of a return economy airfare to Perth will be provided for each officer and each of his/her dependants when proceeding on annual leave to a location other than Perth or Geraldton.

(b) Officers whose headquarters are located 240 kilometres or more from Perth

(i) Officers, other than those designated in paragraph (10)(a) whose headquarters are situated two hundred and forty kilometres or more from Perth General Post Office and who travel to Perth for their annual leave may be granted by the employer reasonable travelling time to enable them to complete the return journey.

5. Clause 30. – Study Leave:

A. Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Conditions for Granting Time Off

(a) An officer may be granted time off with pay for study purposes at the discretion of the employer.

(b) Part-time officers are entitled to study leave on the same basis as full time officers. Officers working shift work or on fixed term contracts have the same access to study leave as all other officers.

(c) Time off with pay may be granted up to a maximum of five hours per week including travelling time, where subjects of approved courses are available during normal working hours, or where approved study by correspondence is undertaken.

(d) Officers who are obliged to attend educational institutions for compulsory block sessions, may be granted time off with pay including travelling time up to the maximum annual amount allowed in subclause (1) (c) of this clause.

(e) Officers shall be granted sufficient time off with pay to travel to and sit for the examinations of any approved course of study.

(f) In every case the approval of time off to attend lectures and tutorials will be subject to:

(i) agency convenience;

(ii) the course being undertaken on a part-time basis;

(iii) officers undertaking an acceptable formal study load in their own time;

(iv) officers making satisfactory progress with their studies;

(v) the course being of value to the agency; and

(vi) the employer's discretion when the course is only relevant to the officer's career in the Service and being of value to the State.

(g) A service agreement or bond will not be required.

B. Delete subclause (2) of this clause and insert the following in lieu thereof:

(2) Payment of Fees and Other Costs

(a) Cadets and Trainees

(i) Agencies are to meet the payment of higher education administrative charges for cadets and trainees who, as a condition of their employment, are required to undertake studies at a University or College of Advanced Education. Officers who of their own volition attend such institutions to gain higher qualifications will be responsible for the payment of fees.

(ii) This assistance does not include the cost of textbooks or Guild and Society fees.

(iii) An officer who is required to repeat a full academic year of the course will be responsible for payment of the higher education fees for that particular year.

(b) All Officers

Notwithstanding paragraph (a), the employer has the discretion to reimburse an officer for the full or part of any reasonable costs of enrolment fees, Higher Education Contribution Surcharge, compulsory textbooks, compulsory computer software, and other necessary study materials. Half of the value of the agreed costs shall be reimbursed immediately following production of written evidence of enrolment and costs incurred, and the remaining half shall be reimbursed following production of written evidence of successful completion of the subject for which reimbursement has been claimed. The employer and officer may agree to alternative reimbursement arrangements.

6. Clause 64. – Dispute Settlement Procedure: Directly after this clause insert new number, title and clause as follows:

65. – EXPIRED GENERAL AGREEMENT SALARIES

(1) No-Disadvantage Test

(a) Expired General Agreement salary rates as amended from time to time are incorporated in the Award at Schedule M. These rates are not to be subject to arbitrated safety net adjustments and unless otherwise specified are only for the purpose of the no-disadvantage test as defined at s. 97VS of the *Industrial Relations Act 1979*.

(b) Notwithstanding the above, if the salary rates within the Award at Schedules A or B are higher than those expressed at Schedule M, the former rates shall be utilised for the purposes of the no-disadvantage test under the *Industrial Relations Act 1979.*

(2) Salary Based Allowances

All salary based allowances specified within this Award will be calculated on the applicable salary rate as specified at Schedule M of this Award or the applicable Award salary rate as specified at Schedule A or B of this Award whichever is the higher.

7. Schedule L – Named Parties: Directly after this schedule insert new title and schedule as follows:

SCHEDULE M - EXPIRED GENERAL AGREEMENT SALARIES

Salaries

Classification Level	Annual Salary at 1-Jan-03 (Not to be subject to arbitrated safety net adjustments)
Level 1	
Under 17 yrs	$14,284
17 yrs	$16,693
18 yrs	$19,472
19 yrs	$22,539

Classification Level—*continued*	Annual Salary at 1-Jan-03 (Not to be subject to arbitrated safety net adjustments)
20 yrs	$25,311
1.1	$27,805
1.2	$28,661
1.3	$29,516
1.4	$30,366
1.5	$31,222
1.6	$32,077
1.7	$33,061
1.8	$33,741
1.9	$34,748
LEVEL 2.1	$35,952
2.2	$36,876
2.3	$37,847
2.4	$38,873
2.5	$39,946
LEVEL 3.1	$41,421
3.2	$42,571
3.3	$43,756
3.4	$44,972
LEVEL 4.1	$46,641
4.2	$47,948
4.3	$49,293
LEVEL 5.1	$51,884
5.2	$53,635
5.3	$55,454
5.4	$57,342
LEVEL 6.1	$60,378
6.2	$62,442
6.3	$64,578
6.4	$66,859
LEVEL 7.1	$70,356
7.2	$72,776
7.3	$75,408
LEVEL 8.1	$79,687
8.2	$82,752
8.3	$86,553
LEVEL 9.1	$91,299
9.2	$94,506
9.3	$98,163
CLASS 1	$103,694
CLASS 2	$109,225
CLASS 3	$114,753
CLASS 4	$120,284

Salaries – Specified Callings

Classification Level	Annual Salary at 1-Jan-03 (not to be subject to arbitrated safety net adjustments)
LEVEL 2/4	
1st year	$35,952
2nd year	$37,847
3rd year	$39,946
4th year	$42,571
5th year	$46,641
6th year	$49,293
LEVEL 5.1	$51,884
5.2	$53,635
5.3	$55,454
5.4	$57,342
LEVEL 6.1	$60,378
6.2	$62,442
6.3	$64,578
6.4	$66,859
LEVEL 7.1	$70,356
7.2	$72,776
7.3	$75,408
LEVEL 8.1	$79,687
8.2	$82,752
8.3	$86,553
LEVEL 9.1	$91,299
9.2	$94,506
9.3	$98,163
CLASS 1	$103,694
CLASS 2	$109,225
CLASS 3	$114,753
CLASS 4	$120,284

AWARDS/AGREEMENTS—Variation of—

2003 WAIRC 09704

AWU GOLD (MINING AND PROCESSING) AWARD 1993 NO. A1 OF 1992

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS

APPLICANT

-v-

KALGOORLIE CONSOLIDATED GOLD MINES PTY LTD & OTHERS

RESPONDENTS

CORAM COMMISSIONER S J KENNER
DATE THURSDAY, 16 OCTOBER 2003
FILE NO/S APPL 899B OF 2002
CITATION NO. 2003 WAIRC 09704

Catchwords	Award – Award modernisation and variation – Wages and conditions of employment – Provisions to promote efficiency and performance of work - Fair conditions of employment – Minimum conditions of employment – Removal of discriminatory provisions – Removal of obsolete provisions – Superannuation, payment for public holidays and annual leave, and shift and cycle work considered – Award varied – *Industrial Relations Act 1979* (WA) s 6(af), s 26(1)(vi), s 40; s 40B; s 46(1)(b), s 48B; *Minimum Conditions of Employment Act 1993* (WA) s 5(1)(b), s 5(2), s 30.
Result	Application upheld in part
Representation	
Applicant	Mr M Llewellyn
Respondents	Mr T Caccamo as agent

Reasons for Decision

1 As a result of earlier proceedings before the Commission, the present claims were divided from application 899 of 2002 to be heard and determined separately. Additionally, a part of application 213 of 2003, again to vary the AWU Gold (Mining and Processing) Award 1993 ("the Award") was joined to these proceedings also. The subject matter of the present proceedings relates to applications to vary the Award in relation to superannuation, payment for public holidays and annual leave. Additionally, the employer respondents have by counter proposals, sought to vary the Award in relation to shift and cycle work and redundancy. The applications arise from s 40B of the Industrial Relations Act 1979 ("the Act").

Superannuation

2 The Award does not presently contain a superannuation clause. Both Mr Llewellyn on behalf of the applicant, and Mr Caccamo, on behalf of the respondents, in detailed and helpful oral and written submissions, submitted to the Commission that the question of superannuation for the gold mining industry is covered by the Gold Mining Industry Occupational Superannuation Order: (1987) 67 WAIG 2108 ("the Order"). It was submitted that the Order originally had application to the Goldmining Consolidated Award 1980 No 21 of 1967 ("the Former Award"), the predecessor to the Award. The Award was made in 1993. The applicant submitted that the terms of the Order, do not comply with s 48B of the Act, in relation to choice of superannuation funds.

3 One of the major grounds advanced by the applicant in support of its claimed superannuation clause was the question of choice of fund. The proposed clause 44 - Superannuation is in the following terms:

"44. - SUPERANNUATION

The subject of superannuation is dealt with extensively by legislation including the Superannuation Guarantee (Administration) Act 1992, the Superannuation Guarantee Charge Act 1992, the Superannuation Industry (Supervision) Act 1993 and the Superannuation (Resolution of Complaints) Act 1993 (collectively the superannuation legislation). This legislation, as varied from time to time, governs the superannuation rights and obligations of the parties.

(1) Definitions

for the purpose of this clause:

(a) "Fund" means a complying superannuation fund as the term is used in the superannuation legislation.

(b) "Ordinary time earnings" means the actual ordinary rate of pay the employee receives for ordinary hours of work including tool allowance, industry allowance, trade allowance, shift loading, special rates, qualification allowance (e.g. first aid, laser safety officer), multi-storey allowance, district/location allowance, piecework rates, underground allowance, award site allowances, asbestos eradication allowance, leading hand allowances, in charge of plant allowance and supervisory allowances where applicable. The term includes any regular over-award pay as well as casual rates received for ordinary hours of work. All other allowances and payments are excluded.

(2) Employer contributions

An employer must, in accordance with the governing rules of the relevant Fund, make such superannuation contributions for the benefit of an employee as will avoid the employer being required to pay superannuation guarantee charge under the superannuation legislation with respect to that employee. For the purposes of the superannuation legislation, an employee's ordinary time earnings are intended to provide that employee's notional earnings base. Employer contributions must be paid monthly, with the first payment being made at the end of the first month following engagement. Contributions must be equal to that required under the superannuation legislation.

(3) Voluntary employee contributions

(a) Subject to the governing rules of the relevant Fund, an employee who wishes to make contributions to the fund may either forward his or her own contribution directly to the Fund administrators or authorise the employer to pay into the Fund from the employee's wages, amounts specified by the employee.

(b) Employee contributions to the Fund deducted by the employer at the employee's request shall be held on employee's behalf and subject to individual agreement shall meet the following conditions:

(i) the amount of contributions shall be expressed in whole dollars.

(ii) an employee shall have the right to adjust the level of contribution made on his or her own behalf from the first of the month following the giving of three months' written notice to the employer.

(iii) Contributions deducted under this clause shall be forwarded to the Fund at the same time as contributions under sub clause (2).

(4) Superannuation Fund

(a) An employer must, in accordance with the governing rules of the relevant Fund, make superannuation contributions to any of the following Funds:

(i) C+BUS, the AWU Guardian, the Westscheme Superannuation Scheme;

(ii) any Fund agreed between an employer and an employee.

If the employee is a member of a union bound by this award, the employee may be represented by that union in meeting and conferring with the employer about the matter and the employer must give the union a reasonable opportunity to meet and confer about the matter.

Note: the consent of the union is not required to any agreement between the employer and the employee.

The agreement must be recorded in the time and wages records kept by the employer in accordance with Clause 31. – Time and Wages Record of this award.

If a dispute or difficulty arises over the implementation or continued operation of this provision, it must be handled in accordance with the dispute resolution procedure in clause 11;

(iii) any Fund which has application to employees in the principal business of an employer, where employees covered by this award are a minority of award-covered employees; or any other Fund to which an employer or employee who is a member of the religious fellowship known as The Exclusive Brethren elects to contribute;

(iv) any Fund the employer was contributing to as at 1 December 1991 or at the date of becoming bound by this award, provided that the level of contribution satisfies the award requirements.

(b) An employer is not required to contribute to more that one Fund in respect of an employee employed under this award."

4 The applicant's contention in this regard, was that employees in the gold mining industry, when they moved from employer to employer, are required to become members of a multiplicity of funds, leading to undue complexity and payment of fees. Furthermore, the applicant also submitted that a multiplicity of superannuation funds, leads inevitably to the issue of lost superannuation funds, in relation to which the applicant tendered exhibits A2 to A4, referring to the significant number of employees in Australia with lost superannuation funds, totalling approximately $6.9 billion. Additionally, Mr Llewellyn referred to labour turnover figures for the gold mining industry, in terms of training expenditure by the industry, at exhibits A5 and A6.

5 In support of the applicant claim in this regard, evidence was led from Mr Alan Hughes, an adviser on the "C+BUS" superannuation fund. In relation to the choice of fund issue Mr Hughes said at 13T:

"MR LLEWELLYN: Thank you.

(TO WITNESS): Mr Hughes, in terms of your experience, can you tell me what the benefit of choice of fund is?--- From a fund point of view in - - in - - in Western Australia, fund - - fund choice has probably eliminated the need for employees to have a multiple of funds which they previously had as they moved from employer to employer, and the - - the nature of the industry that we have our core base in is construction and allied industries which touches on mining to - - to a small degree. Now prior to choice it wasn't uncommon, I suppose, for people to have three, four, five superannuation funds, and as they moved from employer to employer a different employer would use a different fund, and consequently that's how they built up these - - these accounts, and generally it would be fair to say that these accounts consist of very small quantum amounts of - - of entitlements. Since choice on the state level - - we'd have to say on a state level where there is provision for choice with - - with Western Australian registered companies, if you like, the - - the choice factor's there where a - - an employee can go to new employment and nominate a fund. Of course, if an employee does not nominate a fund, there is a default situation which the employer can use if there's no nomination, so there is - - there is room to move there. But we find, particularly in CBIS the loyalty of the members, the satisfaction value, I suppose, with the fund determines that - - that our members who do move around continually ask for choice, and that therefore facilitates, I suppose, the - - an increase in employer participation in the fund where the employer is quite happy, in my opinion, generally to join CBIS, to make contributions for the employee who has picked CBIS as their nominated - -

MR LLEWELLYN: Right?--- - - superannuation vehicle.

All right. Can you tell me what the effect on me is if I have to maintain more than one fund?---Well, by maintaining more - - more than one fund it imposes a - - a cost factor. An example would be fees and charges. Every fund has a - - a fee structure. By obviously having one fund reduces that burden. The fee structures vary from fund to fund, obviously. We pride ourselves in - - in the sense that our fees in the industry are fairly low. Members realise that. By having, again, more than - - more than one fund you are accruing a - - a fee that ultimately at the - - at the end of your working life will - - will erode your retirement savings."

6 In relation to the presence of the C+BUS fund in the mining industry, Mr Hughes gave the following evidence at 19T:

"All right. And in your knowledge in terms of the fund you operate, C-Bus, do you have employers that are members of, or have paid contributions to C-Bus, who are also engaged in the mining industry?---Yes, we do. We do.

And it's not uncommon for those - - do you know if it's uncommon for those people to have employees engaged in work in both construction and mining?---Yes, we do.

It's uncommon or not uncommon?---It's - - oh, look, I can't give the figures on how many companies there are, but I can use an example of Leighton Contractors who are in C-Bus Construction. They're not in C-Bus in the mining industry, but we'd look at, say, McMahons[2], for instance, where there's been choice of fund. We have people in the construction industry and the mining industry. It would go from company to company.

MR LLEWELLYN: What about Henry Walker Eltin?---Henry Walker Eltin, we do have Henry Walker as participating employers in C-Bus. I could not say if they are using C-Bus in the mining sector. They certainly do in construction."

7 In re-examination Mr Hughes referred to an example of an employee moving from the construction industry to the mining industry as follows at 30-31T:

"MR LLEWELLYN: Mr Hughes, are you aware of any member of the fund who has moved from construction to mining and sought to use C-Bus in the mining operations?---Moved from construction to mining. And sought to use C-Bus?

Yes?---Not an individual case, no.

Are you aware of Mr Richards?---I'm aware of people with - - sorry, with Leightons who are presently on the Yarrie site who are using - - they're in another fund. Some of them do come into C-Bus, there's no choice there at the moment. There is a - - yes, you're right, there is a Mr Richards who is a C-Bus member - -

And he was previously a C-Bus member from construction?---From construction.

Now working in mining?---Yes.

And just for the record. The Yarrie minesite is not covered by the Gold Award, to save my friend's - - it's actually an iron ore mine."

8 A further issue raised by the applicant, was that of the definition of ordinary time earnings. The definition claimed is that contained in ruling 94/4 of the Australian Taxation Office, a copy of which was exhibit A7. The applicant submitted that this was the current ruling by the Australian Taxation Office in relation to superannuation.

9 The applicant generally referred to and relied upon a decision of the Full Bench of the Australian Industrial Relations Commission in *Re National Building and Construction Industry Award 1990 and Others* (Print R7700) dealing with superannuation claims in building and plumbing industry federal awards. Indeed, the applicant's claimed clause is based on the relevant clause arising from those proceedings.

10 The applicant also submitted that there was no impediment to the Commission dealing with the present claims, under the Wage Fixing Principles as the claimed provision is consistent with Commonwealth legislation in relation to superannuation and the terms of the Act.

11 The employers represented by Mr Caccamo, made a number of submissions in opposition to the applicant's claim. Those submissions were directed to firstly the merits of the applicant's claim, and the application of the Commission's Wage Fixing Principles and decisions of the Commission in Court Session in related matters. As to the merits, in summary, the respondent's submitted that:

(a) the claimed provision, based as it is on the National Building and Construction Industry Award 1990 (Federal), does not reflect the needs and practice of the gold mining industry in this State and should not be regarded as a test case for present purposes;

(b) that arrangements contained in the Order are adequate;

(c) there are adequate legislative requirements and protection under Commonwealth law and no further regulation is necessary; and

(d) the applicant's claim lacks sufficient evidence to warrant a variation to the Award.

The Order

12 Both parties made submissions about the Order as having application to the gold mining industry in relation to superannuation. The Order was made in 1987 by consent: (1987) 67 WAIG 2108. By the terms of the Order, each company bound by it was required to make a superannuation contribution into a fund known as the "AWU (WA) Branch) Superannuation Fund". The scope of the Order is set out in clause 2 - Application as follows:

"This Order shall apply to gold mining companies, bound by the Goldmining Consolidated Award 1980, No. 21 of 1967, as at the date of this Order, and whose names appear on the Schedule attached hereto."

13 Set out under the Schedule to the Order, are a number of named companies.

14 Both the applicant and the respondents proceeded, in relation to this aspect of the applicant's claims, on the basis that the Order still had operative effect in the industry. For the following reasons in my opinion, and with respect, that assumption is erroneous.

15 By clause 2 - Application set out above, it can be seen that the Order, which in passing was varied in 1998 to accommodate amendments to the Act regarding choice of fund ((1998) 78 WAIG 2559), by its scope, was to apply to gold mining companies bound by the Former Award and who were named in the Schedule to the Order. Of course, the Order was not a general order and did not have common rule effect.

16 The Former Award was made by the Commission by consent in November 1967: (1967) 47 WAIG 967. This award replaced the Gold Mining Award No 11 of 1946.

17 The Former Award was further varied and consolidated in 1980 to become the Gold Mining Consolidated Award 1980, in October 1980: (1980) 60 WAIG 2239. The Former Award was further consolidated in 1983: (1983) 63 WAIG 2524. The Former Award continued in force and effect until October 1993, when again by consent, the Award was made: (1993) 73 WAIG 2941. Importantly, by clause 1 – Title, whilst a common rule award, the Award replaced the Former Award. This was subject to the terms of clause 42 - Supersession, which provided that the Former Award continued to apply and remain binding on Western Mining Corporation Ltd, its subsidiary companies, employees of those entities and the applicant union.

18 The Commission also observes that by clause 41 - Parties Bound of the Award, it would appear that only two companies bound by the Award when made, were named parties to the Order, they being Bamboo Creek Management Pty Ltd and Leighton Contractors Pty Ltd.

19 In my opinion, as a matter of construction of clause 2 of the Order, two possibilities arise. The first possibility is that clause 2 of the Order should be interpreted such that those companies named in the Schedule are bound by the Order independently of the continued existence of the Former Award and who are bound by its successor, the Award. It would follow from this construction that in terms of the Award as it now is, only Bamboo Creek Management Pty Ltd and Leighton Contractors Pty Ltd, would be subject to its terms.

20 The second construction of clause 2 of the Order is that the first limb of clause 2 referring to the Former Award, and reference to the company names on the Schedule, are to be read conjunctively. On this construction, given that the Former Award no longer exists, none of the employer companies named in the Schedule to the Order are "bound by" it. Therefore, whilst the Order may still remain on foot, in my opinion, if this construction be correct, it has no effect and ceased to have any effect in the gold mining industry in this State from 20 August 1993, when the Award was made by consent.

21 It is important to note, that clause 2 of the Order, did not refer to the Former Award as "superseded or replaced from time to time". The Order was, quite specifically, only binding on the named companies who were "bound by" the Former Award and that award only. The only company which seems to have continued to be bound by the Former Award when the Award was made was Western Mining Corporation and its subsidiaries, but Western Mining Corporation is not a named party to the Order.

22 Therefore in my opinion, based upon the above, the issue of superannuation in the gold mining industry in this State, ceased to be regulated by the Order from August 1993, and would have from that time, been the subject of relevant Commonwealth legislation in relation to superannuation contributions and administration.

The Merits

23 The question of choice of fund and the effect of providing choice in superannuation fund coverage is a complex issue. The applicant's case is essentially that by inserting the choice of fund provision, modelled as it is on the National Building Trades Construction Award, would overcome some of these difficulties in employees having multiple fund balances and accompanying loss of fund balances, through employees failing to keep track of a multiplicity of funds as they move from one employer to another.

24 There are difficulties however with the position adopted by the applicant in this matter. The evidence before the Commission suggests that the funds nominated in the proposed clause, do not have a significant presence in the gold mining industry. Extensive reference was made to participation by one employer in the industry with the C+BUS scheme, that being Leighton Contractors Pty Ltd. Whilst this may be so, it is the case that the provision upon which the applicant bases its claim in these proceedings, arose out of proceedings in the building and construction industry.

25 Moreover, within the context of these proceedings, the Commission has not had the opportunity of a detailed examination of competing funds, in terms of fund structure, performance, and other attributes, in relation to which an informed judgement can be made by the Commission, as to the merits or otherwise, of any particular superannuation fund. Generally speaking, at least in this jurisdiction, matters such as choice of superannuation fund, have been dealt with by way of agreement between parties in an industry, reflected in the terms of an industrial agreement registered under the Act. Indeed, the Order, when it was made, was an example of this broad approach. The difficulty confronting the Commission is that it has no detailed material before it in relation to the schemes, as proposed for the new clause, to enable such an informed judgment to be made.

26 Having considered carefully all of the submissions and the evidence, the Commission is not prepared to vary the Award in the terms as sought by the applicant. However, because of the Commission's conclusions set out earlier in these reasons for decision in relation to the Order, the Commission is minded to preserve the arrangements set out in the Order, as appears to have been the presumption of the parties in the industry. Additionally, any such provision will need to accommodate the requirements of s 48B of the Act, in relation to choice. In this way, the intended current arrangements will be preserved, whilst at the same time, reflecting the statutory requirements presently contained in the Act. This in the Commission's opinion will provide a safety net for the employees and employers in the industry. On this basis, reflecting it seems current practice, the amendment will be consistent with the Commission's Wage Fixing Principles.

27 The Commission will therefore invite the parties to put further brief submissions to it in relation to the present identity of the fund referred to in the Order, and a draft of the proposed clause. If it is the case that any other funds can be agreed between the parties, then this could be considered for inclusion in the new clause to be made.

Public Holidays

28 The applicant seeks to amend the Award to comply with what it says is a requirement imposed by the Minimum Conditions of Employment Act 1993 ("the MCE Act"). The proposed amendment seeks to delete the existing cl 12(2) of the Award which provides as follows:

> *"An employee who is absent from work for more than four hours without leave and without reasonable excuse on the working day preceding or following a day observed as a holiday pursuant to this clause, is not entitled to payment for that holiday."*

29 Additionally, the claim seeks the insertion in its place, of a new provision, reflecting s 30 of the MCE Act which is as follows:

> ***"30. Public holidays, entitlement to pay for***
>
> *An employee, other than a casual employee, who in any area of the State is not required to work on a day solely because that day is a public holiday in that area, is entitled to be paid as if he or she were required to work on that day."*

30 The respondents oppose the applicant's claim.

31 The applicant contends that cl 12(2) of the Award in its present terms, is contrary to s 30 of the MCE Act. Mr Llewellyn submitted that this provision offends against the MCE Act, in that it applies other criteria to the issue of payment for public holidays. What s 30 of the MCE Act prescribes is simply that if an employee would have otherwise worked a day, but for it being a public holiday, then the employee is entitled to payment for that day. The applicant submitted that pursuant to s 40B of the Act, in particular s 40B(1)(b), the present cl 12(2) of the Award, is less favourable than s 30 of the MCE Act.

32 The present provision contained in cl 12(2) of the Award, appears to have been inserted into the Award on its making in August 1993: (1993) 73 WAIG 2941 at 2945.

33 Mr Caccamo on behalf of the respondents submitted that there is no inconsistency between the terms of cl 12(2) of the Award and the terms of s 30 of the MCE Act. As the Commission understood the argument, it was put that by reason of cl 5(8) of the Award, which provides that save for paid leave and authorised absences, employees are not entitled to be paid whilst absent, there would be no payment for the public holiday otherwise payable to the employee, from which any deduction may be made. It followed therefore, on this submission that the provisions could co-exist.

34 By s 5(1)(b) of the MCE Act, minimum conditions of employment are implied into the Award. That is, the terms of s 30 of the MCE Act, operate now in any event, on the Award in relation to public holidays. Furthermore, by s 5(2) of the MCE Act, any provision in an award contrary to a minimum condition is of no effect.

35 The first question to determine, before considering whether the Award should be varied in the terms as sought by the applicant or otherwise, is whether there is any inconsistency between these provisions. This is so because parliament requires the Commission, as provided in s 40B(1)(b) of the Act, either of its own motion or on application, to ensure that awards do not contain conditions of employment less favourable than those prescribed by the MCE Act. What in essence s 40B of the Act does in this regard, is to give effect also, to the fact that inconsistent provisions in awards, to minimum conditions contained in the MCE Act, are by the terms of s 5(2) of that Act, of no effect and therefore should be removed from awards of the Commission. In my view, this construction of both pieces of legislation is quite clear from the plain terms of the statutes.

36 Therefore, if the applicant's interpretation of the terms of cl 12(2) is correct, then it could have no effect contrary to s 30 of the MCE Act.

37 By s 30 of the MCE Act, there is an unqualified right for an employee to receive payment for a public holiday, if the sole reason the employee is not required to work on that day, is because it is a public holiday. The legislature appears to have deliberately used the phrase "solely because" in s 30 of the MCE Act. This phrase would appear to be legislative recognition that an employee may not be required to work a day that is a public holiday throughout the State, for a reason other than that fact alone. For example, an employee may be on a period of authorised but unpaid leave whilst a public holiday falls during that period. Given in this situation, that the employee is not required to work that day for a reason other than solely because it is a public holiday, no entitlement to payment would arise under s 30 in my opinion. Indeed, this would appear to have been the circumstance posed in *Australasian Meat Industry Employees Union v Action Food Barns (WA) Pty Ltd & Ors* (1999) 75 WAIG 2845 per Beech C, to which reference was made by the respondents. In such a case, there would be no apparent conflict with the terms of s 30 of the MCE Act.

38 In my opinion, the submissions of the applicant have considerable force. The terms of the existing cl 12(2) of the Award, does on its face, purport to modify the entitlement conferred on an employee by s 30 of the MCE Act. The respondents' submissions carried with them an implicit assumption that if an employee is absent prior to or after a public holiday, then the employee would necessarily have also been absent on the public holiday itself. In my opinion, this assumption cannot be generally taken. Whilst the Commission fully appreciates the reason that cl 12(2) was inserted into the Award, to discourage unauthorised absenteeism in the workplace, which is a laudable objective, the legislature in this State has by s 30 of the MCE Act, confirmed a general entitlement to all employees throughout the State. As it is presently drafted, in my opinion, cl 12(2) cuts down and conflicts with this general entitlement.

39 I am not persuaded by the respondents' submissions that the terms of cl 5(8) of the Award takes the matter any further. All this provision does is to reflect the general industrial principle of "no work as directed no pay", unless otherwise prescribed by the relevant industrial instrument, that is paid leave or the like. Nor am I of the view that the effect of cl 5(8) in some way "suspends" the contract of employment during a period of absence. What does occur is that the contract of employment continues in effect, however, as award provisions operate upon a contract of employment duly formed and in effect, the clause simply relieves the employer from paying wages or salary for the period of the absence, not otherwise covered by paid leave entitlements. In all other respects, during the period of the absence, unless either the employer or employee take any steps to terminate the contract of employment in the intervening period, the contract remains on foot and subject to any legislative or award provision to the contrary, that period of time is service for benefit purposes for the relevant employee.

40 Clearly in circumstances where an employee is not authorised to be absent at any time on a day preceding or following a public holiday, by cl 5(8) of the Award, the employee is not entitled to payment. However, in my opinion, the effect of s 30 of the MCE Act is, all other things being equal, that if the sole reason the employee does not work the public holiday is because it is a public holiday, the employee is entitled to be paid.

41 The applicant's claim in this regard is therefore upheld.

42 Whilst it might be said that such a result is somewhat anomalous, the Commission is duty bound to apply the legislation as made by the parliament. If such a provision is thought to have consequences not intended by it, then that is a matter for parliament to resolve.

Shift Work

43 The respondents' first counterproposal seeks to vary cl 7(2) of the Award relating to shift work. The proposed amendment seeks to limit in effect, the payment of shift allowance such that it is no longer applicable on afternoon and night shifts on Saturday and Sunday during ordinary working hours.

44 Mr Caccamo submitted that the variation claimed, reflects existing practice. Furthermore, in referring to various decisions of the Commission, in relation to interpretation of award provisions dealing with shift allowances being applicable to continuous shift employees, the respondents submitted that in effect, a shift allowance in these circumstances is capable of absorption into a weekend penalty in ordinary hours. The submission being that the weekend penalty rate accommodates all relevant consideration for work in unsociable hours and any other relevant factors.

45 Mr Llewellyn on behalf of the applicant submitted that there was no basis for the variation and moreover, no evidence was adduced by the respondents to justify the change. The applicant disputed the respondents' assertion in its submissions, that the claimed variation represents existing practice. It was the applicant's submission that employers in this industry have applied and paid the allowance in relation to Saturday shifts.

46 In summary, the applicant's submission was that the Award modernisation process under s 40B of the Act should not be a vehicle to reduce entitlements of employees subject to an award, unless there was evidence supporting the claim, accepted by the Commission.

47 The existing cl 7(2) was contained in the Award when it was made by consent in 1993. No application has been made by employer respondents to vary the Award since that time. Additionally, it would appear that no application to interpret the relevant provisions of the Award in relation to payment of shift allowances for such employees has been made.

48 On the basis of the submissions before the Commission, in the absence of any evidence as to present practices and any difficulties with this provision, the Commission is not prepared to vary a long standing provision contained in the Award. In the Commission's view, a better course to test the application of this provision, as set out in the respondents' submissions, would be an application to interpret the relevant provisions of the Award, pursuant to s 46 of the Act. In that respect, the attention of the parties is directed to the terms of s 46(1)(b) of the Act, enabling, where any declaration so requires, an order to be made by the Commission varying any award to remedy any defect or to give full effect to the declaration made.

49 In the circumstances, the respondents' counterproposal is refused.

Cycle Work

50 The respondents' next counter claim, seeks to vary cl 14 – Special Provisions for Cycle Work, by removing the present obligation on an employer to notify and seek union agreement in prescribed circumstances when implementing cycle work arrangements.

51 The respondents cite as grounds in support of their counter proposal, the fact that since 1987, when this provision was inserted into the Award by consent, changes in the industry no longer require the notification provision in practice. It was submitted that provisions of this kind were included originally in the Award, by reason of concerns expressed by the union in relation to relatively new cycle work arrangements, and the detriment that they may have on employees. Reference was made by the respondents to survey material included in their submissions, said to evidence widespread acceptance of cycle work and rostering arrangements in remote mining operations in the State.

52 In summary the respondents submitted that the existing provision is now obsolete and consistent with the requirements of s 40B of the Act, the Commission should grant the counter proposal in full.

53 The applicant in reply, submitted that there was no justification for the removal of this provision from the Award. The applicant submitted that there was no evidence to support the respondents' assertions. It was submitted that the survey material relied upon, disclosed that the majority of the respondents to the survey were not covered by the Award in any event.

54 The survey relied upon by the respondents at attachment 15 to its written submissions establishes that of the 13 unnamed respondents to the survey, only some four or thereabouts, have any involvement with the Award. Of those four the survey results suggest no difficulty with rostering arrangements and little involvement by the applicant union. One respondent to the survey, described as "M", suggests that it advises the applicant in relation to roster cycles, however no response is received.

55 Whilst survey material of this kind can be useful in arbitration proceedings, in this Commission the present responses indicate a limited involvement by employers covered by the Award. A further difficulty with the survey material is its inability to be tested to any meaningful level. The respondent employers were not named, and there was no apparent ability by the applicant to challenge any of the assertions contained in the survey.

56 A further difficulty is that in submissions, the applicant at least referred to one employer where the applicant has refused to agree to implement cycle work arrangements, because of difficulties in relation to the terms of that arrangement. The applicant submitted that this is an example of where the existing cycle work provision has work to do in favour of its retention.

57 There are difficulties with the material before the Commission to justify the variation sought by the respondents. Whilst it is the case that the Commission is required by s 40B of the Act to delete from awards provisions which are obsolete, on the evidence before the Commission presently, I cannot safely conclude that such a provision as is the subject of the respondents' counterproposal is truly an obsolete provision. The evidence in support of the claim, and the submissions of the applicant, put this matter in issue.

58 On this basis, it seems to the Commission that it would be unsafe to vary the Award to remove this provision, on the basis of the limited material before it on this occasion. This counter proposal is therefore refused.

Redundancy

59 The respondents' final counterproposal seeks to vary cl 35 – Redundancy to delete the requirement in cls 35(3) and 35(4) to provide the applicant three weeks notice of an employer's intention to make an employee redundant, in respect of a member of the applicant. The respondents submitted that a provision more consistent with existing State and Commonwealth legislative arrangements, and other common award provisions in this jurisdiction, and with award modernisation principles in s 40B of the Act, is to require advice by an employer "as soon as practicable" to the applicant. Moreover, such advice should only be given when the employer can reasonably expect to know at the time, that the employee was a member of the applicant.

60 The respondent submitted that the present provision imposes an undue restriction on employers, in that it requires an arbitrary time limitation, which may not be consistent with efficiencies in some circumstances.

61 Additionally, the respondent submitted that given the present low levels of union membership in the mining sector, in conjunction with relevant freedom of association legislation, it is not always possible for employers to be aware as to who is or who is not a member of the applicant union, and therefore the present provision is unreasonable in its operation and effect.

62 By way of counterproposal, the respondents propose a variation to cl 35 of the Award, that inserts an obligation on an employer to notify as soon as practicable after making a decision, and to restrict that notification requirement to circumstances where the employer reasonably knows that the employee at the time of the decision, was a member of the applicant union.

63 The redundancy provision was inserted into the Former Award by consent in 1987: (1987) 67 WAIG 2052 at 2055. This provision has remained from that time, and was affirmed by the parties when the Award was made by consent in 1993.

64 General standards in relation to redundancy, as applying to awards generally, referred to by the respondents, have their genesis in the federal *Termination, Change and Redundancy Case* of 1984: (1984) 8 IR 115. The test case standard provision was incorporated into the federal Metal Industry Award: (1984) 9 IR 115.

65 In this jurisdiction, the test case standards were adopted by the Commission in Court Session and incorporated into the Metal Trades (General) Award 1966 in 1986: *Amalgamated Metal Workers and Shipwrights Union of Western Australia v Anchorage Butchers Pty Ltd and Ors* (1986) AILR 149. Whilst the Commission in Court Session emphasised that its decision in that matter was not a test case, it is the case that provisions of this kind have been extended into awards of this Commission, and indeed other jurisdictions throughout Australia.

66 In the case of the Award, it is not insignificant to note that the present provision in cl 35 was retained in the Award when it was made in 1993, and indeed in its predecessors, in the face of the existence of the TCR decisions and subsequent award variations. That is, it would seem from the record that the parties in the gold mining industry turned their minds to this matter and despite what is contained in the TCR provisions, elected to retain the redundancy clause in its present form. The Commission can only deduce that this was done for good reason, for the purposes of the industry in this State.

67 Whilst it is clearly not the case that consenting parties are bound by the terms of their arrangements for ever and a day, given the significance of a provision relating to redundancy, there would need to be before the Commission, at least some evidence that the present arrangements are unworkable or that for other good reason, the terms of the Award should be varied in this respect. Whilst the respondents' submissions in relation to the existence of contemporary provisions in relation to redundancy and notification obligations have some force, for the reasons that the Commission has just expressed, there needs to be more than reliance upon this proposition in my opinion, in the context of the history of the Award to justify the variation to the Award as sought.

68 Undoubtedly, the combined effect of ss 6(af), 26(1)(vi), and 40B(1)(b) of the Act require the Commission to ensure that awards facilitate the efficient organisation and performance of work according to the needs of an industry and enterprises within it. However, in the absence of evidence from the respondents as to the operation and effect of the existing provision, the Commission is not prepared to grant the variation as sought at this point in time and this counter proposal is also refused.

Conclusion

69 In relation to the superannuation issue, the parties are directed to confer within 14 days in relation to a proposed draft variation to the Award to give effect to these reasons.

2004 WAIRC 12054

AWU GOLD (MINING AND PROCESSING) AWARD 1993 NO. A1 OF 1992

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	APPLICANT
	-v-
	KALGOORLIE CONSOLIDATED GOLD MINES PTY LTD & OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 20 JULY 2004
FILE NO/S	APPL 899B OF 2002
CITATION NO.	2004 WAIRC 12054

Result	Award varied. Order issued
Representation	
Applicant	Mr M Llewellyn and with him Mr D McLane as agent
Respondents	Mr T Caccamo as agent

Order

HAVING heard Mr M Llewellyn and with him Mr D McLane as agent on behalf of the applicant, and Mr T Caccamo as agent on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 and by consent hereby orders –

THAT the AWU Gold (Mining and Processing) Award 1993 No. A1 of 1992 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 date of this order.

(Sgd.) S J KENNER,
[L.S.] Commissioner.

SCHEDULE

1. Clause 2. – Arrangement: Delete this clause and insert in lieu thereof the following:

2. - ARRANGEMENT

1. Title
2. Arrangement
3. Term and Application
4. Area and Scope
5. Contract of Employment
6. Hours
7. Shift Work
8. Overtime
9. Rest Breaks and Recall to Work - All Employees
10. Saturday Work
11. Sunday and Holiday Work
12. Public Holidays
13. Leisure Days
14. Special Provisions for Cycle Working
15. Definitions
16. Wage Rates
17. Allowances
18. Employee Relieving in a Higher Capacity
19. Payment of Wages
20. Piece Work
21. Annual Leave

22. Sick Leave and Carer's Leave
23. Accident Pay
24. Re-Employment after an Accident
25. Inclement Weather
26. Bereavement Leave
27. Jury Service
28. Protective Clothing
29. First Aid
30. Representative Interviewing Employees
31. Employment Records
32. Right of Entry
33. Recognised Crib Place
34. Long Service Leave
35. Redundancy
36. Parental Leave
37. Structural Efficiency
38. Enterprise Flexibility
39. Consultation in the Workplace
40. Disputes Procedure
41. Parties Bound To This Award
42. Supersession
43. Liberty to Apply
44. Superannuation

Appendix 1 – Make Up of Total Wage

2. Clause 44. – Superannuation: Insert new clause:

44. - SUPERANNUATION

(1) The subject of superannuation is dealt with extensively by legislation including the Superannuation Guarantee (Administration) Act 1992, the Superannuation Guarantee Charge Act 1992, the Superannuation Industry (Supervision) Act 1993 and the Superannuation (Resolution of Complaints) Act 1993. This legislation as varied from time to time, governs the superannuation rights and obligations of the parties to this award.

(2) Definitions

For the purposes of this clause:

"Fund" means a complying superannuation fund as that term is used in the superannuation legislation.

(3) In order to comply with the provision of s 48B of the Industrial Relations Act 1979, employees may nominate a complying superannuation fund or scheme into which the contributions by an employer on behalf of the employee will be made.

(4) The employer is required to notify employees of the entitlements to nominate an alternative complying superannuation fund or scheme.

(5) The employer and the employee are bound by the nomination of the employee unless the employer and the employee agree to change the complying superannuation fund or scheme. The employer shall not unreasonably refuse to agree to a change of complying superannuation fund or scheme required by an employee.

(6) Superannuation arrangements in place at the date of this order are not required to be altered unless an employee seeks to do so in accordance with subclause (3) and (4) of this clause.

(7) An employer is not required to contribute to more than one Fund in respect of an employee under this award.

(8) If a dispute or difficulty arises over the implementation or continued operation of this provision, it must be handled in accordance with the dispute resolution procedure in clause 40 – Disputes Procedure.

3. Clause 12. – Public Holidays: Delete this clause and insert in lieu thereof the following:

12. - PUBLIC HOLIDAYS

(1) (a) The following days or the days observed in lieu, subject to Clauses 8. - Overtime and 11. - Sunday and Holiday Work of this award, shall be allowed as holidays without deduction of pay, namely, New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Labour Day, Foundation Day, Sovereign's Birthday, Christmas Day and Boxing Day. Provided that another day may be taken as a holiday by arrangement between the parties in lieu of the days named in this subclause.

(b) When any of the public holidays prescribed in paragraph (a) hereof falls on a Saturday or a Sunday, such holiday may be observed on the next succeeding Monday, where gazetted, and when Boxing Day falls on a Sunday or on a Monday, such holiday shall be observed on the next succeeding Tuesday. In each such case, the substituted day shall be deemed a holiday without deduction of pay and the day for which it is substituted shall not be a holiday.

(2) An employee, other than a casual employee, who in any area of the State is not required to work on a day solely because that day is a public holiday in that area, is entitled to be paid as if he or she were required to work on that day.

(3) The provisions of this award do not operate so as to require payment of more than double time and a half for work performed on a public holiday.

(4) This clause does not apply to casual employees.

2004 WAIRC 12051

FIRE BRIGADE EMPLOYEES' AWARD 1990, NO. A 28 OF 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED FIREFIGHTERS UNION OF WESTERN AUSTRALIA **APPLICANT**
	-v-
	FIRE AND EMERGENCY SERVICES AUTHORITY OF WA **RESPONDENT**
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	FRIDAY, 16 JULY 2004
FILE NO/S	APPLICATION 301 OF 2004
CITATION NO.	2004 WAIRC 12051

Result Award varied

Order

WHEREAS on 10 May 2004 the United Firefighters Union of Western Australia applied to vary the *Fire Brigade Employees' Award, 1990 No A28 of 1989* ("the Award") in relation to inserting a new classification of Communication Systems Officer; and

WHEREAS the application was published in the Western Australian Industrial Gazette (84 WAIG 1121) and was served in accordance with s29A of the *Industrial Relations Act 1979* ("the Act") and no objection to the application was received by the Commission; and

WHEREAS at conference proceedings before the Commission on 15 July 2004 the Commission was advised by the applicant that employees classified as Communication Systems Officers are currently award free; and

FURTHER that the pay rates to be included in the award for this classification are the current pay rates being paid to these employees and that on an informal basis the terms and conditions of the Award currently apply to Communication Systems Officers; and

WHEREAS the Commission required the parties to discuss a further amendment as to how Communication Systems Officers were to progress between levels; and

WHEREAS on 16 July 2004 the applicant lodged an amended schedule which updated the rates of pay to include the State Wage Case 2004 and a new subclause as to how Communication Systems Officers were to progress between levels; and

WHEREAS on 16 July 2004 the respondent advised the Commission that it consented to the award being varied in the terms set out in the amended schedule lodged in the Commission on 16 July 2004; and

WHEREAS the Commission formed the view that as the application was by consent and complies with the Act and the State Wage Case Principles 2004 that the award should be varied in the terms of the amended schedule lodged in the Commission on 16 April 2004; and

NOW HAVING heard Mr J Walker on behalf of the Applicant and Ms G Husk on behalf of the Respondent and by consent, the Commission, pursuant to the powers conferred on it under the Act, hereby orders –

THAT the Fire Brigades Employees' Award 1990 No A28 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 16 July 2004.

(Sgd.) J L HARRISON,
[L.S.] Commissioner.

SCHEDULE

1. Clause 6 - Wages: Delete this clause and insert the following in lieu thereof:

(1) The base rate per week for shiftwork staff will be as follows:

Classification		**Base Rate per Week**
Trainee Firefighter		519.20
3rd Class Firefighter		556.00
2nd Class Firefighter		567.20
1st Class Firefighter	- Level 1	590.20
	- Level 2	604.00
	- Level 3	648.00
Senior Firefighter		671.00
Station Officer	- Level 1	740.00
	- Level 2	763.00
District Officer		874.44
Superintendent		928.87
Communication Systems Officer – level 1		556.71
Communication Systems Officer – level 2		583.60
Communication Systems Officer – level 3		608.45
Communication Systems Officer – level 4		633.06

(2) The total weekly rate for employees specified in subclause (1) will be calculated by the sum of the base rate and 39.8% of that base rate of pay in lieu of all loadings and penalties accumulated as a consequence of working shift work as detailed in clauses 8 – Hours of Duty and 34 - Formula for Calculation of Penalties.

(3) The rate of pay per week for fire safety assistants will be:

Fire Safety Assistants	
Grade 1	603.96
Grade 2	649.63
Grade 3	721.98
Grade 4	752.48
Fire Safety Assistant (O'Connor Workshop)	
Grade 1	603.96
Grade 2	649.63

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

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

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

2. Clause 7 – Promotions: Immediately following subclause (6) of this clause insert a new subclause as follows:

(7) Communication Systems Officers will progress between the levels on attainment of the appropriate skills and competencies as agreed between the parties.

2004 WAIRC 12085

MOTOR VEHICLE (SERVICE STATION, SALES ESTABLISHMENTS, RUST PREVENTION AND PAINT PROTECTION) INDUSTRY AWARD NO. 29 OF 1980

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS **APPLICANT** **-v-** AMGAS HENDERSON SERVICE STATION & OTHERS **RESPONDENTS**
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	THURSDAY, 22 JULY 2004
FILE NO.	APPLA 263 OF 2004
CITATION NO.	2004 WAIRC 12085

Result	Variations made
Representation	
Applicant	Mr M D Llewellyn
Respondents	Ms N Thomson as agent on behalf of Respondents for whom warrants were filed Mr G Miller on behalf of Motor Trades Association of WA and as agent on behalf of Respondents for whom warrants were filed

Order

HAVING heard Mr M D Llewellyn on behalf of the Applicant and Ms N Thomson as agent on behalf of Respondents for whom warrants were filed and Mr G Miller on behalf of Motor Trades Association of WA and as agent on behalf of Respondents for whom warrants were filed, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the Motor Vehicle (Service Station, Sales Establishments, Rust Prevention and Paint Protection) Industry Award No. 29 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 Thursday, 22 July 2004.

(Sgd.) J H SMITH,
[L.S.] Commissioner.

SCHEDULE

1. Clause 11. - Wages: Delete subclause (5) of this clause and insert in lieu thereof the following:

(5) Leading Hands:

An employee appointed by the employer as a leading hand shall be paid the following amount, in addition to the ordinary rate of pay, for all purposes of the award:

		Rate Per Week $
(a)	If placed in charge of not less that three and not more than ten other employees	22.50
(b)	If placed in charge of more than ten and not more than 20 other employees	34.60
(c)	If placed in charge of more than twenty other employees	44.80

2. Clause 13. – Overtime: Delete subparagraph (i) of paragraph (a) of subclause (2) of this clause and insert in lieu thereof the following:

(2) (a) (i) An employee required to work overtime for more than two hours, without being notified on the previous day or earlier that the employee will be so required to work, shall be supplied with a meal by the employer or be paid $8.60 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 $5.90 for each meal so required.

3. Clause 16. – Vehicle Allowance: Delete subclause (3) of this clause and insert in lieu thereof the following:

(3) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

SCHEDULE 1 - MOTOR CAR ALLOWANCE

Rates of Hire for Use of Employee's Own Vehicle on Employer's Business

Area and Details	Engine Displacement (in Cubic Centimetres)		
Distance travelled during a year on official business	Over 2,600cc	Over 1,600cc - 2,600cc	1,600cc & Under
Metropolitan Area	63.0	56.3	49.0
South West Land Division	64.4	57.8	50.3
North of 23.5° South Latitude	70.7	63.6	55.4
Rest of the State	66.6	59.6	51.8

SCHEDULE 2 - MOTOR CYCLE ALLOWANCE

Distance travelled during a year on official business	Rate c/km
Rate per kilometre	21.7

4. Clause 18. – Country Work: Delete subclause (4) of this clause and insert in lieu thereof the following:

(4) An employee to whom the provisions of subclause (1) of this clause applies, shall be paid an allowance of $21.00 for any weekend that the employee returns to their home from the job but only if:-

(a) The employee advised the employer or the employer's agent of their intention no later than the Tuesday immediately preceding the weekend in which the employee so returns;

(b) The employee is not required for work during that weekend;

(c) The employee returns to the job on the first working day following the weekend; and

(d) The employer does not provide or offer to provide suitable transport.

AWARDS/AGREEMENTS—Interpretation of—

2004 WAIRC 12267

BAKERS' (METROPOLITAN) AWARD NO.13 OF 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES QUALITY BAKERS AUSTRALIA LIMITED

APPLICANT

-v-

AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH & OTHER

RESPONDENTS

CORAM COMMISSIONER S J KENNER
DATE MONDAY, 9 AUGUST 2004
FILE NO/S APPLICATION 303 OF 2004
CITATION NO. 2004 WAIRC 12267

Catchwords	Industrial law – Award interpretation – Relevant principles to be applied – Payment for work performed on a Sunday on or preceding a public holiday considered – Declaration issued – *Industrial Relations Act 1979* (WA) s 46.
Result	Declaration issued
Representation	
Applicant	Mr D Richards
Respondents	Mr J Nicholas on behalf of the Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch, and no appearance on behalf of the Baking Industry Employees Association of WA

Reasons for Decision

1 The present application is one under s 46 of the Industrial Relations Act 1979 ("the Act") by which the applicant seeks an interpretation of the Bakers (Metropolitan) Award 1987 ("the Award").

2 The questions posed by the application as amended, are as follows:

(1) *Are employees of the Applicant entitled to be paid under clause 10(1) of the Award for the public holiday, at the same time as receiving payment under sub-clause 2(vii) of Schedule B of the Award for time worked on a public holiday, in circumstances in which they have been given a paid day off on the Sunday in lieu of the public holiday?*

(2) *What penalty rate applies to work performed on the public holiday where a Sunday preceding the Public Holiday is either worked or not worked?*

3 Both parties filed written submissions in relation to their contentions as to the proper interpretation of the Award. I should also observe that the applicant's operations are also subject to an industrial agreement that being the Buttercup (WA) Enterprise Agreement 2001. However, as there is no reference in the industrial agreement to the issue to be determined by the Commission on this application, I refer to it no further.

Relevant Award Provisions

4 The questions raised by this application concerned appropriate payments to be made when employees of the applicant work on a public holiday. The relevant provisions of the Award are set out in clause 10 - Holidays and Schedule B - Appendix Buttercup Bakeries Malaga and are as follows:

"10. – HOLIDAYS

(1) *(a)* *When Christmas Day or New Year's Day falls on a Saturday or Sunday, such holiday shall be observed on the next succeeding Monday, and when Boxing Day falls on a Sunday or Monday, such holiday shall be observed on the next succeeding Tuesday, in each case the substituted day shall be deemed a holiday without deduction of pay, in lieu of the day for which it is substituted.*

(b) *The normal penalty loading shall be paid for the week in which Christmas Day and Boxing Day falls, or are observed, on a Monday or Tuesday...*

(4) *(a)* *An employee who accepts an offer to work or who is rostered to work ordinary hours on any holiday prescribed in subclause (1) of this clause shall be paid at the rate of time and one half, in addition of the payment prescribed in subclause (1) of this clause, for any part of the first 7.6 hours of work and at the rate of double time and one half for work in excess of 7.6 hours. Provided further that a minimum payment of four hours at the rate of time and one half shall be made to any employee who works on any prescribed holiday.*

(b) *At the request of an employee who works on any prescribed holiday, and with the agreement of the employer, paid time off in lieu of payment for the work done may be taken. Such time off in lieu, when taken during ordinary hours, shall compensate for the penalty premium at which the time off in lieu accrued. For example, two and one half ordinary hours compensates for one hour of double and one half time.*

(c) *The taking of paid time off in lieu of payment for work done on any prescribed holiday shall be agreed at the time of the employee accepting the offer to work on the holiday otherwise payment in accordance with paragraph (a) of this subclause shall be made.*

(d) *Subject to the limitations imposed by paragraphs (b) and (c) of this subclause, part payment and part paid time off in lieu of payment for work done on any prescribed holiday may be agreed between the employee and employer...*

(6) *If any award holiday falls within an employee's period of annual leave and is observed on a day which in the case of that employee would have been an ordinary working day, there shall be added to that period one day being an ordinary working day for each such holiday observed as aforesaid…*

(9) *On any public holiday not prescribed as a holiday under this award the employer's establishment or place of business may be closed, in which case an employee need not present himself for duty and payment may be deducted but if work be done ordinary rates of pay shall apply...*

SCHEDULE B

APPENDIX

BUTTERCUP BAKERIES MALAGA

This Appendix applies to Quality Bakers Australia Limited trading as Buttercup Bakeries Malaga and its employees and shall operate in conjunction with the award provided that where there is any inconsistency between this Appendix and the award, the provisions of the Appendix shall prevail to the extent of the inconsistency.

1. ***Payout of Income Maintenance Allowance***

Clause 24. – Income Maintenance Allowance of this award, will cease to apply to each employee at the date on which the agreed payout of the income maintenance allowance is made in respect of each employee.

2. ***Averaging of Penalty Structure***

For employees, other than casual employees, a loading of 27.88% shall be payable in addition to the ordinary rate of pay and is to be paid for each ordinary hour worked in lieu of premiums payable pursuant to Clause 20. – Allowances of this award, subject to the following conditions.

(i) *A three month trial period shall apply during which time the averaging arrangements can be discounted at any stage with 14 days notice by either party.*

(ii) *The company reserves the right to continue the current arrangements for rotating or varying shifts and employees.*

(iii) *Overtime is to be based upon the ordinary time hourly rate of pay calculated by dividing the weekly rate in Item 3. - Interim Classification Structure of this Schedule by 38.*

(iv) *The parties reserve the right to re-negotiate the average penalty rate in the event of unforeseen change (eg. changes to the hours of baking).*

(v) *Unless the parties agree to continue the averaging arrangements award conditions will apply at the end of, or at the discontinuance of, the trial period.*

(vi) *In lieu of subclause (4)(a) of Clause 7. - Hours of this award, ordinary hours may be worked on a Sunday and are included in the calculation of the average penalty rate of 27.88% payable for each hour worked. This arrangement is based on existing Sunday commencement times for each shift.*

(vii) *Provided that in lieu of a loading of 27.88%, a loading of 77.88% will be paid for each hour worked on a public holiday where no Sunday is worked in that week. Where the Sunday is worked a loading of 177.88% will apply for each hour worked on the public holiday in lieu of a loading of 27.88%..."*

5 The questions to be answered in this application, involve a consideration of the terms of clause 10 - Holidays and the relevant parts of Schedule B - Appendix. Before I do so however, I comment on the relevant principles in relation to applications to interpret awards.

Relevant Principles

6 It is settled law in this jurisdiction, that awards should be interpreted consistent with relevant principles having application to the construction of any other written instrument: *Perth Electrical Tramways Employees Industrial Union v Commissioner of Railways* (1927 WAIG 155; *FMWU v Wormald International (Australia) Pty Ltd* (1990) 70 WAIG 1287. That is, the meaning of the relevant provision in the Award needs to be read in its ordinary and natural sense within the context of the Award as a whole: *Norwest Beef Industries Ltd v WA Branch, Australasian Meat Industry Employee's Union* (1984) 64 WAIG 2124. Additionally, given that many if not most awards are drafted by those not always skilled in the art of legal drafting, a generous approach to interpretation ought be adopted: *Hospital Salaried Officers Association v Minister for Health* (1981) 61 WAIG 616; *Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia and Others* (1987) 67 WAIG 1097.

7 I apply those principles for present purposes.

Consideration

8 It seems from its terms, that cl 2 of Schedule B - Appendix makes provision for the introduction of an averaging penalty structure so as to permit work during hours of work that would ordinarily attract a different penalty regime as set out in other parts of the Award. For example, this would include working on Saturdays or Sundays in the latter case, prior to 6pm in the evening. Importantly, the introductory paragraph to Schedule B prescribes that the terms of Schedule B are clearly intended to prevail if there is any conflict between its terms and the remainder of the content of the Award provisions.

9 I first turn to an analysis of cl 10 - Holidays. In my opinion, the intention of this provision is clear in that by cl 10(1), the Award prescribes that certain nominated holidays fall as an entitlement to an employee to be absent from work without deduction of pay. Clause 10(2), then contemplates the circumstance where certain public holidays fall on specified days. Importantly, cl 10(4) deals with the issue of penalty payments to be made to employees where they either accept an offer to work or are rostered to work ordinary hours on any public holiday as prescribed in cl 10(1). From the language of cl 10(4)(a), the penalty payment prescribed is a payment to be made in addition to the payment for the holiday at ordinary rates, as provided for in cl 10(1). That is, the effect of cl 10(4)(a), by way of penalty payments, is not to provide for the penalty to be paid in substitution or the payment for the holiday ordinarily in any event. What cl 10(4)(a) does is simply to provide an additional penalty payment, if an employee actually works on any of the prescribed public holidays.

10 I then turn to clause 2 of Schedule B - Appendix. As I have already observed, the purpose of cl 2 appears to provide for aggregate penalties without the necessity to individually apply the penalty regime as prescribed elsewhere in the Award. In particular, cl 2(vi) makes provision for the working of ordinary hours without an overtime penalty, but by payment of the alternative average penalty rate of 27.88% for each hour worked on a Sunday. By cl 2(vii), it is provided that the average penalty rate of 27.88% is displaced by a higher average penalty rate for working on public holidays either where no Sunday is worked in a particular week, or, where a Sunday is worked in any particular week of the public holiday. In my opinion, the combined effect of cls 2(vi) and (vii) of Schedule B, consistent with the terms of cl 2 read as a whole, deal with "penalty payments", that is, payments to be made when employees work on certain days. Adopting this construction, the question then is whether any part of cl 2 of Schedule B - Appendix, is inconsistent with in particular, cl 10 - Holidays of the Award, such that its terms should prevail.

11 Given the foregoing analysis as to the operation and effect of cl 10 - Holidays, in my opinion, to the extent that cl 10(4)(a) and cl 2(vii) of Schedule B - Appendix of the Award deal with payments for working on public holidays, there is an inconsistency and the terms of Schedule B - Appendix will prevail. That is, what is clearly intended in my opinion, is that clause 2(vii) of Schedule B - Appendix, will displace the operation of cl 10(4)(a) of the Award, in terms of penalty payments to be made where an employee works on a public holiday. That is both sets of provisions deal with the issue of penalty payments to be made where employees are required and do work on a public holiday.

12 The terms of cl 2 of Schedule B - Appendix, are silent in relation to the issue dealt with in cl 10(1) of the Award that is payment for the public holiday in the ordinary course as and when it falls. The entitlement to a holiday without deduction of pay is not dealt with by the terms of Schedule B at all. In my view, this interpretation is not inconsistent with the scheme of

Schedule B - Appendix or the terms of the Award, in particular cl 10, when read as a whole. That is, nowhere in Schedule B - Appendix, does it appear that there is any intention to deprive an employee from the benefit of cl 10(1) which would otherwise apply in circumstances of the application of cl 10(4) (a) of the Award if the terms of Schedule B – Appendix had no application.

13 I am therefore of the opinion that the approach adopted by the respondent is the correct approach and accordingly the answers to the two questions posed should be as follows:

(a) Yes.

(b) In the case where a Sunday is worked preceding a public holiday the average penalty rate should be 177.88% and when the Sunday is not worked the average penalty rate should be 77.88%.

14 I declare accordingly.

AGREEMENTS—Industrial—Retirements from—

NOTICE

CUTTING CONCRETE/BLPPU COLLECTIVE AGREEMENT 2001

No. AG 63 of 2001

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 936 OF 2004

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.

Cutting Concrete will cease to be a party to the Cutting Concrete/BLPPU Collective Agreement 2001 No AG 63 of 2001 on and from the 23 September 2004.

Dated at Perth this 22 July 2004.

J. SPURLING,
Registrar.

PUBLIC SERVICE ARBITRATOR—Matters dealt with—

2004 WAIRC 12254

LEVEL OF DUTIES PERFORMED

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED **APPLICANT**
	-v-
	GOVERNING COUNCIL OF THE CHALLENGER COLLEGE OF TAFE **RESPONDENT**
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DATE	FRIDAY, 6 AUGUST 2004
FILE NO	PSACR 2 OF 2003
CITATION NO.	2004 WAIRC 12254

Catchwords	Public Service Arbitrator – Matter to be treated as Reclassification Appeal – Relevant principles to be applied – Work Value Principle – No significant net addition to the work – Matter dismissed – *Industrial Relations Act 1979* (WA) s 44
Result	Matter dismissed
Representation	
Applicant	Mr O J Wood
Respondent	Mr M Taylor

Reasons for Decision

1 This is an application pursuant to s.44 of the Industrial Relations Act 1979, referred for hearing and determination. The hearing of this matter commenced on 15 January 2004 to hear the evidence of a witness who was otherwise unavailable. It reconvened on 18 February 2004 however, was adjourned to enable the applicant to consider its position further and to have discussions with the respondent. At a hearing on 28 June 2004, the parties reported to the Arbitrator that it had been agreed

between them that the matter should be treated as a reclassification appeal, dealt with according to that appropriate process and according to the Work Value Principle set out in the Statement of Principles arising from the State Wage Case decision. The Work Value Principle provides:

> **"6. <u>Work Value Changes</u>**
>
> (a) Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.
>
> In addition to meeting this test a party making a work value application will need to justify any change to wage relativities that might result not only within the relevant internal award classifications structure but also against external classifications to which that structure is related. There must be no likelihood of wage "leapfrogging" arising out of changes in relative position.
>
> These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with this provision.
>
> In applying the Work Value Changes Principle, the Commission will have regard to the need for any alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which work is performed.
>
> (b) Where new or changed work justifying a higher rate is performed only from time to time by persons covered by a particular classification or where it is performed only by some of the persons covered by the classification, such new or changed work should be compensated by a special allowance which is payable only when the new or changed work is performed by a particular employee and not by increasing the rate for the classification as a whole.
>
> (c) The time from which work value changes in an award should be measured is the date of operation of the second structural efficiency adjustment allowable under the September 1989 State Wage Decision [69 WAIG 2917].
>
> (d) Care should be exercised to ensure that changes which were or should have been taken into account in any previous work value adjustments or in a structural efficiency exercise are not included in any work evaluation under this provision.
>
> (e) Where the tests specified in (1) are met, an assessment will have to be made as to how that alteration should be measured in money terms. Such assessment should normally be based on the previous work and the nature and extent of the change in work.
>
> (f) The expression "the conditions under which the work is performed" relates to the environment in which the work is done.
>
> (g) The Commission should guard against contrived classifications and over-classification of jobs.
>
> (h) Any changes in the nature of the work, skill and responsibility required or the conditions under which the work is performed, taken into account in assessing an increase under any other provision of this Statement of Principles, shall not be taken into account in any claim under this provision."
>
> (Statement of Principles arising from the State Wage Case Decision of 3 June 2004)

2 The employees the subject of this application, now being treated as a reclassification appeal, Mr Steve Bye and Mr Ivan Collins occupy positions as Hospitality Technicians Level 2 at Challenger TAFE and they seek reclassification of those positions to Level 4.

3 The applicant says that there has been change in the conditions under which the work is performed. The role is said to have changed from purely technician to venue management and there are changes in the delivery of training services providing for a wider scope of skills of a higher nature. The positions are quite autonomous and require very little direct supervision.

4 During the course of the hearing Mr Bye gave evidence of the duties performed by himself and Mr Collins and there was other evidence which demonstrates that they have performed those duties and exercised the same skills and responsibilities since around 1995. Having said that though it is quite clear that as with all jobs, different ways of doing things arise and different technologies and methods are developed as time goes by. In this case, there has been the introduction of the use of a personal computer attached to the cash register, dealing with the implications of the Goods and Services Tax, as well as the requirements on the College for quality accreditation. There is no evidence of change over the years in the nature of the work, skill or responsibility of the positions. The Job Description Form is effectively the same as it was and reflects the roles of the employees concerned. As Mr Bye says, nothing has changed, he still does the same training in the bar as he has always done.

5 The respondent says that there has been no significant change to the work of the positions or in the skills required.

6 Having considered the submissions of the parties and the evidence that have been presented I conclude that there is some misunderstanding as to the case being put forward on behalf of the applicant. The applicant appears to be claiming that the position was never properly classified. I say this on the basis that the evidence is quite clear that there has been no change in the position for at least 9 years. There is however, some dispute between the parties as to the role of the technicians and the degree to which they are involved in teaching or whether they are assisting the lecturer. It is quite clear that the Job Description Form, whether in its previous terms or as amended by the respondent in recent times to remove reference to teaching, reflects the job as it is performed. The job remains the same as it has been for some 9 years.

7 The test to be applied according to the Statement of Principles requires that there be a demonstration of a significant net addition to the work, skill or responsibility of the position. This is not simply a case for determining whether the proper classification has been allocated in the first instance. According to the proper tests set out in the Work Value Principle, any claim for reclassification in circumstances of there having been no significant net addition to the work must fail.

8 Having said that, though, it is important to note that the BIPERS Assessment prepared by the respondent in anticipation of this hearing demonstrates that the position is still within the reasonable range as would be expected of a Level 2. It is true that the BIPERS Assessment is but part of, and a tool in, the proper classification of the position. The applicant challenges

whether the BIPERS Assessment correlates properly with the essential criteria contained within the Job Description Form. It is not my intention to cover each and every point of the BIPERS Assessment save to note that the position appears to be correctly classified overall. There is no anomaly of significance between the BIPERS Assessment and the essential criteria for the position such as to take the position to the next level.

9 As noted earlier, in any event, that is not the appropriate test for the purposes of a reclassification appeal.

10 In all of these circumstances the application shall be dismissed.

2004 WAIRC 12253

LEVEL OF DUTIES PERFORMED

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED **APPLICANT**
	-v-
	GOVERNING COUNCIL OF THE CHALLENGER COLLEGE OF TAFE **RESPONDENT**
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	FRIDAY, 6 AUGUST 2004
FILE NO	PSACR 2 OF 2003
CITATION NO.	2004 WAIRC 12253

Result Matter dismissed

Order

HAVING heard Mr O J Wood on behalf of the applicant and Mr M Taylor on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Commissioner,
[L.S.] Public Service Arbitrator.

INDUSTRIAL MAGISTRATE—Complaints before—

2004 WAIRC 12088

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES' COURT

PARTIES	GREG LOGAN-SCALES, DEPARTMENT OF CONSUMER & EMPLOYMENT PROTECTION **CLAIMANT**
	-v-
	ECO TOURS PTY LTD T/AS WESTERN TRAVEL BUG **RESPONDENT**
CORAM	MAGISTRATE RH BURTON IM
DATE	FRIDAY, 9 JULY 2004
FILE NO	M 199 OF 2003
CITATION NO.	2004 WAIRC 12088

Representation	
Claimant	The Claimant appeared in person.
Respondent	Ms L Walser and with her Mr B Anderson appeared on behalf of the Respondent.

Reasons for Decision

The Claim

1 This is a claim by Mr Greg Logan-Scales, an Industrial Inspector, made under section 83(1) of the ***Industrial Relations Act 1979*** (the Act), for the enforcement of an instrument on behalf of Allan Thomas Morgan (hereinafter referred to as "Morgan").

2 Morgan is a tour guide who drives a bus under contract to the Respondent. He is a casual worker.

3 The Claimant alleges that Morgan's work is covered by the ***Transport Workers (Passenger Vehicles) Award No R47 of 1978*** (the Award) by virtue of section 37(1) of the Act.

4 Section 37 of the Act has the heading "**Effect, area and scope of awards**" and subsection (1) provides:

> *An award has effect according to its terms, but unless and to the extent that those terms expressly provide otherwise it shall, subject to this section-*
>
> *(a) extend to and bind-*
>
> *(i) all employees employed in any calling mentioned therein in the industry or industries to which the award applies; and*
>
> *(ii) all employers employing those employees;*
>
> *and*
>
> *(b) operate throughout the State, ….*

5 Morgan claims he has not been paid:

- the minimum casual hourly rate of pay for all the hours worked in some weeks.
- the 15% shift penalty for hours worked between certain times Monday to Friday.
- the additional penalty rate of 50% for work performed during ordinary hours on Saturdays.
- the additional penalty rate of 100% for work performed during ordinary hours on Sundays.
- the additional penalty for work performed on a Labour Day public holiday.
- overtime rates of pay for additional hours worked on any or all days of the week Monday to Saturday.
- overtime rates of pay for additional hours worked on two Sundays.

6 Morgan had kept calculation sheets recording hours and days worked in the period from 5 December 2001 to 10 May 2002 and these have been used to base a claim for payment of $7083.02. The claim also seeks pre-judgment interest, costs and the imposition of a penalty.

7 At the outset I decide that the claim made for pre-judgment interest is unsuccessful because of the decision of the Full Bench of the Western Australian Industrial Relations Commission in ***Foy v Terraqua (2003) 83 WAIG 3319***.

8 The Respondent's answer to the claim is that Morgan is only bound by the ***Minimum Conditions of Employment Act 1993*** (the MCE Act) and is employed as a tour guide and not a bus operator and has been paid according to the MCE Act.

9 The Respondent disputes much of the detail recorded on the calculation sheets produced by the Claimant as to the hours worked.

10 It was agreed that my principal task was to decide whether Morgan was a bus driver and the parties could probably resolve later the question of quantum, or the sum to be paid, if any.

11 The question I have to resolve is whether the driving of the twenty-five seater bus was the major and substantial part of the employment as a bus driver/tour guide.

12 I find that the Respondent is a tour bus operator.

The Evidence

Allan Thomas Morgan

13 Morgan gave evidence that at the relevant time he was a bus driver/tour guide and had initially responded to an advertisement that was for a tour coach driver/guide. He said he did not get that job but later responded again to an advertisement. Later again he was called in for an interview. The advertisements stated that knowledge of the South-West of the State was essential. The fax number in the advertisement was that of Western Travel Bug.

14 He said he has an F class driver's licence that covers passenger vehicles and paying passengers. He said he thought he had to have the appropriate licence, interest in the tourism industry, knowledge of tourist places of interest and be able to communicate with and get on with people. He was expected to adhere to a schedule, perform the appropriate duties at each destination, and pay park fees and accommodation expenses.

15 He was paid $145.00 per trip and that sum increased to a maximum of $160.00 after twelve months experience. He was not paid while being trained.

16 He started work at 6.00 am at the bus depot and finished at 7.00 pm to 8.00 pm.

17 He took tours to the Pinnacles, Wave Rock, Albany, (a two day trip) and Margaret River. He often drove around to pick up passengers and later dropped them off at their Perth accommodation.

18 The passengers would, during the tour, have a morning tea stop, toilet breaks and lunch and afternoon tea stops. Sometimes these were organised by the driver. Visits were made to various sites and commercial premises. Morgan would also unload the coach for overnight stops and arrange and pay for accommodation and generally look after his passengers.

19 On longer trips he could be on the job for as much as eleven to thirteen hours per day.

20 He said that the majority of his time was spent driving and while driving and when stopped he would give the passengers local information. This varied to a certain extent depending on the number of passengers on the trip and who they were.

21 He said he had to keep records for the Respondent. He said he did not have any experience as a tour guide prior to commencing with the Respondent, but had driven buses for three or four years.

22 He said that at the conclusion of each trip he had to have the bus fuelled up for the following day and then he washed and cleaned it at the depot. There was evidence that cleaning could take half an hour to an hour and a half. He said sometimes he had to wait as there were other drivers cleaning buses.

23 Morgan said that he had recorded the hours in a school exercise book that he had later summarised and then, later still, lost.

24 Mr Anderson who is the sole director of the Respondent cross-examined Morgan. Additionally I permitted Mr Anderson's daughter, Ms Walser, to also ask questions of the witnesses as she is involved extensively in the business.

25 The Respondent disputed the time taken to complete the work required to be performed on the return of the buses to Perth.

26 Ms Walser disputed that Morgan had obtained the job in response to any advertisement but, on the evidence, I find that Morgan got the job through the advertisements.

27 Every tour guide had to have an appropriate driver's licence and additional knowledge. Morgan had to have other skills as well as driving.

28 There was a dispute as to at least some of the times Morgan had recorded.

Garry James Chidlow

29 Mr Chidlow gave evidence for the Claimant. He said he had worked for the Respondent for about four months from January 2002. His evidence more or less corroborated that of Morgan.

30 His evidence was subjected to cross-examination.

Brian Anderson

31 Mr Anderson (hereinafter referred to as "Anderson") gave evidence that he was the managing director of Eco Tours. The company has ceased business and owes about $80,000.00. It has not been liquidated due to the current proceedings.

32 His evidence was that Morgan was employed as a tour guide on minimum wage conditions. He said that Morgan had allegedly had difficulty sticking to the itinerary for his trips.

33 He said it was essential to have tour guiding skills.

34 While being cross-examined he handed over certain financial statements to the Claimant. He said Eco Tours traded as Western Travel Bug and reaffirmed that Morgan was employed on minimum conditions.

35 I find that Eco Tours hired Morgan.

36 Ms Walser, in examining Mr Anderson, referred to the decision ***Transport Workers Union v Pinnacle Services Pty Ltd 80 WAIG 4402***. I decide that the test set out in that decision is not the test I have to apply but rather the one set out below being that of the major and substantial purpose of the employment. I make a further comment about this case below.

Steven Vincent Crawford

37 Mr Crawford told the Court he was a director of the Western Australian Tourism Commission. He said there was a difference between a mere bus driver and a tour guide. I agree with that. A tour guide must contribute much more, including information and care and other skills.

38 I agree with the witness that the tourism industry is a very competitive market.

Jeffrey Noye

39 Mr Noye said that he had been a tour guide for some ten years on a casual basis. He said there was a lot more to being a tour guide than merely driving a bus.

Submissions - Claimant

40 Mr Logan-Scales submitted that Morgan was bound by the Award because of its scope clause and, as a common rule award; it applied through section 37(1) of the Act.

41 He quoted clause 3.- Scope and clause 4.- Area of the Award, which are as follows:

> *3. - SCOPE*
>
> *This Award shall apply to all bus drivers (including Service, Tour, Charter and School Bus drivers) employed in the classifications described in Clause 10. - Wages of this Award, except those workers employed by the Western Australian Government Railways, the Eastern Goldfields Transport Board, and the Metropolitan (Perth) Passenger Transport Trust.*
>
> *4. - AREA*
>
> *This Award shall operate over the whole of the State of Western Australia.*

42 Clause 10.- Wages gives two rates for adult drivers based on whether the bus being driven has a seating capacity of under or over twenty-five. A slightly higher sum is stated for the larger bus. The rates of pay set out in exhibit B have no doubt been changed since 1986.

Submissions – Respondent

43 Ms Walser made submissions on behalf of the Respondent. She emphasised the fact that Morgan was taken on as a tour guide not a driver.

44 I note that there was other written information on the Court file but I have only acted upon the evidence from the witnesses called. I also record that the appropriate hourly rate under the MCE Act during the material time was $10.01 until 28 April 2002 and $10.34 thereafter.

45 I observe that I have tried to help the Respondent present its case, but it is difficult where the Respondent is not represented either by Counsel or an industrial agent. I have done the best I can while remaining impartial.

Authorities

46 I have been referred to, and given consideration to, the following cases:

47 ***Parker & Son v Amalgamated Society of Engineers (1926) 29 WAIG 90***. The Claimant submitted that this authority did not apply in this matter because in this case before the Court I have found that the Respondent is a bus operator whereas in that case there was not such a finding.

48 ***Montuolo v Amcor Packaging (Australia) Pty Ltd trading as Amcor Flexibles Australasia (1999) 79 WAIG 2674***. This authority deals with the concept of the major and substantial purpose of the engagement.

49 ***Doropolous v Transport Workers' Union of Australia, WA Branch (1989) 69 WAIG 1290*** dealt with the same issue.

50 ***Flood, Industrial Inspector v Westwright Pty Ltd trading as Harts-Parkers Drycleaners (1984) 64 WAIG 2008*** was also on the same point.

51 ***The Western Australian Shop Assistants and Warehouse Employees Industrial Union of Workers v Richared Spaanderman trading as Carry on Camping Pty Limited (1983) 63 WAIG 1956*** deals with the fact that it is not merely the quantity of the work but also the quality of the work which had to be considered.

52 There is also another authority I have found; ***Federated Clerks' Union of Australia, WA Branch v Cary (1977) 57 WAIG 585*** and I will deal with this later herein.

Determination

53 I come to the conclusion that exhibit G, a summary of working hours for Morgan, properly records the hours worked by Morgan.

54 I also conclude that the ***TWU v Pinnacles*** case (supra) is not relevant as it was held there that the defendant was not operating buses.

55 Another matter that I should note is that a passenger on one of these tours does not just go to be driven to Hyden's Wave Rock for example. He or she goes for the total experience that includes the commentary, the trip, the morning tea and accommodation if any.

56 I should also record that in any event I come to the conclusion that it is unfair that if Morgan is a driver he would be paid more when in fact as a tour guide, doing far more, he may be caught by the MCE Act only, and be paid less. Having said that, I clearly state that unfairness is not the test to be applied in this matter.

57 I now refer back to the ***FCU v Cary*** case (supra). In that regard Burt J (as he then was) said, at page 586, the enquiry is to find what it is the worker was employed to do. Regard should be had to the (major and) substantial nature of the employment in terms of the purpose to be achieved by it in terms of ends and means. His Honour said:

> *… one judges the question as it may arise in any particular case simply by finding as a fact what it is that the worker was employed to do and then deciding whether upon the facts so found he was employed to "make written entries, keep accounts" and other work of that character. Of course one has regard to the substantial nature of the employment in terms of the purpose to be achieved by it, the question being, I think, very much controlled by the difference, which is not always accepted by philosophers but which serves the purposes of practical men, between ends and means. If in substance the worker's job is to write and the job is done when the writing has been done he is a clerk, but if in substance the writing done by the worker is but a step taken in the doing by him of something extending beyond it then he is not. The "substance" of the work identifies the question as being one of degree and it indicates the answer to it will be, or may be, very much the product of a value judgment.*

58 The employee in that case negotiated agreements, supervised tenants and advised landlords as to termination of leases. The making of written entries that coincided with a clerk's duties was incidental to the main tasks as stated above.

59 Further, in ***Doropoulos*** (supra) the Full Bench, after quoting the above passage from ***Cary***, stated at page 1293:

> *Thus, incorporated in the consideration of major and substantial employment on that authority, are questions of substantial nature of the employment, the substance of it, and the purpose to be achieved by it. One has to look at the contract or evidence of it, and obtain a comprehensive picture of the whole of the employment, to enable one to apply Burt J.'s test.*

60 Here, what I have is a man who drives a bus and conducts a tour at the same time. His driving is the major and substantial part of his time spent on such tours. The rest occupies a much lesser time. I find that the majority of the work was driving the bus on each occasion.

61 It is axiomatic that if there is no driving then there is no tour. The other matters attended to by the driver are important but incidental aspects to the contract. I have the reverse of ***Cary*** as the other duties were incidental to the driving.

62 I find that Morgan is a driver and is covered by the Award.

63 If I am wrong in that regard, I find also that, on the hours of work presented to me, Morgan has on at least some occasions not been paid his minimum entitlements.

64 The matter is adjourned for the parties to make the relevant calculations. In default of agreement the matter may be referred back to me.

RH Burton
Industrial Magistrate

POWER OF ENTRY—Matters pertaining to—

2004 WAIRC 12071

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOSEPH LEE OF THE BUILDING INDUSTRY AND SPECIAL PROJECTS INSPECTORATE **APPLICANT**
	-v-
	JOSEPH MCDONALD AND MICHAEL BUCHAN **RESPONDENTS**
CORAM	COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 21 JULY 2004
FILE NOS	APPLICATION 568 OF 2004 AND 569 OF 2004
CITATION NO.	2004 WAIRC 12071

Catchwords	Right of entry – Revocation of entry authority – Principles discussed – Suspension ordered – *Industrial Relations Act, 1979 s.49J, s.49G-s.49O – Police Act 1892 s.82 – Occupational Safety and Health Act 1984 s19 - Occupational Safety and Health Regulations 1996 R3.1*
Result	Respondents suspended for three months
Representation	
Applicant	Mr C. Bydder (of Counsel) appeared for the Applicant
Respondent	Mr H. Borenstein (of Senior Counsel) and with him Mr T. Kucera (of Counsel) appeared for the Respondents

Reasons for Decision

Introduction

1 These are two separate applications pursuant to s.49J(5) of the *Industrial Relations Act, 1979* (the Act) to revoke the right of entry authority issued to Joseph McDonald and Michael Buchan pursuant to Division 2G of the Industrial Relations Act 1979. They were heard together on 24th and 25th June 2004 because they both relate to events that occurred on 16th April 2004 on a building site operated by Doric Constructions (Australia) Pty Ltd at the Burswood International Resort Casino.

2 The grounds of each application are identical. Under the provisions of s.49J(5) of the Act the Applicant seeks orders for the revocation and suspension of the Western Australian Industrial Relations Commission (WAIRC) authorisation issued by the Registrar to Joseph McDonald on 28th August 2002 and the authorisation issued to Michael Buchan on 26th February 2003.

3 The grounds on which the applications are made are that on 16th April 2004 whilst purporting to exercise the powers of entry conferred under Division 2G of the Act Joseph McDonald, in company with Michael Buchan, entered the construction site occupied by Doric Constructions (Australia) Pty Ltd t/as Doric Constructions (Doric) situated at the Burswood International Resort Casino (Burswood) Great Eastern Highway and intentionally and unduly hindered an employer or employees during their working time at the construction site operated by Doric at the Burswood site.

4 The particulars of the claim are set out in Schedule A to each of the applications. Except for the first paragraph of the particulars relating to the claim against Mr McDonald the schedules are identical. The particulars of claim relating to Mr McDonald appear hereunder:

> *"On 16 April 2004, whilst purporting to exercise powers of entry conferred under Division Two of the Industrial Relations Act 1979 (WA), Joseph McDonald and Michael Buchan acted in an improper manner and/or intentionally and unduly hindered an employer or employees during their working time at a construction site occupied by Doric Constructions (Australia) Pty Ltd trading as Doric Constructions, situated at the Burswood International Resort Casino, Great Eastern Highway, Burswood, by:*
>
> *1. Displaced the chute of a concrete agitator, positioned in readiness to commence operation in the pour of concrete between the concrete agitator and a concrete pump.*
>
> *2. In company with another Authorised Representative of the CFMEU, used his person as a physical barrier to prevent the pouring of concrete between a concrete agitator and concrete pump, in circumstances where workers were attempting to operate the concrete agitator and concrete pump to perform work.*
>
> *3. Remaining positioned between the concrete agitator and concrete pump for a period of approximately 15 minutes, thereby preventing the performance of work.*
>
> *4. Refusing to move from the position between the concrete agitator and concrete pump despite a request by the Site Manager and Sergeant Herrington of the Western Australian Police Service; and*
>
> *5. Having to be forcibly removed from the site by members of the Western Australian Police Service."*

Glossary of Organisations, People and their Affiliations

Building Industry and Special Projects Inspectorate (BISPI)

The Applicant in these proceedings; empowered to make the applications by virtue of the appointment of an employee, Mr Joseph Lee, as an Industrial Inspector pursuant to s.98 of the Act. As the Commission understands it BISPI has a role to assist in the proper industrial management of building sites in the State. It seeks to ensure compliance with industrial laws and from time to time launches prosecutions against either employers or employees who it alleges may be in breach of those laws. BISPI also attends industrial disputes on building sites with the aim to assist with their resolution.

Joseph Lee

Is a Senior Investigator employed by BISPI and is appointed as an Industrial Inspector.

Warren Gray Milward and Steven Kennedy

Both Industrial Inspectors employed by BISPI who attended the site on 16th April 2004.

Ian McGiveren

Site Manager in charge of Doric's operations at the Burswood site.

Colm Peter O'Hagan

Principal of Shamrock Enterprises and Director or Unreel Structures Pty Ltd (Unreel). Unreel is engaged as a sub contractor to Doric as a concrete placer for the project. Unreel Structures Pty Ltd is sometimes known on site as Shamrock.

Lawrence Anthony Ennis

Sales Manager for the Readymix Group for 25 years, present on 16th April 2004 at Burswood to assist the delivery by his company of 130 cubic metres of S50MPA concrete.

Danio Tangi

Director of Professional Concrete Pumping. The principal business of the company is providing concrete pumping services to the industry. It has a contract with Doric to provide all concrete pumping services on the Burswood site. Mr Tangi was present on the site on 16th April 2004.

David Richard Herrington

Police Sergeant based at Kensington Police Station. Sergeant Herrington was the officer in command of a police contingent of four who attended the site at the request of Doric to keep the peace and ultimately were requested, pursuant to the powers vested in them by s.82B of the Police Act, to remove Mr McDonald and Mr Buchan from the site.

Constable Gary Seers, Constable Michael Knell, Constable Brendon Griffiths

Sworn Police officers under the command of Police Sergeant Herrington on the site on 16th April 2004.

Joseph McDonald

Assistant Secretary of the Construction, Forestry, Mining and Energy Union of Workers.

Michael Buchan

Organiser of the Construction, Forestry, Mining and Energy Union of Workers.

Construction, Forestry, Mining and Energy Union of Workers

The CFMEUW – the union employing Mr McDonald and Mr Buchan.

Job Safety Analysis (JSA)

According to the evidence and material publicly available from Worksafe Western Australia (www.safetyline.wa.gov.au) is a process of planning for work with safety as an integral factor of the way the job is done. It is a method of ensuring that sufficiently skilled manpower, plant, equipment, materials and resources are allocated for a task and all persons ultimately involved are aware of and follow a safe work system.

The Commission was told that formulation of a JSA is an important part of an organisation's safety and management plan for risk management and assists consultative work practices. It is in keeping with Occupational Safety and Health Legislation Objectives. The relevant legislation to which JSAs are said by the Respondents to be related is the *Occupational Safety and Health Regulations 1996* Part 3 Division 1. Regulation 3.1 which provides:

> *"3.1* ***Identification of hazards, and assessing and addressing risks, at workplaces***
>
> *A person who, at a workplace, is an employer, the main contractor, a self-employed person, a person having control of the workplace or a person having control of access to the workplace must, as far as practicable –*
>
> *(a) identify each hazard to which a person at the workplace is likely to be exposed;*
>
> *(b) assess the risk of injury or harm to a person resulting from each hazard, if any, identified under paragraph (a); and*
>
> *(c) consider the means by which the risk may be reduced.*
>
> *Penalty: $25,000."*

A JSA is said to facilitate hazard identification, assessment and control strategies needed to achieve a safe system of work. It contributes to good safety management but is also said to increase productivity. It is a way of involving all persons involved in a job and engendering commitment and cooperation for the achievement of a safe working outcome. A JSA is created following the formulation of a Work Plan. When the Work Plan is created it identifies the tasks to be performed, any permits required and rare tasks. It is through an analysis of the Work Plan that a JSA is built.

Sunrise and Civil Twilight

Sunrise is a time when the upper miniscus of the sun is on the level of the horizon. That is the moment of first appearance to an observer at sea level and over a sea horizon. In other locations local features make variations of a few minutes. The period of twilight between sunrise or after sunset is arbitrarily divided into three stages designated as civil twilight, nautical twilight and astronomical twilight. Civil twilight commences at sunrise when the sun is 6 degrees below the horizon, after that time ordinary outdoor activities become practical without artificial light.

Throughout Western Australia the duration of each twilight stage varies by only a few minutes during the year. Roughly, civil twilight begins or ends 25 minutes before sunrise or after sunset (see Exhibit A6 document prepared by Ralph Martin, Astronomer). On 16th April 2004 at the Burswood Casino in Burswood sunrise was at 06:38am and civil twilight was at 06:13am.

The work scheduled for 16th October 2004

Described later in these Reasons for Decision as 'the concrete pour'. The work to be done was the Level 1 pile cap for the building. The pile cap dimension was 30m x 10m x 2m. The pour consisted of 130 cubic metres of S50MPA concrete to be poured at the rate of 30 cubic metres an hour. To remain within specification the concrete is required to be placed within 90 minutes of batching. The concrete was batched by Readymix in an off site batch plant and transported to the site. At the time the pour was to commence at 06:00am there was one agitator truck on site and another two agitator trucks in transit (see Exhibits A7, an elevation of the concrete pour to be performed on 16th April 2004 and Exhibit A8, a plan of the concrete pour).

Audio Tape

The Site Manager, Ian McGiveren, carried a tape recording machine and taped voice conversations on the site from time to time as he chose. These tapes are referred to in the Reasons for Decision as McGiveren's tapes (Exhibit A5).

Video Tape

Burswood Casino provided surveillance of the site from its security cameras. The surveillance video tape of the site on 16th April 2004 is before the Commission in Exhibit A9 and is referred to in these Reasons for Decision as 'Burswood surveillance tapes'.

The Man Dressed inBlack

An unidentified person speaking with an Irish accent who attempted, without being in possession of the requisite authority, to enter the Burswood site on the morning of 16th April 2004.

The Legislation

5 These applications are brought pursuant to s.49J(5) of the Act which provides as follows:

> *"The Commission constituted by a Commissioner may, by order, on application by any person, revoke, or suspend for a period determined by the Commission, the authority if satisfied that the person to whom it was issued has —*
>
> *(a) acted in an improper manner in the exercise of any power conferred on the person by this Division; or*
>
> *(b) intentionally and unduly hindered an employer or employees during their working time."*

6 The Division referred to is Division 2G of the Act and contains ss49G to 49O. Section 49J is in two parts; the first part requires the Applicant satisfy the Commission that the Respondents acted in an improper manner in the exercise of the power

> *(i) to enter any premises during working hours where relevant employees work for the purpose of holding discussions at the premises with any of the relevant employees (s.49H)(1) or*
>
> *(ii) during working hours enter any premises where relevant employees work for the purpose of investigating any suspected breach of certain legislation, or an award, order, industrial agreement or employer/employee agreement that applies to any such employee (s.49I(1)).*

7 The second limb of s.49J(5) requires the applicant to satisfy the Commission tht Mr McDonald and Mr Buchan intentionally and unduly hindered an employer or employees during their working time. It is conceded that the hindrance referred to must be both intentional and undue. The legislation recognises that there can be "due hindrance" of an employer or employees during their working time (see C*urran v. Thomas Borthwick* (1990) 33 IR 6 at 19 and following).

8 The word 'premise' is defined in the Act as including any land. There is no contest that the building site at Burswood where these events occurred are premises. I take those concessions to mean that the Burswood site is premises for the purposes of s.82B of the Police Act 1892 which Act defines the premises as including any land, building structure or any part thereof.

9 It is understood that the police removed Mr McDonald and Mr Buchan from the site under the authority vested in them by s.82B of the Police Act 1892 which provides:

> *"(1) A person shall not, without lawful authority, remain on any premises after being warned to leave those premises —*
>
> *(a) in the case of premises occupied by the Crown or a public authority, by a person in charge of the premises or by a member of the Police Force;*
>
> *(b) in the case of premises other than premises occupied by the Crown or a public authority, by the owner or a person in charge or occupation of the said premises or by a member of the Police Force.*
>
> *Penalty: $2 500.*
>
> *(2) A person who for the purposes of and in accordance with subsection (1) warns some other person to leave premises may, at the same time as he gives the warning, indicate to such person that part of the premises which the person concerned is required to leave and in any such circumstances the part of the premises so indicated shall constitute the premises for the purposes of that subsection.*
>
> *(3) A person shall not, without lawful authority, prevent, obstruct, or hinder any lawful activity which is being, or is about to be, carried on upon any premises.*
>
> *Penalty: $2 500.*
>
> *(4) In this section —*
>
> ***"premises"** includes any land, building, structure, or any part thereof;*
>
> ***"public authority"** means an authority or body (not being an incorporated company or association) constituted by or under a law of the State or the Commonwealth."*

Resume of Events According to the Applicant

10 The Applicant's evidence is that Mr McGiveren had received a telephone call from Colm O'Hagan the Director of Unreel Structures that he had been told by Joseph McDonald that he must employ a particular individual on the site. Mr O'Hagan did not want to do this. Mr McGiveren agreed that Mr O'Hagan was not bound to employ a particular person merely because Joseph McDonald told him to. As a result of that conversation Mr O'Hagan expressed the view that because he did not intend to employ the person there might be some problems with the concrete pour which was scheduled for 16th April 2004. This was an important concrete pour for the project because it was the first and it was major. It was a pour that the management wanted to proceed as smoothly as possible.

11 Mr McGiveren decided that he would inform BISPI and he attempted to contact Joseph Lee with whom he had previous dealings. He eventually made contact with Warren Milward an Industrial Inspector; he also made phone calls to the Building Industry Task Force, a Federal organisation, and also to an officer of the Western Australian Police Force at Kensington Detectives. Each of those persons was told by Mr McGiveren what he thought might happen and that there was a possibility that their services would be required on the morning of the concrete pour.

12 The concrete pour had been set up during the day of 15th April 2004. As it was to commence prior to sunrise on the 16th April 2004 Mr McGiveren had installed a CLJ6000 lighting set to illuminate the work site. The set was to provide working light as opposed to egress light in the area where the concrete pump was located and placement of concrete was to occur. The lighting set consisted of four lights. These were aligned so that three lights would illuminate the placement area i.e. the pile cap and one light would illuminate the area where the concrete pump and agitator trucks were to stand. According to Mr McGiveren the effect of the artificial light was brighter than daylight and there were no dark areas.

13 Prior to this there had been some discussions between Mr McGiveren, Mr O'Hagan and Mr Cavanagh, a safety representative from the CFMEUW concerning a JSA for concrete placement and Mr Cavanagh had assisted with the preparation of such a document. According to Mr McGiveren there were JSAs for all facits of the job, some of them being generic in nature but again, according to Mr McGiveren, all were satisfactory and achieved the aims for which JSAs were created.

14 On 16th April 2004 Mr McGiveren attended the site at 5:00am, turned on the lights and switched on all other equipment to be ready for the arrival of the concrete pump. The pump duly arrived and was positioned by its operators within a general area that had been indicated by Mr McGiveren. There were no difficulties during the set up of the concrete pump and the employees from Professional Pumping went about their business of making ready for pumping operations. In the meantime

grano workers from Unreel, who were to place the concrete had arrived and were having their coffee and reading the paper before entering the work site.

15 About 05:50am Mr Milward and Mr Kennedy, two BISPI officers, signed in and Mr McGiveren briefed them.

16 While Mr McGiveren was having discussions with the two BISPI inspectors, Mr McDonald stuck his head through the door and said the words "There is no need for this" and he entered the site at a quick pace. Mr McGiveren followed Mr McDonald to where the pump was set up, when Mr McGiveren caught up with him he was on his way back with the two pump operators from Professional Pumping. Mr McGiveren taped the discussion he then had with Mr McDonald. During this conversation Mr McGiveren asked to see his permit (right of entry authorisation). According to McGiveren, Mr McDonald thrust the authorisation into his face so that his glasses were pushed back and he was not able to read it. McGiveren asked to see the authorisation again and it was eventually held in front of him so that he could verify the authority.

17 Mr McDonald was invited to sign the visitors book. At that time Mr McGiveren saw Mr Buchan outside the gate.

18 The visitors book shows that Mr Buchan and Mr McDonald signed in about 6:00am. There was then a heated conversation with Mr McDonald as to why he removed the pump operators from the work site. The conversation involved Mr McGiveren, Joseph McDonald and Adam Harry the Contracts Manager for Doric. This conversation was also recorded on Mr McGiveren's tape.

19 After the conversation Mr McDonald had a discussion with the two pump operators. Mr McGiveren also attempted to have a conversation with them to find out what had happened because he was concerned about the delay in conmmencing the pumping operating.

20 At that time Mr McGiveren received a phone call from Mr Colm O'Hagan who said he had been informed that there were several car loads of union organisers and union people coming to the site. Mr McGiveren told Warren Milward and Mr Milward suggested to Mr McGiveren that he should call the police. At this time a man dressed in black appeared and attempted entry to the site. There appears to be little role for this gentleman in the rest of the story and I do not intend to recite the conversation he had with Mr McGiveren other than to note it was bizarre and that it may indicate that Mr O'Hagan's information that strangers were on the way to the site had some substance.

21 Mr McGiveren placed a call to the Kensington police and spoke with Sergeant Herrington. Sergeant Herrington had been briefed about the likelihood of disturbance on the site; he then briefed a contingent of three Constables and proceeded to the site.

22 The work on the site was then at a stand still, the pump operators were waiting for their employer Danny Tangi to arrive. They had already made contact with him and had told him that issues had been raised concerning the adequacy of the light. According to Mr McGiveren he waited around for Mr Tangi to show up or alternatively for Mr McDonald to let the operators out of the smoko shed, but he did not.

23 Mr Tangi arrived at the site at 06:40am; he went directly to the site shed and spoke with his pump operators. Within a few minutes he came out and announced that his company would be pumping concrete and proceeded to walk some 80m to the concrete pump. Mr Tangi told the Commission that his company, of which he is a Director, provides concrete pumping services to the building industry generally and has a contract to provide pumping services to Doric on the Burswood site. The company has six concrete pumping machines. Typically a concrete pump has an outrigger system which stabilises the machine and a hydraulic boom which unfolds and is deployed to where it is needed to place the concrete. A concrete agitator truck reverses up to the back of the pump, discharges concrete into a hopper and then the pumping action takes place. The concrete is pushed through pipelines and is discharged wherever it is needed. The concrete is moved from the hopper with blades, the boom is remotely controlled by an operator and it can be placed in many different positions.

24 Mr Tangi said his company had been booked for a 06:00am start which meant that his operators had to arrive half an hour prior to set the machine up. They had done so after making an assessment of the best area in which to place the machine so that the out riggers were extended to suitable ground to ensure stability of the pump. Both the operators were licensed to perform this work. There is a daily check list with which operators must comply before operating the machine. The company has a standard JSA which is for set up, operation and dismantle with provisions relating to particular site conditions.

25 According to Mr Tangi his operators are required to abide by the JSA, which lays down general practice with particular requirements of a pour catered for (see Exhibit A4).

26 Mr Tangi gave evidence that he had not planned to the present on 16th April 2004 but at 05:45am he received a telephone call that there was an issue on the site. He was told by Mr Adam Harry that his operators were unable to start pumping and that they had been taken away from the concrete pump by a CFMEUW official. The issue was whether there was sufficient illumination at the work area where the concrete was to be poured.

27 Mr Tangi had a discussion over the phone with his two employees and they told him that there was insufficient light. He then instructed them if they had any doubts at all to wait until there was sufficient light to start pouring. In the meantime he would immediately travel to the site.

28 When he arrived at the site his two operators were with Joseph McDonald in the site sheds. Mr Tangi said he asked Mr McDonald what was the issue. The only explanation Mr MacDonald gave was there was insufficient light and the men could not proceed to pour. The time was 6:45am and Mr Tangi was more than happy that there was sufficient light to do the work because the sun was up and it was daylight. There was no question that there was sufficient light to do the work.

29 Mr Tangi checked again with Mr McDonald whether there was any other issue other than light. Mr McDonald did not raise any. Mr Tangi asked Mr McDonald why they could not start pouring. His evidence is Mr McDonald kept repeating "do not pour, do not pour". There was no explanation at all.

30 Mr Tangi then told Mr McDonald that he had a contract for the project, there were no safety issues and that the pumping must begin. Mr Tangi left the site sheds and went to where the concrete agitator truck was waiting near the concrete pump. He took control of the pump and announced he was ready to start pumping concrete. He says that a concrete agitator truck pump had already been backed to the pump hopper and was ready to discharge. Mr McDonald and Mr Buchan then placed themselves between the agitator truck and the hopper. Mr McDonald pushed the agitator truck's discharge chute away so that the concrete could not be poured into the pump hopper.

31 At this time Mr Tangi again told Mr McGiveren that he was prepared to pump but as there was no concrete in the hopper he could not.

32 Mr McGiveren related that Mr Tangi had told him that if he could get concrete into the hopper it would be pumped. Mr McDonald and Mr Buchan were still standing in between the agitator and the pump. Mr McGiveren asked them to leave. Mr

McGiveren then consulted Mr Tangi and asked the Readymix officers to back the other agitator trucks in to be ready to pour. By this time it was clear daylight, there was no need for any artificial lighting. The work site was open to the sky. Mr McGiveren then asked Mr Ennis from Readymix whether there was any safety reason why the concrete could not be poured and Mr Ennis replied there was not. Mr McGiveren asked the same question of Mr Tangi and Mr O'Hagen who both said there were no safety reasons why concrete could not be poured.

33 Mr McGiveren said he approached the police and explained what had happened and what he intended to do. In the meantime Mr Joseph Lee from BISPI attempted to mediate the dispute by discussing the situation with Mr McDonald. This is consistent with Mr Lee's evidence he requested the opportunity to speak with Mr McDonald.

34 According to Mr McGiveren the position in which Mr McDonald and Mr Buchan were located was dangerous and their continued presence made pumping impossible. At this stage Mr McGiveren asked Sgt Kendrick to remove Mr McDonald and Mr Buchan because they were not properly exercising their right of entry and were in a state of trespass. Sergeant Kendrick asked Mr McDonald to leave the site, Mr McDonald said he had a right of entry and was prepared to show his authority. Sergeant Kendrick exercised power under the Police Act and himself requested Mr McDonald to leave. Sergeant Kendrick in company with Constable Seers then escorted Mr McDonald from the site. Constables Knell and Griffiths then escorted Mr Buchan from the site.

35 In his evidence Sergeant Herrington confirmed the position in which both men were standing. It appeared to him that their location was preventing concrete from being unloaded from one truck onto the concrete pump.

36 There are various photographs of these events which are contained in Exhibit A2, photographs 1-6. See also the Burswood surveillance tapes which record these events (Exhibit A9).

37 It is important to summarise the evidence of Joseph Lee as it is Mr Lee who is the initiator of the applications. As indicated earlier he is the Senior Investigation officer of BISPI and is an Industrial Inspector appointed pursuant to s.98 of the Act.

38 His evidence was that he was summoned to the Burswood site on 16th April 2004 and arrived at about 06:30am. He spoke to his officers on the site; Stephen Kennedy and Warren Milward. Mr Kennedy was maintaining a running sheet of events. Mr Lee also spoke to Mr McGiveren, and to Mr Adam Harry who he knew to be an employee of Doric. As a consequence of those conversations he went to the amenities lunch room and there observed Mr Joseph McDonald talking to construction workers.

39 Mr Lee had a conversation with Mr McDonald. He was told by Mr McDonald he had an issue with safety in regard to light and that the two workers on the concrete pumps were not prepared to work because the working area was insufficiently lit.

40 Mr Lee continued his investigations trying to ascertain what was happening on the site. He had a discussion with Mr Harry during which he learnt that Danny Tangi was going to attend the site. Mr Lee advised that the most appropriate action was to await Mr Tangi's arrival. That occurred within two or three minutes and Mr Lee observed Mr Tangi go and speak to Mr McDonald and the employees. At this time Mr Lee also saw Michael Buchan.

41 Mr Lee witnessed a brief conversation between Mr Tangi and Mr McDonald. After that conversation there was a general movement towards the concrete pump which was about 80m away. On arrival Mr Lee observed there were a number of workers in and around the pit and there were some people not far from the concrete agitator. There were at that time two agitators on the site, one appeared to be ready to discharge.

42 Mr Lee observed that a conversation took place between Mr McDonald and Mr Tangi. He saw them walk to the rear of the concrete pump. He then approached and stood 2 to 3 metres away. He saw that Mr McDonald and Mr Buchan were standing between the hopper and the agitator truck with their backs to the agitator.

43 Mr Lee observed Mr McGiveren ask Mr McDonald to move. Mr Lee then approached Mr McDonald and advised him that in his opinion he was in breach of his right of entry and he should move because he was unduly hindering work and acting improperly. Neither Mr McDonald nor Mr Buchan would engage in conversation. Mr Lee continued repeating his advice that he thought that they should move because they had no right to be conducting themselves in that manner. There was an opportunity for a conversation when Mr McDonald asked Mr McGiveren to step back. During this conversation Mr Lee recalled that Mr McDonald may have mentioned a JSA.

44 It was then Mr Lee decided he would make a telephone call to the CFMEUW industrial officer and he attempted to do so. He was absent for a few minutes and when he returned he observed Police officers were on the site. He was later able to identify one as Sergeant David Herrington. Mr McDonald and Mr Buchan were still standing between the two pieces of machinery.

45 Mr McGiveren approached Mr Tangi, Mr Ennis from Readymix and Mr O'Hagan from Unreel Constructions and asked them each individually whether they believed there were any safety issues or whether there was any reason why work should not continue. All of them said that they did not believe there were any safety issues.

46 Mr McGiveren, after a conversation with Sergeant Harrington, approached Mr McDonald and Mr Buchan and asked them to leave the site, stating that in his opinion they were in breach of their right of entry. After that conversation Mr Lee suggested to Mr McGiveren that he might try and ask them to move one more time. He again spoke briefly to Mr McDonald who did not answer. He then walked around to the other side of the concrete pump to attempt engage Mr Buchan in conversation, he was unable to do so but he advised Mr Buchan that he should move and that he risked losing his authorisation permanently for unduly hindering work if he did not. Mr Lee implored Mr Buchan to think about the consequences. Mr Lee gave evidence that he thought it was his duty to ensure that Mr Buchan made an informed decision about what he was doing and what the potential consequences were.

47 Thereafter Mr Lee observed Mr McGiveren request Sergeant Harrington to remove Mr McDonald and Mr Buchan. That soon occurred; there was no struggle or violence. The two police officers escorted Mr McDonald off the site. Another two police officers removed Mr Buchan.

48 The above recitation does not summarise every part of the evidence received by the Commission but it is sufficient to identify the major events upon which the Applicant relies to support his applications.

The Respondent's version of events

49 Following is a summary of the evidence of David Keith Cavanagh and Joseph McDonald.

50 Mr Cavanagh is an industrial occupational safety and health officer employed by the CFMEUW; he has held that position for a year. He is the holder of a number of certificates relating to safety in the construction industry; an industry in which he has worked for about 12 years. In addition he has been a health and safety representative on eight construction projects. His experience encompasses several states in Australia and overseas on construction sites as a rigger scaffolder and labourer.

51 He described his current duties as assisting CFMEUW Organisers by advising them on matters relating to the occupational safety and health. He is involved in various safety committees which are constituted through WorkSafe Western Australia. He recalled that on 8th April 2004 he visited the Doric site at Burswood. He did so at the request of Organiser Michael Buchan who wanted assistance on the issue of JSAs.

52 Mr Cavanagh said that the concept of JSAs emanates from Regulation 3.1 of the *Occupational Safety and Health Regulations*. He asserted that the preparation of JSAs has the approval and support of WorkSafe by virtue of s.19 of the *Occupational Safety and Health Act 1984* which sets out the responsibilities of employers to have safe systems of work. WorkSafe are currently examining JSAs at State level and how they are to be used.

53 On 8th April 2004 Mr Cavanagh had a conversation with Mr McGiveren during which he told him he was at the site to look at JSAs. Mr McGiveren had no problems with the purpose of the visit. Thereafter Mr Cavanagh met with employees and explained the purpose and importance of JSAs. He did so by reference to the media campaigns from WorkSafe. He explained techniques to identify hazards and control them. The employees role in formulating the JSAs was demonstrated. He then set about helping the employees produce a JSA relevant to their work. He saw two other JSAs on that morning. In his opinion there were a number of problems with them in that they were not sequential and they included controls where there should have been hazards. He thought the JSAs were not adequate. Mr Cavanagh then guided the group through the preparation of a JSA. Mr Cavanagh also informed himself of the quality of JSAs on the site.

54 Later Mr Cavanagh conducted a safety walk around the site during which he identified a number of hazards which he communicated to Mr McGiveren. He had a discussion with Mr McGiveren about whether some of these hazards constituted a serious and imminent danger. Ultimately Mr McGiveren agreed that the hazards were present and they would be rectified.

55 Although Mr Cavanagh did not attend the site on 16th April 2004 during his evidence he expressed some opinions about the lighting set which was used. He was told that the evidence was that there was a lighting set with four lights. He said he was familiar with the equipment. He opined that there was a requirement in the *Occupational Safety and Health Regulations* that lighting should be sufficient so as not to pose a risk to workers. Mr Cavanagh was shown a sketch of the site and given an indication of the location of the lighting set. On the basis of his experience he offered an opinion about its adequacy. During his working life he had worked on a number of night shift operations and he was aware that light towers cast shadows over large areas. That being the case he thought that the lighting set would only light sufficiently half of the work area. This meant that the area in the front of the pour would be satisfactory but the rest would be in shadow cast by the lift shaft. If he had been working on the site he would have two lighting towers, one on either side of the lift shaft to ensure that there were no shadows.

56 Mr Cavanagh said that he had attended the site after 16th April 2004 during the hours of darkness and on these occasions he was able to judge whether egress lighting was sufficient. In his opinion it was not. He passed some comments about what had been discussed in other evidence about generic JSAs. He was not in favour of them. He also said he discussed the JSA for employees and drivers of Professional Pumping Services and had done so on other sites. It was his opinion that WorkSafe's view of JSAs was they should be specific to work processes and to work places and incorporate identified hazards and applicable controls for those hazards.

57 Evidence was taken from Joseph McDonald who told the Commission he was the Assistant Secretary of the CFMEUW and had been since 1998. He has been a full time official for 19 years and has engaged in various union duties in Perth and around the State including work on building sites over that time.

58 On 16th April 2004 he attended the Burswood site at 05:45am, as it was 'winter' it was dark. Mr McDonald said he went straight into the site with the intention to stop the concrete pour from starting up and pumping concrete because it was dark. He went to the two pump attendants and told them to 'bail up' and meet him in the smoko shed. Mr McGiveren was present and was firing questions at him.

59 Mr McGiveren made some comments to the workers and Mr McDonald said that is why he wanted them off the job. He eventually was asked to sign in and there were various caustic exchanges between him, Mr McGiveren and Mr Harry. He was asked to show his right of entry authority. He produced it to Mr McGiveren, he insisted he pulled it out of his pocket and showed him. He did recall Mr McGiveren said he could not see it but he did not hold the authority up against his face.

60 Mr McDonald said he talked to the two pump operators about how dark it was and how they should not have started to work. He told that they were not going to start the pour nor should they have started to set up. Mr McDonald had concerns about the lighting of the job; he had told the operators that they knew that the union was 'calling down' on that day. There was a major concrete pour and the employers were having a push to start so it would be impossible to stop it and do anything about safety.

61 Mr McDonald told the pump operators they were entitled to safe working environment where ever they went. He thought that Mr McGiveren and Mr Harry were trying to put pressure on the two workers by telling them they would ring their boss and they did. The men spoke to their boss (Tangi) on the phone. Eventually the phone was handed to Mr McDonald; he spoke to Mr Tangi and told him it was too dark to do anything. Mr Tangi's response was that he was on the way down and that his employees should wait in the shed until he arrived. The men then waited for Mr Tangi. After that Mr McDonald made another excursion onto the site to speak to the grano workers. He told them that it was an absolute joke they had been forced to start work. He mentioned to them that every time he had been on the job there was a problem with the JSAs. He told them that he tried to inspect a JSA and Mr McGiveren's response was that he did not care about them. He had a humorous exchange about Colm O'Hagan's approach to safety.

62 Mr McDonald remembered that Mr Tangi arrived on the site about 06:45am; they had a conversation about why Mr Tangi's operators had started early. He told Mr Tangi he was not happy that the concrete pump had been set up in the dark. Mr McDonald told Mr Tangi quite clearly that he would do everything necessary to stop them pouring in an unsafe situation. He believed that Mr Tangi was under pressure from Mr McGiveren.

63 Mr McDonald remembered Mr McGiveren poking his head through the door saying that the concrete had 8–12 minutes left before it was outside the specification time. Everyone moved towards the location of the concrete pump. Mr McDonald says that on the way he put to Mr Tangi that he did not have a JSA and if he did it was generic and not suitable. He said that Mr Tangi was getting frustrated and heated. Mr Tangi mounted the concrete pump and said he was ready to start pumping. He then responded 'We will see Danio'. Mr MacDonald was then in the process of standing between the two vehicles.

64 Mr Buchan was not on the site when Mr McDonald first arrived and did not appear until 15 minutes after Mr McDonald. Mr Buchan was answerable to him and he (Buchan) was required to follow his instructions on site. When he positioned himself between the agitator and the pump he expected Mr Buchan to do the same and he did. A number of people came up to ask him to leave. He remembered that Mr McGiveren did on at least two occasions but he would not speak to him because he carried a tape recorder.

65 Mr Joseph Lee was present and Mr McDonald remembered that on at least one occasion Mr Lee spoke to him. He did not answer because Mr McGiveren had a tape recorder. Eventually Mr McGiveren stood back so that he and Joseph Lee could have a conversation. Mr Lee 'played the drama queen' quite well by reminding him that if he lost his job that his family would suffer. Mr McDonald said Mr Lee told him if he did not move away there was nothing he could do to help him. Mr McDonald said that he mentioned to Mr Lee that there has not been one occasion on the job that the JSAs had been satisfactory. He told Mr Lee he was fed up with people being injured and he was fed up with Mr Lee because he did nothing about it. Mr Lee continued with his request for Mr McDonald to leave, Mr McDonald said he was getting more heated and he asked him to leave again. Mr McDonald said he would not because he still had safety problems. In cross examination he said there was no problem with the light by this time. He insisted that the safety problems related to the state of the JSAs but he did not ask Mr McGiveren for copies of the JSAs. He said he did not do so because Mr McGiveren did not seem to take any responsibility for them. Mr McDonald had been told to take it up with the contractors.

66 The above is a fair summary of the evidence in chief of Mr McDonald. Mr Buchan was not called to give evidence.

Comments on the Law

67 Earlier in these Reasons for Decision I have cited the law that is to be applied. The Applicant seeks revocation or suspension of the authorisation issued by the WAIRC Registrar to Mr Buchan and Mr McDonald because they either acted in an improper manner or intentionally and unduly hindered an employer or employees during their working hours. That can only happen if the holder of the authorisation has engaged upon conduct which is not conduct authorised by Division 2G of the Act which enables the holder to enter premises during working hours for the purpose of holding discussions at the premises with any relevant employees or similarly during working hours enter any premises where relevant employees work for the purpose of investigating any suspected breach of certain legislation or an award, order, industrial agreement or an employer/employee agreement that applies to any employee.

68 It is trite to say that the occupier of land is entitled to enjoy the benefits of its occupation without interference. The law creates a offence if a person is to trespass upon land in a way that is not authorised. For discussion on this concept see *Kathleen Mary McGinty and Others v Gregory Alan Web and Others Supreme Court of Western Australia Decision delivered on 27th November 1990 in Appeal No. 1108 to 1115 of 1990* and in particular the writing of Nicholson J.

69 The law in various legislation does authorise entry into private property, for example by enforcement officers in the course of their duties; but the scope of the right to enter into private property is delineated by the specific statute which authorises the entry. So it is with the Act. The Act creates a right to enter if a person holds an authorisation but only to extent that the Act authorises. That authorisation is in the terms I have set out before which is essentially to hold discussions and investigate breaches of applicable industrial legislation.

70 Senior Commissioner Beech in his Reasons for Decision in *Silent Vector Pty Ltd t/a Sizer Builders v The Construction, Mining and Energy Union of Workers (2003)* 83 WAIG 565 has expressed some views about the effect of s.49J(5)(a) in respect of improper conduct. I respectfully agree with his interpretation of that section of the Act subject to the additional comments I have made herein.

Analysis and Findings

71 The Commission has a duty to review the evidence and submissions that have been received, draw conclusions from the facts as found and apply the law to the conclusions that it reaches.

72 I have listened carefully to the evidence of the number of witnesses. The events on 16th April 2004 were witnessed by a number of people and there is much corroboration of the Applicant's contentions available when one searches through the evidence. The Applicant's witnesses appear to me to be credible. Their stories have internal consistency and enjoy corroboration. The evidence they give should receive heavy weight in determining on the balance of probabilities what most likely happened.

73 For the Respondents the Commission heard evidence from Mr David Cavanagh. There is no reason for me to conclude that he did not relate his version of events in a truthful way and he is a credible witness. Whether or not his view of, for instance the adequacy of light, at the work place should out weigh the views expressed by witnesses for the Applicant is a matter for the analysis which I undertake hereunder, but I accept that he expressed an honest view.

74 The evidence of Mr McDonald is limited in his evidence in chief. He told the story to the Commission as he saw it and although I do not believe that he attempted to mislead the Commission, whether he told all of the story is not entirely clear. Essentially Mr McDonald says he did what he did because he thought people were being threatened and bullied. Because he represents those people and they put their faith on him if the employer does not, in his opinion, supply a safe working environment then Mr McDonald will do 'whatever it takes to keep people alive'.

75 The corroborated evidence of the Applicant's witnesses, who I find to be credible, must attract more weight than the evidence presented by the Respondents. Although Mr Cavanagh's evidence is credible it does not provide support by the Respondents version of events on 16th April 2004. Mr Buchan gave no evidence and Mr McDonald's suffers as a result of his silence on the day and the impression he has left that there was more he could have told the Commission about his motives and intentions.

76 It is against that view of the evidence that I analyse the facts and reach conclusions on the balance of probabilities about what happened.

77 I accept that the evidence of Mr O'Hagan that he received information that there may be difficulties by way of interference with the concrete pour and that Mr McGiveren took action to prepare for that eventuality. It is open to find and I do that the employers on the site had no idea that the conduct of Mr McDonald and Mr Buchan on 16th April 2004 had anything to do with JSAs although JSAs were an issue on the site.

78 However that they were, is not surprising because on the evidence the form of JSAs has been a matter of conjecture throughout the industry. What should be said is that Regulation 3.1 of *Occupational Safety and Health Regulations 1996* does not create a legal obligation for a JSA to be created nor does s.19(1)(b) of the *Occupational Safety and Health Act 1984*. It is clear from WorkSafe publications and from evidence before the Commission that the use of a JSA along with a Work Plan is encouraged to achieve the aims of the Regulations. It remains a matter of opinion as to what the JSAs should contain; WorkSafe has offered a template which is available to the industry. It is open to conclude that the employers on the Burswood site did have JSAs, some of them were generic in nature and there is a difference of opinion between the employers and the CFMEUW about the usefulness of generic JSAs.

79 What should or should not be in the JSA is a matter of subjective view; the legislation does not say what should be contained in the document.

80 This conjecture and argument about the content of JSAs was an issue between the CFMEUW and the employers. However there is no evidence at all that any employee on the Burswood site had raised JSA's as an issue on the site. Whether it was just a convenient issue for Mr McDonald and Mr Buchan to justify stopping the work on 16th April 2004 is a matter for speculation which I will now try to resolve.

81 On 16th April 2004 Mr McGiveren attended and opened the site, he turned on the lighting set which had been pre-positioned for the work at hand. It was his opinion on his long experience in the building industry that lighting was more than sufficient. That opinion was supported by Mr Ennis and Mr O'Farrell. Mr Cavanagh said the lighting was not sufficient but he did not attend the site on 16th April 2004 nor did he see it. It is more likely than not that because the slab was being poured was basically flat that the potential for shadows was slight. I conclude on the balance of probabilities that there was sufficient working light for the job to be done at the time scheduled (see Exhibits A7 and A8).

82 Mr McDonald arrived on the site. His contact with Mr McGiveren in the early stages was a continuation of a difficult relationship between the men which existed since the job had started. It is open to conclude that both Mr McDonald and Mr McGiveren are hard men doing to each other what hard men do in a tough industry. However Mr McDonald went to the work location, and he took the two workers who were ready to start the pumping operation away from the work place. Subject to what I conclude later the conduct had all the hallmarks of improper conduct (see discussion on improper conduct by Beech SC in *Sizer's* Case ibid). But whether it was or not became moot soon afterwards because Mr Tangi after conversations with his employees instructed them not to commence work until he arrived on site. He arrived about 06:45am, after full daylight had been established (There was full daylight at 06:38am Exhibit A6). The site was able to be worked in daylight. Whether there was sufficient lighting on the job had by that time ceased to be an issue (see Burswood surveillance tapes Exhibit A9).

83 After discussions with Mr McDonald, Mr Tangi decided that the work should proceed, and he went to his concrete pump and announced that he is prepared to pump. By this time the first agitator truck was in position, the concrete is to be poured within 90 minutes of batching and by then the time was fast approaching when the concrete would be out of specification and would have to be dumped. The same would then occur to the loads of the other two agitator trucks then on site. There was then some urgency for the employers to resolve the situation. By this time Mr McDonald had interposed himself between the agitator and the truck and the concrete pump. Mr Buchan joined him. Mr McDonald pushed away the discharge chute of the agitator truck. No discharge could take place without endangering both men.

84 Mr McDonald was not communicating to Mr McGiveren at the time because of his concern about McGiveren's tapes. He did not answer questions; he did not make any suggestion that the lack of an appropriate JSA was a reason that the concrete pour could not commence. He did mention to Mr Lee that there was an issue with JSAs but Mr Lee did not think that it was anything other than a passing reference. Mr McDonald also says that he mentioned JSAs to Danio Tangi when they were walking down towards the site but there is no confirmation from Mr Tangi that the matter was substantially raised with him. There was no evidence called from any of the workers to whom Mr McDonald claims he mentioned JSAs.

85 It is open to conclude, and I do that even though the issue of insufficient light was initially resolved by Mr Tangi telling his men not to pour until he arrived, by the time he was present on site and decided to commence pumping it was well past civil twilight and into daylight and the justification for the pour to be stopped for safety purposes had evaporated.

86 Before Mr McGiveren asked Mr McDonald and Mr Buchan to leave for the last time he asked for confirmation from Mr Tangi, Mr O'Hagan and Mr Ennis whether they thought any of their workers were in an unsafe position due to lack of light. Even then, before the final request to leave was made, Mr Lee was given the opportunity to speak to Mr McDonald and Mr Buchan. He took pains to point out to them the implications of them refusing to leave for their right of entry.

87 There was a refusal to leave and at the request of Mr McGiveren, Sergeant Kerrington moved to affect the expulsion of Mr McDonald and Mr Buchan from the site. He did so because the occupier of the land had requested him to do so but even if the occupier had not Sergeant Kerrington was empowered to make the request himself and that request was refused. In my respectful view the request to remove was properly made because by that time it was open for the occupier of the site to conclude that Mr McDonald and Mr Buchan were exceeding their authority to remain on the land.

88 I conclude that after the decision of Mr Tangi not to ask his employees to work until he arrived on the site that there was no undue hindrance by Mr McDonald or Mr Buchan to the employer or employees on the site. There was hindrance prior to Mr Tangi's arrival on site but giving the most generous weight to Mr McDonald's evidence that he believed there was insufficient light, that is accepting that he genuinely believed there was not enough light notwithstanding that on all the available evidence there was, the hinderance could be said to be due hindrance on the authority of *Curran v Borthwick (ibid)*..

89 It remains to consider whether there was hindrance later and whether that hindrance was intentional and undue.

90 Mr McDonald asserts that he remained between the concrete pump hopper and the agitator truck because he was dissatisfied with the JSAs. That seems to be the only logic one can attach to his conduct. In cross examination he said there was nothing else he could have done because he thought the work place was still unsafe because of the lack of an appropriate JSA, at least in his view.

91 It is open to find to the contrary that there were things that Mr McDonald could have done. For instance he could have allowed the pour to continue and remain watching it and drawn to the attention of the employers to any looming unsafe event. Apart from that there were three BIPSI officers already on site. It is open to conclude that Mr McDonald opted to use the situation after the 'problems' with the light had evaporated to pursue some industrial end because he is a very experienced official who would know he was not authorised under the law to hold up the work on the basis that he was dissatisfied with the form of the JSAs that were used on that site. As I have concluded there is no legal obligation to produce JSAs at all let alone in a specific form. In any event there were JSAs available applicable to the work that had been produced in these proceedings (Exhibits R2, R3 and R4). The fact that Mr McDonald may have disagreed with the form of the JSAs is not sufficient to justify stopping the work and in doing so he intentionally and unduly hindered an employer and employees during working hours.

92 For completeness I add that even if Mr McDonald did communicate his concerns about continuation of the pour were related to the JSAs to Mr Tangi and Mr Lee he never told the person, he should have told and that is Mr McGiveren. When Mr McGiveren asked him what were the problems on site Mr McDonald told him 'lots of things' and he refused to elaborate. Later when Mr McGiveren challenged him near the smoko shed where the pump operators were with Mr McDonald it was then Mr McGiveren was told that there was insufficient light. The evidence is, and I so find, that Mr McGiveren was never told at any time by Mr McDonald that his problem was anything other than a problem with insufficient lighting.

93 Mr McDonald had the opportunity to tell Mr McGiveren when he (McDonald) and Mr Buchan were between the two pieces of machinery when Mr McGiveren asked him on a number of occasions what his problems were. Mr McDonald says he did not answer because of McGiveren's tape. One would have thought that is the very reason why he could have given an answer because the tape would record his genuine concern about a failure to have appropriate JSAs if that were true. Mr McDonald

never told Mr McGiveren in any explicit way that his concern was with JSAs and Mr McGiveren had no way of knowing what was on his mind. Mr McGiveren was a representative of the occupier of the property; he was a person on behalf of the occupier with whom Mr McDonald had dealt on a number of ocassions. If Mr McDonald had a problem which Mr McGiveren could remedy and therefore fix the industrial dispute, he never took the opportunity to tell him what it was. Mr McGiveren had no such knowledge and asked for Mr McDonald's removal, it is open to find, on the basis that he and Mr Buchan were stopping work when the reason for the stoppage, that is the alleged lack of light, was no longer an issue because it was clear daylight. Setting aside the other findings I have made that finding alone would justify reaching the conclusion that Mr McDonald and Mr Buchan on 16th April 2004 intentionally and unduly hindered the work of the employer and the employees during their hours of work. In so far as Mr Buchan is concerned he never said anything to anybody and never voiced any opinion about the occupier of the land's conduct, he merely placed himself between the machinery and refused to leave until removed. There could be no clearer indication in his case than that he intentionally and unduly hindered the work in progress.

94 It is clear from all of the evidence, and I find, that the conduct of Mr McDonald and Mr Buchan in stopping the work after Mr Tangi said he was available to pump the concrete intentionally and unduly hindered the employer and employees during their working time.

95 As I have indicated previously the hindrance must both intentional and undue. This was not due hindrance as described in *Curran v Thomas Borthwick & Sons (Pacific) Ltd (1990)* 33 IR 6 at 19 and following. It is open to conclude and I find that Joseph McDonald and Michael Buchan did intentionally and unduly hinder the employer and employees on the Burswood site during their working hours on 16th April 2004. In doing so both men were in breach of the authorisation they had to enter the site and were in breach of s.49J(5) of the Act.

96 I finally mention it is passing strange that Mr Buchan did not give evidence on his own behalf in this case. It is a situation where it might be suggested that an adverse inference be drawn, however I leave the matter on the basis that the Commission is surprised that he did not give evidence on his own behalf. In short there is, the evidence of Mr McDonald excepted, no challenge by Mr Buchan to the Applicant's allegations.

97 The authority issued by the Registrar remains in force unless it is revoked or suspended under s.49J. The Commission constituted by a Commissioner may order on application by any person revoke or suspend for a period determined by the Commission the authority if satisfied that the person to whom it is issued has acted in an improper manner in the exercise the power conferred by the Division or intentionally or unduly hindered an employer during their working time.

98 Having so decided the Commission must consider what should follow the finding that there has been a breach. In specific terms there has been an intentional and undue hindrance of an employer or employees during their working time. The conduct was brought about by persons, that is Mr McDonald and Mr Buchan, acting in an improper manner in the exercise of a power conferred on them.

99 The Commission has heard submissions from the parties on the penalty to be applied. At no time during those submissions was the attention of the Commission drawn to any findings by a Commission or any other body authorised to make an inquiry into matters affecting the building industry of any misconduct by Joseph McDonald or Michael Buchan. The only information before the Commission concerning right of entry relating to Mr McDonald is the case involving *Sizer Builders ibid* where both applications against him were dismissed. Therefore the Commission should regard the events that occurred on 16th April 2004 as being the sole source of information before it concerning the conduct of both Mr McDonald and Mr Buchan and should frame the penalty, if one can describe it in that way, accordingly.

100 I consider that a permanent revocation of the authority for both these men on the basis of what happened on 16th April 2004 would be too harsh a penalty. I have decided that revocation should not occur, but instead the authorisation of both men should be suspended. This is the first occasion when an adverse finding has been made against Mr McDonald or Mr Buchan and it appears to me that an appropriate suspension is for a period of three months and an order will issue accordingly. It was pleaded on behalf of Mr Buchan that he was merely acting on Mr McDonald's orders. In my view that is not a sufficient reason that he should suffer a lesser penalty than Mr McDonald. Mr Buchan's authority is issued to him in person and the exercise of the authorisation in accordance with the Act is his responsibility, therefore no different penalty should apply. Minutes of an order will issue which will provide upon a finding that in each of these applications that the Respondent has intentionally and unduly hindered an employer or employees during their working hours that each authority be suspended for a period of three months from the date the order is signed.

2004 WAIRC 12106

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOSEPH LEE OF THE BUILDING INDUSTRY AND SPECIAL PROJECTS INSPECTORATE **APPLICANT** **-v-** JOSEPH MCDONALD **RESPONDENT**
CORAM	COMMISSIONER J F GREGOR
DATE	26th JULY 2004
FILE NO	APPLICATION 568 OF 2004
CITATION NO.	2004 WAIRC 12106

Result	Respondent suspended for three months

Order

HAVING heard Mr C. Bydder (of Counsel) who appeared on behalf of the Applicant and Mr H. Borenstein (of Senior Counsel) and with him Mr T. Kucera (of Counsel) who appeared on behalf of the Respondent, the Commission pursuant to the powers conferred on it under s.49J(5) of the *Industrial Relations Act, 1979*, hereby orders:

THAT the right of entry authority issued to Joseph McDonald on 28th August 2002 be and is hereby suspended for a period of three months from the date hereof.

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

2004 WAIRC 12107

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOSEPH LEE OF THE BUILDING INDUSTRY AND SPECIAL PROJECTS INSPECTORATE **APPLICANT**
	-v-
	MICHAEL BUCHAN **RESPONDENT**
CORAM	COMMISSIONER J F GREGOR
DATE	26TH JULY 2004
FILE NO	APPLICATION 569 OF 2004
CITATION NO.	2004 WAIRC 12107

Result Respondent suspended for three months

Order

HAVING heard Mr C. Bydder (of Counsel) who appeared on behalf of the Applicant and Mr H. Borenstein (of Senior Counsel) and with him Mr T. Kucera (of Counsel) who appeared on behalf of the Respondent, the Commission pursuant to the powers conferred on it under s.49J(5) of the *Industrial Relations Act, 1979*, hereby orders:

THAT the right of entry authority issued to Michael Buchan on 26th February 2003 be and is hereby suspended for a period of three months from the date hereof.

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

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2004 WAIRC 12204

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK KENNETH BAKER **APPLICANT**
	-v-
	WORKS INFRASTRUCTURE PTY LTD **RESPONDENT**
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 23 JULY 2004
FILE NO/S	APPLICATION 822 OF 2004
CITATION NO.	2004 WAIRC 12204

Catchwords	Industrial law – Termination of employment – Harsh, oppressive and unfair dismissal – Acceptance of referral out of time – Application referred outside of 28 day time limit – Relevant principles to be applied – Commission satisfied applying principles that discretion should not be exercised – Acceptance of referral out of time not granted – *Industrial Relations Act 1979* (WA) s 29(1)(b)(i), s 29(2), s 29(3).
Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mr M Baker on his own behalf
Respondent	Mr S Scott as agent

Reasons for Decision
(Ex tempore)

1 The matter before the Commission is an application by the applicant, Mr Baker, against the respondent Works Infrastructure Pty Ltd.

2 The application is one brought pursuant to s 29(1)(b)(i) of the *Industrial Relations Act* 1979 (WA) ("the Act"), by which it is said that the applicant was harshly, oppressively and unfairly dismissed from his position as a rail labourer by the respondent, it seems on or about 15 May 2004 as particularised, although it now seems that the date of termination as alleged might well be 8 May 2004.

3 In his application the applicant asserts that as a rail labourer he was engaged in duties involving fixing and putting in rail, and various labour related duties.

4 The Commission has listed this application of its own motion because the application was filed some 10 days beyond the 28 day time limit prescribed by s 29(2) of the Act for applications of this kind, although it is clear that the Commission has jurisdiction and power under s 29(3) of the Act to extend time, in effect, to accept an application out of time if it forms the view that it would be unfair for the Commission not to do so.

5 The respondent employer, by notice of answer and counter-proposal, has taken issue with the applicant's claim, but, most particularly for present purposes, denies that it was ever the employer of the applicant, and therefore submits, in effect, that the applicant's claim is beyond the Commission's jurisdiction. The respondent asserts in its notice of answer that the applicant was at all material times an employee of a labour hire company, WorkPac Industrial.

6 The facts are not, essentially, in dispute, fortunately, and, in summary terms, they are that the applicant commenced his engagement with the respondent, it seems, on or about 21 January 2004. He then continued up until about, as I have said, 8 May 2004.

7 The circumstances are, essentially, that the applicant, whilst admitting he was employed by the labour hire company, WorkPac Industrial, says to the Commission that shortly before, or on the day of, 8 May 2004 he was in receipt of a signed letter of offer of employment by the respondent. However, prior to the acceptance of that offer, the arrangement was brought to an end, such that he never became an employee of the respondent company. There seems to be common ground between the parties that an issue was taken with a medical condition that the applicant suffers, that being epilepsy, on the applicant's submission, and accordingly the offer of employment was taken no further by the respondent.

8 I pause to note that none of the allegations made by the applicant for seeking an extension of time and the grounds upon which that has been brought are contested by the respondent through its agent in the proceedings this morning.

9 The applicant, in effect, says that the reasons for the delay of some ten days were because he suffered personal circumstances at about the time of the alleged dismissal; that he was seeking advice from various agencies, including the Equal Opportunity Commission, the Epilepsy Association, and, ultimately, the Employment Law Centre. He submits to the Commission that once he obtained advice from the latter agency, he commenced these proceedings promptly, and, in fact, they were filed on 23 June 2004.

10 The applicant submits to the Commission that his claim ought be accepted out of time because he feels that he has been harshly dealt with in all of the circumstances.

11 The Commission considers and turns to the established principles in this matter, dealt with by the Commission as presently constituted, by the Full Bench and by the Industrial Appeal Court, in the matter of *Malik v Paul Albert, Director General, Department of Education of Western Australia*, in particular the decision of the Industrial Appeal Court in the *Malik* matter, reported at 2004 WASCA 51. In that judgment, the Industrial Appeal Court referred to various considerations that the Commission should have regard to in relation to determining whether to accept an application out of time or not, and I refer in particular to the judgment of Heenan J at par 74 in the Industrial Appeal Court decision, adopting and applying the decision of the Industrial Relations Court of Australia in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298. A number of factors are referred to, including :

> *"1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.*
>
> *2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.*
>
> *3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.*
>
> *4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.*
>
> *5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.*
>
> *6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion."*

12 As the Commission made plain during the course of the proceedings in this matter, a major hurdle for the applicant to contend with in the instant case is his admission, to his credit, that he was never an employee of the respondent, but, however, was at all material times an employee of the labour hire agency, WorkPac Industrial.

13 On the basis that the applicant was never an employee of the respondent, then he cannot be dismissed by the respondent to attract the Commission's jurisdiction. On this basis, while the Commission has no doubt from the submissions of the applicant that his circumstances are genuine, and the Commission has some reservations and concerns about the circumstances, such as the reason for the delay, the length of the delay and so on, the applicant's position is such that he cannot be dismissed to attract the Commission's jurisdiction for the purposes of the Act.

14 On that basis, there is simply no jurisdiction to deal with the applicant, and in my view, therefore, it can never be unfair, to not accept an application out of time if the application itself has no prospect of success because of this question of jurisdiction.

15 Whilst the Commission has considerable sympathy for the circumstances of the applicant and his position, and, as I have submitted, I have no doubt as to the genuineness of the applicant's circumstances, the Commission has no alternative but to dismiss the application, for the reasons that I have indicated.

2004 WAIRC 12091

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK KENNETH BAKER
	APPLICANT
	-v-
	WORKS INFRASTRUCTURE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 23 JULY 2004
FILE NO/S	APPLICATION 822 OF 2004
CITATION NO.	2004 WAIRC 12091

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mr M Baker on his own behalf
Respondent	Mr S Scott as agent

Order

HAVING heard Mr M Baker on his own behalf and Mr S Scott 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 for want of jurisdiction.

(Sgd.) S J KENNER,
[L.S.] Commissioner.

2004 WAIRC 12123

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KAY MAREE BALZER
	APPLICANT
	-v-
	SONNY PTY LTD T/AS QUINNS LIQUOR STORE
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	WEDNESDAY, 28 JULY 2004
FILE NO	APPLICATION 1223 OF 2003
CITATION NO.	2004 WAIRC 12123

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal – Nature of employment relationship – Casual Employment - Jurisdiction – Workplace Relations Act 1996 (Cth) - Industrial Relations Act 1979 (WA) s 29(1)(b)(i) – Fair go all round afforded – Application dismissed
Result	Application dismissed
Representation	
Applicant	Ms K Wroughton of Counsel
Respondent	Mr O Moon as agent

Reasons for Decision

1 This is an application pursuant to s.29(1)(b)(i) of the *Industrial Relations Act, 1979* ("the Act"). The applicant Ms Kay Balzer was employed to work in the respondent's liquor store at Quinns Rock. The applicant had been employed by the previous owner of the business for approximately 3 years and 3 months. The respondent took over the business on 7 June 2003. The applicant alleges that she was summarily dismissed on 16 July 2003. It is submitted on her behalf that no reasons were provided for her termination, no separation certificate was provided, there were no warnings in relation to her performance and no counselling was provided. The applicant was paid as a casual at the rate of $15.52 per hour and worked approximately 30 hours per week. The applicant disputes that she was in effect a casual employee. The respondent challenges the jurisdiction of the Commission to deal with the application. The respondent maintains that Ms Balzer was at all times a casual employee and submits that she was not dismissed; she was taken off the roster. The applicant was employed pursuant to an Australian Workplace Agreement (AWA).

JURISDICTION

2 I will deal initially with the question of jurisdiction. It is unnecessary to go to the full submissions of both parties. These submissions were provided in writing prior to hearing the merits of the application. In essence the respondent submits that by virtue of clause 20 of the AWA and section 170VR of the Federal *Workplace Relations Act 1996* the provisions of the Act relating to remedy for unfair dismissal do not apply. Section 170VR stipulates:

"170VR Effect of AWA on other laws

(1) Subject to this section, an AWA prevails over conditions of employment specified in a State law, to the extent of any inconsistency.

(2) Provisions in an AWA that deal with the following matters operate subject to the provisions of any State law that deals with the matter:

(a) occupational health and safety;

(b) workers' compensation;

(c) apprenticeship;

(d) any other matter prescribed by the regulations.

(3) If a State law provides protection for an employee against harsh, unjust or unreasonable termination of employment (however described in the law), subsection (1) is not intended to affect the provisions of that law that provide that protection, so far as those provisions are able to operate concurrently with the AWA.

(4) To the extent of any inconsistency, an AWA prevails over prescribed conditions of employment specified in a Commonwealth law that is prescribed by the regulations.

(5) In this section:

Commonwealth law means an Act or any regulations or other instrument made under an Act.

prescribed conditions means conditions that are identified by the regulations.

State law means a law of a State or Territory (including any regulations or other instrument made under a law of a State or Territory), but does not include a State award or State agreement".

Subclause (3) is the provision upon which the respondent relies. The respondent then submits that "there is a direct collision between the *Workplace Relations Act* and the *Industrial Relations Act* in that the AWA specifically excludes the provisions of the *Industrial Relations Act*." (Paragraph 24 of the respondent's submissions)

3 The applicant's submission in turn can be summarised as follows:

"The argument advanced by the Respondent is that by virtue of a clause in the AWA, the *Industrial Relations Act* has been excluded from the relationship between the parties. That is what is stated in Clause 20 of the AWA. The AWA is an agreement formed between the parties under the provisions of the *Workplace Relations Act*: See Sections 170VF, 170VG and 170VPB. However, the stream cannot rise higher than its source and the legislative authority for the AWA, is the *Workplace Relations Act* and it is in that legislation that one must look to see whether there is any inconsistency and thereby a Section 109 (of the Constitution) dominance of the state law: See ***T.A Robinson and Sons Pty Ltd v Haylor (1957) 97 CLR 177***". (Paragraph 5 of the applicant's submissions)

Further the applicant submits that the AWA does not make provision for remedy for unfair dismissal. It is silent on the right.

4 The relevant provisions of the AWA are as follows:

"**13. Contract of Service**

13.1 Casual Employee is defined as an employee who may be engaged as required from time to time by the hour or rostered to work on any day or days as and when required by the employer on an ongoing employment relationship.

13.2 As a Casual Employee, you are paid a rate of pay in lieu of being paid for annual leave, sick leave and public holidays.

13.3 As a Casual Employee, either party may terminate the Contract of Employment giving to the other party one (1) hour's notice, provided that, failure to comply with this provision shall result in the payment or forfeiture of one (1) hour's pay by the defaulting party.

16. Relationship with Award

When this agreement has commenced operation, no provisions of any existing award or Workplace Agreement shall form part of the contract of employment between the employer and the employee.

17. Anti-Discrimination Provision

17.1 The parties to this AWA agree that:

(i) it is their intention to achieve the principle object in sub-clause 3 (j) of the Workplace Relations Act 1996, which is to respect and value the diversity of the work force by helping to prevent and eliminate discrimination at their enterprise on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and

(ii) any dispute concerning these provisions and their operation will be progressed initially under the dispute resolution procedure in this AWA; and

(iii) nothing in these provisions allows any treatment that would otherwise be prohibited by anti-discrimination provisions in applicable Commonwealth, State or Territory legislation; and

(iv) nothing in these provisions prohibits:

a. any discriminatory conduct (or conduct having a discriminatory effect) if:

(1) the employee is a member of staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed; and

(2) the conduct was in good faith to avoid injury to the religious susceptibilities of that religion or creed.

18. Dispute Resolution Procedure

18.1 In relation to any matter that may be in dispute between the parties to this AWA ('the matter'), the parties:

(i) will attempt to resolve the matter at the workplace level, including, but not limited to:

a. the employee and his/her supervisor meeting and conferring on the matter; and

b. if the matter is not resolved at such a meeting, the parties arranging further discussions involving more senior levels of management (as appropriate); and

(ii) acknowledge the right of either party to appoint, in writing, another person to act on behalf of the party in relation to resolving the matter at the workplace level; and

(iii) agree to allow either party to refer the matter to mediation if the matter cannot be resolved at the workplace level; and

(iv) agree that if either party refers the matter to mediation, both parties will participate in the mediation process in good faith; and

(v) acknowledge the right of either party to appoint, in writing, another person to act on behalf of the party in relation to the mediation process; and

(vi) agree that during the time when the parties attempt to resolve the matter:

a. the parties continue to work in accordance with their contract of employment unless the employee has a reasonable concern about an imminent risk to their health or safety; and

b. subject to relevant provisions of any State or Territory occupational health and safety law, even if the employee has a reasonable concern about an imminent risk to their health or safety, they must not unreasonably fail to comply with a direction by the employer to perform other available work, whether at the same workplace or another workplace, that is safe and appropriate for the employee to perform; and

c. the parties must co-operate to ensure that the dispute resolution procedures are carried out as quickly as is reasonably possible; and

(vii) agree not to commence an action:

a. to obtain a penalty under section 17OVV of the Workplace Relations Act 1996 "the Act" or

b. to obtain damages for breaches of an AWA; or

c. to enforce a provision of the AWA or Part VID of the Act (other than an action to enforce section 17OVU of the Act; unless:

d. the party initiating the action has genuinely attempted to resolve the dispute at the workplace level; and

e. either;

(1) a period of seven (7) days has expired from the date when the party initiating the action gave notice that mediation is not requested; or

(2) the mediation was requested by either party and that mediation has been completed.

(viii) If the dispute is not resolved either party is entitled to pursue the matter in an eligible court.

An eligible court is defined as:

• the Federal Court of Australia;

• a District, County, or Local Court; or

• a Magistrate's Court

(ix) The parties are committed to avoid stoppages of work, lockouts, or any other bans or limitations on the performance of work and accordingly work shall continue normally without any form of ban or limitation.

20. State Legislation

20.1 The following Western Australian Legislation shall not apply to the parties to this agreement:

(i) Industrial Relations Act 1979 (as amended)

(ii) Minimum Conditions of Employment Act 1993 (as amended)"

5 These provisions seek to recognize State and Federal laws in one part and then purport, in another part, to exclude by agreement the operation of the *Industrial Relations Act 1979* and the *Minimum Conditions of Employment Act 1993*. The AWA does not contain any provision concerning unfair termination. The Industrial Appeal Court decision in *City of Mandurah v Hull* 80 WAIG 4319 made it clear that the Federal *Workplace Relations Act* did not seek to cover the field in relations to unfair dismissal laws and did not cause a direct inconsistency with the Act. The respondent's submissions would have the Commission conclude that an instrument available under the Federal Act can achieve a result, by agreement of the parties to the AWA, not envisaged by the Federal Act. The parties cannot by agreement seek to deny a right under State law without any alternate provision within the agreement.

EVIDENCE

6 Evidence was given by the applicant and for the respondent by Mr Stefan Janusi, the proprietor of the business. Ms Balzer says that she was employed by Mr Janusi when he took over the business on 7 June 2003. Her only change of duties, from her previous employment with the previous owner of the business, was that she now had to do restocking of the cold room in addition to the other duties which she performed. Her duties included customer service, unpacking stock, restocking fridges, calculating prices, sweeping the floors and cleaning the shop. She signed an AWA as her contract of employment [Exhibit A1]. She would keep a record of her hours and at the end of each week inform Mr Janusi of the amount of hours she had worked. Her roster sometimes varied. She says that when she first started a piece of paper was put up in the office showing her days and hours. That was the roster to which she worked. Ms Balzer kept a record of her hours in a book [Exhibit A2]. The book shows the hours she worked each week and includes payment for one hour's notice on termination.

7 Ms Balzer says that she was advised that her employment was secure and ongoing. Mr Janusi indicated he was very happy with her work and regularly thanked her for her work. She had no doubt that her employment was continuing. She says that two days before her dismissal Mr Janusi asked her whether she would like to make changes to her work. He suggested that she work longer shifts but fewer days per week and work 12 hours on Sunday. She replied positively to the suggestion and he asked her what days of the week she would like to work. She asked if she could consider that. She does not believe there was any intention to increase her hours, just the spread of hours, if there was to be an increase of hours she says it would only have been minimal.

8 Ms Balzer says that she really enjoyed the work and customers. Sometimes Mr Janusi would be in the shop at the same time as Ms Balzer and at other times she would be left at the shop on her own. There were no other employees except in the last week. Ms Balzer said there was a young girl that came in a couple of times for a couple of hours. She believes that this girl had worked in the shop for the last week or two of her employment. Ms Balzer instructed her on how to use the till. Ms Balzer said that she only ever received positive comments from Mr Janusi. Her impression was that she was doing a terrific job. Ms Balzer says that typically she started at 3.00 o'clock in the afternoon from Monday through to Friday. Sunday was the longest day and she started around middle of the day until about 6.00 o'clock. She would sometimes come in earlier if Mr Janusi had to do some other work. She usually worked during the week until 7 or 8 o'clock. However, her usual starting and finishing times were 3pm to 8 pm.

9 On Wednesday 16 July she arrived at work at her normal start time of 3 pm. She walked through to the office where she normally left her bag. Before she even had the opportunity to put her bag down Mr Janusi came out and said, "I'm letting you go". She says there was a long pause and then she said to him, "What do you mean? Am I sacked?" He replied, "Yes, that's right." Ms Balzer was stunned and asked when she was to finish and Mr Janusi told her she was to finish instantly. He advised her that he only had to give her one hour's notice. He advised her that he would pay her the hour. He provided her with no reasons as to her termination. He did not want to give her any reasons for her termination and he did not want to discuss the matter. Ms Balzer was given a letter regarding her termination [Exhibit A3].

10 Ms Balzer says that she sought work and commenced her new position on 11 December 2003 working in a drive thru bottle shop. She was unemployed for approximately 21 weeks. She understands Mr Janusi has since sold the Quinns Liquor Store.

11 Under cross-examination Ms Balzer says that she received an increase in hours with the new ownership of the store. Previously she had not been working 7 days a week. The respondent tendered the covering letter to the AWA [Exhibit R1]. Ms Balzer says she never objected to being offered a casual position. She says:

> "When I get a job, if I'm told to sign this, I - - I know better than to question workplace agreements because I know it's not really an agreement as such, it's just - - it's not something you discuss or argue about. If you want the job you sign what you're told to sign." (Transcript p.23A).

Ms Balzer says that she knew that she was classed as casual by Mr Janusi but she did not know that she was classed as casual in law.

12 Under cross-examination Ms Balzer says that two days before her dismissal Mr Janusi said to her as follows:

> "Are you happy with the way things are or would you prefer to change it? Would you rather do fewer shifts and longer hours, or are you happier doing more short shifts?" (Transcript p.27A)

Ms Balzer says it was left completely up to her and she was not told there were going to be changes. She was simply given the opportunity to change things if it suited her. She does not recall being told that another employee would be brought into the business and that was connected to the re-arrangement of hours. She did not ask and was not told on 8 July that by bringing the other employee her hours would be reduced. She also denies that on 9 July, after being advised of this, she was found not attending to her duties, in that she did not attend to the milk order and stocking the shelves, she simply sat at the sales counter. She denies also that she was spoken to about not performing her work.

13 Ms Balzer says that she was not spoken to on 10 July about not performing her duties. She says she was never once spoken to by Mr Janusi in a negative fashion. Ms Balzer further denies that on 11 July she was given a warning that if she did not perform her duties in the normal fashion that she would be taken off the roster. She further denies that on 12 July that she was not performing her duties and was again warned that if she did not do as asked then she would be taken off the roster. She denies that on 13 July she was again found not performing her duties and was told that she was to be taken off the roster. She denies that on 14 July she turned up for work and was advised that she had been taken off the roster. She agrees that on one occasion she attended the liquor store with her son. However, she says it was not on 16 July. She says also on that occasion there were no customers in the store; hence she did not harass customers. She did not go into the store at that time and denies that she was abusive towards Mr Janusi. She says she simply insisted on a separation certificate and her group certificate. Ms Balzer says she came to the liquor store on 17 July with her son. On that occasion Mr Janusi contacted the police. Ms Balzer says that she also asked her son to contact the police because Mr Janusi was telling lies to the police on the telephone. She demanded her final pay and was paid it. She says that she was asked by Mr Janusi through the police to leave. She protested that she had not received her group certificate and separation certificate. The police indicated that Mr Janusi had said he had already sent them. Ms Balzer says she has not received them to date. She says as a result of the discussions between her and the police she was given [Exhibit A3], her letter of termination by Mr Janusi.

14 Ms Balzer agrees that she attended the liquor store a week later in the company of a friend. She denies there were customers there at that time. She says she did not swear at Mr Janusi, she simply insisted on getting her group certificate. Mr Janusi called the police again. She left the premises at the request of the police.

15 Ms Balzer says she was dismissed on 16 July but that her letter of dismissal was given to her on 17 July.

16 In re-examination Ms Balzer says again that she was not advised about any negatives in relation to her performance. She says she did not work on 12 July, a Saturday. She worked on 14 July and she was dismissed on 15 July.

17 Ms Balzer says in response to questions from the Commission that she was instantly dismissed on one day and after brief discussion left the premises. She returned to the store the next day to ask for her pay and notice of dismissal and her group certificate. They had a disagreement about whether he had to give her the documents and Mr Janusi called the police.

18 Mr Janusi gave evidence that he was the owner of the Quinns Rock liquor store and has since sold it. He immigrated to Australia as a business migrant. He employed Ms Balzer as a casual employee to help as a cashier, do milk orders and clean up around the store. He got advice from an agent Mr Tony Thompson regarding the employment agreement. Mr Janusi says that he advised Ms Balzer that he needed to take down her hours and employ another employee in case one of them got sick and there was then no coverage. He says Ms Balzer was upset by this and indicated that she needed the hours to pay her rent and her bills. He says he tried to talk to her about this but she seemed to be depressed and would not respond to him. He says he tried to talk to her the first day and did not get any response so he left her alone. He then tried to talk to her the next day and incurred the same problem. He says as follows:

> "I couldn't do anything myself. I was working 8 hours a day and she was working 4 hours a day and I needed my break and I needed to know that - - because I did a lot of ordering and I - - and - - and - - and stuff like that so I tried to talk to her some more and it was obvious to me that she didn't want to and I - - I told her that she needed to do her work." (Transcript p.51)

He says she did not respond and do her work. Mr Janusi says on the 3rd day it was the same and the atmosphere in the store was poor and customers could feel that atmosphere. He said to Ms Balzer, "Oh, I maybe have to take you off the roster if this continues". He says that she did not respond to that comment. Mr Janusi says he was feeling a lot of pressure and needed Ms Balzer's help. Mr Janusi says that on the final day he spoke to Ms Balzer again as she was not doing her work and indicated to her that if she did not do her work he was going to have to put her off the roster. He says on the final day he told her he was taking her off the roster but she did not seem to respond to that. She just took her clothes and walked out. He advised her of this at the end of the day. Mr Janusi says that Ms Balzer then just came in the next morning as if nothing had happened and he advised her that he was taking her off the roster to which she queried what he meant. She advised him that he could not do that and he indicated that he could and that she was a casual employee. Mr Janusi says that Ms Balzer became quite angry and walked out. She went into the cafeteria and advised everyone that she had been fired. Mr Janusi says that subsequently Ms Balzer's friend Sandy came in and asked what was happening regarding Ms Balzer. Mr Janusi did not want to talk about it. Then Ms Balzer's boyfriend came in and threatened Mr Janusi. The following day Ms Balzer came to start work again and he advised her that she was off the roster.

19 Mr Janusi says that 2 or 3 days later Ms Balzer came in with her son and acted quite aggressively demanding her pay right away. He says he took out his cheque book and paid her immediately. She demanded papers also which she says she needed for unemployment. He indicated he would send that to her or she could pick it up later. He says Ms Balzer demanded the papers then and there. He did not want to give her the papers without professional help. Mr Janusi said that Ms Balzer demanded the paper saying that she did not work in the shop anymore. She indicated she needed it otherwise she could not get money. Mr Janusi called the police. Mr Janusi says he felt pressured, he wanted to seek professional help however, he wrote the note regarding her termination [Exhibit A3]. There was then the following exchange:

> "MR MOON: Okay. Is that the first time that you had indicated to her that she was dismissed?---Yes. She wanted dismissal paper. I never brought it up.
>
> Are you telling the court the reason you wrote "dismissed" on there is because she requested it?---Yes. She said she wanted to be finished with this. She just needed the papers for - - to get money from the dole and she would leave me alone. That's what the police said that she stated. I - - I then - - then proceeded to do so." (Transcript p.58)

20 Mr Janusi agrees that the police attended on 17 July. He gave her the letter of termination on that date. He says about a week later Ms Balzer came in with her friend Sandy to buy a cask of wine. He says they appeared to be drunk and started abusing him. He called the police again.

21 Mr Janusi said that he advised Ms Balzer that her work was good prior to advising her regarding change of hours. He denies that he ever indicated to her that he would increase her hours. He says if Ms Balzer had been performing her duties he would not have sought to take her off the roster.

22 Under cross-examination Mr Janusi said he initially relied on Ms Balzer when ordering goods. He says she knew the ropes. He agrees with Ms Balzer's evidence in terms of her duties except he says he did the ordering. Mr Janusi says he relied on professional help in having the AWA drawn up and he does not fully understand its implications. Mr Janusi accepts that Ms Balzer was employed in the first week for 29 hours, then the following weeks for 38 ½ hours, 38 hours, 33 hours, 28 ½ hours and in the final week 25 hours. He says that the papers he received from the previous owner indicated that Ms Balzer was working as a casual. In the beginning she had the same hours that she used to work then he changed it around because he says he was working 12 hours a day and he had to go to the bank sometimes and drop off papers. He says they would discuss each day what time he wanted her to start. He says there was a roster on the notice board but that got changed daily. He would call her and ask her if she could come in 2 hours earlier or alternatively she might seek to change a day. There was a published roster when she started.

23 Following Ms Balzer's termination Mr Janusi says he had two casual staff. He says he was under a lot of pressure when he wrote out the termination note and it was the day the police were there. He says he had no intention of dismissing Ms Balzer.

24 Mr Janusi says he advised Ms Balzer two to three days prior to 16 July about her change of hours. He says that he was advised by Mr Thompson about the words to use i.e. to take Ms Balzer off the roster. He denies that he was advised by Mr Thompson about these words after the event. He says he gave her a warning that he was going to take her off the roster on 12 July 2004. He says he did not dismiss her. She wanted the papers for dismissal and he gave them to her.

25 In answer to questions from the Commission Mr Janusi says that he advised Ms Balzer that she would be taken off the roster two days before he gave her a letter regarding termination. He says there was a day between taking her off the roster and the incident with the police. He does not recall having contact with Ms Balzer the day before the police came. Mr Janusi says that Ms Balzer did not work on the day he told her she was not on the roster for the second time. She did work the day prior to that. On that day he told her that if she continued not talking to him or doing the orders he would take her off the rosters. He told her that when she arrived for work at approximately 12 o'clock. He says he advised her about 7 or 8 times that day.

26 Mr Moon for the respondent submits that it is clear from the AWA and the definition of casual that Ms Balzer's employment is casual. He submits Mr Janusi had ample reasons to take her off the roster due to her failure to obey lawful instructions. He refers to the decision in *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66 regarding conduct which is incompatible with the fulfilment of an employee's duties being a ground for dismissal. However, he submits that Ms Balzer was not dismissed. Given her actions she was simply taken from the roster. Ms Wroughton, for the applicant, submits that there are a number of provisions in the AWA which demonstrate the ongoing permanent nature of the contract (eg hours of work, bereavement leave). There was a roster placed on the roster board. She worked most days between 3pm and 8 pm. There was regularity in hours and days. She was advised by the respondent that she was doing a good job and her position was secure. Ms Wroughton referred to a decision of the Commission in *Serco (Australia) Pty Limited v John Joseph Moreno* 76 WAIG 937. Ms Wroughton says in weighing the indicia in that decision Ms Balzer is clearly not a casual and she was in fact summarily dismissed from her position as a permanent part time worker.

27 There is considerable conflict of evidence in this matter. In summary, on Ms Balzer's evidence her work was really good, she had responsibility for looking after the store, albeit she was not a manager, Mr Janusi was very happy with her work, had praised her regularly, had asked her to consider changing her hours albeit not to reduce her hours and against this background all of a sudden summarily dismissed her, without reason and without any separation certificate. The summary of Mr Janusi's evidence is that he had newly acquired the store, continued Ms Balzer's employment as a casual employee, needed and appreciated her assistance, decided that the business required additional casual staff to ensure coverage of opening hours given his other responsibilities, he engaged another employee, then sought to reduce Ms Balzer's hours, she responded badly and ceased performing her duties properly, he responded by warning her and then taking her off the roster. He then issued her with a letter of termination after which Ms Balzer came to the store, a disturbance ensued and the police were called. Suffice to say that both versions of events cannot be correct.

28 I have no difficulty accepting the evidence of Mr Janusi over that of Ms Balzer as being the more probable account of what transpired. Mr Janusi was seeking to run a business that he had newly acquired. He readily accepted in evidence his reliance on Ms Balzer to operate the business. If I accept Ms Balzer's account of events then nothing negative occurred between the two of them until she was summarily dismissed. It is hard to reconcile why this would have suddenly happened in this way. Add to this is the fact that a new employee was engaged and Ms Balzer was teaching that employee the cash register and I presume other facets of the business. This is more commensurate with Mr Janusi's account that he required additional assistance to run the business given his other duties, and his concern least either Ms Balzer or he were not available. On Ms Balzer's termination Mr Janusi engaged another employee until he finally sold the business. The other employee is a senior employee and hence any suggestion of motive to employ a junior employee to replace Ms Balzer or cut costs cannot be sustained. The supposed letter of termination [Exhibit A3] in my view also supports Mr Janusi's version of events. It would appear to have been hurriedly completed, contains the barest of details and would appear to be consistent with Mr Janusi's account of having hurriedly produced it, under pressure, with the police in attendance. It also contains the words, "this is not a legally binding document", which I consider is consistent with Mr Janusi's evidence that he was reluctant to sign something and wanted to clarify his legal position first.

29 It is my clear impression of Ms Balzer that she liked working at the store, liked operating things her way and was not happy about any changes. She was both forceful and emphatic in her evidence and denials. She quickly rejected any suggestions that may have been negative towards her case and greatly downplayed the instances where following her employment she attended the store and on more than one occasion police were called. She says that she was seeking her separation certificate and sought to convey the impression that she had done nothing untoward and was seeking to counteract the "lies" told by Mr Janusi. Mr Janusi's demeanour at hearing was not one of antagonism or aggression toward Ms Balzer. He appeared more bewildered by her actions. I consider that it is more likely that, notwithstanding some confusion in his evidence about the dates on which events occurred, that Mr Janusi attempted to get Ms Balzer over the offence she felt by the suggested change of hours, and to get her to complete her duties. He says the atmosphere within the business became difficult and this was experienced by customers. He says that he warned Ms Balzer and sought to correct this situation without success. In my view the truth lies more with Mr Janusi's version of events.

30 It is necessary to deal with the nature of Ms Balzer's contract. The submission on her behalf is that she was employed as a permanent part-time worker. Ms Balzer admits that she signed her contract as being a casual worker, understood that she had been regarded as a casual worker previously, but says that she only signed the contract as she needed to so as to secure the job, but that she was not a casual employee in law. The evidence of Ms Balzer is that she had a regular pattern of work, including start and finish times, but would adjust these if required by the employer. In other words she would come in earlier or provide additional coverage for Mr Janusi if required. Mr Janusi's evidence does not differ greatly on this point other than he says that the flexibility worked both ways and that Ms Balzer's hours did vary a little and he would also cover for her if for example she needed to attend to a social engagement. The roster which was posted served only as a guide.

31 It is submitted on Ms Balzer's behalf that the AWA which she signed also signifies that Ms Balzer was not a casual employee by the inclusion of benefits, eg bereavement leave, which do not normally ascribe to casual employees. The letter of offer of employment [Exhibit R1] clearly refers to casual employment, expresses an hourly rate and refers to the conditions of employment being contained within the AWA.

32 In the decision of the Full Bench in the matter of *Swan Yacht Club (Inc) v Leanne Bramwell* 78 WAIG 579 @ 583 his honour the President states:

> "Casual employment at common law, as distinct from casual employment defined in an award, is generally taken to connote an employee who works under a series of separate and distinct contracts of employment entered into for a fixed period, rather than a single and on-going contract of indefinite duration. Whether a person is a casual employee depends upon the facts and circumstances of each case. The parties cannot by the use of a label render the nature of a contract something which it is not. Certainly, there may be indicia which are indicative of the nature of the contract, but, taken alone, they are not necessarily determinative of the nature of the contract. However, the indicia may include the classifying name given to an employee and initially accepted by the parties, the provisions of the relevant award (if an award applies), the number of hours worked per week, whether the employment was regular, whether the employee worked in accordance with a roster published in advance, whether there was reasonable mutual expectation of continuity of employment, whether notice is required by an employee prior to the employee being absent on leave, whether the employer reasonably expected that work would be available, and whether the employee had a consistent starting time and finishing time".

33 In my view Ms Balzer's employment contract was clearly that of a casual employee. She worked for the respondent for a matter of several weeks. She signed on with the respondent as a casual in full knowledge. The hours varied somewhat in each week, which suggests that additional or lesser hours were worked to accommodate either party. Her hours were then reduced. There is evidence that her hours of work were generally agreed, but were subject to some variation through discussion. This was about the same pattern of work she had with the previous employer. When I weigh these factors I conclude that Ms Balzer was in fact a casual employee as her contract stipulated.

34 For the reasons explained above I do not find that Ms Balzer was unfairly dismissed (*Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385). I do not accept that her services were summarily terminated. Her hours were to be reduced and she reacted very badly to that announcement. She later harassed the respondent at his place of work. I would order then that the appication be dismissed.

2004 WAIRC 12124

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES KAY MAREE BALZER

APPLICANT

-v-

SONNY PTY LTD T/AS QUINNS LIQUOR STORE

RESPONDENT

CORAM COMMISSIONER S WOOD
DATE OF ORDER WEDNESDAY, 28 JULY 2004
FILE NO/S APPLICATION 1223 OF 2003
CITATION NO. 2004 WAIRC 12124

Result	Application dismissed
Representation	
Applicant	Ms K Wroughton of Counsel
Respondent	Mr O Moon as agent

Order

HAVING heard Ms K Wroughton 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 application be and is hereby dismissed.

[L.S.]

(Sgd.) S WOOD,
Commissioner.

2004 WAIRC 12226

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SIMON BIRD
	APPLICANT
	-v-
	MARINE FIRE SECURITY PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	WEDNESDAY, 4 AUGUST 2004
FILE NO/S	APPL 2052 OF 2001
CITATION NO.	2004 WAIRC 12226

Result	Dismissed for want of prosecution
CatchWords	Termination of employment – Harsh, oppressive and unfair dismissal – Application had been adjourned together with parallel applications – Applicant not actively pursuing claim – Industrial Relations Act 1979 (WA) s 7, s 26(1)(a), s 26(1)(c) & s 29(1)(b)(i)
Representation	
Applicant	No appearance
Respondent	Mr A. Conway and Mr W. McCaskey, both Directors of the respondent, by written submission

Reasons for Decision

1 By this application Mr Bird claimed that he was unfairly dismissed from his employment as a security guard on 22 October 2001. Mr Bird had been employed pursuant to a workplace agreement which expired on 30 September 2001. The application stated that after the expiry of the workplace agreement Mr Bird's employment was governed by the *Security Officers Award.*

2 On 4 December 2001 the respondent filed an answer requesting that the application be discontinued on the grounds that the Commission does not have the jurisdiction to hear the matter because it was currently before the Industrial Magistrate's Court.

3 It is a matter of record that at that point Mr Bird's agent was Mr Richardson. Mr Richardson was also acting on behalf of Mr Brenzi and Mr Clark who similarly had been dismissed by the same respondent at the same time as Mr Bird. Applications by Mr Brenzi and Mr Clark claiming unfair dismissal were also lodged in the Commission. It is also a matter of record that Mr Brenzi and Mr Clark lodged claims in the Industrial Magistrate's Court regarding these dismissals.

4 A conciliation conference in all three applications in the Commission was set down but prior to the date of the conference Mr Richardson, on behalf of Mr Brenzi, Mr Clark and the applicant in this matter Mr Bird, requested that all three applications in the Commission be adjourned to await the outcome of the proceedings before the Industrial Magistrate's Court. The respondent, who was then represented by a firm of solicitors, confirmed that the respondent agreed these applications should be adjourned on that basis. All three applications were adjourned on 13 March 2002.

5 On 21 June 2002 the Commission requested to be advised of the status of the matter. On 21 July 2002 Mr Richardson advised the Commission that the claims of Mr Brenzi and Mr Clark were to be heard before the Industrial Magistrate's Court on 14 and 15 August 2002. It noted that Mr Bird was not available on that date and would not be available until December 2002 due to his having rejoined the Royal Australian Navy.

6 On 8 October 2002 Mr Richardson advised the Commission that the claims before the Industrial Magistrate's Court were part heard and were to be re-listed.

7 On 17 April 2003 Mr Richardson advised the Commission that although the Industrial Magistrate's Court had handed down its decision in the claims of Mr Brenzi and Mr Clark, an appeal against that decision had been lodged by them in the District Court. Mr Richardson's letter advised the Commission that Mr Bird was waiting the result of the appeal before pursuing his claim in either the Industrial Magistrate's Court or the Commission. Accordingly, Mr Richardson requested that all applications remain adjourned until the result of the appeal was known. No objection to the request was received from the respondent.

8 On 8 January 2004 the Commission wrote to the parties seeking further advice. On 25 January 2004 Mr Richardson advised the Commission that with effect from the date of that letter he no longer represented Mr Bird in "this or any other matter". He stated:

> "I have advised Mr Bird by letter written today and sent to his last known address that [I] would inform the Commission of this fact and that he should contact you directly if he wishes to proceed with this matter."

The letter included Mr Bird's last known address.

9 Accordingly, on 2 February 2004 the Commission wrote directly to Mr Bird advising him of the request of the Commission to be advised of his intentions. Mr Bird telephoned on 27 February 2004 indicating that he would like to proceed with his application but had no money for representation. He informed the Commission that he was now in the armed forces and was away a good deal of the time.

10 On 18 March 2004 the Commission wrote to Mr Bird acknowledging the telephone call and referring to the considerable period of time that had then past since the dismissal. It informed Mr Bird of the Commission's intention to list the matter For Mention Only for no more than one hour in order to be informed what circumstances had changed over that time and the present position of the parties in relation to the matter. It also informed him that the Commission would then give consideration to whether the application should be listed for hearing. Mr Bird was requested to contact the Commission within fourteen days of the date of the letter for that purpose.

11 On 24 May 2004 the Commission again wrote to Mr Bird stating that nothing had been heard from him and it requested advice as to why his application should not be discontinued. It informed Mr Bird that if no reply was received from him within the following fourteen days the application may be listed in court for Mr Bird to show cause why it should not be dismissed.

12 As a courtesy to Mr Bird the Commission directed Ms Allison from the Commission's chambers to telephone Mr Bird. Mr Bird informed Ms Allison that he was at that time attending a course the daily hours of which were 7.00am to 7.00pm and the course was to run until mid July 2004 without any break. After the completion of the course Mr Bird would be returning to sea for the following five months. Mr Bird was at a loss to give the Commission any time that would be suitable for listing the application.

13 On 1 June 2004 the Commission wrote in detail to Mr Bird setting out the history of the matter and observing that his unavailability would result in a further ten month delay. The Commission noted in the letter that a further ten months delay in the listing of the application of unfair dismissal from October 2001 gave rise to considerations whether it remained in the public interest for this application to be dealt with. The Commission informed Mr Bird that the matter was set down for hearing For Menton Only. The letter noted:

> "The Commission will take into account your unavailability and if you are unable to attend the hearing or are not represented you are requested to respond in writing addressing the issues raised in this letter. Your responses will then be taken into account. If you do not attend, are not represented, or do not respond in writing prior to the date and time set out in the Notice of Hearing then your application is likely to be dismissed."

14 On 15 July 2004 Mr Bird sent a facsimile to the Commission which stated:

> "I will be unable to attend the hearing scheduled for Wednesday the 16th of June 2004 at 4.00pm as I am currently on course, Monday to Friday, starting at 7.30am finishing at 7.00pm. My course finishes on Friday the 16 of July 2004, my ship sails on Monday the 19 of July 2004 and I will be away until late November."

15 The respondent, in its written submission stated that Mr Bird has made no contact with it or attempted to finalise any dates in the Commission. The respondent stated that Mr Bird has not accepted any offer to talk or settle the matter. The respondent stated:

> "We understand that he has made no attempt to serve quick justice in this matter and has not made himself available to ANY parties to resolve any issues, we also understand he has not lodged any appeal, application or request for any orders in any courts or commissions."

16 The respondent stated also that it is a company with no assets or liquid cash. It is barely financial and further costs would or could place the company into insolvency. Further, of the three parties who took action against the company only two are proceeding. The respondent stated that after such a long period of time it has been prejudiced "in time, stress and funds".

17 What follows is the Commission's consideration of the circumstances of this matter.

18 Although Mr Bird's dismissal occurred in October 2001, all parties agreed that his application in the Commission should, in common with the applications referred by Mr Brenzi and Mr Clark, be adjourned to await the outcome of developments in the Industrial Magistrate's Court. However, the Industrial Magistrate's Court has made its decision (27 March 2003; (2003) 83 WAIG 1005). That decision was that Mr Brenzi and Mr Clark were unfairly dismissed but because they had been employed as casual employees the Industrial Magistrate's Court did not have the jurisdiction to deal with their claims.

19 The preliminary issue in Mr Bird's case as well arose because Mr Bird had been employed pursuant to a workplace agreement. This Commission does not have the jurisdiction to deal with a claim of unfair dismissal brought by somebody employed pursuant to a workplace agreement. For that reason, and particularly given the consent of the employer to its adjournment as well, no criticism is directed towards Mr Bird for having his application adjourned until the date of the decision of the Industrial Magistrate's Court.

20 However, from the date of the decision of the Industrial Magistrate's Court it was confirmed that this Commission had the jurisdiction to deal with Mr Bird's application. After 8 January 2004 when Mr Richardson no longer represented him, Mr Bird was responsible for the conduct of his own case quite separate from the parallel cases of Mr Brenzi and Mr Clark whose actions against the respondent were actively proceeding via their appeals to the District Court.

21 There was thus no further reason for Mr Bird's application to remain adjourned. On that basis, Mr Bird needed to actively proceed with his claim. Mr Bird having decided to proceed with his application, he must be prepared to do so. He has not done so.

22 While I take into account his present position in the armed forces and that he may be unavailable personally to attend the Commission, the fact remains that he has simply taken no steps at all to advance his claim in the Commission. Neither has he taken any steps to negotiate the matter with the respondent or to accept any offer to talk of settlement.

23 As a consequence, there is a very real question as to whether it is in the public interest for the Commission to continue to deal with a claim of unfair dismissal relating to events in October 2001 when it is not clear whether, if at all, Mr Bird will take any steps at all to proceed with his claim until, perhaps, November 2004.

24 There are many claims of unfair dismissal in the Commission and they are claims which are not only filed promptly but brought by persons who proceed to press their claim in the Commission. It is not an appropriate use of the State's time and resources in holding open a claim of unfair dismissal relating to October 2001 when it is not even clear that Mr Bird will be available to deal with his claim in November 2004.

25 There is obvious prejudice to the respondent for an even further delay in dealing with this matter. The company is barely financial and further costs might place it into insolvency. In my view it is unconscionable for the respondent to be put to further delay in finalising a claim against it which, unlike the other two claims against it, has not been actively pursued since 8 January 2004.

26 For those reasons I do not consider it to be in the public interest for this application to remain open and an order will now issue that the application be dismissed for want of prosecution. An order to that effect now issues.

2004 WAIRC 12230

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR SIMON BIRD
	APPLICANT
	-v-
	MARINE FIRE SECURITY PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	WEDNESDAY, 4 AUGUST 2004
FILE NO/S	APPL 2052 OF 2001
CITATION NO.	2004 WAIRC 12230

Result	Application dismissed for want of prosecution
Representation	
Applicant	No appearance
Respondent	Mr A. Conway and Mr W. McCaskey, both Directors of the respondent, by written submission

Order

There being no appearance on behalf of the applicant and having heard Mr A. Conway and Mr W. McCaskey, both Directors of the respondent, by written submission, on behalf of the respondent,

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s.27(1) of the *Industrial Relations Act 1979*, hereby order -

THAT the application be dismissed for want of prosecution.

(Sgd.) A R BEECH,
[L.S.] Senior Commissioner.

2004 WAIRC 12079

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ADRIAN CICCOTOSTO
	APPLICANT
	-v-
	TPS FIREPOWER PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	WEDNESDAY, 21 JULY 2004
FILE NO/S	APPLICATION 1527 OF 2002
CITATION NO.	2004 WAIRC 12079

Catchwords	Industrial Law (WA) – Termination of employment – Harsh, oppressive or unfair dismissal – *Industrial Relations Act, 1979* s 29AA – Prescribed amount – Definition of salary for the purposes of s 29AA(3) – Salary above prescribed amount as defined at s 29AA(5)(a) – Employee continuously employed by an employer for a period of less than 12 months – *Industrial Relations (General) Regulations 1997* Part 3, Regulation 5 – Salary above prescribed amount when calculated according to r 5(2)(c) – Commission prevented from determining claim – Application dismissed
Result	Order issued
Representation	
Applicant	Mr A Randles (of counsel) by leave, on behalf of the applicant
Respondent	Mr J Auerbach (of counsel) by leave, on behalf of the respondent

Reasons for Decision

1 When the application claiming unfair dismissal was filed and served in September 2002 the salary limit under section 29AA of the *Industrial Relations Act, 1979* ("the Act") which operates to prevent the Commission determining claims above the prescribed amount stood at $90,000 per annum. At that time the applicant states that his salary was $79,892 per annum.

2 Although in the 'Notice of Answer and Counterproposal' the respondent did not object to the salary quoted, subsequently the Commission's jurisdiction was questioned when the respondent cited the contract of employment as providing the applicant with a "remuneration package of $100,000" of which $92,592.59 per annum was specified as being designated as salary. On the basis of this, the application was claimed to be outside the Commission's jurisdiction.

3 The respondent's position is that the applicant's salary is the amount remaining under the remuneration package after the statutory superannuation levy has been deducted. The contract of employment enabled the applicant, at his election, to 'salary sacrifice' for the purchase of a motor vehicle and for further superannuation.

4 It was submitted that amounts paid by the employer on the employees account under salary sacrificing do not reduce the employee's salary. The salary level remains identifiable under the remuneration package by reference to the amount remaining after the statutory superannuation has been paid out and the amounts deducted on the applicants account under the salary sacrificing arrangement have also been paid. To be otherwise, it is submitted would be to promote the circumvention of section 29AA(3) of the Act.

5 Documentation tendered by the respondent records that the initial payment to the applicant before he exercised any option available to him under salary sacrificing establishes his salary as $92,592.59 per annum (Exhibit R5 folio 2 – file note dated 11th January 2002). A recalculation of monthly payments carried out by the respondent in February 2002 again noted the salary component of the package at the rate of $92,592.59 per annum (Exhibit R5 folio 2 – file note dated 15th February 2002). With the applicant exercising the contractual right to salary sacrifice, the respondent's records show that the novated lease arrangement commenced on 1st March 2002 (Exhibit R5 folio 13), and that this impacted on the applicant's remuneration package to the extent that the "base salary", as noted by the respondent on 14th March 2002, was $72,484.59 per annum (Exhibit R5 folio 17). This amount is expressed by the respondent as the "cash component" of the applicant's remuneration package. The arrangement to receive this amount of salary reflects the applicant's decision to avail himself of beneficial tax arrangements under the contract of employment. No advantage or benefit devolves to the respondent.

6 In the respondent's view the fact that the statutory superannuation payments remain the same for the period of employment reinforces the point that the salary component of the package is established at $92,592.59 per annum even though the "basic salary" is stated at a lower level. The disbursement of remuneration at the applicant's discretion under more beneficial tax arrangements does not reduce the applicant's salary for the purposes of section 29AA of the Act. The motor vehicle selected, the exclusive use of the vehicle and it's registration in the applicants name show that there was no benefit to the respondent. The arrangement, save and except for the contractual limitation that the funds be expended on a motor vehicle or for additional superannuation, remained outside the control or intent of the respondent.

7 The applicant's position put simply is that the amount of salary is to be determined by ascertaining what payment the employee receives. This is the meaning of "salary". It does not include amounts paid on the employees account. The structure of the salary package is irrelevant in determining the applicant's salary pursuant to section 29AA of the Act. There is no need for the Commission to go behind the amount stated as salary under the contract of employment. In the circumstances of the application the respondent's records provide the answer; the "base salary" is specified as $72,484.59 per annum. The salary package is summarised as being:

Base Salary	$72,484.59
Superannuation – employers contribution	$7,407.41
Motor vehicle – novated lease	$10,139.00
Motor vehicle – expenses	$9,969.00
	$100,000.00

(*see Exhibit R5 folio 17 - respondents file note dated 14th March 2002*)

8 It is noted that the salary quoted by the applicant when the claim was lodged ($79,892.59 per annum) is different from that now cited for determining the issue of jurisdiction ($72,484.59 per annum). Both amounts are below the prescribed amount. The former amount appears to have been taken from an estimate provided to the respondent when the impact of fringe benefits tax was being assessed with a fully novated lease of a motor vehicle by the applicant (see Exhibit R5 folio 15). The latter amount is the rate determined by the respondent with effect from 15th March after the novated lease and motor vehicle running costs paid under 'salary sacrificing' were put in place. The amount of $72,484.59 per annum established the basis for computing "base salary" payments from 15th March until the employment relationship ceased in August 2002 (see Exhibit R5 folios 17 and 18).

9 Although the applicant's letter of appointment states that, "The remuneration package will be $100,000 made up of the following: salary, motor vehicle allowance and superannuation which can be salary sacrificed", (Exhibit R5 folio 1) the respondent submits that reference to the "motor vehicle allowance" is an error. The intended deletion of the word "allowance" from the offer of appointment is not contested by the applicant. Where an allowance is paid to reimburse an expense incurred by an employee the payment does not form part of salary (see *O'Sullivan v Cooks Construction* (2003) 83 WAIG 2860). The provision of the motor vehicle under the terms of the contract of employment by way of a novated lease is not an allowance. Therefore in the circumstances of this matter no issue arises out of the reference to an allowance.

10 The applicant submits that the provision of the Act which limits the Commission's jurisdiction with respect to applications at or below the prescribed amount is not concerned with particular arrangements which may benefit one or both parties. The history of salary movements is irrelevant to the determination of the salary at the relevant time i.e. at that date of termination. In any event the initial structure of the applicant's remuneration package reflected the fact that the vehicle to which he was entitled under salary sacrificing was not available. The subsequent leasing arrangement reflected a variation to the contract by mutual consent. Under the terms of the lease, the respondent was responsible for the periodic payments. The Act does not concern itself with a distinction between salary and payments that are "connected into something else". Therefore the Commission should not concern itself with what might have been if there was not an arrangement between the parties to structure the remuneration package the way they agreed. In the applicants view it is unhelpful to attempt to try and classify the type of payment by the nature of the benefit that an employee or employer receives for the payment.

11 In the course of proceedings I was referred to a number of cases which were meant to assist in identifying the meaning of "salary" for the purposes of section 29AA(3)(b) of the Act.

12 In *John Anthony Ardino v Count Financial Group Pty Ltd* (1994) IRCR 221, "relevant wages" and wages the employee "was entitled to receive" were considered within the context of section 170CD of the *Workplace Relations Act 1996* (Cth).

13 In the *Civil Service Association of Western Australia Incorporated v Vice Chancellor Curtin University of Technology* (2003) 83 WAIG 3708 an annual leave loading and an over award personal allowance were considered for the purposes of identifying "salary" under section 29AA(3) of the Act. In the course of determining whether an employee is in receipt of a salary the Full Bench in *Edith Fisher v The Totaliser Agency Board* (1997) 77 WAIG 619 cites the approach taken by the High Court in *Government Transport v Kesley* [1972] 127 CLR 374 and the Federal Court in *Commissioner of Superannuation v Carpenter* (1983) 77 FLR 224. In those cases the meaning of the word "salary" was dealt with under the *Transport Act 1930* (NSW) and section 67 of the *Superannuation Act* (Cth) respectively. The matter of "salary sacrificing" was considered by the Industrial Appeal Court in *Commissioner, Public Service Commission v Civil Service Association of Western Australian Incorporated* (1998) 78 WAIG 3629 but only with respect to government policy and public sector awards.

14 More relevantly for the purposes of ascertaining the meaning of the word "salary" Anderson J (with whom Kennedy J and Scott J agreed) in *The Totaliser Agency Board v Edith Fisher* (1997) 77 WAIG 1889 ("the TAB case") sets out the approach to be taken.

> "In my opinion although it can be helpful to see how words have been defined in other cases, the starting point is the ordinary meaning of words. As Lord Haldane LC said in *Vacher & Sons v London Society of Compositors* [1913] AC 107 at 113, "…I think that the only safe course is to read the language of the statute in what seems to be its natural sense." We were referred to several dictionaries. There is not much difference between them as to what salary in its ordinary sense means. In the Macquarie Dictionary the following meaning is given:
>
> > "A fixed periodical payment, usually monthly, paid to a person for regular work or services, especially work other than that of a manual, mechanical or menial kind."
>
> In the New Shorter Oxford English Dictionary the following meaning is give:
>
> > "Fixed regular payments made by an employer to an employee in return for work"."
>
> (*op cit*)

15 Each of the judgements in the *TAB case* (op cit) identify that for the ordinary meaning of "salary", the concept of a fixed payment made periodically is central to the definition. In the circumstances in that case the issue was whether commission, which was computed on the basis of an opening fee for the agent, a percentage on net investments and a specified percentage based on weekly turnover, was salary for the purposes of the Government Officers Award. Two members of the Court cited the judgement of Fry LJ in *Re Shine; Ex parte Shine* [1892] QB 522 as giving an indication of the criteria that may be looked at in determining whether or not a particular payment is "salary". Fry LJ said at 531:

> "Whenever a sum of money has four characteristics – first, that it is paid for services rendered; secondly, that it is paid under some contract or appointment; third, that it is computed by time; and fourthly, that it is payable at a fixed time – I am inclined to think that it is 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."

16 In the present matter the "sum of money" to be considered in the first instance must take into account the components of "basic salary" and payments made on the applicants account in accordance with the "salary sacrificing" arrangement. "Basic salary" satisfies the criteria set out by Fry LJ above. The money which would otherwise be paid to the employee (indeed as it was before the motor vehicle novated lease was entered into) became available solely on the basis of services rendered to the respondent under the contract of employment. Payments were made on a monthly basis being computed in accordance with the terms of the lease and running costs but were paid as deductions in conjunction with the applicant's salary on the 15th day of each month.

17 On the basis of this arrangement, the amount of salary for the purpose of section 29AA(3) of the Act is $92,592.59 per annum. This exceeds the "prescribed amount" under section 29AA(5)(a) as at the date of the applicant's termination of employment which at that time (i.e. 9th August 2002) was $90,000 per annum.

18 However the "prescribed amount" defined under section 29AA(5) of the Act is ascertained by reference to $90,000 per annum or "the salary specified, or worked out in a manner specified, in regulations made by the Governor for the purposes of this section" (section 29AA(5) "prescribed amount" under (b)).

19 Under the *Industrial Relations (General) Regulations 1997* Part 3 – Unfair dismissal and contractual benefits claims, Regulation 5 – Prescribed amount – section 29AA provides at subsection 5(2)(c) that:

> "(c) for an employee who was continuously employed by an employer for a period less than 12 months immediately before the dismissal or claim – the amount worked out using the formula –
>
> $$\frac{\text{Remuneration received x 365}}{\text{Days employed}}$$

20 Applying the above formula to the circumstances of the matter the computation is based on the following:

"Remuneration received"		
	Gross payment	$48,947.54 (Exhibit R5 folio 18)
	Total sundries	$6,066.13 (Exhibit R5 folio 18)
	Total	$55,013.67
"Days employed"		214
Calculation	$\frac{\$55,013.67 \times 365}{214}$ =	$93,831.72

21 The salary determined by reference to the authority set out in *Re Shine; Ex parte Shine* (op cit) and by reference to "remuneration received" (as here where the applicant was employed for a period of less than 12 months) and calculated in accordance with regulation 5(2)(c) places the applicant above the prescribed amount.

22 Therefore, the Commission must not determine the claim for harsh, oppressive or unfair dismissal.

23 Anorder now issues dismissing the application.

2004 WAIRC 12080

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ADRIAN CICCOTOSTO
	APPLICANT
	-v-
	TPS FIREPOWER PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	WEDNESDAY, 21 JULY 2004
FILE NO/S	APPLICATION 1527 OF 2002
CITATION NO.	2004 WAIRC 12080

Result	Application dismissed
Representation	
Applicant	Mr A Randles (of counsel), by leave on behalf of the applicant
Respondent	Ms J Auerbach (of counsel), by leave on behalf of the respondent

Order

HAVING HEARD from Mr A Randles, (of counsel) on behalf of the applicant and Ms J Auerbach (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.

[L.S.]

(Sgd.) W S COLEMAN,
Chief Commissioner.

2004 WAIRC 12199

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	VINKO CIKARA
	APPLICANT
	-v-
	BRISTILE OPERATIONS PTY LTD (ACN 079 711 603) T/A TEMPLE FREIGHTS WA
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	TUESDAY, 22 JUNE 2004
FILE NO	APPLICATION 158 OF 2003
CITATION NO.	2004 WAIRC 12199

Catchwords	Outstanding contractual entitlements claim - Federal certified Agreement – Pay rate in excess of Agreement – Jurisdiction of the Commission considered – Inconsistency with Federal Act – Commission without jurisdiction – Change to contract by respondent – Acceptance by applicant – Matter otherwise dismissed
Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mr G Stubbs of Counsel
Respondent	Mr S Harben of Counsel

Reasons for Decision
(Given extemporaneously and subsequently edited by the Commissioner)

1 This is an application pursuant to s.29(1)(b)(ii) of the Western Australian *Industrial Relations Act, 1979* ("the Act"). What is in dispute is the formula to be used under the contract to calculate Mr Cikara's pay and whether the Commission has jurisdiction to deal with the matter. I give you my decision on jurisdiction now. I reserve my right to add to the decision in publishing it. The facts in this matter I find as follows, on the evidence before me:

1. Mr Cikara's employment relationship is bound by the 2001 Agreement certified on 17 May 2001 [Exhibit A4].
2. Mr Cikara's employment relationship was earlier bound by the 1999 Agreement certified on 1 November 1999 [Exhibit A1].
3. Prior to that time, and from December 1998, Mr Cikara was paid accordingly to a formula which used 9 catchers as the maximum divisor.
4. This arrangement was agreed with Mr Malone at that time, and applied to other permanent catchers, as it applied to Mr Cikara.
5. Notwithstanding the terms of the 2001 agreement, Mr Cikara, and other permanent catchers, were paid according to this formula until 1 February 2002.

6. This formula is consistent with the 1999 agreement.

7. This formula, on its face, is inconsistent with the 2001 Agreement.

8. The respondent, through Mr Albrecht, advised Mr Cikara, and I assume other permanent catchers, that their pay would remain the same about the time of the introduction of the 2001 Agreement.

9. The respondent, unilaterally altered the pay of Mr Cikara and other permanent catchers, in February 2002, seemingly for reasons of financial distress to the business. I say seemingly as that evidence is not directly before me. However, I refer to paragraph 11 of the decision of the Australian Industrial Relations Commission ("AIRC") of 17 November 2003 *Bristile Guardians Pty Limited as trustee for the Clay Tile Trust trading as Temple Freights and Cikara, Vinko (C 2003/189*) PR 940601. The decision now being a matter of public record. Albeit I am unsure as to the last sentence of that paragraph which refers to Mr Cikara leaving the employ of Temple, shortly after this change to pay. The evidence before me is that Mr Cikara continued in employment with the respondent, on a continuous basis until he was made redundant in early April 2004. There is also mention in that paragraph of other workers accepting a pay offer of the 2001 Agreement plus 5% of which I am not aware.

2 The pay arrangement which applied to Mr Cikara, following the certification of the 2001 Agreement, was to pay Mr Cikara and other permanent catchers in effect at a rate above the agreement. This was not a special arrangement for Mr Cikara. I say this because it is the evidence of Mr Cronin, backed by his work notes [Exhibit R2] which refer to there being no special arrangement for Mr Cikara. I do not doubt or challenge the evidence of Mr Cronin. Unfortunately Mr Malone is deceased and I do not have evidence from Mr Albrecht. Mr Cronin says he asked Mr Malone whether there was a special arrangement for Mr Cikara. The evidence is unchallenged in that the arrangement of using 9 catchers as the maximum divisor applied equally to other permanent catchers. It applied for over 8 months after the 2001 Agreement was certified. I say this also because this piece of evidence would appear to be the only aspect of relevantly contested evidence before me. Most of the evidence is either common or unchallenged. I am of course yet to deal with the issue of the quantum of denied benefit.

3 In summary, the respondent paid Mr Cikara and other catchers according to a pay formula using a maximum of 9 catchers as the divisor from December 1998 to February 2002, notwithstanding the terms of the 2001 Agreement. That was the contract which the respondent by their conduct chose to adopt, for whatever reason. They were paying Mr Cikara and other catchers over and above the rate specified in the agreement and continued to do so for sometime until the unilateral change whereby the respondent then applied the 2001 Agreement. As I have stated there is mention in the decision of the Federal Commission of a different payment above the rate of the 2001 Agreement but this is not evidence before me. I find therefore that Mr Cikara's contract of employment, which was bound by the 2001 Agreement, included this over agreement component as at February 2002 when the contract was unilaterally changed. The amount claimed is the amount in excess of the 2001 Agreement, calculated by using the more generous divisor which had earlier applied.

4 For completeness I would say that it is clear that the terms of the 2001 Agreement replaced those of the 1999 Agreement. Mr Cikara is bound by the actions of his representatives, in this case the officials of the Transport Workers' Union of Australia ("TWU"). The 2001 Agreement remains in operation notwithstanding its nominal expiry date.

5 Let me then go to the terms of the Agreement. Clause 10 of the 2001 agreement and Clause 9 of the 1999 agreement are in effect the same. At subclause (a) it states that "The conditions of employment provided for by this Agreement shall be the conditions of employment of employees". Clause 11 and Clause 10 then differ in some respects, importantly in respect of the divisor used. The 1999 Agreement specifies a maximum of 9 catchers. The 2001 Agreement says "divided by the number of catchers". From May 2001 to February 2002 the company chose to apply that clause as if there were a maximum of 9 catchers, for payment at least. Seemingly the company was employing more than 9 catchers. I refer to paragraph 10 of the Federal decision.

6 The respondent says that the Commission does not have jurisdiction and that the applicant's claim is unenforceable. The respondent's view is that the contract is the federal instrument and hence is a claim that cannot be made in this Commission. The applicant's position is that the contract which Mr Cikara seeks to enforce, is the over agreement component which was agreed between employer and employee, and hence is claimable within this jurisdiction.

7 I know of no limitation to the Commission's power for claims pursuant to s.29(1)(b)(ii) to deal with over award or over agreement matters. There are clear restrictions to the Commission's powers to deal with enforcement of benefits arising from awards, agreements and orders of the Commission (State or Federal). The distinction to make here is that even though the subject matter of the pay formula is confined in the federal agreement and so prima facie not within the jurisdiction of the State Commission, the company chose to pay at a different and higher rate. In my respectful view there is no limitation to Mr Cikara claiming that over award or over agreement component through the State Commission, if in fact, that over award or over agreement payment had remained part of the contract. The wording of the Agreement does not preclude the respondent from making such a payment. If the respondent had applied clause 11 of the Agreement as they now do, from the time of making the agreement, then in my view the applicant would have no case. This is notwithstanding the protest on behalf of the applicant that he did not accept the changed agreement at that time. Mr Cikara is bound by the actions of his representatives (ie. the Union).

8 Suffice to say, in dealing with an over agreement payment, the Federal Act and the agreement in this matter does prevent the powers of the Commission from operating (*City of Mandurah v William Hull* 80 WAIG 4319 (IAC)). There is no direct inconsistency or collision between provisions under a State and Federal jurisdiction or as a result of the federal instrument.

9 Let me then go to one other matter in the agreement which is important. The dispute resolution clause of the agreement clearly directs matters in dispute in the employment relationship to the Australian Industrial Relations Commission. In the decision of *Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia, West Australian Branch and ABB Engineering and Construction Pty Ltd* 82 WAIG 492 Gregor C held that any matter in the employment relationship should be referred to the Australian Industrial Relations Commission. I agree with the basis of that decision.

10 In my view, in this matter the dispute resolution provision of the Federal agreement so acted as to constrain Mr Cikara from taking the matter to the State Commission. Albeit the applicant submits that this is a matter separate to the agreement and although an over agreement matter would typically be within the power of this Commission; clearly, disputes about the agreement were to be referred to the AIRC. This dispute has always been and is about the application of the pay formula in the agreement.

11 The inconsistency then is one that exists in the dispute settlement clause, and for those reasons I find that I am without jurisdiction to deal with this matter further. If I am wrong on that point, I would say this. The matter, on the limited evidence before me, went before the AIRC in dispute. For whatever reason it did not resolve in that Commission. It would seem, from

the Federal decision, that it resolved for some workers but not for Mr Cikara, and seemingly, in about August 2002 the matter was at an end before the Federal Commission.

12 The matter before me is an application to the State Commission dated 11 February 2003. It is a lapse of some time to pursue the application before the State Commission on a matter which obviously did not resolve before the Federal Commission. It is open to find, and I do so, that the unilateral change to Mr Cikara's payment by the respondent in February 2002, by applying the divisor contained in the 2001 Agreement, and ceasing the over agreement component, was accepted by Mr Cikara due to his continued work for the respondent. I refer to the following decision in *Western Excavating (ECC) Limited v Sharp* (1978) QB 761 in which Lord Denning MR described the basis of constructive dismissal as follows:

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time with out leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."*

13 In short form then, in my view, by his continued employment Mr Cikara accepted the change to the contract. It was open to him, if he did not accept the change to resign and claim unfair termination. It was open to him, through his representatives, to go to the Federal Commission, which he did in conjunction with other catchers. For those reasons, if I am wrong on jurisdiction in relation to the dispute resolution clause, I would find that the matter should be dismissed in any event as Mr Cikara accepted the application of the 2001 Agreement by deciding to continue in employment.

2004 WAIRC 12200

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	VINKO CIKARA
	APPLICANT
	-v-
	BRISTILE OPERATIONS PTY LTD (ACN 079 711 603) T/A TEMPLE FREIGHTS WA
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	TUESDAY, 3 AUGUST 2004
FILE NO	APPLICATION 158 OF 2003
CITATION NO.	2004 WAIRC 12200

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mr G Stubbs of Counsel
Respondent	Mr S Harben of Counsel

Order

HAVING heard Mr G Stubbs of counsel on behalf of the applicant and Mr S Harben 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.) S WOOD,
[L.S.] Commissioner.

2004 WAIRC 11100

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIANA ELIZABETH DOWNS-STONEY
	APPLICANT
	-v-
	DERBARL YERRIGAN HEALTH SERVICE
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	THURSDAY, 8 APRIL 2004
FILE NO.	APPLICATION 37 OF 2003
CITATION NO.	2004 WAIRC 11100

Catchwords	*Industrial Relations Act 1979* (WA), agreement to compromise; jurisdiction; implied powers to make orders in terms of compromise ss 29(1)(b)(i) and (ii), 6, 23(1), 23A, 32, 32(a) *Industrial Relations Act 1979*; application of ss8, 67(1) 76(1), 183 and Schedule 1 *Workers' Compensation and Rehabilitation Act 1981*.
Result	Commission has implied power to make orders in terms of an agreement to compromise claims made under s 29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979.*
Representation	
Applicant	In person
Respondent	Mr G Stubbs (as counsel)

Reasons for Decision

1 Diana Elizabeth Downs-Stoney ("the Applicant") made an application under s 29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979* ("the Act") claiming she was harshly, oppressively or unfairly dismissed by Derbarl Yerrigan Health Service ("the Respondent") on 13 December 2002. The Applicant also claims in that application that she was denied benefits under her contract of employment. The application was filed on 10 January 2003.

2 The Applicant was employed by the Respondent as Director, Client Services from January 2002 until 13 December 2002. The Applicant states in her application that she was employed for 40 hours per week and worked approximately 20 hours of overtime each week. In relation to the Applicant's claim that she is owed amounts under her contract of employment it is stated in relation to the heading "Contractual Benefits" "To be advised following provision of documents in possession of defendant". Under the heading "What sums of monies are you claiming you are due under the contract of employment and what is each for?", it is stated "Higher duties amount underpaid, overtime/time of [sic] in lieu not paid approximately 800 hrs and underpayment of sick leave and annual leave".

3 The Commission's file records that particulars of claim were sought by the Respondent's solicitors but not provided as the parties entered into negotiations to reach an agreement to compromise the Applicant's claim.

Agreement to Compromise

4 On 17 September 2003, after some amendments were agreed to by the Applicant and Mr Robin Yarran the Applicant accepted an offer made by Mr Yarran to compromise her claims. Mr Yarran at that time was the President of the Respondent's Board. The terms of the amended offer accepted by the Applicant are as follows:

> "Please be advised that the Board of Derbarl Yerrigan Health Service has resolved to offer you reinstatement to your position at Derbarl Yerrigan. I am authorised to negotiate your return with you.
>
> Our offer is that you return at the same salary conditions and with no loss of your leave and other entitlements. You will be repaid a sum of money equal to the gap between the salary to which you would have been entitled during your absence, and the salary monies received from Worker's Compensation and other insurers.
>
> You will also be reimbursed for any overtime worked for which approval was given prior to your departure from Derbarl Yerrigan Health Services. These payments will be made immediately upon your acceptance of this offer.
>
> You have also requested payment of your legal fees. Please provide Derbarl Yerrigan Health Service with receipts or invoices for unpaid accounts. So that these may be paid or reimbursed. We understand that you estimate these costs to be circa $10,000.00, and agree to pay your legal costs up to this amount.
>
> I understand that you are keen to return to work at Derbarl Yerrigan. The Executive Committee and I welcome you back and look forward to working with you again. We hope to put all this sorry business behind us and apologise to you for what has happened.
>
> Your return of course is with our acknowledgment that you had no case to answer with respect to the allegations made and the subsequent termination of your employment. This will be made clear to staff at Derbarl Yerrigan Health Service and other relevant parties, following consultation with you.
>
> To accept this off [sic] please sign below as indicated"

Background

5 After the offer was accepted by the Applicant, the Applicant commenced employment with the Respondent on 23 September 2003 as the Director, Client Services. She also commenced to act in the position as Deputy Chief Executive Officer for a period of time. The Applicant says she was required by the Respondent to produce a medical certificate certifying her fit for work and assessing her future risk of injury. This requirement, I gather, occurred because the Applicant had redeemed a worker's compensation claim in June 2003 in relation to an injury or disability suffered by her while working for the Respondent. On 9 October 2003, she produced to the Board a medical certificate from a consultant psychiatrist certifying her fit for work as a Deputy Chief Executive Officer. Sometime later in December 2003, the Applicant's employment with the Respondent came to an end. The Applicant then sought to reactivate this application on this basis that the terms of the compromise had not been satisfied. In a conference for directions on 29 January 2004, the Commission set down the jurisdictional issue whether the claims for unfair dismissal and contractual benefits had been compromised and whether the Commission can make orders in terms of the compromise for hearing. The Commission informally directed the Applicant to provide particulars of the terms of the compromise and the Respondent to provide an answer to the particulars. In accordance with those informal directions the Applicant filed the following particulars:

> "1. The terms of the compromise were discussed on a number of occasions with members of the board of Derbarl Yerrigan Health Service.
>
> 2. The culmination of all of the discussions which were held were conveyed to Mr Haydn Lowe. At the request of the Board of Derbarl Yerrigan Health Service, Mr Haydn Lowe drafted a letter of offer of restatement.
>
> 3. On the 17 September 2003 this letter was delivered by hand by a quorum of the Board members of Derbarl Yerrigan Health Service to my home. After a number of duly initialled amendments, it was signed by the President of the Board and myself at 1 Coast Rd West Swan.

4. The document was retyped later in the day and the amended copy was signed by both parties.

5. Following a resolution of the board both parties agreed that the original workplace agreement would be modified to reflect changes in Industrial Relations Law in the tenure of the contract and in the dispute resolution procedure.

6. A contract prepared by Mr Tim Retallack of Pullinger Readhead Stewart reflecting these changes was provided to the Board of Derbarl Yerrigan Health Service subsequent to the signing of the offer of reinstatement.

7. The Board of Derbarl Yerrigan Health Service offered a contract of employment in the terms of the modified document and both parties signed the contract on the 23 September 2003.

8. The signing of the document took place before a quorum of the Board of Derbarl Yerrigan Health Service at 156 Wittenoom Street East Perth.

9. This contract of employment and the letter of reinstatement are the only documents on which the particulars of the compromise are based. There were no verbal agreements made in relation to the compromise.

Secondly I state that the following terms of the contract have been satisfied:

1. I was accorded the status of Director of Client Services as confirmed in emails from the President and CEO to staff and in other correspondence to other stakeholders.

2. An office, access to the IT system, security pass, master keys to the building, a vehicle, fuel card and mobile phone were provided in accordance with the entitlements of the position.

3 I was required to perform the Director of Client Services and subsequently Deputy CEO and Acting CEO in accordance with agreements made with the Board of Derbarl Yerrigan Health Service (recorded in writing and in Board minutes).

4. I attended numerous meetings as the representative of Derbarl Yerrigan Health Service including interstate meetings of the National Aboriginal Community Controlled Health Organisation.

Thirdly I am required to state the amounts due under the terms of the compromise

1. $5634.60 This is the amount which is claimed at the rate of $54.5897 per hour for the higher duties from 28/1/2002 to 14/6/2002 following the deduction of an amount of $5037.30 payed in error at the rate payable to the redundant position of Director formally occupied by director Mr Ted Wilkes. This is confirmed in a memo recording a board resolution.

2. $507.12 This represents the additional superannuation for the period of Higher Duties calculated as 9% salary.

3. $2460.00 Mobile phone packaged value amount agreed on the acceptance of the offer of appointment in January 2002.

4. $484.00 Refund for vehicle deductions incorrectly made.

5. $11056.50 Vehicle pro-rated packaged value as stated in first contract.

6. $17006.88 TOIL at acting CEO rate ($54.5897 p/h for 311.54 hours as shown on time card records 28/1/2002 to 14/6/2002)

7. $3880.66 TOIL at Director of Client Services rate ($40.3605 p/h for 96.15 hours.

8. $1067.19 Additional annual leave payment for higher duties 28/1/2002 to 14/6/2002

9. $186.76 Leave loading at 17.5% for above

10. $20115.89 Difference in salary due between 13/12/2002 and 22/9/2003 based on increment payable on the 7 January 2003 less amounts received under the terms of workers' compensation and temporary disability claims received in this period.

11. $1810.43 Additional superannuation related to above.

Total claim $64,210.13."

6 The Respondent in their particulars of answer say that:-

"(a) The terms of the Applicant's employment are wholly in writing and contained in Derbarl Yerrigan Health Service Inc. Workplace Agreement dated 11 January 2002 and signed by the Applicant and the Respondent ('Workplace Agreement'); and

(b) If, (which is not admitted) the President of Derbarl Yerrigan, Mr Robin Yarran had authority to enter into a compromise with the Applicant, it is an implied term of the compromise that the compromise was conditional upon the consent and agreement of the Funds Administrator and Steering Committee. Otherwise the terms of the compromise are contained wholly in writing and contained in a letter from Mr Robin Yarran on behalf of the Respondent to the Applicant, dated 17 September 2003 ('Letter')."

7 Further the Respondent says that if Mr Yarran had the authority to enter into a compromise, the Applicant was reinstated to the position Director, Client Services. The Respondent also denies that the Applicant is due any amount under the terms of the compromise as pleaded by her in her particulars or any amount at all.

8 In relation to jurisdiction the Respondent says:-

(a) If, (which is not admitted) Mr Yarran had the authority to enter into a compromise with the Applicant, the compromise was entered into at the time when the Applicant was not an employee of the Respondent and the issue of the compromise of the actions is not an industrial matter.

(b) The issue of the compromise of the action is not a benefit to which the employee is entitled under the contract of employment.

(c) The issue of the authority of Mr Yarran to enter into compromise with the Applicant is not an industrial matter.

The Applicant's Evidence and Contentions

9 The Applicant contends that items 1 to 4, 8 and 9 are due and owing under the terms of the compromise. She says that these amounts arise out of the agreement to reinstate her on the same salary conditions with no loss of her leave and "other

entitlements". In respect of the items 6 and 7 she says these amounts arise out of the specific agreement to reimburse her for overtime which was approved to be paid before her departure from Derbarl Yerrigan Health Service. In relation to items 5, 10 and 11 she says these amounts are the amounts owing as part of the agreement that the Respondent pay her the gap between the salary she would have received and the workers' compensation and other insurance monies she received whilst off work.

10 The Applicant testified that her position substantively was Director, Client Services but from 29 January 2002 until 14 June 2002, she also acted as the Respondent's Chief Executive Officer ("CEO") and the Director of Corporate Services from 29 January 2002 until 4 April 2002. The Applicant tendered a memorandum from Ms Marian Kickett, who was at the time the Respondent's CEO, dated 19 July 2002 approving payment for higher duties from 28 January 2002 to 14 June 2002. The letter does not refer to a position or a rate of pay. The Applicant testified that she was paid higher duties for acting in the position of CEO but she was paid the wrong rate of pay. She said that she was paid at the rate which had been paid to the Respondent's former Director, Mr Ted Wilkes. She said that Mr Wilkes' position was made redundant in December 2001 and a new CEO's position was created. The Applicant claims in item 1 that she should have been paid the rate of $54.5897 for each hour of the higher duties carried out by her on and between 28 January 2002 and 14 June 2002. She says that this was the rate that was agreed to by the Respondent to be paid to Ms Kickett who was permanently appointed to position of CEO on 14 June 2002. The Applicant agreed when cross-examined that Ms Kickett's contract was negotiated sometime shortly before the Applicant acted as CEO. The Applicant however, maintained in her evidence that the rate paid to Ms Kickett was struck when the position of CEO was created in December 2001. In item 2 the Applicant claims an additional amount of superannuation which is calculated on the higher duties amount set out in item 1. The Applicant says that item 8 also arises out of these higher duties because she says that when she was paid her annual leave she should have been paid at the higher rate for the period of leave that accrued from 28 January 2002 to 14 June 2002. She also claims an amount for leave loading in item 9 on the same basis.

11 The Applicant makes a claim in item 3 for the value of a mobile phone which she says was agreed when she accepted the offer of employment in January 2002. In item 4 the Applicant claims that she was due a refund for contributions made by her to entitle her to the private use of a motor vehicle owned by the Respondent. She says that $44.00 per fortnight was deducted from her pay for the use of a vehicle and that she did not realise for sometime that this deduction should not be made. In item 5 the Applicant claims an amount which she says is owing under the terms of the compromise as part of her "other entitlements" to reinstate her in the same position as if her employment had continued. She says that this amount is the value in money of the private use of a motor vehicle as if she had continued to work during that period.

12 In items 6 and 7 the Applicant claims amounts as time off in lieu ("TOIL") which she says is the same as payments of overtime for the period of time in which she acted as CEO and additional time she worked as Director, Client Services.

13 Ms Abigail Harry, the Respondent's former Treasurer and member of its Board was called as a witness on behalf of the Applicant. She testified generally to the events which lead to the Respondent's Board making a decision to reinstate the Applicant. Ms Harry testified that the Respondent's Board had approved payment to the Applicant of extra hours. Ms Harry was extensively cross-examined on the issue as to when the Board approved payment to the Applicant for TOIL. Ms Harry said that she could not recall when the Board made such a resolution but said she could recall that it was when the Applicant was acting in the Director's position that the resolution was passed. Her testimony in relation to this issue was not shaken. Ms Harry said that payment was approved on the basis the Applicant was carrying out higher duties and she had two jobs. Ms Harry was unable to say exactly when this occurred. No board minutes recording this resolution was produced by the Applicant in support of her case.

14 It was also put to Ms Harry in cross-examination that the Board vacillated in relation to whether the Applicant should be reinstated. In particular, it was put to Ms Harry, "wasn't there a resolution passed not to reinstate her", Ms Harry replied, "no, there wasn't such a resolution there was only a resolution passed to reinstate her". She recalled that there had been times when the Respondent has been under funds administration and she agreed that the Funds Administrator had to approve monies that were spent by the Respondent.

15 It is apparent from the evidence adduced from Ms Harry and the other witnesses that neither the Applicant nor the Respondent has in their possession full copies of all the board minutes during the period of time the Applicant was employed.

16 Mr Yarran also gave evidence on behalf of the Applicant. He was elected President of the Respondent on 4 August 2003. Prior to that time he was the Vice President. He said that he was unaware of the circumstances as to why the Applicant was terminated at the end of 2002 but following the Applicant's termination of employment discussions occurred within the aboriginal community about the circumstances of the termination. A decision was later made that the Respondent's advisor, Mr Haydn Lowe, should investigate the circumstances of the Applicant's termination and prepare a report for the Board. Mr Yarran testified that on the basis of the report produced by Mr Lowe, the Board made a decision that the Applicant should be reinstated and that Mr Lowe was asked to prepare the letter containing the offer of reinstatement. Although Mr Yarran had kept his own copies of board minutes during the period he was on the Board, he was unable to produce to the Commission a copy of the board minutes which record the resolution of the Board to reinstate the Applicant. Mr Yarran also questioned when cross-examined about board minutes dated 18 August 2003, whether these minutes were an accurate record of the Board meeting.

17 Mr Yarran confirmed that he signed the letter of offer dated 17 September 2003 and took it to the Applicant who signed it after making some handwritten alterations. The document was then retyped and signed by both the Applicant and Mr Yarran.

18 Mr Yarran testified that after the compromise agreement was signed he negotiated with the Applicant a contract of employment and those terms were reduced to writing and signed by him and the Applicant on 23 September 2003. He says he consulted Mr Lowe about the terms of the contract. When asked whether the Applicant received any entitlements which were outlined in the letter of compromise Mr Yarran said no, that the Steering Committee refused to authorise payment. He testified that Mr Terry Murphy and Mr Alan Phillips were on the Steering Committee and Mr Michael O'Kane was "the big boss" of the Commonwealth body that provided funds to the Respondent.

19 Mr Yarran agreed in cross-examination that he met with the Steering Committee on 18 or 19 September 2003. Mr Yarran said that Mr Phillips told him in June 2002 that he would not agree to the Applicant returning to work with the Respondent.

20 The Applicant tendered a letter dated 30 May 2003 from Mr O'Kane, State Manager of Health and Ageing, to Mr Robert Isaacs, a former President of the Respondent stating that Mr O'Kane had appointed a Funds Administrator to oversee the financial operations of the Respondent and to manage the accounts for an initial period of three months. In a letter dated 22 September 2003 from Mr O'Kane addressed to Mr Yarran, Mr O'Kane stated in relation to a meeting held on 19 September 2003, that:

"Last Friday, following a request from DYHS, I met with you in your capacity as President of DYHS, the Vice President, Mr Neville Collard, the A/CEO, Ms Sandra Harben and Mr Haydn Lowe to discuss a number of matters of which you had concern. This letter confirms the agreed upon outcomes of these discussions.

Firstly, I advised Departmental funds would not be made available for the purposes of employment of Ms Diana Downs-Stoney until it was established that such an appointment would not have any adverse effect on the organisation's workers' compensation insurance premiums. It was agreed that you would investigate this issue and provide the Department though the Steering Committee with any relevant information."

21 He said he debated the failure to pay the Applicant for sometime with the Steering Committee. In cross-examination Mr Yarran refused to concede that the Funds Administrator made decisions about how the Respondent would spend its money. He conceded however that if Mr Shane Devitt, the Funds Administrator did not approve an expenditure that payments could not be made. Mr Yarran initially agreed in cross-examination that the Steering Committee made decisions about how the Respondent could spend its money. Mr Yarran then strongly made the point that he did not agree that the Steering Committee could tell the Board how to spend its money and he told the Board that he did not agree they (the Steering Committee) could do so. He said that the Steering Committee could determine to give the Respondent funds but not to determine how it was to be spent.

22 In re-examination Mr Yarran testified that the Steering Committee eventually agreed to pay the Applicant.

23 Mr Yarran could not recall if the Respondent was under funds administration when the Applicant was first employed.

24 Mr Haydn Lowe testified that he was employed as a consultant by the Respondent in 2003. Mr Lowe has had extensive experience working with Aboriginal agencies and communities. At one time he held the position of head of the Department of Indigenous Affairs in Western Australia. At the time of giving evidence Mr Lowe was not employed by any government agency. Mr Lowe testified that there had been factionalisation within the Aboriginal community in Perth and this factionalisation was reflected within the Respondent's Board. From around May 2003 the Board had appointed an acting CEO to replace the CEO who had been terminated. He said the Respondent's Board was having difficulty convincing the funding bodies, particularly the Commonwealth that they were a viable concern and the Board felt, in a sense, disempowered by the Commonwealth's decision to place the Respondent into funds administration. Mr Lowe was asked to look into circumstances surrounding the Applicant's dismissal and he prepared a report for the Board. In a report dated 4 August 2003, Mr Lowe made the following recommendation to the Board:-

"It is recommended:

1. The Executive Committee move to re-instate Ms. Downs-Stoney as soon as reasonably possible.
2. The Acting CEO meet individually with at least some of the staff involved to discuss the situation with them (I could provide her with suggestions as to who and how, and would be prepared to participate).
3. I spend some time with Ms Downs-Stoney before she returns concerning some of the matters raised in the report and the management of the situation on her return.
4. An offer be made to Ms. Downs-Stoney to return to her original contract with no loss of salary or other entitlements; any offer should be made "without prejudice".
5. The offer includes that any reference to these matters will be expunged from her personnel file, although the CEO should archive these records confidentially in case they are ever required in the future (e.g, marked "to be read by the CEO only").
6. Ms. Downs-Stoney's medical records are returned to her immediately.
7. If the Executive Committee accepts these recommendations, a written apology would be appropriate after the matter is settles.
8. Gadens be instructed to make the above offer to Ms. Downs-Stoney through her solicitors."

25 It is apparent from the board minutes tendered in these proceedings that Mr Lowe's recommendation was not initially accepted by the Board. It is not clear from any of the minutes produced as to when Mr Lowe's recommendation was finally accepted. As set out above, the board minutes which record that the Applicant was to be offered reinstatement were not tendered and did not appear to be in the possession of either party. Mr Lowe testified that the Board had "flip-flopped" between being in favour of the Applicant's reappointment and not being in favour of reappointment. He said the Board's position seemed to be dependent upon who attended the Board meetings. He said that at the last meeting it was agreed that the Applicant would return to work and that Mr Yarran, Mr Collard and he (Mr Lowe) would be empowered to go and talk to the Applicant about the "nature of her return". He said that the Board informed him that they (Mr Lowe, Mr Yarran and Mr Collard) could proceed with the appointment if there were no significant variations from the terms the Board had agreed to offer. He said the Board had agreed that the Applicant should be returned without loss of privilege or service time in the sense that the payments she received by way of compensation or whatever would be topped up to the salary she would have received in her absence. Further she would have her leave restored, her superannuation restored, her long service leave entitlements restored and anything else that would have happened in the course of events. He said that the Applicant had mentioned to him that she would have been due an increment and it was his view she would receive an increment. When asked about the Applicant's claim for higher duties, Mr Lowe said that they had some flexibility in the way they approached the negotiation, the idea was, "if there was any legitimate financial claim that related to work that had been signed off previously, yes, that looked to be part of the deal."

26 Mr Lowe confirmed he drafted the letter of offer dated 17 September 2003. He however said that he had no further dealings with the Applicant or any Board members in relation to the contract of employment that was signed by the Applicant on 23 September 2003. He said he only saw a copy of that document some months after 17 September 2003. It then came to his attention that there were two copies of that document in existence, both of which are purported to be signed on the same date by the Applicant and Mr Yarran. One containing a three year term and the other containing a five year term. Mr Lowe testified that if he had been asked for advice, there were a number of matters in that contract of employment that he would have given advice to the Respondent not agree to.

27 Mr Lowe said he investigated the Steering Committee's issues raised in the letter dated 23 September 2003. He spoke to the risk managers and insurers and asked them about the Applicant's impact on other people and he looked at records of persons who had taken stress leave and other forms of leave. He testified that he ascertained that the incidence of insurance and other claims had dropped while the Applicant was employed and went up when she left. He imparted that information to the Commonwealth, and was told that he (Mr Lowe) had missed the point. The Commonwealth then asked whether the Applicant

was fit to resume work and whether there was an increase risk of her suffering any further stress or depression or going on workers' compensation. In response the Applicant then obtained medical reports and produced those to the Board.

The Applicant's Evidence in Relation to Her Salary Claim

28 In items 10 and 11 the Applicant claims the difference in salary between 13 December 2002 and 22 September 2003, less amounts received as workers' compensation weekly payments and temporary disability payments received in that period. The Applicant says that pursuant to her workplace agreement signed by her in January 2002 ("the workplace agreement") that she should have received an increment on 7 January 2003.

29 Clause 7(a) of the workplace agreement provides "Your taxable salary on commencement shall be $63,253 per annum. Your salary will be paid fortnightly in arrears, by direct deposit into a bank account nominated by you." Clause 7(b) provides, "After twelve months continuous service both parties to enter into negotiations for a review of salary and conditions. Any increase will be subject to a satisfactory annual performance appraisal." The Applicant testified a performance appraisal was conducted after her re-instatement in September 2003.

30 It is common ground that the Applicant received a gross amount of $17,813.96 for disability payments between 18 February 2003 until 24 September 2003. The Applicant also received the following entitlements from QBE as workers' compensation:-

Weekly compensation	$23,858.32	Paid by QBE during the period from 19 December 2002 until 13 June 2003.
Medical expenses	$1,361.20	
Rehabilitation expenses	$303.34	
HIC contribution	$4,500.00	
Redemption	$40,500.00	(Exhibit 2)

31 Item 11 is an amount the Applicant says is payable for superannuation calculated on the amount she says is due and owing under item 10.

The Respondent's Evidence

32 The only evidence the Respondent produced was copies of the minutes which were available from the year 2002. The Respondent says that there was no resolution passed in the year 2002 in respect of payments being made to the Applicant in respect of TOIL. The Respondent's Counsel was unable to assure the Commission that the minutes were a complete record of all the meetings the Board held in year 2002.

Respondent's Submissions

33 The Respondent contends the first matter the Commission must determine is whether the Commission has jurisdiction to make orders in respect of the compromise and if such jurisdiction is found, whether the Commission can and should make orders in terms of the compromise in this case. In written submissions filed by the Respondent, the Respondent says the Commission does not have jurisdiction to make orders in respect of matters set out in the compromise because under s 23A of the Act, the Commission cannot make orders until it makes a determination that a dismissal of an employee was harsh, oppressive or unfair.

34 In relation to the issue whether the Commission can or should make orders in terms of the compromise the Respondent says the decision of *Thompson v Bituminous Products Pty Ltd* (2002) 82 WAIG 1309, establishes that if there is a substantial dispute as to the terms of the agreement or whether the agreement was validly made the Commission should not make orders in terms of a compromise agreement.

35 As set out in paragraph 8 of these reasons for decision the Respondent also argues that the compromise is outside the employment relationship and thus does not constitute an industrial matter. The Respondent says that the compromise arose after the employment relationship had ceased and it did not arise out of the employment contract.

36 The Respondent says that even if the Commission finds that it is within jurisdiction to enforce the compromise that the compromise was not validly made. The Respondent says that the compromise agreement was not validly made because Mr Yarran was not authorised to sign the letter of compromise. Further it says the Applicant was not entitled to rely on the assumption that Mr Yarran was authorised because she knew or suspected the assumption to be incorrect. Alternatively, the Respondent says if, (which is not admitted) Mr Yarran had authority to enter into a compromise with the Applicant, it is an implied term of the compromise that the compromise was conditional upon the consent and agreement of the Funds Administrator and Steering Committee. In relation to the Respondent's authority to contract, the Respondent says:-

(a) The Applicant knew that the Respondent would not be able to reinstate her without the express authorisation of the Respondent's Board, funding body and Steering Committee.

(b) The Respondent is an incorporated association under the *Associations Incorporations Act 1987*, and can enter into a contract by any person acting under its express or implied authority.

(c) The Respondent as an incorporated association is subject to the *Corporations Act 2001* (Cth). Section 28(4) of the *Corporations Act* provides that a person is not entitled to make an assumption regarding the authority of an officer if at the time of the dealing that person knew or suspected that the assumption was incorrect.

37 Further the Respondent says the Applicant had been employed by the Respondent for approximately 12 months and had been involved in the management of the Respondent and knew that:-

(a) the Respondent's Board needed to authorise her reinstatement and any terms of the reinstatement;

(b) the Respondent could not make any payments without the agreement of the Funds Administrator and the Steering Committee;

(c) the Respondent could not incur any new liabilities without the agreement of the Funds Administrator and the Steering Committee; and

(d) the Respondent's Board therefore needed the agreement of the Funds Administrator and the Steering Committee before it could authorise her reinstatement and any terms of the reinstatement.

38 In relation to the Respondent's argument that it is an implied term of the reinstatement, it says that the agreement was conditional upon the consent of the Funds Administrator and the Steering Committee because:-

(a) the term is reasonable and equitable;

(b) the contract is unworkable without the term being implied;

(c) the term is so obvious it goes without saying;

(d) the term is capable of clear expression and certain in its operation; and

(e) the term is consistent with the other terms of the contract.

(*BP Refinery (Westernport) Pty Ltd v Shire of Hasting* (1977) 180 CLR 266 at 283) Further, a term should be implied by reference to the imputed intention of the parties if, it can be seen that the implication of the particular term is necessary for the reasonable or effective operation of a contract of that nature in the circumstances of the case (*Hawkins v Clayton* (1988) 164 CLR 539 per Deane J at 573).

39 The Respondent also says that even if the Commission is of the view that it is able as a matter of jurisdiction and as a matter of law to make an order in terms of the compromise that there are no sums of money due and owing under the terms of the contract. In particular the term that the Applicant be reinstated to position of Director, Client Services was satisfied and that the other amounts claimed as denied contractual benefits pursuant to the agreement to compromise have no merit in law or in fact.

The Applicant's Submissions

40 The Applicant says that it was not a precondition to the Respondent entering into an agreement to reinstate her that the Funds Administrator and the Steering Committee consent to the arrangement. In particular she says that the Funds Administrator and the Steering Committee imposed two conditions on paying her and both of those conditions were satisfied after her reinstatement. The Applicant says that when she was first appointed in January 2002, the Respondent was in funds administration at that time and no approval was required for her appointment from the Funds Administrator or the Steering Committee.

41 The Applicant also says that the Commission does have power to make an order in terms of the compromise and in particular she says that the decision of the Commission in *MacLeod v Paulownia Trees Pty Ltd* (1997) 78 WAIG 1057 should be followed. In that case, Commissioner Beech found that the Commission does have power to make an order in terms of an agreement to compromise a claim for unfair dismissal, as to do so, is entirely consistent with the objects of the Act, two of those being to encourage and provide the means for conciliation with a view to an amicable agreement, and to provide for the observance and enforcement of agreements made for the prevention and settlement of industrial disputes.

Legal Principles - Jurisdiction

42 In *Thompson v Bituminous Products Pty Ltd* (op cit) the issue before the Commission in that case is whether parties reached an agreement to compromise a claim under s 29B(1) of the Act. In that case there was a dispute as to whether an offer was made to compromise all claims including for a claim of under payment of award entitlements claimed on behalf of the Applicant by the Construction, Forestry, Mining and Energy Union in the Industrial Magistrates' Court. I observed in paragraph [12].

> "Although I have concluded that the Commission does have the power to hear and make a declaration as to whether the parties have, by agreement, compromised an application and to make orders to enforce a compromise agreement, it is my view that the Commission should not exercise its power to hear and determine whether this application has in fact been compromised by an agreement between the parties. The reason I have reached this view is that it is clear that the remedy the Applicant seeks is in the nature of a summary judgement or relief. In an application for enforcement of a compromised agreement in the Supreme Court in *Chesterton International (WA) Pty Ltd v Interchange Holdings Pty Ltd* unreported; SCt of WA; del. 21 February 1995 Heenan J at page 7 observed:
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> > 'Bearing in mind that the power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried (see *Fancourt and Another v Mercantile Credits Ltd* (1983) 48 ALR 1 at 10) I am satisfied that this is a case in which the power should be exercised. On the material before me it is clear not only that the Court has the power in these proceedings to enforce an agreement compromising the action but also that the agreement in question is binding upon the first defendant.'
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> Further in *Chesterton International (WA) Pty Ltd v Interchange Holdings Pty Ltd (op cit)* Heenan J, at page 5, observed that if there was a substantial dispute as to the terms of the agreement in question the summary procedure would be inappropriate. Murray J in *Dalmation Nominees Pty Ltd v Marinovich (op cit)* made similar observations at page 14 of his reasons for decision. In my view the order sought by the Applicant is an order enforcing the agreement. In *Roberts v Gippsland Agricultural Earthmoving Contracting Co Pty Ltd* [1956] VLR 555 at 561 Smith J observed:
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> > 'And it is to be observed, at the outset, that what we are concerned with here is not the class of case in which, following upon the making of an agreement for the compromising of an action, an order has been pronounced with the real or apparent consent of both parties, and one of them then says that the order should not be drawn up or should be set aside. What we are concerned with is the class of case in which, following upon the making of such an agreement, and at a stage when no order has been pronounced, one of the parties comes to Court, with the other opposing, and asks the Court to make an order to which, by the agreement, the other party undertook to give his consent, or an order directing the other party to pay money or do some other act which, by the agreement, he undertook to do. In other words it is the class of case in which a party to an action comes to the Court seeking what is, in effect, an order enforcing the agreement specifically.'
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> Smith J dealt with a number of rules of practice in relation to enforcement of compromise action and summary procedure at page 562-563. At 563 he observed that it would not be appropriate to make orders in terms of an agreement if there was a:
>
> > '(d) …substantial question to be determined as to what were the terms of the agreement, or as to whether it was valid or specifically enforceable, as for example where a substantial case was put forward of material mistake or of other circumstances such as would afford a defence to a suit for specific performance, a party would ordinarily be left to proceed by separate bill so that the matters raised might be fully investigated: see *Askew v Millington (supra); Richardson v Eyton (supra); Edwards on Compromises*, p. 186; *Fry on Specific Performance* (6th ed.), p.720.' "

43 In *Thompson v Bituminous Products Pty Ltd* (op cit) it was conceded by the parties that the Commission does have power in an appropriate case to make orders in terms of a compromise agreement. In this matter the Respondent makes no such

concession and says that the compromise agreement constitutes a separate contract which cannot be dealt with by the Commission under s 29(1)(b) of the Act.

44 The Commission is not a superior court of record, it has no inherent jurisdiction, and its jurisdiction is limited to that explicitly provided by the Act *(Robe River Iron Associates v Federated Engine Drivers and Firemen's Union of Workers' of Western Australia* (1987) 67 WAIG 315; *Australian Glass Manufacturing Co Pty Ltd v Transport Workers' Union of Australia, Industrial Union of Workers', Western Australian Branch* (1992) 72 WAIG 1499). The Commission's powers are circumscribed by statute. In respect of an application under s 29, powers to make orders are confined to the express provisions of the Act (see *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26). The Commission does have implied powers that arise by necessary implication out of the effect of exercise of a jurisdiction which is expressly conferred (*Grassby v The Queen* (1989) 168 CLR 1 at 16-17 per Dawson J). Pursuant to s 12(1) of the Act the Commission is a Court of record. It exercises judicial power when hearing and determining claims by an employee under s 29(1)(b). As its jurisdiction is limited it is an inferior court of record. Dawson J, in *Grassby v The Queen* (1989) 168 CLR 1 at 16, delivered the leading judgment of the court in which he discussed the limits of the implied jurisdiction of an inferior court. Dawson J, first referred to Menzies J observations in *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1 at 7, that implied jurisdiction requires no authorising provision, and Dawson J then went on to say at 16 to 17:

> "Inherent jurisdiction is an elusive concept and the proposition that it arises from the nature of a court has been described as metaphysical. See *Yale Law Journal*, vol. 57 (1947) 83, at p. 85, cited by Jacob, 'The Inherent Jurisdiction of the Court', *Current Legal Problems*, vol. 23 (1970) 23, at p. 27. But it is undoubtedly the general responsibility of a superior court of unlimited jurisdiction for the administration of justice which gives rise to its inherent power. In the discharge of that responsibility it exercises the full plenitude of judicial power. It is in that way that the Supreme Court of New South Wales exercises an inherent jurisdiction. Although conferred by statute, its powers are identified by reference to the unlimited powers of the courts at Westminster. On the other hand, a magistrate's court is an inferior court with a limited jurisdiction which does not involve any general responsibility for the administration of justice beyond the confines of its constitution. It is unable to draw upon the well of undefined powers which is available to the Supreme Court. However, notwithstanding that its powers may be defined, every court undoubtedly possesses jurisdiction arising by implication upon the principle that a grant of power carries with it everything necessary for its exercise (ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest). Those implied powers may in many instances serve a function similar to that served by the inherent powers exercised by a superior court but they are derived from a different source and are limited in their extent. The distinction between inherent jurisdiction and jurisdiction by implication is not always made explicit, but it is, as Menzies J. points out, fundamental.
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> …
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> It would be unprofitable to attempt to generalize in speaking of the powers which an inferior court must possess by way of necessary implication. Recognition of the existence of such powers will be called for whenever they are required for the effective exercise of a jurisdiction which is expressly conferred but will be confined to so much as can be 'derived by implication from statutory provisions conferring particular jurisdiction'."

45 In this matter the Commission has before it an application under s 29(1)(b)(i) and (ii). Despite the fact the Applicant was reinstated to her position as Director, Client Services on 23 September 2003, the application was not discontinued. The Commission cannot in this case make orders expressly under s 23A in relation to the application under s 29(1)(b)(i) because as the Respondent points out the Commission may only make an order under the section if the Commission determines that the dismissal of an employee was harsh, oppressive or unfair. Section 23A has no application to a contractual benefit claim under s 29(1)(b)(ii). This matter has been the subject of conciliation and arbitration under ss 23(1) and 32 of the Act. The Commission has no express power under ss 23(1), 23A or 32 to make an order in terms of a compromise agreement. Although there is no express power vested in the Commission to make an order in terms of a compromise agreement I am of the view that the Commission has inherent power to do so in relation to this matter. The reasons why I have reached this conclusion are as follows.

46 This application was referred for conciliation and for arbitration under ss 23(1) and 32 of the Act. Section 23(1) provides:

> "(1) Subject to this Act, the Commission has cognizance of and authority to enquire into and deal with any industrial matter."

47 Section 32(1), (2) and (7) provides:

> "(1) Where an industrial matter has been referred to the Commission the Commission shall, unless it is satisfied that the resolution of the matter would not be assisted by so doing, endeavour to resolve the matter by conciliation.
>
> (2) In endeavouring to resolve an industrial matter by conciliation the Commission shall do all such things as appear to it to be right and proper to assist the parties to reach an agreement on terms for the resolution of the matter.
>
> (7) Where a matter is decided by arbitration the Commission shall endeavour to ensure that the matter is resolved on terms that could reasonably have been agreed between the parties in the first instance or by conciliation."

48 Section 32A of the Act provides that conciliation and arbitration functions may be exercised at anytime and are not limited by any other provision of the Act.

49 Pursuant to s 7(1a) of the Act the Commission still has before it an industrial matter. Section 7(1a) provides:

> "(1a) A matter relating to —
>
> (a) the dismissal of an employee by an employer; or
>
> (b) the refusal or failure of an employer to allow an employee a benefit under his contract of service,
>
> is and remains an industrial matter for the purposes of this Act even though their relationship as employee and employer has ended."

50 As Beech C, observed in *MacLeod v Paulownia Trees (op sit),* s 6(b) and (c) of the Act are consistent with making order in terms of a compromise agreement. Section 6(b) and (c) provide it is a principal object of the Act:

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

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

51 For a power to be implied, it must be necessary for the effective exercise of the jurisdiction. What is "necessary" requires identifying a power to make orders which are reasonably required or legally ancillary to the accomplishment of the specific remedies provided for in the Act (see *Pelechowski v The Registrar, Court of Appeal* (1999) 198 CLR 435 at 452; [51] per Gaudron, Gummow and Callinan JJ).

52 I am of the view that the Commission has power to make orders in terms of a compromise agreement providing that the orders it makes could otherwise be made expressly under ss 23(1), 23A and 32 of the Act. The power to do so is implied in the Act when regard is had to objects in s 6(b) and (c) as the grant of power in ss 23(1), 32 and 32A carries with everything that is necessary for the effective exercise of the power.

53 In the context of claims made under s 29(1)(b) it is reasonably necessary or legally ancillary to the proper object of accomplishing settlement of industrial disputes that parties be held to their bargains and the means for holding them to their bargains be carried out with the maximum of legal form and technically. The implied power does not extend to making orders that are not within the scope of the original application or to make orders in terms of a compromise that could not have been made following an arbitration of the merits of the application in the absence of any compromise agreement. For example the Commission could not make an order requiring the Respondent to pay the Applicant's legal costs as to do so is contrary to s 27(1)(c) of the Act.

Should the Commission Make Orders in Terms of the Compromise

54 An unimpeached compromise represents the end of the dispute or disputes from which it arose *Prudential Assurance Co Ltd v McBains Cooper* [2000] 1 WLR 2000 at 2005, CA.

55 In this matter the Respondent says it should not be bound by the compromise agreement entered into on 17 September 2003 as the Board did not have the authority to enter into the agreement with the Applicant because it did not obtain the approval of the Funds Administrator or the Steering Committee. The Respondent led no evidence on this issue and relied upon the evidence given in the Applicant's case.

56 Having considered that evidence I am not satisfied the Respondent can make out a case that a substantial question or dispute is raised in relation to this issue that should be tried in a separate case. In my view a substantial question or dispute must be one that has merit. There is no reliable evidence before this Commission that the Board of the Respondent was required to seek approval of the Steering Committee or the Funds Administrator prior to offering to compromise the Applicant's claim. Ms Harry gave uncontradicted evidence that at the time of the Applicant's appointment as Director, Client Services in January 2002, the Respondent was under funds administration and the Respondent did not have to obtain approval for the Applicant's appointment from the Funds Administrator or the Steering Committee. Further, Ms Harry confirmed that the Board was able to employ other persons without obtaining approval of the Funds Administrator and that the Funds Administrator had not refused to pay any other employee of the Respondent. The only document produced in these proceedings that relates to this issue is a copy of the letter from Mr O'Kane from the Department of Health and Ageing. Whether he was on the Steering Committee is not clear from his letter or the evidence given in these proceedings. All the letter says is that funds would not be made available for the Applicant's employment until certain information was provided. It is apparent from the evidence that the required information was provided and after a period of time following the Applicant's reinstatement funds were approved to her for the work carried out by her after 23 September 2003 and she was paid her salary.

57 As to the Respondent's contentions set out in paragraph 37 of these reasons, the Applicant did not give evidence in chief about this matter and nor were these contentions raised with her in cross-examination. As to the Respondent's contention that it should be implied in the compromise agreement that the Board required the approval of the Funds Administrator or the Steering Committee to enter into the compromise agreement, I do not agree that such a condition should be implied at law. A term will not be implied if it is not reasonable to do so. At the highest if it accepted that the letter written by Mr O'Kane, dated 22 September 2003, is a letter setting out the requirements of the Steering Committee, it follows that the Steering Committee simply imposed conditions (namely the requirement to produce evidence of the Applicant's fitness to work and the likelihood of re-injury) on the agreement to reinstate. At law these conditions can be said to be conditions subsequent on the performance of the agreement to compromise which was accepted by both parties. In such a case it cannot be said that it is necessary for the reasonable or effective operation of the contract to imply the term sought by the Respondent. Further the term sought to be implied is inconsistent with the conditions subsequent.

Credibility

58 I prefer the evidence given by Mr Lowe to the evidence given by the Applicant, Ms Harry and Mr Yarran where their evidence departs from the evidence given by Mr Lowe. Mr Lowe is an independent witness who has no interest in the outcome of these proceedings. Mr Lowe's recollection of events is consistent and his evidence was not shaken in cross-examination. That does not mean that I reject the evidence given by Ms Harry or Mr Yarran. I found both of them to be honest witnesses. However, their recollection of some events is in some aspects poor. I found that Ms Harry's recollection of the timing of events better that Mr Yarran's.

59 I accept the Applicant's evidence where her evidence is corroborated by the evidence by the other witnesses or by documentary evidence.

What are the Terms of the Compromise Agreement

60 The evidence establishes that the terms of the agreement are set out in the letters dated 17 September 2003. The contract of employment signed by the Applicant and Mr Yarran on 23 September 2003 do not form part of the compromise other than to evidence that the Applicant was reinstated to her position as Director, Client Services. It may be the case that the contract whether it be for a five or three year term contains conditions which are superior and constitute terms beyond what was authorised by the Board when making a decision to reinstate her. The veracity of that document in my view is not relevant to these proceedings.

61 The terms of the compromise agreement are in my view clear and unambiguous. Those are:

(a) The Applicant is to be reinstated to her position as Director, Client Services; and

(b) The Applicant is to return at the same salary conditions and with no loss of leave and other entitlements. The Applicant is to be repaid a sum of money equal to the gap between the salary to which she would have been entitled during her absence and the salary monies received from workers' compensation and other insurers. These conditions mean the Applicant is to be treated as if her employment was continuous from January 2002, for the purposes of annual leave, sick leave, long service leave, bereavement leave and superannuation. Further the Respondent is obliged to pay the Applicant

the same salary and conditions that she was previously engaged in her position as Director, Client Services. This condition was subject to the condition subsequently imposed by the Steering Committee that the Applicant's appointment would not have an adverse affect on the Respondent's workers' compensation insurance premiums. This condition was satisfied. I do not accept these terms entitled the Applicant to be paid an increment from January 2003 as cl 7(b) of the workplace agreement simply required the Applicant and Respondent to enter into negotiations for a review of salary and conditions after 12 months continuous service. Further, any increase was subject to a satisfactory annual performance appraisal. Until these conditions were met the Applicant was not entitled to an increase. This performance appraisal did not occur until after the Applicant was reinstated.

Further, I do not accept the Applicant is entitled to claim a sum for loss of private use of a motor vehicle and mobile telephone owned by the Respondent, from the time of her dismissal until reinstated, as I am not satisfied that the Applicant was entitled to the private use of a motor vehicle or a mobile telephone. Her workplace agreement states in cl 16(c) that "you will be provided with a mobile phone for business use". Her workplace agreement clearly also states use of the Respondent's mobile telephone and vehicle is for business purposes only. The Applicant's workplace agreement does not make provision for private use of a motor vehicle. In cross-examination the Applicant conceded that she had signed a form on 11 February 2002 to authorise the Respondent to deduct $44.00 per fortnight as payment for the use of a Derbarl Yerrigan Health Service vehicle outside business hours inclusive of the use of the vehicle to travel to and from the place of employment. In the particulars, she says that this is the pro-rated package value as stated in the first contract. It appears to be common ground that the first contract is, as I understand it, a reference to the workplace agreement. That contract states she was entitled to use her own private vehicle for business purposes under the terms of the organisation's vehicle use policy or alternatively a Derbarl Yerrigan Health Service pool vehicle for the purposes of performing duties under the contract during normal working hours. Clause 16 of the workplace agreement also provides that if she uses her own vehicle she will be paid mileage in accordance with the current Derbarl Yerrigan Health Service Motor Vehicle Policy. The Applicant testified that her claim is justified on the basis that because the Respondent cannot provide retrospective use of a vehicle that she is claiming the value of that private use. The Applicant says that when her position of Director, Client Services was advertised by the Respondent it stated that there was a right to the private use of a vehicle and that as the advertisement stated that she had that right and she should not have been required to pay for the private use of a motor vehicle. The Applicant however did not produce a copy to the Commission of the advertisement in support of her claim.

The Applicant is however entitled to receive an amount between the amount she would have received in the period she was off work accessed at the rate of $63,253.00 per annum and the amounts she received as salary from workers' compensation and other insurers if those late amounts are less than the former. The Applicant was off work for 40 weeks (being the period from 13 December 2002 until 23 September 2003). If the Applicant was employed for that period she would have been paid $48,656.15 as salary. The applicant was paid $23,858.32 in weekly payments of workers' compensation and $17,813.96 as disability payments. These amounts total $41,672.28. The Applicant concedes the amounts she received as weekly payment of compensation and as disability payments should be deducted from the amount she would have received as salary had she not been dismissed. The Applicant was also paid $40,500 as a lump sum in redemption of weekly payments of workers' compensation under ss 67 and 76 of the *Workers' Compensation and Rehabilitation Act 1981*. She says this amount should not be taken into account when determining if she is owed any amount by way of salary under the terms of the compromise agreement.

Section 67(1) of the *Workers' Compensation and Rehabilitation Act* provides:

> "(1) Where weekly payments for a permanent total or permanent partial incapacity resulting from a disability other than mesothelioma have continued for not less than 6 months, the liability for the incapacity is to be redeemed by the payment of a lump sum if —
>
> (a) the worker and the employer agree to the redemption and on the amount of the lump sum; and
>
> (b) a memorandum of the agreement is registered under Division 7."

Section 76(1) of the *Workers' Compensation and Rehabilitation Act* provides:

> "(1) Subject to section 92(h), where the amount of compensation under this Act has been ascertained, or any weekly payment varied, or any other matter decided under this Act by agreement, or any agreement, whether purporting to be made under this Act or not, has been entered into whereby a worker agrees to compound any claim or right to compensation under this Act, a memorandum thereof shall be sent, in manner prescribed, by any party interested, to the Director, who, subject to subsection (2a), shall, on being satisfied as to its genuineness, and, where the agreement provides for the payment of compensation pursuant to an election under section 24 or 24A, as to the adequacy of the amount thereof, record such memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as an award or order made by the Directorate."

As to the amount of $40,500 the Applicant received as a lump sum, she says this was a sum received by her as a settlement of her workers' compensation and common law claim against the Respondent. The evidence does not however, support her contention. Exhibit 2 states the amount of $40,500 was paid in relation to her workers' compensation claim as "redemption". Under the provisions of the *Workers' Compensation and Rehabilitation Act*, workers and employers can only enter into an agreement to redeem weekly payments of compensation and other entitlements under the *Workers' Compensation and Rehabilitation Act* and not any claim at common law.

Under s 18 of the *Workers' Compensation and Rehabilitation Act*, if a disability of a worker occurs, the employer shall subject to the *Workers' Compensation and Rehabilitation Act* be liable to pay compensation under schedule 1 of the Act. Under cl 7 of schedule 1 the Applicant was entitled to weekly payments equal to her weekly earnings calculated and varied in accordance with schedule 1. She was also entitled in addition to weekly payments of compensation medical expenses under cl 17 of schedule 1. Under s 76(1) of the *Workers' Compensation and Rehabilitation Act* only weekly payments of compensation and other entitlements owing under the *Workers' Compensation and Rehabilitation Act* are part of a redemption agreement.

The question then is whether the amount received by the Applicant as redemption can be said to be "salaried monies" received from workers' compensation. In my view, clearly part of that money is capable of being characterised as "salaried monies" as the statutory framework of a redemption payment contemplates redemption of entitlements to weekly payments of compensation. The Applicant conceded in written submissions filed on 24 March 2004 that there is no evidence before the Commission of the basis of calculation of the amount for "redemption". The quantum of the redemption amount (if any) that can be characterised as "salaried monies" is not a matter the Commission can speculate.

However, the Applicant bears the burden of proving that none of the amount of $40,500 or an amount less than $6,983 paid as redemption was for weekly payments of compensation so as to entitle her to payment of an amount of $6,983 or a lesser amount (being the difference between the amount she would have been paid as salary and the amount she received as weekly payments of compensation and disability payment she received between 13 December 2002 and 23 September 2003). In my view she has failed to prove that to be the case.

Notwithstanding my views set out above the amount paid as redemption could be capable of being discounted if s 183 of the *Workers' Compensation and Rehabilitation Act* applies.

Section 183 provides:

> "(1) A payment of compensation, or a sum paid by way of redemption thereof, is not capable of being assigned, charged or attached, and shall not pass to another person by operation of the law, nor shall any claim be set off against such payment or sum, except in respect of voluntary advances of future compensation made by an employer or insurer with the approval of the Directorate.
>
> (2) A person who purports or agrees to do anything the doing of which is prevented by subsection (1) commits an offence and is liable to a fine of $5 000."

The Respondent submits that the purpose of s 183 is to prevent a payment of compensation, or a sum paid by way of redemption thereof, ("prescribed payments") being redirected or otherwise applied such that the worker is effectively denied the benefit of it.

The classes of transactions which are prohibited have in common the effect of ensuring that all or some of the prescribed payments do not reach the worker.

In general terms, the Respondent submits that since:

(a) The Applicant has already, and, at the time of the Agreement, had already, received all the prescribed payments to which she was entitled; and

(b) The Agreement does not propose that the Applicant should pay any of these monies received to the Respondent or to any other party;

The Agreement does not contravene s 183 of the *Workers' Compensation and Rehabilitation Act*.

Clearly the agreement to compromise the Applicant's claim cannot be described at law as a charge, attachment or a conveyance by operation of law of a sum paid by way of redemption within the meaning of s 183. The agreement to compromise was entered into by a voluntary act by the Applicant. Can the agreement be described as an assignment or a set-off? The answer to that question is, in my view, no. An assignment is to transfer to another all of part of one's property, interest or rights (see *Blacks Law Dictionary*). The agreement to compromise does not propose to transfer of the amounts paid to the Applicant as compensation or redemption. *Blacks Law Dictionary* defines a set off as:

> "A counter-claim demand which defendant holds against plaintiff, arising out of a transaction extrinsic of the plaintiff's cause of action; and
>
> Remedy employed by defendant to discharge or reduce plaintiff's demand by an opposite one arising from transaction which is extrinsic to plaintiff's cause of action."

The Respondent submits that several elements of a set-off are absent from the arrangement proposed in the Agreement. I agree with their submission. Firstly, there is nothing in the agreement to compromise which has the character of a demand which the defendant (Respondent) has against the plaintiff (Applicant). The Respondent has not claimed, in the agreement to compromise, that the Applicant owes any monies to them. Secondly, there is nothing in the agreement to compromise which could be said to be extrinsic to the plaintiff (Applicant's) cause of action. The Applicant's claim against the Respondent arises from the termination of their relationship as employer and employee. The Agreement arises from the same circumstances.

For these reasons, I am of the view, the Applicant is unable to prove that she is entitled to amounts in items 10 and 11 as she is unable to prove that the salaried monies she received from workers' compensation and her disability insurer were less than the money she would have received had she not been dismissed.

(c) The Applicant is entitled to be paid for any overtime approved before her departure from Derbarl Yerrigan Health Service. This term requires the Respondent to pay an amount approved as overtime provided that approval was given prior to the Applicant's termination of employment. The Applicant says the Respondent approved payment to her for extra hours worked as CEO and Director, Client Services during the period from 28 January 2002 until 14 June 2002. She testified (page 12 of the transcript) during the period of time she was carrying out the duties of three positions she was working extraordinarily long hours and the Board approved payment of the extra hours work as she was unable to take any time off. The Applicant's workplace agreement in cl 13.3 states, "As a minimum your ordinary hours of work shall be 37.5 per week.". Further 13.3(c) provides "It would be expected, as a Senior Manager, that hours worked in excess of 37.5 hours per week would be without the payment of overtime.". Clause 13.3(d) states, "In exceptional circumstances, where significant longer hours have been work [sic] TOIL can be negotiated with your immediate Manager." It was put to the Applicant in cross-examination that the workplace agreement only entitled the Applicant to time off in lieu (TOIL) and did not provide for entitlement or payment. It is clear from the express terms of the workplace agreement that all of the terms of the workplace agreement did not apply to the Applicant's duties as acting CEO. The Applicant testified that the Respondent had a policy of paying TOIL. Further, the Applicant says that there was a Board motion to approve payment to her for TOIL, which was passed prior to the termination of her employment in December 2002. It was put to the Applicant in cross-examination that the Respondent's policy in relation to payment of TOIL is that it does not pay TOIL out. However, the Respondent did not produce the policy in support of this proposition nor did the Applicant produce a copy of a Board minute in support of her claim that additional hours of work performed by her was to be paid out. However, Ms Harry, a former Treasurer of the Respondent testified that the Board had approved payment to the Applicant. Whilst Ms Harry gave vague evidence on many issues, she did not depart from her testimony that the Board approved payment of extra hours worked by the Applicant whilst she was acting as the CEO. Although the Respondent tendered into evidence copies of all Board minutes it says it has in its possession which record Board meetings between January 2001 and end of December 2002, I am not satisfied that bundle of minutes contains a complete record of Board resolutions in that period.

62 In relation to the Applicant's particulars of claim of monies due and owing under the terms of the compromise I make the following findings:

(a) I am not satisfied the amounts claimed in items 1 and 2 of claims arising out of higher duties performed between January 2002 until June 2002 form part of the terms of compromise. Whilst this amount is within the ambit of the claim

for contractual benefits set out in the application, they were not amounts agreed to in the compromise. For the reasons set out above I find that any claim in respect of these amounts have been extinguished by the compromise agreement.

(b) For the reason set out above I am not satisfied that item 3 and 5 (claims for compensation for loss of the private use of a mobile telephone and motor vehicle) are amounts due and owing under the terms of the compromise agreement. Further, for the reasons set out above these claims have no merit.

(c) It was not a term of the compromise agreement that the Applicant be reimbursed an amount for vehicle deductions in item 4. In any event this claim has no merit (see Exhibit 1).

(d) I find that the Applicant does have an entitlement in respect of items 6 and 7 (payment for TOIL) providing that she can produce evidence of the hours worked. I am not satisfied that she should be paid the rate which was paid to Ms Kickett. I will hear further evidence in relation to these items.

(e) An entitlement to items 8 and 9 (claims for payment of annual leave and leave loading at the CEO's rate) do not form part of the terms of compromise. Further these items have no merit. The claim relates to a period between January 2002 and June 2002. The Applicant testified she took no leave in that period. It is a well established principle at common law that the rate annual leave is paid is the rate the employee would have received at the time the leave is taken. This principle is enshrined in s 18 of the *Minimum Conditions of Employment Act 1993.*

(f) In relation to items 10 and 11 (the claim for salary and additional superannuation for the period from 13 December 2002 and 22 September 2002, the Applicant has failed to prove that the amounts she was paid by the Respondent's workers' compensation insurer and her disability insurer were less than the amount she would have received had she been continuously employed by the Respondent between 13 December 2002 until 23 September 2003.

2004 WAIRC 12077

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIANA ELIZABETH DOWNS-STONEY
	APPLICANT
	-v-
	DERBARL YERRIGAN HEALTH SERVICE
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	FRIDAY, 23 JULY 2004
FILE NO.	APPLICATION 37 OF 2003
CITATION NO.	2004 WAIRC 12077

Result	Order made the Respondent pay the Applicant $11,077.70
Representation	
Applicant	Ms K Hafford (of counsel)
Respondent	Mr G Stubbs (of counsel)

Supplementary Reasons for Decision

1 On 8 April 2004 [2004] WAIRC 11100 the Commission found that:

(a) It was a term of the compromise agreement that the Applicant would be reimbursed for any overtime worked for which approval was given prior to her departure from the Respondent's employment.

(b) The Applicant has an entitlement in respect of items 6 and 7 of her claim providing she can produce evidence of the hours worked and the appropriate rate of pay (see paragraph [62](d)).

2 The Applicant claimed in item 6 and 7 of her claim:

"6. $17,006.88 TOIL at acting CEO rate ($54.5897 p/h for 311.54 hours of time card records)

7. $3,880.66 TOIL at Director of Client Services rate ($40.3605 p/h for 96.15 hours)."

3 As recorded at [62](c) of the Commissioner's reasons for decision the Applicant testified in relation to items 6 and 7 that from 28 January 2002 until 14 June 2002, she acted in three positions and the Board approved payment of the extra hours worked. Ms Harry also gave a similar testimony.

4 The Applicant, in her evidence on 4 June 2004, produced a time off in lieu ("TOIL") record covering additional hours worked by her from week ending 18 January 2002 until week ending 6 September 2002 (Exhibit C). At the completion of her evidence the Applicant's counsel provided to the Commission the following summary of Exhibit C:

Week Ending	**No. of hours worked each day**						**Total Hours worked**	**TOIL (total hours worked minus 37.5 hours)**
	Monday	**Tuesday**	**Wednesday**	**Thursday**	**Friday**	**Saturday/ Sunday or Public Holidays**		
18/01/2002	9	10.25	8.75	12	7		47	9.5
25/01/2002	10.5	10.25	14.75	12	9		56.5	19
Cumulative sub-total whilst in substantive position only								28.5

Week Ending	No. of hours worked each day						Total Hours worked	TOIL (total hours worked minus 37.5 hours)
	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday/ Sunday or Public Holidays		
29 January 2002 - Commenced Acting as Chief Executive Officer								
29 January 2002 - Commenced Acting as Director, Corporate Services								
01/02/2002	8.5	9.5	10.75	10.25	12.5		51.5	14
08/02/2002	10.5	8.5	8.5	11	8.25		46.75	9.25
15/02/2002	13.25	14	13	11	10.75		62	24.5
22/02/2002	11.25	12.25	13	12.75	6		55.25	17.75
01/03/2002	11.75	7.25	11.5	9.5	9		49	11.5
08/03/2002	0	9.5	15.75	10	10.5	7.5	53.25	15.75
15/03/2002	13	15	14	11.25	7.75		61	23.5
22/03/2002	11	8.5	8.5	8.5	8.5		45	7.5
29/03/2002	6	8.5	8.5	13.5	8.5		45	7.5
4 April 2002 - Ceased Acting as Director, Corporate Services								
05/04/2002	14	14.25	8	9.75	8.5	10	64.5	27
12/04/2002	11	11.25	15	9.25	8		54.5	17
19/04/2002	8	7	9	8	8		40	2.5
26/04/2002	8.5	15.5	9.75	7.5	6		47.25	9.75
03/05/2002	12	10.5	11.5	11	6.5		51.5	14
10/05/2002	12.5	15	12.25	9.25	4		53	15.5
17/05/2002	11.5	14.7	9.25	14.5	6		55.95	18.45
24/05/2002	10.5	11	15.5	12	10.5		59.5	22
31/05/2002	13	14.25	9.25	13.25	8.5		58.25	20.75
07/06/2002	7.5	12.75	9.5	7.75	10.75		48.25	10.75
14/06/2002	11	10	14.25	14.75	8		58	20.5
14 June 2002 - Ceased Acting as Chief Executive Officer								
							Cumulative TOIL hours when Acting in higher duties	309.45

21/06/2002	0	10	8.5	13.25	13.5		45.25	7.75
28/06/2002	8.75	8.5	12.75	11	9.5		50.5	13
05/07/2002	12	15	10	9	10.75		56.75	19.25
12/07/2002	9.5	10.75	11.5	8	7.5	11	58.25	20.75
19/07/2002	11.5	13.5	9.5	9	8.5		52	14.5
26/07/2002	10.75	10.25	14.25	11.75	9		56	18.5
02/08/2002	11.25	11.25	11.25	12	9.5		55.25	17.75
09/08/2002	11.75	12	17	15	6.75		62.5	25
16/08/2002	12.5	12.75	13	11.75	10.5		60.5	23
23/08/2002	12	10.5	11.5	8	8		50	12.5
30/08/2002	11.75	8.5	8.5	8.5	8.5		45.75	8.25
06/09/2002	8.5	8.5	8.5	8.5	8.5	7	49.5	12
							Cumulative sub-total whilst in substantive position only	192.25

Subtotal of TOIL in substantive position:	220.75
Subtotal of TOIL whilst in higher duties:	309.45
Total number of hours of TOIL:	**530.2**

5 The Applicant testified on 4 June 2004 that when she was employed by the Respondent on 7 January 2002, she was contracted to work 37.5 hours per week. However, due to the redundancy two weeks later of two senior managers and the standing down of the Chief Executive Officer ("CEO"), she was obliged to work very long hours three to four evenings a week. She generally did not leave the office before 9:00 pm or 10:00 pm and on odd occasions she remained in the office until 2:00 am. She said that Exhibit C was prepared by her Professional Assistant ("PA"), Ms Rachael Ngawaka, using her (the Applicant's) timecards. The Applicant clocked in and out each time she attended her office workplace. The Applicant said that timecards were not always available as they were regularly mislaid so she did not always clock on and off. Further, because the Respondent has six work sites (which she regularly visited), she would not necessarily clock in at the time she started work or clock off at the

time she finished work because she was at other premises. The timecards remained at her office. The Applicant also testified that her PA also recorded her (the Applicant's) hours of work in Exhibit C by referring to itineraries when she (the Applicant) travelled to the Eastern States and from the Applicant's diary. The Applicant said that she reviewed the entries made by her PA in Exhibit C from time to time and corrected incorrect entries. For example if Ms Ngawaka recorded a default time (8:30 to 5:00 pm) if those hours were incorrect she (the Applicant) would change those hours and total of TOIL by making a handwritten notation on Exhibit C.

6 Exhibit C is principally a document created on an Excel program by Ms Ngawaka, which records for each week the Applicant's start and finish time, the total hours worked by the Applicant each day and a total of hours worked each week. The typewritten entries on the Exhibit C record makes a deduction of one hour per day from the total hours recorded. The Applicant, however, made handwritten notes on that document which records hours worked which are different to the computer record. The Applicant said she added five hours in each week (being one hour per day). This is despite the Applicant's evidence that she did not claim one extra hour of work a day to reflect the fact given her position in the organisation, it would have been appropriate for her to work some additional hours of work per week in addition to her contracted hours. Her written contract of employment as Director of Client Services provided that it would be expected as a senior manager that hours worked in excess of 37.5 hours a week would be worked without payment of overtime (see Exhibit 2). The Applicant made no deduction in Exhibit C record in her handwritten totals for any breaks during the day such as a lunch break.

7 The Applicant testified she was often required to work outside the normal hours of work, which were 8:30 am to 5:00 pm each day. She says she was required to attend breakfast meetings and attend Board meetings out of hours. The Applicant was cross-examined in relation to what she did beyond the hours of 5:00 pm in respect of almost everyday that she worked from 18 January 2002 to 6 September 2002. The Applicant testified that in general she could not record exactly what she did on each day except she could recall that after hours she replied to emails, drafted letters and met with staff. However, she could recall in relation to some specific days what she did and whether she attended Board meetings and when she attended some functions. The Applicant pointed out that it was over two years since she performed the work. The Applicant also testified that it was not her habit to usually take a lunch hour. She said she sometimes ate lunch at her desk if her PA purchased lunch for her and she did not take breaks for coffee or dinner on most of the days she has claimed extra hours.

8 The Applicant conceded in cross-examination that the salary sacrifice component of her terms and conditions of employment, being an amount of $15,450.00 per annum, could not be taken in cash.

9 Ms Rachael Ngawaka, testified that she was employed by the Respondent from March 2002 until February 2003 as the Applicant's PA. She testified that the Applicant worked very long hours and she (Ms Ngawaka) would often leave the premises and buy the Applicant lunch. Further, the Applicant would often eat her lunch at her desk. She said she prepared the typewritten entries in Exhibit C from information on the Applicant's timecards. On some occasions she left days blank because times were not recorded on timecards. This would have occurred when the Applicant was at another one of the Respondent's sites, such as Maddington. When cross-examined, she was asked to look at a number of timecards. She agreed that on some occasions when no times were recorded on a timecard that she recorded on Exhibit C that the Applicant commenced work at 8:30 and finished work at 5:00 pm. She conceded that she would not be able to say how many hours the Applicant worked on those days. When asked why five hours each week was deducted from the total hours of hours worked each week, she said that it could have been because one hour was deducted each day for lunch but she could not recall whether that was the case.

10 Ms Nadia Burgess testified that she was employed as the Respondent's Resources Manager for a period of two years whilst the Applicant was employed on the first occasion. She said that when she left the office around 6:30 to 7:00 o'clock at night the Applicant was still in the office. On one or two occasions when she (Ms Burgess) was still at work until 8:00 or 9:00 o'clock at night the Applicant was still at work. She too, did not often take a lunch break. She said that as managers, they were aware they should have been taking lunch breaks but due to an extreme workload a lot of people did not take lunch breaks. They just sat at their desks and continued to work.

11 Ms Burgess testified that when the Applicant was acting in the CEO's position she was paid higher duties according to the rate that had been paid to the previous Director, Mr Ted Wilkes. That was an hourly rate of $47.0769. In cross-examination, Ms Burgess testified that this hourly rate of pay did not take account of the entire Director's package, which also contained a non-cash salary package component.

12 In making closing submissions the Applicant's counsel handed up a document setting out the Applicant's calculation of the value of her claim for payment of TOIL. This document states as follows:

"1. Whilst employed as Director of Client Services:

(a) No. of hours of TOIL: 220.75

(b) Hourly rate: $40.3605

(c) Calculation: 220.75 (hours) x $40.3605 (hourly rate) = $8,909.58

2. Acting as CEO:

(a) No. of hours of TOIL: 309.45

(b) Hourly rate: $47.0769

(c) Calculation: 309.45 (hours) x $47.0769 (hourly rate) = $14,567.94

3. TOTAL: $23,447.52"

13 I am satisfied that the Applicant worked the hours set out by her in Exhibit C. However, I do not accept that the cumulative total of hours in that document in either typewritten or handwritten form is correct. However, I have checked the calculations set out in the Applicant's summary, in paragraph 4 of these reasons, and I am satisfied that the hours recorded and the total number of hours are correct. However, I am of the view that one hour for each day should be deducted from the Applicant's total in her summary as her own evidence establishes that it was her view that she, as a senior manager, was required to work some additional hours above 37.5 hours per week without payment. This is reflected in her contract of employment. Exhibit A2 clause 13(d) and (c) provides:

"(c) It would be expected, as a senior manager, that hours worked in excess of 37.5 hours per week would be without the payment of overtime.

(d) In exceptional circumstances, where significantly long hours have been worked, time off in lieu (TOIL) can be negotiated with your immediate manager."

14 Having regard to the evidence given by the Applicant and Ms Harry on 17 February 2004, I am satisfied the Applicant was only entitled to be paid for additional hours worked whilst she was acting as CEO. There is no evidence before me that after 14 June 2002 payment of extra hours of work had been approved by the CEO or the Board. I do, however, accept her evidence that upon immediately commencing work she was required to take over some of the duties of the CEO from 18 January 2002. Accordingly, I will allow her claim that she is entitled to be paid 18.5 hours of TOIL for hours worked on the weeks ending 18 January 2002 and 25 January 2002 at an hourly rate of $40.3605, which is an amount of $746.67. In light of my reasons in paragraph 12 I have deducted one hour per day for each week worked.

15 In light of the Applicant's evidence that whilst acting as CEO she was expected to work at least one additional hour per day without payment of overtime, I will deduct 90 hours from the total 309.45 hours claimed. Accordingly, the Applicant is entitled to be paid for 219.45 hours at $47.0769 per hour, which is a total of $10,331.03.

16 Accordingly, I will make an order for the Respondent to pay the Applicant an amount of $11,077.70. I will otherwise make an order dismissing the Applicant's claims.

2004 WAIRC 12128

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIANA ELIZABETH DOWNS-STONEY
	APPLICANT
	-v-
	DERBARL YERRIGAN HEALTH SERVICE
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	TUESDAY, 27 JULY 2004
FILE NO.	APPL 37 OF 2003
CITATION NO.	2004 WAIRC 12128

Result	Order made the Respondent pay the Applicant $11,077.70
Representation	
Applicant	Ms K Hafford (of counsel)
Respondent	Mr G Stubbs (of counsel)

Order

HAVING heard Ms K Hafford, of counsel, for the Applicant and Mr G Stubbs, of counsel, for the Respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby:

(1) ORDERS that the Respondent pay to the Applicant within 14 days of the date of this order, the sum of $11,077.70;

(2) ORDERS that the application is otherwise hereby dismissed.

(Sgd.) J H SMITH,
[L.S.] Commissioner.

2004 WAIRC 11988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JONATHON ROBERT FOULDS
	APPLICANT
	-v-
	AVIAN PTY LTD - TRADING AS ACACIA CARAVAN PARK
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	WEDNESDAY, 14 JULY 2004
FILE NO.	APPLICATION 1743 OF 2003
CITATION NO.	2004 WAIRC 11988

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal – Lack of procedural fairness – Applicant unfairly terminated – Compensation ordered – Contractual benefits claim – dismissed *Industrial Relations Act 1979* (WA) s 29(1)(b)(i) and (ii).
Result	Declaration made that the Applicant was unfairly dismissed. Order made the Respondent pay the Applicant $1,400. Claim for contractual benefits dismissed.
Representation	
Applicant	In person
Respondent	Mr D F Beere (of counsel)

Reasons for Decision

1 Jonathon Robert Fould ("the Applicant") claims he was harshly, oppressively and unfairly dismissed on 8 November 2003, by Avian Pty Ltd trading as Acacia Caravan Park ("the Respondent") under s 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act"). The Applicant also claims that he was denied the following contractual benefits pursuant to s 29(1)(b)(ii) of the Act not being benefits under an award or industrial agreement. He says he was employed for a five year fixed term and was unlawfully dismissed six months after the term commenced. Consequently he claims:

(a) Payment of $70,200 for free rental of a four bedroom two bathroom beachside house for four and a half years. The Applicant calculates this amount as $300 per week;

(b) $3,942 for gas supplied for the balance of the term being $73 per month;

(c) $3,240 for the cost of electricity for the balance of the term being $60 per month; and

(d) $3,780 for telephone calls for the balance of the term assessed at $70 month.

Background

2 It is common ground the Applicant was employed by the Respondent to work for the Respondent to man the office of the caravan park between the hours 4:00 pm to 6:00 pm Monday to Friday and was responsible for the day-to-day running of the caravan park after hours on an on-call basis each night during the week. He was also required to man the office each weekend between the hours of 8:00 am to 12:00 noon and 2:00 pm to 6:00 pm each day. He was otherwise on-call for the remainder of the weekend. The Applicant said that he was employed as a manager and he was engaged to co-manage the caravan park together with Mr Leslie Pollard, who worked between the hours of 8:00 am to 4:00 pm Monday to Friday. The Respondent strongly contends that the Applicant was not employed as a co-manager but as a caretaker and at all material times Mr Pollard and his wife, Mrs Pamela Pollard, were employed as the managers of the caravan park. The owners of the company, which own the caravan park, Ms Susan Strickland and Mr Steve Kennedy, are not involved in the day-to-day running of the caravan park. However, Mr Kennedy regularly visits the caravan park and carries out maintenance.

3 The Applicant has other employment, he works as a teacher assistant at the West Busselton Primary School. He held that position in 2002 and 2003. Mrs Pollard also works as a physical education teacher at the school four days a week. In the middle of the year 2002, Mrs Pollard spoke to the Applicant and asked him if he and his wife were interested in living in the caravan park to look after the office and be on-call except for the hours from 8:00 am to 4:00 pm Monday to Friday. It was agreed the Applicant would be paid $200 per week and he and his family would be provided with a four bedroom two bathroom house at the caravan park, free gas and electricity and the use of a telephone.

4 From 2003 until late April 2003, the Applicant worked on a casual basis at the caravan park. During that period of time, Mrs Pollard showed him office procedures. Whilst the Applicant disputes that he was shown all the tasks he was required to complete, it is clear Mrs Pollard did show him how the day-to-day client booking procedures were to be completed (page 125 transcript). In that period he also carried out some routine maintenance and rubbish collection. In late April 2003, Mr and Mrs Pollard moved out of the caravan park house into their own home in Busselton and the Applicant and his family moved in. The Applicant commenced work on 26 April 2003.

5 The Applicant's employment was terminated following a heated discussion with Mr Pollard on 29 September 2003, when Mr Pollard raised with him that he had failed to properly account for a roll-over deposit. The Applicant complained bitterly about Mrs Pollard during that heated discussion. The Applicant was of the view that Mrs Pollard was not the manager of the caravan park and had no right to be on the caravan park grounds nor give him instructions. Following the altercation the Applicant spoke to Mr Kennedy on site about what had occurred. Mr Kennedy then discussed the issue with his fellow director, Ms Strickland and they made the decision to terminate the Applicant's employment. The Applicant's employment came to an end on 8 November 2003, after a letter advising him his employment was to be terminated was given to him by Mr Kennedy on 5 October 2003. He was given four weeks' notice on that day, which he worked out. He and his family were given five weeks to vacate the caravan park house.

6 The Applicant claims his contractual entitlements arise out of an agreement he had with the Respondent that he would be employed at the caravan park for a period of at least five years. Consequently, he makes a claim for contractual benefits for wages, rent, gas, electricity and telephone calls for the balance of the five year fixed term period.

7 The Respondent kept the following records and says the Applicant was required to make the following notations in each of the following books:

(a) Guest Register – When a guest or group of guests book in, the car registration of the caravan park clients is to be recorded together with the number of adults, the number of children, the christian names and surnames of the clients and address. Also recorded are the dates the clients arrive and leave, the site number of the caravan, camp site, accommodation or cottage they occupy.

(b) Site Book – This is a record of all the caravan and camp sites at the caravan park. When a booking is obtained a site is allocated and the booking is required to be noted in the site book. Further, when a person arrives without a booking, they are allocated a site which is to be noted in the site book.

(c) The Respondent also keeps an accommodation book in the same form as the site register, which is a register of bookings and persons present in the site cottages.

(d) Receipts Book – when payments are received each client receives a receipt from this book. The Respondent says that on each receipt the person's christian name and surname must be noted in words, the number of persons visiting, the type of site or accommodation and the period of time they stayed.

8 When bookings are obtained, deposits are received prior to the arrival of the patrons. Some patrons return to the caravan park frequently and ask for their deposits to be rolled over for a further stay and others ask for their deposit to be deducted from the final account. The deposits are recorded in the accommodation or site book and should be deducted or crossed out in these books or noted as rolled over when further bookings are made.

9 The Respondent says the Applicant's employment was terminated for two reasons. Firstly, he failed to complete the receipts and register in the manner required. The Respondent contends these failures were on a regular and continuing basis. The Respondent says the Applicant was warned by Mr and Mrs Pollard on numerous occasions to correctly complete the notations in each of the fore mentioned books but he failed to rectify those deficiencies. He was inefficient in carrying out some of his duties, namely timely organisation of the cleaners. Further, the Applicant on occasions charged incorrect tariffs to some bookings. In addition, he charged goods for his personal use at Mitre 10 and failed to reimburse the Respondent for those goods.

10 The Applicant never received any warning that his employment was in jeopardy until he received his notice of termination. The Applicant says that he had insufficient training and many of the paperwork deficiencies were not brought to his attention at the time they were made. Further, the Applicant says that he was not advised he was required to note certain information in

the books until sometime in July 2003 and after those deficiencies were brought to his attention, the number of mistakes he made in the receipts book and registers substantially declined.

11 The Respondent also says that it was entitled to terminate the Applicant's employment because after the Applicant was given notice to terminate, it came to the Respondent's attention that the Applicant had accessed the Respondent's wages and other records, which is an invasion of the Respondent's privacy. Further, that the Applicant made unsubstantiated and outrageous allegations against Mr Pollard and Mrs Pollard after he was given notice. When those factors are combined the Respondent was entitled to summarily dismiss the Applicant.

Applicant's Evidence

12 Mr Foulds testified that when he was approached by Mrs Pollard in 2002, she asked if he and his wife were interested in living in and working at the caravan park. He either used the words "co-manager" or Mrs Pollard did. He said that they were very interested in the position because they were renting their home which strained their finances. Sometime later, Mrs Pollard spoke to Mr Pollard and an offer was made to the Applicant that he would be paid $200 per week to look after the office and be on-call all of the time except 8:00 am to 4:00 pm Monday to Friday. Mr Foulds said that this offer was made on the basis that either he or a member of his family would be required to carry out the duties. Mrs Pollard asked whether they could, "stick it out" and he informed her that he and his wife saw it as a five year plan and they hoped to stay longer. Mrs Pollard informed the Applicant that they had to speak to the owners, Mr Kennedy and Ms Strickland, and that could take a while because Mr Kennedy never made a decision quickly about anything. The Applicant says he was told later that Mr and Mrs Pollard would be moving out of the caravan park house about Christmas time and the job would become available then. Mr and Mrs Pollard began renovating their house. The Applicant commenced working for the Respondent in the office around Christmas 2002. He said that they were very busy because the caravan park handyman had left so he carried out some of the handyman's work. He said that on the weekends he was mostly working in the office on his own as Mr and Mrs Pollard were busy renovating their house. In mid January 2003, the Applicant was informed that they would be doing more renovations and the house in the caravan park would not become available until mid April 2003.

13 Prior to the Applicant commencing the position in April 2003, he met Ms Strickland and told her, "We would stick it out for at least five years" and she said, "Well, just remember if we sell the business we can't guarantee your employment." The Applicant says that Mr Kennedy and Mrs Pollard were present at that meeting. He then assumed that he would be employed for at least five years. The Applicant said that he also made that assumption because his family had given up a rental of a house, which they had rented at a reasonable rate for 10 years and that was why they had formed the plan they would do this job for at least five years.

14 The Applicant says once they had moved in, things seemed to be going well. Mr and Mrs Pollard continued to take time off work to renovate their house. For the first couple of weeks another couple came to run things in the caravan park, whilst he (the Applicant) and his wife settled in. He said that things went fairly smoothly.

15 The Applicant said he received day-to-day instructions from Mr and Mrs Pollard about things he needed to fix in bookwork, such as ruling lines in the middle of a row and completing EFTPOS dockets correctly. He was also told to make sure he obtained the first names of the clients and noted them in the appropriate bookwork.

16 The Applicant said he began to become disgruntled after Mr Pollard told him (the Applicant) that the rubbish had to only go out on weekends and that he (the Applicant) had to do it. It was his view that he was employed to look after the office and not to do the rubbish. He had to ask his wife to look after the caravan park when he went out to do the rubbish and this "niggled" him as she had "nothing to do with the park". He said that he was only given keys to the front and back doors of the house/office and for the shed and was not specifically allocated keys for anything else. Therefore, if there was an emergency after hours they had to find the keys for various things.

17 It was the Applicant's view that once he moved onto the caravan park and Mrs Pollard moved out, she ceased to be a manager. He began to feel that she was much more involved than necessary. He said that she was not being paid. So, in his view, she was not an employee and not entitled to give him instructions. He, however, conceded that on each Monday she worked at the park while Mr Pollard did the banking. The Applicant became more and more disgruntled about Mrs Pollard giving him instructions. He said she kept on coming and "telling us" various things that we should be doing. He said nothing we did lived up to her expectations. He said a "classic example" was she told him that they must obtain the first name of each client and call them by their first name. The Applicant said that he and his wife were brought up in a business background, whereby customers would be referred to by "Mr" and "Mrs" until such time the customer asked to be called by their first name. The Applicant, however, agreed that he should make a note of each client's christian name and record their christian name in the books. The Applicant argued with Mrs Pollard about calling clients by their christian names. He told her they would not do so and Mrs Pollard stormed out. He says this started a chain of events that became unbearable.

18 Mr Pollard asked the Applicant to look after the caravan park during the July/August 2003 school holidays as Mr and Mrs Pollard wanted to do further work on their house and have a holiday. The Applicant agreed, thinking that he would be paid $200 per week plus an equivalent wage for the extra hours he worked each week. He said that he was paid an additional $300 gross for 40 hours' work. He said he rang Mr Pollard, who laughed and said, "Do you expect to be paid as much as me?" The Applicant said that he did not expect to be paid the same as Mr Pollard but expected to be paid a fair wage for working the two week holiday period.

19 The Applicant's discontent came to a head on 29 September 2003. The Respondent had a staff contact book, whereby he would write notes to Mr Pollard when things were required to be done and Mr and Mrs Pollard also made notes to him in this book. He found a note from Mr Pollard that he had not made a note of deposits in one of the books to indicate the deposits had been rolled over. He said he had made a note of them but he had not scribbled them out of one book and put them in another book. He also said another mistake was raised which was not his, it was a mistake made by Mr Kennedy when Mr Pollard was off sick. As a result, he (the Applicant) said he had finally had enough and he had a heated argument with Mr Pollard. He told Mr Pollard that Mrs Pollard was interfering in his work, she had been taking linen out of the linen storeroom and had taken money out of the filing cabinet drawer and out of the safe on weekends and not told him. When cross-examined the Applicant conceded that he told Mr Pollard that Mrs Pollard had no right to be in the caravan park as she was not an employee and that Mr and Mrs Pollard would not required to work on weekends during the 2003/2004 Christmas period. He testified that he said that because it was his opinion that he could handle the additional work in the busy period. It was put to him that he told Mr Pollard he intended to employ his own staff. He disagreed and said his daughter, Teagan, would help out during the holidays. He also agreed that Mr Pollard raised with him that he had on one occasion sent the cleaners home early before clients had checked out and they had to be recalled. He said that was raised with him but the Applicant claimed the cleaner was lying. The Applicant also agreed that he told Mr Pollard that Mrs Pollard's comments in the staff communications book were sarcastic and unwarranted. Further, when cross-examined the Applicant agreed that the note in the communication book, which led to the argument on 29 September 2003, related to three accommodation deposits he failed to roll-over. He, however,

testified that although he knew to roll-over deposits on caravan sites, he did not know he had to do it in relation to accommodation units.

20 The Applicant agreed when cross-examined that he was required to follow the instructions given by Mr Pollard but strongly maintains that he was not required to comply with any instructions given by Mrs Pollard. He agreed Mr Pollard was the senior manager. He testified he believed he was the manager from 4:00 pm each day and he had the right to reject Mrs Pollard's instructions and suggestions if he thought they were inappropriate. He agreed that from time to time he had failed to record either the full names or initials in the guest register and that other information was incomplete, such as registration details. He said he was told that when clients came in late to let them pick a site and get their details in the morning. If he was not working the next morning, he told the clients to speak to Mr Pollard in the morning. Consequently, he expected Mr Pollard to complete the records in the morning.

21 The Respondent says that the Applicant regularly failed to put money in the safe. The Applicant contended in his evidence that he was told to put money in the bottom drawer of the filing cabinet until it contained too much money and then to transfer it to the safe. He agreed that in October 2003, he had failed to put $3,500 in the safe.

22 It was put to the Applicant in cross-examination that he was given oral warnings during the course of his employment that he was not doing his job properly. He disagreed but said that even if Mrs Pollard had given him a warning he would not have paid any attention to those warnings. The Applicant maintained that he was not told about making notes in the guest register until July 2003. Yet when cross-examined about a similar omission on 1 May 2003, he agreed he knew at that time he had to mark the guest register when a guest paid. He was also cross-examined about a number of notations made in the receipts book by his wife and daughter, which did not contain sufficient information. He maintains that his daughter was employed as a casual employee for the caravan park. He said that he did not instruct her how to complete the receipts book because he himself was not trained. He also said he did not give instructions to his wife for the same reason. When shown copies of 90-odd receipts containing comments made in red where insufficient information had been recorded on receipts or other record keeping books, the Applicant said that a substantial number of the comments were made on the receipts book after he left employment with the Respondent. He, however, agreed when cross-examined that mistakes or omissions in the books were raised with him prior to September 2003. He said that the discussions went along the lines of, "Jonathan you haven't filled that out correctly. Can you make sure you do it?" He said he then did so unless he forgot again. The Applicant contends that his omissions to properly complete the paperwork stopped in July 2003.

23 After the Applicant had the argument with Mr Pollard on 29 September 2003, he tried to contact Mr Kennedy by leaving a message on his answering machine. Mr Kennedy came into the caravan park on 2 October 2003. The Applicant testified that he told Mr Kennedy that he had a heated conversation with Mr Pollard and they had both said "things" that maybe they should not have said. He said he asked Mr Kennedy to look into the problems in the caravan park. He complained to Mr Kennedy that Mrs Pollard was coming into the caravan park far too much. He maintained that Mr Kennedy said little in this conversation and that was not unusual as he was a very amiable person. When cross-examined it was put to the Applicant that Mr Kennedy raised Mr and Mrs Pollard's criticisms of his work. The Applicant said that he could not recall Mr Kennedy saying much at all, he just listened. The Applicant said he only talked to Mr Kennedy for about 15 minutes. He agreed there was some conversation about their complaints because he said they may have told Mr Kennedy that he may have overstepped the mark.

24 The Applicant testified that on 6 October 2003, Mr Kennedy came back with a letter which stated that his services were being terminated. He initially said Mr Kennedy gave him the letter. He later said he thought Mr Kennedy left the letter for him to read and did not give it to him in person. The letter of termination stated as follows: –

> "Dear Jonathan
>
> Following your discussion with Steven Kennedy on Thursday 2nd October 2003 the Board of Directors has reviewed your position as Caretaker at Acacia Caravan Park.
>
> The Directors have discussed at length your ability to perform the tasks required to the standards of their expectations. The Directors feel that you have not met these expectations.
>
> Consequently we wish to advise you that your employment will terminate on Saturday 8th November 2003.
>
> As at the 8th November we require that your personal possessions both in the house and sheds be removed by 12:30PM. Any pay or personal Superannuation payments will be finalised at this date.
>
> If you wish to leave earlier please feel free to do so and thank you for all your effort with the running of the Park over the past five months."

25 The Applicant said he was shocked when he received the letter. He said at no time in the five months of his employment had he been told that his actions would put his job in jeopardy. He also complains that the termination letter does not give any reason for termination and that the 2 October 2003 was the first time he had ever discussed anything about the running of the caravan park with Mr Kennedy. The Applicant pleaded with Mr Kennedy to reconsider his decision to terminate his employment because he had given up a lot to move into the caravan park and expected they would be there for five years. Mr Kennedy agreed to talk to Ms Strickland. He rang him back that night and told the Applicant that the dismissal still stood. On 8 October 2003, the Applicant wrote to Mr Kennedy and again asked him to reconsider his position. The letter states as follows: –

> "Dear Steve,
>
> With regards to your letter dated 5/10/2003, I have spoken to relevant people and must notify you of the following.
>
> When I spoke to you on 6/10/2003 with regards to my performance as caretaker at Acacia Caravan Park, I asked specifically what I had done wrong. You admitted that I hadn't done anything wrong but that I just wasn't suited to the park. With this in mind and with no other formal warnings, I feel that you have unjustly terminated my employment.
>
> You have said I must be out by the 8th November 2003 at 12:30 pm. This is impossible as the house I will be returning to is not available till March 2004.
>
> I also feel that your Manager, Les Pollard, who interviewed and employed me has misrepresented the position I have been in.
>
> I also feel that the managers [sic] wife, Pam Pollard, has unduly harassed and pushed the limits of myself, my wife and my children to the point where my wife is unable to work in the office when Pam is around.
>
> I made a huge commitment to you Steve, one where I gave up a house we had rented for 10 years, a casual lifestyle with no pressure and people around me who appreciated me. I gave all this up and made a commitment to you to stay on for a minimum of 5 years. You accepted this commitment gratefully but now after just 5 and a half months you are telling me I am not suitable.

> I don't believe you have had any complaints by patrons about my work ethics or my ability to service their requirements. The only complaints you have received are I believe from the Manager and his wife, who 5 and a half months earlier felt it was time for them to leave the pressures of living in the park, and have the convenience of my services so that Les could work just a 35 hour week.
>
> I have had countless complaints about Pam and her rude and abrupt way of dealing with customers. It has been embarrassing on occasions to hear these complaints and have to justify them to the customer.
>
> I really do believe you are terminating the services of the wrong person. I have pointed out discrepancies in bookwork to you. These discrepancies in any other business would be considered a criminal offence.
>
> Steve I know it must be hard for you but I believe that Pam's attitude is detrimental to the smooth and cost efficient management of the Acacia Caravan Park. I feel that Les goes along with Pam, knowing that she is in many cases going too far.
>
> This park could be earning you and Sue a lot more money if you so desired, but with an archaic booking in system and no going that extra yard for the customers money is being wasted. The classic example is spending nearly $400.00 to put a new TV and an aerial point in the back office. We have stoves in units that need repairing, garden hoses that need replacing a multitude of more worthwhile things, yet Pam and Les found it necessary to have this TV put in the back office.
>
> I ask you to reconsider your Termination of employment letter and allow me to at least discuss the Parks [sic] situation with yourself and the other directors."

26 The Applicant then consulted a solicitor and the solicitor prepared a letter, which was sent to the Respondent on 3 November 2003. In that letter the solicitor stated –

> "We are instructed that the existing day manager from Mondays to Fridays is Mr Les Pollard. We understand that his wife, Mrs Pam Pollard, assists him.
>
> Our client believes that the employment relationship went well for the first four months. However, in late August 2003, our client had an argument with Les Pollard concerning the interference of Pam Pollard with our client's ability to perform his duties.
>
> Notwithstanding the argument, our client believes that a good working relationship continued to exist, and still exists between he and Les Pollard."

27 In that letter the solicitor indicated that the Applicant was still willing to continue to work at the caravan park in his current role for the same terms and conditions until 12 March 2004, when his previous accommodation would become available and alternatively the Applicant was willing to consider a monetary settlement if they were not willing to retain him as an employee until 12 March 2004.

28 Notwithstanding the statement in that letter that the Applicant believed he had a good working relationship with Mr Pollard, the Applicant agreed when cross-examined that after he received the termination letter he had an argument with Mr and Mrs Pollard and he told them they had no right to be in the caravan park. He agreed Mr Pollard had just been released from hospital and he told Mr Pollard that he should be back in hospital.

29 On 18 November 2003, the Applicant wrote to Mr Kennedy:

> "You should be aware that Pam or Les told you that if they ever officially warned me they are perjuring themselves and that only three written warnings is a reason to dismiss me. It will also be necessary for me to bring up in court certain procedures that would be frowned upon by authorities, including the underpayment of wages, non-payment of superannuation, under the counter receipt books, claims on park home expenses, etcetera, etcetera. These things I believe were some of the reasons Pam and Les wanted me out of the park.
>
> …
>
> I feel sorry, Steve, that you've been misled by Pam and Les for so many years. They are really bringing the park into disrespect. If you ever get the chance to employ someone in their place you should take it."

30 The Applicant said when cross-examined that prior to being informed his employment was terminated he went through the Mitre 10 accounts. The reason he did so was because he believed Mr and Mrs Pollard were embezzling funds from the caravan park.

31 On 13 November 2003, the Respondent made an offer to the Applicant to resolve his claim for unfair dismissal but the offer was rejected by the Applicant. During that period of time, the Applicant tried to persuade Mr Kennedy to let him and his family stay in the caravan park house until his previous rental became available in March 2004. Prior to the Applicant leaving the caravan park, he applied for a position at the Busselton Village Caravan Park but was unsuccessful. His daughter later prepared flyers for him to seek computer work. As a result he obtained two jobs and earnt an amount of $294. He also sold some T-ball caps and made an amount of $92. During the school holidays, he was able to obtain some work at the West Busselton Primary School to upgrade the school computers. For that work he was paid $1,800.

32 The Applicant says that he has suffered a loss of income from being unfairly terminated. He says as a result of the termination he had to refinance his vehicle and obtain rental accommodation, which costs him more than the accommodation he had prior to commencing employment with the Respondent. He now pays $200 per week for a two bedroom one bathroom house. The house he had previously rented for 10 years had cost $155 per week. That house had three bedrooms and one and a half bathrooms. The Applicant says that the value of the house he was provided at the caravan park should be assessed at $300 per week because a house that has four bedrooms and two bathrooms with ocean views and 30 metres from the beach in the Busselton area, rent between $280 to $345 per week. He said that rental prices have dropped recently but he is locked into a 12 month lease.

33 The Applicant had permission from the Respondent to book up goods for his personal use at Mitre 10, provided he reimbursed the Respondent when the accounts were received by the Respondent. In August 2003, the Applicant booked up three items, which totalled $132.11. The Applicant agreed when cross-examined that Mr Pollard received the account in September 2003, Mr Pollard showed the Applicant the account and asked him to indicate which items were his. The Applicant did so. However, once he received the termination notice he was unable to pay the account because of his financial situation. He said he had to find money for a bond for the new house and it cost him $1,900 to move. He also said he was probably annoyed and did not want to pay it. The Applicant agreed when cross-examined that Mr Kennedy offered him the use of the park ute to move.

34 Apart from the matters in the receipts book it was put to the Applicant that he made a number of other errors. It was put to him that he had failed to record that a particular client had paid a deposit, which had not been recorded in the booking register, which meant that the client was not booked into the caravan park for 17 January 2004. The Applicant said that he recalls receiving the deposit on 29 September 2003 but because he had been told not to do anything with January 2004 reservations, as Mr Pollard did all the bookings for the holiday period, he did not enter that information into the booking register. He was also asked whether he had breached the Respondent's policy not to book any incoming clients on Christmas Day. He agreed that he had booked two groups to arrive on Christmas Day contrary to instructions. He said that was the only time they could come in. It was also put to the Applicant that he had allowed two ladies and a baby to occupy a chalet without recording the details in the books. This chalet had already been allocated to the relief caretakers, Betty and Tom, to occupy. The Applicant said that he did not make a record or charge them because they came in at 2:00 am in the morning because their house had been on fire. He agreed he did not tell Mr Pollard but he told Betty and Tom Reilly the next day.

35 The Applicant was cross-examined about discounts he had given to several clients, which was contrary to the Respondent's policy in respect of discounts. The Applicant had given discounts to some clients, who had stayed 3 nights by charging them for two nights. In at least one other case he had also discounted the charge by another 10%. The Applicant said that he was told on many occasions to charge only two nights when a client stayed for three. On the occasion he applied a further 10% discount he said the person concerned could have had applied for a discount card.

36 The Applicant agreed he had accessed the wages records. He said he did so because one employee said he was being paid $10 or $11 per hour and he (the Applicant) was entitled to look at those records because he was a manager. He agreed he did not prepare the wages. Further, he said he did not raise with Mr Kennedy the amount of wages paid to the employee.

The Respondent's Evidence

37 Ms Susan Strickland testified that she is an owner of the business together with Mr Kennedy. Ms Strickland lives in Perth. It is apparent from her evidence that she has little to do with the running of the caravan park. She only met the Applicant on one occasion and that was before he was employed. She said that it was an informal meeting which occurred one day after Mr and Mrs Pollard had finished work. They sat outside the caravan park house and had a beer. She said that she could recall telling the Applicant that if they sold the caravan park he would not have a job. When cross-examined she agreed that the Applicant's wife was present at that informal meeting and Mr and Mrs Pollard were not present all the time during the discussion as the telephone rang a number of times, which required one of them to answer the telephone from time to time. It was also put to Ms Strickland that she asked how the Applicant and his wife could handle living in the caravan park and said it would not be easy. She agreed that she may have said that but she could not recall what the Applicant said in reply.

38 Mr Kennedy testified that he is an owner and director of the Respondent. He confirmed that Mr and Mrs Pollard had been managers of the caravan park for nearly 10 years and they had suggested to him that the Applicant be employed. He said he could recall meeting the Applicant at a barbeque held at the caravan park sometime in 2003. He said he told the Applicant that Mr and Mrs Pollard had been employed for nine years, they needed some time off and they needed someone to help run the caravan park in a caretaker capacity. He said he recalls telling the Applicant that Mr and Mrs Pollard would still be managing the caravan park and he and his wife would be jointly employed with Mr and Mrs Pollard. Mr Kennedy said that when Mr and Mrs Pollard were away they usually asked Tom and Betty Reilly to come in and work as caretakers. Other times, Jenny Smith, the cleaner or Raymond Smith, the gardener sometimes filled in. On occasions, Mr Kennedy also filled in as caretaker. Mr Pollard's job description was to ensure that the guests were happy, the caravan park was making money, to employ people, to coordinate repairs, ensure bookings and associated paperwork were run smoothly and banking and payroll duties were properly completed. When Mr Pollard was away no major repairs were carried out on the caravan park.

39 Mr Kennedy testified that both Mr and Mrs Pollard remained the managers of the caravan park whilst the Applicant was employed. He said that although Mrs Pollard was not paid directly, her proceeds were paid directly to Mr Pollard. He said he had complete confidence in Mr and Mrs Pollard and the Applicant's allegations about them were unfounded. He said he thought they were fantastic managers. He testified that the Respondent's accountant checks all the books, wages and superannuation payments. He agreed that they did have a second receipt book at one stage because they had two offices and they tried a second receipt book to try to make it easier to run the paperwork. Further, he testified that Mr Pollard had the authority to purchase materials for his own use on the caravan park accounts provided those items were paid when the account came in. He also said that he was aware a lot of materials in Mr Pollard's home belonged to the caravan park and that was with his (Mr Kennedy's) permission. He also testified that Mr Pollard did not have the authority to purchase furniture or electrical goods for his house.

40 Mr Kennedy said he was aware there were problems with the Applicant performing his duties prior to 2 October 2003. Mr and Mrs Pollard had spoken to him about those problems and he was aware from the time the Applicant commenced employment that the books were not properly completed but Mr Kennedy did not speak to the Applicant about it. He left it up to Mr Pollard to deal with the issue as he is not involved in the day-to-day running of the caravan park. He also said that he expected the Applicant to report to Mr Pollard in relation to any major problems which occurred after hours and discuss it with him.

41 When cross-examined he said it had been reported to him that the Applicant upset one of their cleaners but again he did not raise that issue with the Applicant. He said he found it hard to talk to the Applicant. He also said the gardener informed him (Mr Kennedy) that he did not like the Applicant and was not getting on with him. He did not raise this with the Applicant, but he reported it to Mr Pollard. Mr Kennedy says he visits the caravan park several times a week and he speaks to his clients. During the course of the Applicant's employment, between 10 to 20 clients made negative comments about the Applicant's manner, in particular, when they said good morning to the Applicant the only response they got was a grunt. Again, Mr Kennedy did not address this issue with the Applicant.

42 In September 2003, Mr Pollard spoke to Mr Kennedy about the argument he had with the Applicant and as a result Mr Kennedy met with the Applicant on 2 October 2003. Mr Kennedy testified that at that meeting he told the Applicant that Mr Pollard had told him "things aren't working out. I've tried and tried to accommodate him and things aren't just working out." He said that he raised with the Applicant that he was not getting on with clients and staff and about not completing the bookwork properly, including not obtaining christian names of the clients. Mr Kennedy said that it was very important for first names of clients to be obtained because you may have five Smith's come in at Christmas. He said that he has been in the caravan park business for 25 years and people like to be remembered and be called by their christian names.

43 The Applicant's reaction was that he denied all the matters that Mr Kennedy put to him. He said the Applicant may have said he probably would try to do better but he (Mr Kennedy) was left with the impression that nothing was going to change. It was put to Mr Kennedy that he dropped the termination letter off. Mr Kennedy said that was not the case, he handed the termination letter personally to the Applicant. He said that the Applicant was obviously shocked when he gave him the termination letter. He offered him the caravan park ute and trailer to help shift his gear.

44 Mr Kennedy said that the rental value of the caravan park house provided to the Applicant was worth about $150 per week. His opinion is based on the fact that he rents two other houses on the edge of the caravan park which have three bedrooms. One is rented for less than $150 per week. In his opinion those houses have better amenity, although they are in much the same condition as the house which was occupied by the Applicant. They are on large blocks and have fences, gardens and privacy. The house occupied by the Applicant, whilst it has air-conditioning and polished boards, has no private outdoor area.

45 Mr Pollard testified that he and his wife had jointly managed the caravan park for almost 10 years. He met the Applicant a few times prior to Mrs Pollard approaching the Applicant to ask him whether he wanted to take up a position as caretaker at the caravan park. Mr Pollard maintains that at no time did he ever suggest to the Applicant that he would be engaged as a manager.

46 Mr Pollard said that when the Applicant commenced on a casual basis in January 2003, he assisted with the rubbish disposal and Mrs Pollard trained him how to complete the bookwork procedures. He says the bookwork is simple. He testified that the Applicant consistently made errors in the bookwork and he and Mrs Pollard both had severe doubts if he could carry out the work even before the Applicant commenced living in the caravan park in April 2003. Despite their doubts, Mr Pollard said that the Applicant told him that he could handle the work and Mr Pollard thought that with the training the Applicant had received and time, he should be able to do the job. He said he thought that if they persisted with the Applicant, eventually it would all come together and he would stop making so many errors.

47 Mr Pollard testified that he reviewed the cash receipts each week on Monday or Tuesday of the following week. While his wife organised the banking, he made notes on those cash receipts of the omissions to record matters in the other registers or omissions or errors in the receipts themselves. Mr Pollard maintains that the Applicant was asked a couple of times to correct those errors and nothing was done. Mr Pollard said that the Applicant's response was usually "here we go again". When cross-examined he said that 99% of the notations were made in the cash receipts book by him. In his evidence in chief, he said all of these notations were made whilst the Applicant was employed, on Monday or Tuesday of each week. When cross-examined he said that about 1% of the notations had been added in preparation for the case when he and his wife had gone through the cash receipts book. Mr Pollard conceded when cross-examined that he never put to the Applicant that if he did not improve his record keeping, his employment could be terminated.

48 In July 2003, Mr and Mrs Pollard took a two week holiday during the school holidays. He asked the Applicant if he wished to carry out his (Mr Pollard's) duties as holiday caretaker during that period and he made an offer to the Applicant that he be paid the same as the relief caretakers, that is, $500 per week and the house. He says the Applicant accepted the offer. During the holidays, Mr Pollard received a complaint from the cleaners that they had been told to go home early on more than one occasion when clients had late checkouts and the units were not cleaned until the next day. Arrangements should have been made for the cleaners to stay on at work and to clean after the clients had checked out. The Applicant denied that he had told the cleaners to go home and accused the head cleaner, Ms Smith, of lying. Mr Pollard said, however, that after he raised this issue with the Applicant he had no further complaints from the cleaners. Mr Pollard said that he also received a complaint from the gardener, Mr Smith, after the Applicant's employment was terminated. Mr Smith informed Mr Pollard that the Applicant had told him, he would be "the next to go". Mr Pollard said that he assured the gardener that his job was safe but he did not raise this issue with the Applicant. Mr Pollard said the Applicant had no authority to employ or dismiss people in the caravan park.

49 Mr Pollard testified that on 29 September 2003, he had an argument with the Applicant after he had left a note for the Applicant telling him to mark in the accommodation register whether a deposit had been rolled over. Mr Pollard said that he had informed the Applicant on numerous occasions in the past that he was required to do this, so on 29 September 2003, he decided to tackle the Applicant about a number of issues. Mr Pollard said that during the course of the conversation the Applicant told him that they (Mr and Mrs Pollard) were not required to work over the Christmas period or during the weekends of the Christmas holidays. He said the Applicant told him he would get his daughter and a friend to assist over that period and he (the Applicant) maintained that he was the co-manager of the caravan park. Mr Pollard said he told the Applicant that it was impossible for him to handle the work in a busy period as his performance had shown he could not completely handle his duties during quiet periods and he reminded him, the Applicant that he was the caretaker and that he, Mr Pollard, was the manager. The Applicant then informed Mr Pollard that complaints had been made by clients that Mrs Pollard had been abrupt to children in the caravan park and he had received complaints from clients. It was at this meeting, the issue about the cleaners was raised and Ms Smith came in and stated her version of events. The Applicant called Ms Smith a liar. During that conversation the Applicant also complained to Mr Pollard that Mrs Pollard had made sarcastic remarks to him (the Applicant) in the staff communications book. Mr Pollard informed the Applicant that those comments were made under his direction. When Mr Pollard was cross-examined in relation to this issue, neither party sought to tender the staff communication book into evidence. Also in this meeting, the Applicant told Mr Pollard that Mrs Pollard had no right to be in the caravan park as she was not employed as a manager or co-manager. As a result of what was said by the Applicant, Mr Pollard formed the view that it was unlikely the Applicant was going to improve. He told the Applicant that he was going to speak to Mr Kennedy about this situation. Mr Pollard then spoke to Mr Kennedy and Mr Kennedy later informed him that he was going to terminate the Applicant's employment.

50 After the Applicant was given the termination letter, Mr Pollard said the Applicant's standard of work did not improve. The Applicant refused to speak to him and Mrs Pollard and he refused to attend a handover at 4:00 pm each day between Monday and Friday. Mr Pollard testified that about this time, he and his wife went into Bunbury and bought some outdoor chairs, which they put on the side veranda of the caravan park house that was occupied by the Applicant. The Applicant told them that they could not leave their chairs there that the veranda was his property and the Applicant screamed at Mrs Pollard that she was not employed, she was to get off the park and she should not be there. The Applicant told Mr Pollard in an aggressive manner to get back to hospital because that was where he belonged.

51 Mr Pollard was cross-examined at length about a list of items contained in a handwritten list of four or five pages long. The Applicant put to Mr Pollard that he had purchased these items from Mitre 10 and other places for his own use, and he had not accounted for them in the Respondent's cashbook. The list was not tended into evidence but the Commission was shown a handwritten list of items. Mr Pollard looked at each one of those items and said, with the exception of three items on that list being a dust collector, a multi-stand and a timber toilet roll holder, all the items had been purchased for the caravan park. He said he made no purchases of goods to renovate his house in early 2003, as the renovation work was carried out by a builder. Mr Pollard conceded that he did not account for the three items in the cashbook and said he could not explain why they were not in the cashbook. When pressed why he did not put the items, which collectively cost about $130, in the cashbook, he said it was because he had taken them as a refund for items he had donated to the caravan park and the value of those items exceeded an amount of $1,500.

52 In relation to the allegation that Mr Pollard had authorised the Applicant to provide discounts on accommodation and sites, Mr Pollard testified that the Applicant had not followed instructions as to discounts. He said the arrangement was that in the

off-season, if a client stayed three nights they got the fourth night free; whereas, the Applicant had given discounts of one night when clients stayed three nights. In a couple of other cases he had given a further 10% discount when the policy was that only one discount should be given in any one case.

53 Mrs Pamela Pollard testified that she is employed as a Physical Education Teacher at West Busselton Primary School. She works as a teacher from Tuesday to Friday of each week. She is also employed as a manageress of the Respondent's caravan park together with her husband, Mr Pollard. Mrs Pollard has known the Applicant for about five and a half years. She approached the Applicant in the middle of the year in 2002, to take up a position of caretaker at the caravan park. It was anticipated that she and her husband would not work on weekends except during the busy times when she and her husband would be required to work. She testified that when the Applicant was a casual employee, she showed him step by step all the details that needed to be recorded in the registers. For example, in respect of each cash receipt she explained it was important for him to make a note of the client's christian and surnames, the money paid in words, the number of people (including whether they were adults or children) the type of site or accommodation and the number of nights they stayed. She also said it was important to record in the guest register, the vehicle registration, the number of adults and children, their address, their arrival and departure date and site or accommodation number. She said the keeping of a guest register by the caravan park is a requirement of the Royal Automobile Club. In the quiet times, the Applicant was required to tick the guest register when payment was made and in the busy times, he was required to mark the spreadsheets. She said it was also important to record in the site book what site people were occupying and she showed him how to make a note of what sites had been allocated to a booking. She also explained how it was important to note whether deposits were deducted when the client paid for their accommodation or whether they were rolled over to a future booking.

54 Mrs Pollard says she told the Applicant she was manageress and she told him if he needed any advice or help to ask her for assistance if Mr Pollard was not around.

55 Mrs Pollard said when the Applicant moved to the caravan park in April 2003, she could not recall any specific errors he had made but she recalled that he had made some errors in the cash receipts book. She said that she helps Mr Pollard run the caravan park on each Monday. Whilst the Applicant was employed she assisted Mr Pollard with checking the book entries made by the Applicant. Each week she would check the guest register and other registers. She said that she saw Mr Pollard make notations of errors, made by the Applicant, in the receipts book. She conceded when cross-examined that up to 5% of the notations in the cash receipts book were additions made in preparation for the hearing of this case and they had not been made at the time the Applicant was employed.

56 Mrs Pollard said that she approached the Applicant on more than one occasion about the standard of his work. Sometime late on a Sunday in August 2003, she visited the caravan park office and saw that the Applicant had the guest register book open. She looked at the book and saw that the christian names of a lot of clients were not recorded. She had asked him on a number of previous occasions to put the christian names in the guest register. When she raised it with him on this day, the Applicant told her that he was not going to ask people for their christian names because a lot of people who stayed in the caravan park were older than him. Mrs Pollard became short tempered and tried to explain to him that they ran a caravan park on a personal basis and it was important to obtain the christian names of clients.

57 On other occasions, she had spoken to him about putting bookings on the cleaners board so the cleaners would be aware what accommodation needed to be cleaned and eventually the Applicant did that. Mrs Pollard also said she had instructed the Applicant to put all the big notes in the safe each evening at 6:00 pm including any big bags of cash. The Applicant did not do that on at least six or seven occasions.

58 Mrs Pollard also gave evidence in relation to the incident that occurred after the Applicant had been given notice of termination which concerned the outdoor chairs. Her evidence was substantially the same as Mr Pollard's.

59 Mrs Pollard said that whilst the Applicant was employed she had direct contact with him on about 50 occasions and on at least half of those occasions she would speak to him about the way he was doing his job and she would ask him whether he had any questions. Mrs Pollard also conceded when cross-examined that she never informed the Applicant at any stage that his job was in jeopardy if he did not carry out her instructions.

Submissions

60 Counsel on behalf of the Respondent submitted that at the end of the day it does not matter if the Commission makes a finding whether the Applicant was employed as a caretaker or manager, it is plain that the Applicant failed to properly carry out his duties, which were relatively simple. In any event, the Respondent submits there is no basis for the Applicant to assume that he was a manager, that was simply an assumption made by him. He had no managerial duties. Further, the Applicant is unable to make out a case that he was not given sufficient training. The Respondent's counsel pointed out that Mrs Pollard's evidence that the Applicant was provided with appropriate training was not challenged in cross-examination. Further, an examination of the cash receipts shows a consistent and substantial failure by the Applicant to perform his duties.

61 The Respondent concedes that it gave no warning to the Applicant that if he did not improve his performance he would lose his job. The Respondent contends that its failure to give the Applicant a warning is not fatal to the Respondent's case because it is clear from the cash receipts book that the Applicant consistently failed to comply with Mrs Pollard's instructions and to hold the Respondent accountable for this failure to warn the Applicant would simply punish the Respondent for being lenient.

62 When these issues were raised with the Applicant by Mr Pollard on 29 September 2003, if the Applicant had shown any contrition, it was unlikely he would have lost his job. It is submitted on behalf of the Respondent that the Applicant's contentions that the receipt book recorded notations are fabricated after the event cannot be made out and this accusation is consistent with his poor attitude to Mr and Mrs Pollard. Yet, he launched an attack on Mrs Pollard, which would leave any employer with the view that this was a hopeless situation, which could not continue. Further, the allegations made by the Applicant against the Pollard's are consistent with an antagonistic employee. It is contended that the basis of his allegations are without foundation and the making of such allegations against the Pollard's are also grounds for dismissal. It is apparent from the evidence the Applicant was never prepared to change his ways. Further, the conduct of the Applicant in looking at the payroll records of other employees constituted an invasion of the Respondent's privacy, which is also grounds for dismissal.

63 Alternatively, if in the event, the Commission finds the Applicant's termination is unfair the only basis for doing so is that the Applicant was not warned that his employment was in jeopardy if he did not improve his performance. If such a finding is made, the Commissioner is required to assess the value of the house that was provided to the Applicant. It is contended on behalf of the Respondent that the evidence is inadequate on both sides and that the onus of proof is on the Applicant to prove the value of the house. As the Applicant has failed to adduce any expert evidence in relation to this issue the Commission should accept the low level value given by Mr Kennedy as a concession that the house was worth $150 per week. The Respondent also contends that the Applicant failed to adequately mitigate his loss and that the Commission should take into

account the Respondent's offer made to the Applicant of $2,000 to settle his claim prior to the proceedings in the Commission commencing.

64 The Applicant conceded in his closing submission that a lot of what the Respondent's counsel has said, in a lot of ways, is very true. He however, he says he gave up a rental of the house his family had rented for 10 years on the basis they believed they would be working for the Respondent for at least five years. He says he was given insufficient training. He also contends that the bookwork was the most difficult part of the job and despite not giving evidence on this point, he submitted that the bookwork procedures were time consuming and time wasting. He conceded that no one told him that once Mr and Mrs Pollard moved out of the caravan park that Mrs Pollard would not continue to be a manager. Further, he agreed that he made mistakes but says that the receipts which were tendered into evidence amount to about 130 receipts out of 1,700, which were issued during the period of his employment. Consequently, he says that an inference can be drawn that not a lot of mistakes were made by him during the period of his employment. He also said that he does not quibble with 80% of the receipts but says that they did not constitute a warning his job was in jeopardy. Further, he maintained that it was still his view that Mrs Pollard was far too involved in the running of the caravan park. When asked by the Commission if he had known that his job was in jeopardy what steps would he have taken to do things differently? He said, "I would have kept my mouth fairly well closed. I don't think I would have changed the way I was doing things because if we look at the receipts … after July, there were a lot less errors."

65 As to the duty to mitigate, the Applicant contends that he has taken sufficient steps to mitigate his loss. He says that it is difficult to find a job that offers accommodation and work on weekends, as any additional work has to fit around his teaching hours.

Credibility and Findings

66 Where the evidence of the Applicant and the evidence of Mr Kennedy, Mr Pollard and Mrs Pollard conflict I prefer the evidence given by Mr Kennedy, Mr Pollard and Mrs Pollard to the evidence given by the Applicant. There was no real conflict between the evidence of the Applicant and Ms Strickland. Further, there was not a wide divergence of the evidence of the Applicant and other witnesses in many respects.

67 In many aspects I found the Applicant's evidence to be unsatisfactory. In particular, I do not accept that he did not know he had to make an appropriate note of when a client rolled over a deposit on an accommodation unit on a future booking. Deposits can only be rolled over on the instruction of a client. His contention that he stopped making mistakes in the books in July 2003 is not supported by the extracts from the receipt books (Exhibit D). Further, I do not accept the Applicant's evidence the bookwork was complicated or he had insufficient training. Plainly, the book-keeping notations he was required to make were extremely simple and cannot be said to be time consuming. The Applicant is an intelligent educated man. Plainly, he thought the booking tasks were repetitive and time wasting. Clearly, from the receipts books he often completed all the necessary details correctly. Consequently, it is clear to me that his approach to record keeping was sloppy. Whilst ongoing errors may not cause much disruption to the Respondent's business during the off-season, one can imagine that would be the case during the Christmas peak.

68 It is apparent that the Applicant's view of his role was and is misconceived. Further, it is apparent that he paid insufficient attention to his duties. Further, I find that the allegations of impropriety and embezzlement he makes against Mr and Mrs Pollard are without foundation. Mr Pollard was only cross-examined about items that were purchased at Mitre 10 and other businesses on the Respondent's accounts. It was apparent from the list of items and the explanation given by Mr Pollard that none of the items purchased were for the renovation of Mr and Mrs Pollard's house. Whilst I did not find Mr Pollard's explanation as to why he did not account for three items in the Respondent's cash receipt book entirely satisfactory, the allegations made by the Applicant are plainly mischievous.

Legal Principles

69 Kenner C in *Scott v Consolidated Paper Industries (WA) Pty Ltd* (1998) 78 WAIG 4940 made a clear statement of the law in respect of industrial fairness where poor performance of an employee is raised. In *Scott v Consolidated Paper Industries (WA) Pty Ltd* (op cit) Kenner C observed at 4943:

> "… that it is not for the Commission to assume the role of the manager in considering whether the dismissal is or is not unfair. The test is an objective one in accordance with the Commission's duty pursuant to s.26(1)(a) and (c) of the Act.
>
> Moreover, contemporary standards of industrial fairness require in my view, that before an employee is dismissed, the employee be given some fair warning that his or her employment is at risk if his of her performance or conduct does not improve as required by the employer. This requires more than a mere exhortation to improve and should place the employee in the position of being in no doubt that their employment may be terminated, unless they take appropriate remedial steps: *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 3635. It should be emphasised that whether an employee is afforded procedural fairness is but one factor for the Commission to consider, however it may be a most important factor, depending upon the circumstances of the particular case: *Shire of Esperance v Mouritz* (1991) 71 WAIG 891. It follows however, that a dismissal will not necessarily be unfair in the event of procedural unfairness alone, as all the circumstances need to be considered."

70 It is common ground that the Applicant was given no notice that his employment was at risk if his performance and attitude towards Mrs Pollard did not improve. The failure to do so, in my opinion, was industrially unfair. Whilst it appears that if the Applicant was given such a warning his shortcomings would not have improved. However, he was not given such an opportunity. In my view, given October was still a quiet time, he should have been given four weeks to improve before he was terminated. I assess the loss caused by his unfair dismissal as the loss of being employed for four weeks prior to being given notice of termination

71 I will make an order that he be paid four weeks' remuneration, being wages assessed at $200 per week and the value of the house at $150 per week. In assessing the value of the house I accept the submission made on behalf of the Respondent that the Applicant has not satisfied his onus of proof in respect of the value of the caravan park house occupied by him. His evidence was at the highest anecdotal. Further, I accept the evidence given by Mr Kennedy that the value of the house was diminished by its lack of outdoor privacy. I am unable to assess the value of the free gas, electricity and telephone calls provided to the Applicant by the Respondent as the Applicant did not adduce any evidence in relation to the value of these items. In light of my findings I will make an order that the Respondent pay to the Applicant $1,400 as compensation.

Claim for Contractual Benefits

72 For the Applicant's claims to succeed, he must prove that he entered into a binding contract with the Respondent to work for a five year term, whereby the term could not be unaffixed by notice. First of all there must be an offer which is accepted. For the Applicant's words to Ms Strickland to constitute a binding and enforceable contract, the words used by him must be certain.

Vague, ambiguous or imprecise expressions of contractual promises are unenforceable (see *Cheshire and Fifoot's Law of Contract* (6th Australian Ed) at [157 – 161]). A statement to Ms Strickland that "we would stick it out for at least five years", in my view cannot constitute an offer to enter into a five year term that cannot be terminated by the giving of reasonable notice. Further, it is apparent from the Applicant's evidence that even if the words used by the Applicant could be said to be certain it cannot be said that she accepted the Applicant's terms. His evidence was that she told him, "Well just remember if we sell the business we can't guarantee your employment."

73 In light of these finding I will make an order dismissing the Applicant's claim that he is owed benefits pursuant to his contract of employment.

2004 WAIRC 12058

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JONATHON ROBERT FOULDS
	APPLICANT
	-v-
	AVIAN PTY LTD - TRADING AS ACACIA CARAVAN PARK
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	TUESDAY, 20 JULY 2004
FILE NO.	APPLICATION 1743 OF 2003
CITATION NO.	2004 WAIRC 12058

Result	Declaration that the Applicant was unfairly dismissed. Order made that the Respondent pay the Applicant $1,400. Claim for contractual benefits dismissed.
Representation	
Applicant	In person
Respondent	Mr D F Beere (of counsel)

Order

HAVING heard Mr J R Foulds and Mr D F Beere of counsel on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby:

(1) DECLARES that the Applicant was unfairly dismissed;

(2) ORDERS that the Respondent pay to the Applicant within 14 days of the date of this order, the sum of $1,400;

(3) ORDERS that the application is otherwise hereby dismissed.

(Sgd.) J H SMITH,
[L.S.] Commissioner.

2004 WAIRC 12263

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARION RENEE GARDNER
	APPLICANT
	-v-
	KALDENT PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 6 AUGUST 2004
FILE NO	APPLICATION 1318 OF 2003
CITATION NO.	2004 WAIRC 12263

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal – Summary Dismissal – Breach of trust and confidence - Lack of Procedural Fairness - Fair go all round afforded – *Industrial Relations Act 1979* (WA) s 29(1)(b)(i)
Result	Application dismissed
Representation	
Applicant	Ms L Ellery of Counsel
Respondent	Mr A Dungey of Counsel

Reasons for Decision

1 This is an application made pursuant to s.29(1)(b)(i) of the *Industrial Relations Act, 1979* ("the Act"). Ms Gardner was employed as a dental nurse in the respondent's dental practice in Kalgoorlie for the period 11 June 2002 to 12 August 2003. Ms Gardner says in her application as follows:

"My employer was unhappy in September 2002 when I discovered I had a dermatological condition which was most likely work related. When a previous dental nurse asked for her old job back, Dr Dawson started cutting my hours and giving them to her. I became distressed and depressed about this and started up my own gardening business to supplement my reduced income. As a result of workplace stress, I suffered an emotional breakdown on 5 August 2003 and was certified unfit for work for a week. I gave the certificate to Dr Dawson. He delivered a letter to me while I was sick asking me to attend a meeting to explain why I had continued my gardening business whilst certified unfit for work. My solicitor wrote to him to postpone the meeting until the following week so I could respond. He refused and terminated my employment whilst I was on sick leave. He advertised for a part-time dental nurse three days before terminating my position."

2 The applicant does not seek reinstatement as she considers that relations have broken down to such an extent that reinstatement would be impracticable.

3 The respondent says that Ms Gardner was dismissed for gross dishonesty in that she misled her work colleagues and her employer by indicating that she was suffering a life threatening illness and instead whilst off sick was attending to a private gardening business. Evidence was given by the applicant, and for the respondent by Dr Peter Dawson, the dentist and proprietor of the business, Ms Allison Clarke, a dental assistant and Ms Annette Siggs, a dental assistant.

4 Ms Gardner gave evidence that her duties for Dr Dawson were to help him with dental care of patients, cleaning the surgery and emptying the bins. She enjoyed her work but suffered a dermatological complaint in 2002, and required medical attention. She told Dr Dawson about her complaint in October 2002 and he tried various approaches to investigate whether something at work caused the condition. She says that since she stopped work it has not come back. She had to take some time off work to attend for medical treatment. In April or May 2003 she found a lump in her breast and given her medical history was concerned that she might have cancer. She was referred to the Breast Clinic in Perth. She advised Dr Dawson of this. He encouraged her to take time-off.

5 Ms Gardner says that he also encouraged her to take time off to spend with her son who lived in America and visited Kalgoorlie a few times a year. Dr Dawson assured her that Ms Siggs would be available to cover her absences. Ms Gardner says that she did not want to take the time off as she wanted to keep working to take her mind off her troubles. She also thought that if she kept working then she would have time banked for when she needed to go to Perth for treatment. She stopped working Mondays and Fridays. She was paid for these days. She worked this pattern for about 4 weeks prior to her dismissal. She says that she felt stressed, anxious and bullied.

6 On 7 July 2003 Dr Dawson called a staff meeting and asked Ms Gardner to attend at the end of the day. Ms Gardner says that she was ill that day but attended nevertheless. Dr Dawson offered to pay for her to go to Perth to get treated at the Breast Clinic. Ms Gardner tried to explain that it could not be done so simply and that she needed to go through the doctors.

7 On the night of 5 August 2003 Ms Gardner says that she had an emotional breakdown and her partner took her to the accident and emergency where she underwent blood tests, was put under observation and then discharged. Ms Gardner then attended an appointment with her doctor, Dr Sampson at 12:15 on 6 August 2003. Dr Sampson upgraded her anti-depressant medication and certified her unfit for work for 10 days. Prior to her appointment with Dr Sampson she received a call from a woman who wanted some yard work done. Ms Gardner said that she had started up a landscaping business and had made up cards and distributed them. She did this because her brother was coming from America and he needed something to produce an income. The business was set up for him; albeit it was in her name. Ms Gardner said that the woman rang back after 2:00 pm. She appeared aggressive and indicated that she wanted her yard done. Ms Gardner advised her that she could not do it; she says that the woman was insistent and hence she agreed to do her yard that afternoon.

8 Ms Gardner went to an address in Piesse Street, Boulder and quoted on the job. She then went home and went to bed. The next morning on 7 August 2003, the same woman called again and asked her to do the job. Ms Gardner suggested that she get someone else to do it but the woman was not satisfied with that. Ms Gardner then went and did the work. She wrote a receipt for the woman on a piece of paper. Ms Gardner says the woman would not give her name but her husband's name was Neil. On 8 August 2003 Ms Gardner says that Dr Dawson came knocking on her door in the morning and asked if she was home. Her son answered the door and Dr Dawson gave him a letter addressed to her asking her to attend a meeting at 4:10 pm to give a full explanation as to why her employment should not be immediately terminated [Exhibit A3]. Ms Gardner contacted Ms Ellery her solicitor. Ms Ellery wrote to the respondent at the applicant's request [Exhibit A4]. Ms Gardner says that she was not mentally capable of attending the meeting. She asked that the meeting be postponed. She says as a result of the letter she was terminated. Ms Gardner received a letter in response [Exhibit A5].

9 Ms Gardner exhibited an advertisement in the Kalgoorlie Miner 2003 on 9 August 2003 for a part time dental nurse for the respondent's practice [Exhibit A6].

10 During the week of 11 to 15 August Ms Gardner attended the Breast Clinic in Perth and underwent a series of tests. The final results were negative. She was advised to come back every four to six months for a check up. Ms Gardner says she last worked for the respondent in the last week of July. She was on sick leave at the time and covered by a medical certificate from Dr Sampson. She was not paid in August as she says Dr Dawson indicated she did not have any sick leave left. Ms Gardner's medical records were tendered and sealed [Exhibit A7].

11 After her dismissal Ms Gardner says she started to mow lawns to ensure money would come in. She says prior to the woman calling her she only had one customer for the gardening business and that was a part time dental nurse at the surgery. Ms Gardner closed down her gardening business at the beginning of March 2004. Ms Gardner tendered a list of earnings from her business [Exhibit A8]. She did not receive any income other than that. She applied for a job at the regional prison and sought to do a training course in the mining industry.

12 Under cross-examination Ms Gardner says that she commenced seeing Dr Sampson in September 2002 but did not receive time off from work to see her until November or December 2002. She says Dr Dawson appeared concerned for her welfare and did patch tests on her for the chemicals at the surgery. She says Dr Dawson was not angry with her; she says, "Dr Dawson does not get upset or angry period". He was not unhappy with her. He was concerned about having a dental nurse there to do the work for him. Ms Gardner says in relation to her dermatological complaint that Dr Dawson did all that she asked him to do or asked him to consider (transcript p.34).

13 Ms Gardner says that she told Dr Sampson in February or March 2003 about the lumps in her breast. She advised Dr Dawson of this in April or May 2003. Ms Gardner then says a mixture of dates in relation to when she advised Dr Dawson. Her doctor's referral to the Perth breast clinic was signed in July 2003.

14 In the first week of July Ms Gardner says she had one or two days off work at short notice. She then attended the staff meeting on 7 July 2003. At the meeting were Dr Dawson, Alison Clarke, Jay (the receptionist) and two other staff members. She

discussed freely her health problems with the other staff. She denies that she told Dr Dawson that she was undergoing chemotherapy at that time. She denies that she said she was scheduled for breast cancer surgery. She says that she advised that she was going to the breast clinic and if she needed surgery it will probably be in September or October 2003. Dr Dawson drafted a letter to Dr Sampson asking whether surgery could be brought forward. Ms Gardner asked Dr Dawson, when she saw the letter, not to get involved. Dr Dawson offered to pay for her flights to Perth. He offered to help her financially but Ms Gardner says she did not want to be obligated to him. She advised the staff that she did not need any money because she had just received a quarter of a million dollars from the sale of her property in the United States. Ms Gardner says that Dr Dawson asked about her mental status and she did not inform him that she was being counselled and treated for depression (transcript p.39). She agrees that the problems she was having with her partner and teenage son were part of her depression. She mentioned these problems to Dr Dawson.

15 At the meeting on 7 July 2003 Ms Gardner told Dr Dawson that she would need more time off. He advised her that a former staff member would be available to fill in for her. He asked her to liaise with that dental nurse about the time off. Ms Gardner then had the following exchange:

> "And you in fact arranged with Annette to take Mondays and Fridays off?---It was only supposed to be in the morning but when I show up at 1 o'clock after lunchtime she gets upset. "What - - what are you doing here?" you know.
>
> Okay. So you agree that you - - you did - - you say - - ?---I did not talk with her.
>
> - - you did make that arrangement to take time off but you say it was only on the mornings of Mondays and Fridays?---Yes.
>
> Okay. And that was because you told - - you told everyone at that meeting that you were taking medication on a Wednesday and a Saturday and that Mondays and Fridays were your worst days in response to that medication?---Yes" (Transcript p.41)

16 Ms Gardner says that Dr Dawson pressured her to take time off. She says she advised Dr Dawson that her breast cancer was not life threatening. Ms Gardner then says that Ms Siggs indicated that Mondays and Fridays would suit her best. She says Mondays and Fridays suited both of them and then of the arrangements she says, "I wasn't mutual to any of it." (Transcript p.42)

17 Ms Gardner accepts that the general practice was very busy most days. She says that Ms Siggs was supposed to be available at short notice. She did not expect her to be available at the drop of her hat but at a few hours notice. She accepts that in the end the decision not to work Mondays and Fridays was hers but she says she felt pressure. She says, "I was already under extreme stress and I was depressed and pressuring me at work was no good" (Transcript p.43). She says that when she was no longer an asset to him (ie Dr Dawson) he started giving her a hard time. She agrees that she never ever said to Dr Dawson that she did not want to take more time off and that she wanted to be back at work. Ms Gardner says that her hours were reduced and Ms Siggs commenced working after the staff meeting in July.

18 Ms Gardner applied to register the gardening business in June. On 5 August 2003 Ms Gardner told Jay, a fellow employee that she had a super infection and would be having a nap all afternoon. Ms Gardner denies that she lied to her fellow employees about her medical condition. She says she did not mention her depression as it is a very taboo thing. She says she did not tell Dr Dawson and her fellow employees that she had in fact been diagnosed with breast cancer and that she was having surgery to remove it. She has not applied for a nursing position or enrolled nursing positions since her termination. She agrees that there is a shortage of nursing staff in Kalgoorlie. She says she does not have qualification in Australia for a registered nurse and would have to do a bridging qualification before she enrolled as a nurse. She did not apply for a carer's assistant either. She says she would prefer not to be in the medical profession at this point in time. Ms Gardner says that she told Ms Clarke and Dr Dawson about the problem with her breast at about the same time. Ms Clarke encouraged Ms Gardner to tell Dr Dawson as he would then be aware of what was happening and be more sympathetic. He would have more understanding of her medical needs. Ms Gardner says that she advised staff at the meeting on 7 July 2003 that she had the money from America transferred into her bank account. The money in fact was sitting in her American bank account. She did this because she did not want Dr Dawson to think that she needed money.

19 Dr Peter Dawson gave evidence that he has been a dentist for 20 years and has worked in Kalgoorlie for 10 years. At the time of Ms Gardner's employment he employed Ms Gardner on a full time basis, Allison Clarke on a part time basis (Monday to Friday, 8:30 am to 1:00 pm each day) and Jay as a full time receptionist/bookkeeper. He currently has the same ratio of staff in his practice. He first heard that Ms Gardner had medical problems approximately 4 months into her employment. Ms Gardner says she had a skin irritation and showed Dr Dawson her hands. She mentioned she was seeing her general practitioner about the complaint as well as a Dr Clay, and that she was having some tests done by a dermatologist in Fremantle. Dr Dawson did some patch tests to eliminate any reaction to drugs or chemicals in the surgery. He ordered some latex non allergenic gloves and allowed Ms Gardner to attend medical visits.

20 He first discovered Ms Gardner had an issue with breast cancer in early July. She approached him and advised him that she had been diagnosed with breast cancer and would need to schedule some time off to get treatment. He says that he indicated he was saddened by her news and the practice would do its utmost to fit in with her treatment. The following Monday he organised a meeting of staff. He says the meeting was to confirm Ms Gardner's health status, to schedule staffing arrangements and provide whatever support they could. He says Ms Gardner phoned in ill on that day and he asked Jay to contact her. At that meeting he says that she confirmed that she had been diagnosed with breast cancer. He says he drafted a letter to the Breast Clinic, which she sighted, to bring forward the date of operation. He volunteered to pay for her return airfares to Perth. He says Ms Gardner indicated that she had sold her house in America and so had funds deposited in the bank in the ANZ bank in Kalgoorlie. Dr Dawson says that Ms Gardner indicated that the breast surgery would occur in Perth in August. He asked Ms Gardner to liaise with Ms Siggs to take the time off she required for her medical treatment. Ms Gardner indicated she would talk to Ms Siggs directly. Dr Dawson says that Ms Gardner indicated that she was under a course of chemotherapy and taking medication and felt worse on Mondays and Fridays so required those days off. He was not aware that she was suffering from depression and says the first indication he had of that was her solicitor's letter of 8 August 2003. Ms Gardner also mentioned her son was visiting from the States; that she was having difficulties with her partner and she may wish to take some time off. Dr Dawson denies that he made any mention of reducing her hours. He says at no time did Ms Gardner indicate that Ms Siggs was forcing her to take time off.

21 Dr Dawson became aware of Ms Gardner's gardening business about the time of the meeting on 7 July 2003. Dr Dawson says that shortly after the meeting on 7 July 2003 he began to doubt Ms Gardner. He says that Ms Siggs who was helping out at the time also expressed deep cynicism (transcript p.77). He says that Ms Gardner was expected to be at work at 8am on 5 August 2003. He had scheduled about 20-25 patients for the day and by 9am he had no dental nurse. Ms Gardner telephoned the receptionist to say that she had been to the hospital, had a super infection, needed to sleep and could not be contacted until

5pm. On 6 August 2003 a medical certificate was put under the door of the surgery to say that Ms Gardner was sick that week and the following week. On 7 August 2003 Dr Dawson discovered that Ms Gardner had attended to a gardening job rather than come to work. He says that both the staff and he felt highly misled. Ms Clarke and Ms Siggs had been under strain not knowing the day to day staffing arrangements. Dr Dawson consequently drafted a letter to Ms Gardner which he had his solicitor clear before sending it.

22 Dr Dawson says that he placed the advertisement for a dental nurse in the Kalgoorlie Miner on 7 or 8 August 2003. He says that he had not made up his mind to dismiss Ms Gardner at that time but wanted staff to interview if he was not happy with the explanation which he received from Ms Gardner. He then received a reply to his letter which admitted that she had lied to him and that she had been suffering depression for sometime. He contacted Dr Sampson the next day who advised that the medical certificates were for Ms Gardner's skin condition and that she had not been diagnosed with breast cancer whatsoever. In response to Dr Dawson's comment "how is the breast cancer situation", Dr Dawson says that Dr Sampson replied "news to me". This was different to the message he gained from the meeting on 7 July 2003 which was that Ms Gardner was scheduled for invasive surgery.

23 Dr Dawson says that Ms Gardner had run out of sick leave prior to her dismissal and hence her pay reduced. He says that Ms Siggs only ever provided relief nursing; she has not been employed in a full-time capacity since Ms Gardner's dismissal (Transcript p.81).

24 Under cross-examination Dr Dawson says that several days before the staff meeting on 7 July 2003 Ms Gardner came to his office and said that she had a lump in her breast, had been diagnosed with breast cancer that needed treatment, that she had had breast cancer before and that this was her fourth bout. She mentioned that a few weeks down the track she would require surgery. Ms Gardner mentioned that she did not want sympathy. She said this again at the meeting on 7 July 2003.

25 Dr Dawson approved Ms Siggs' plan to set up an offer of gardening work for Ms Gardner. He says that he wanted to clarify the statements which Ms Gardner had made to staff; to get the truth. He thought that if she was fit enough to do the gardening work then she was fit enough to attend the surgery. He never asked Ms Gardner if he could speak to her doctor to get clarification and he did not approach Ms Gardner and ask her to explain until after the gardening incident when he wrote her a letter. At that time he had a medical certificate from Ms Gardner stating that she was unfit for work. On the basis of Dr Sampson's comments and Ms Gardner's actions and statements Dr Dawson decided to terminate her employment (transcript p.96). He dismissed her for gross dishonesty.

26 Dr Dawson says that he put an advertisement in the newspaper for a part-time dental nurse as he wanted to see who was available in the workforce and to be able to quickly interview candidates. He does not answer adequately why he did not seek a full-time dental nurse. He says also that Ms Siggs continues to work for him on a part-time basis (Transcript p.110-111). A new employee would have to co-ordinate with Ms Clarke and Ms Siggs the hours to be worked (Transcript p.111).

27 Ms Allison Clarke gave evidence that Ms Gardner was a reliable, diligent worker but that this changed just before Ms Gardner told Ms Clarke that she had breast cancer. A few months prior to that Ms Clarke started working full days as Ms Gardner was having time off. Ms Gardner told Ms Clarke of her breast cancer on 2 July 2003. She encouraged Ms Gardner to tell Dr Dawson. At the meeting on 7 July 2003 Ms Clarke says as follows:

> "Okay. And I think you were about to start telling us or what was said at the meeting with Peter?---Oh, Peter asked was there anything he could do, arrange flights, speak to her doctor, did she have financial worries about, you know, getting all the treatment that she needed, that this work hours, we could try and work something out between all of us. He suggested that we ask Annette - - that Marion and Annette liaison - - sort of speak about what would be best for Marion, what hours - -" (Transcript p.126).

28 Ms Clarke also remembers Ms Gardner stating that she was undergoing chemotherapy for breast cancer and that she was to have an operation. Ms Gardner requested that she have Mondays and Fridays off due to the medication that she was taking. Ms Gardner was to speak to Ms Siggs and organise this.

29 Ms Clarke says that her colleagues were trying to help Ms Gardner. She says that she felt sorry for Ms Gardner, but that she had three children and she could not keep working full-time to cover her absences. She says that she had to fill in for Ms Gardner on afternoons fairly frequently.

30 Under cross-examination Ms Clarke says that after the meeting on 7 July 2003 Ms Siggs started working Mondays and Fridays. Ms Clarke returned to working mornings on Monday through to Friday. Ms Clarke says that she was aware that Ms Gardner was being set up regarding the quote and the request to do the gardening work. She was aware that photos were being taken. Ms Clarke says that she was puzzled as to how Ms Gardner could be doing gardening when she was off sick and the surgery needed her.

31 Ms Annette Siggs gave evidence that she had worked for Dr Dawson previously, but that in July 2003 she went to relieve for Ms Gardner on a regular basis. Ms Siggs was working at the Kalgoorlie Miners and Prospectors Hall of Fame at that time. She had done some relief in the preceding months as Ms Gardner was off sick fairly regularly. Ms Gardner had indicated that she was undergoing chemotherapy and was ill from the drugs hence she needed the days off. Ms Siggs said that she took Ms Gardner's word for it and believed her at first. Ms Gardner requested Mondays and Fridays off. She became suspicious because Dr Dawson sought to help Ms Gardner with her dates for breast surgery and Ms Gardner resisted; Ms Siggs saw Ms Gardner driving around in her working gear (ie for gardening).

32 Ms Siggs says that Ms Gardner did not liaise regularly with her about times. She says that Dr Dawson contacted her most of the time to ask her to work. On 5 August 2003 Ms Siggs says that the receptionist advised her that Ms Gardner had called in sick and indicated that she had a super infection and needed to rest. Ms Gardner had said that she needed surgery for breast cancer. Ms Siggs thought of a plan to expose her and put this to Dr Dawson who agreed. She continued to work for Dr Dawson after Ms Gardner was dismissed. She does not think she knew that Ms Gardner did not have cancer at the time of her dismissal. Ms Siggs says that she was under a lot of pressure in juggling her various commitments.

33 Mr Dungey for the respondent says that Ms Gardner lied to her employer and work colleagues about her medical condition. It is a small work environment; they sought to assist Ms Gardner and were repaid with deceit and a breach of trust. This was highlighted finally by the events of 5 and 7 August. This was not a "sting". The respondent simply wanted the truth. Mr Dungey submitted, somewhat incredibly as there was no basis in evidence or law, that Ms Gardner was a casual employee at the time of her dismissal. He further submitted that the employment relationship could not have lasted.

34 Ms Ellery submitted on behalf of the applicant that Dr Dawson was annoyed about Ms Gardner's dermatological condition. Ms Gardner did not say that she had breast cancer, she said that she had to attend the Breast Clinic in Perth. Ms Gardner was not keen on Ms Siggs taking over her hours; she thought Ms Siggs wanted her job. She submitted that it is clear that Dr Dawson wanted to replace Ms Gardner with Ms Siggs. Ms Ellery submitted that Ms Gardner was bullied to take time off. The witnesses on behalf of the respondent had colluded in giving their evidence in her submission. Ms Ellery says that at the time

of Ms Gardner's dismissal she was suffering a breakdown and could not face the respondent. She asked for more time before having a meeting and this was refused. Dr Dawson decided not to allow more time given what he says Dr Sampson had said to him. Ms Ellery submitted that once Dr Dawson found that he could not get Ms Siggs to work more often then he advertised for a new dental nurse. Ms Gardner's services were terminated whilst she was absent and had a medical certificate covering this absence.

35 The evidence of Ms Gardner was often inconsistent. One example being the dates on which she told Dr Dawson and Ms Clarke about her breast condition. The answers which Ms Gardner gave were at times drawn reluctantly from her. She would revert from the detail to a general impression which she wanted to leave. An example of this being quite specific answers to the assistance which she received from Dr Dawson and co-workers and then her more generalised statements that she was bullied. The facts and the general impression did not sit well together. Ms Gardner on her evidence was having some considerable difficulties in her personal life, and yet she blamed the bulk of her difficulties and stress on her work life. Ms Gardner admitted that she sought to have Monday and Friday off as these were the days when she was more affected by medication, and yet she wanted to convey the impression that she was forced into reduced hours. She agreed to discuss with Ms Siggs the relief she required so as to have time off and then on her own evidence expected Ms Siggs to be available at short notice to fill in for her if she felt unwell. This was clearly on Ms Gardner's evidence a source of considerable complaint for her yet I do not consider her approach to be reasonable. Obviously Ms Siggs needed to have some planning so as to be able to organise her own affairs. In my view I can have less confidence in the evidence of Ms Gardner than the evidence given on behalf of the respondent.

36 I did not on hearing the evidence for the respondent conclude that the witnesses for the respondent had colluded in their evidence or that their evidence was made up. Having now had the opportunity to review the transcript and my notes I am firmly of the view that the evidence of the respondent can be relied upon. I find Ms Clarke to be a good witness. I have no reason to doubt the evidence of Ms Siggs, even though in my view she displayed a clear antagonism toward Ms Gardner. I consider that the evidence of Dr Dawson can be believed and is largely consistent and not damaged in cross-examination; except that his evidence in relation to the advertising of the position and his rationale for doing this was not adequate in my view. He did not approach these questions in cross-examination in a direct manner when they were capable of simple answers. I do not consider that I can rely on this part of his evidence.

37 I consider that Ms Gardner advised Ms Clarke in early July, and shortly thereafter Dr Dawson, that she had breast cancer and needed surgery. In response to this Dr Dawson called a meeting of staff to ensure coverage of work in the surgery and to see what assistance Ms Gardner required. The offers to fly her to Perth and to write to the Breast Clinic to ensure swifter treatment do not make sense unless seen in this context. That is unless both Ms Clarke and Dr Dawson jumped to wrong conclusions about what they were told. Even if that were so then Ms Gardner was capable of immediately correcting their misconception. I should add that it is clear from Ms Gardner's evidence alone that the dermatological condition which she suffered was quite separate and commenced earlier than the events which surrounded her termination. In my view, Dr Dawson responded sympathetically to Ms Gardner's dermatological condition and took steps to assist and to ensure changes within the surgery.

38 This can be seen as consistent with the prompt action he took later when Ms Gardner advised him that she had breast cancer and needed surgery. Ms Gardner in her application says that Dr Dawson was unhappy about her dermatological condition and that the condition was work related. Her evidence does not substantiate this claim other than she says that now she does not have the condition. I note also that in her application Ms Gardner states that she started the gardening business to "supplement her reduced income". Clearly on her own evidence she sought in June 2003 to register a business which she says was to accommodate her brother. This occurred before her hours were reduced and for completely unrelated reasons.

39 It does not assist Ms Gardner's claim to make such generalised accusations, which are factually wrong, and in my view designed to colour the Commission's attitude against the respondent. Ms Gardner wanted at hearing to leave the Commission with a view that Dr Dawson had acted in an oppressive and bullying manner. That is not the impression I had of Dr Dawson. Ms Gardner's own evidence as to how Dr Dawson acted generally does not support such a view. I consider that it is much more likely that Ms Gardner felt stressed due to her own depression, her personal problems, her concern about her breast condition (which was not clarified until after her dismissal) and the secrecy she maintained about her real medical issues.

40 I have no doubt given the evidence of Ms Clarke, Dr Dawson and Ms Siggs that Ms Gardner's co-workers were greatly offended when they thought they had been misled about her illness and found she was working in her gardening business. I have no doubt that they were greatly offended that Ms Gardner was well enough to mow someone's lawn but not well enough to attend to her duties at the surgery. They did not know of Ms Gardner's depression at that time. Any stress which Ms Gardner felt toward her work and the surgery must, I consider, be put down to a considerable degree to how she chose to deal with the situation. I should add that it appeared strange to me that Dr Dawson called a staff meeting on 7 July 2003 to discuss Ms Gardner's difficulties rather than simply discuss it with her directly. He also called her in on a day when she had telephoned in sick. However, I balance this against the fact that it was a small practice in which four people worked, three of which already knew of Ms Gardner's alleged breast cancer and imminent surgery. On Ms Gardner's evidence it was also a busy practice and hence the issue of one staff member being absent, and the one who was a full-time staff member, would need to be addressed quickly and in collaboration with other staff who might need to assist.

41 Dr Dawson's evidence is that shortly after he was advised of Ms Gardner's breast cancer he started to doubt what she had told him. He says that Ms Siggs expressed deep cynicism (Transcript p.77). Ms Siggs then organised for someone to contact Ms Gardner, when she was absent due to illness and under the cover of a medical certificate, to get a quote for a gardening job and to ask that the job be done quickly. This was done with Dr Dawson's knowledge and endorsement. I have no doubt from having seen Ms Siggs and Dr Dawson give evidence that Ms Siggs' suspicion of Ms Gardner was a driving force behind what transpired. Dr Dawson says also that he spoke to Dr Sampson and whilst the exact discussion is not clear and Dr Sampson has not given evidence, Dr Dawson says that he got the clear impression that Dr Sampson was surprised at a suggestion that Ms Gardner had breast cancer. Dr Dawson had earlier written to Ms Gardner directing her to attend a meeting. He had formed a view that she had misled him and the other staff and should be dismissed. Ms Gardner sought legal advice and a deferral of the meeting. Dr Dawson then proceeded to terminate Ms Gardner's employment by summary dismissal on the grounds of gross dishonesty [Exhibits A3 and A5]. Dr Dawson was alerted in the letter of 8 August 2003 from Ms Gardner's solicitor that Ms Gardner suffered from depression. He did not take steps to inform himself about this even though he had sought out Dr Sampson and put other matters to her. Dr Dawson did not pause to give Ms Gardner an opportunity to explain matters. He may not have been convinced in any event but he moved hastily under a cloud of suspicion and with incomplete information. In this way the dismissal of Ms Gardner was clearly unfair in a procedural sense.

42 It is the case that Ms Gardner did not attend the Breast Cancer Clinic until just after her dismissal at which time she was cleared of any thoughts of breast cancer. She says that she was able to pursue her gardening business on 6 or 7 August 2003 and was well enough to do so, but not well enough to attend at the dental surgery due to the stress she felt in that workplace. As I have stated, if the surgery was causing her stress then she must take a large part of the responsibility for that, given her lack of honesty with her employer and colleagues. It is understandable if Ms Gardner did not want her work colleagues to

know of her medical condition, but it is not acceptable for her to have lied about the seriousness of one of her conditions. I think that it is probable that she did this due to the problems she was having with depression, the time-off which she required and hence the accommodation she required of her employer and work colleagues as a result. She clearly did not want to portray the real reason, she says for fear of discrimination. The evidence is that other co-workers adjusted their own personal lives to cover for Ms Gardner based on a misguided premise. They felt let down as a result.

43 Dr Dawson says that he dismissed Ms Gardner for gross dishonesty. The dismissal was a summary dismissal. The letter to Ms Ellery of 12 August 2003 [Exhibit A5], which is the letter of termination states in part:

> "I believe it best Marion seek employment elsewhere and as she has not taken up my invitation to resign, dismiss her forthwith. Several weeks ago Marion announced to my staff that she was suffering from her fourth bout of breast cancer with surgery scheduled for Tuesday 12 August and intimated this was a life threatening illness. My staff have made considerable personal sacrifices (which have impacted on their own children/spouses) to accommodate her requests and were surprised to discover she had the enterprise and energy to establish a new gardening business whilst unable to work at this practice".

44 The letter to Ms Gardner of 7 August 2003 [Exhibit A3] is headed "Termination of Employment – gross dishonesty" and directs Ms Gardner to attend a meeting the next day to explain why she should not be terminated immediately. It also seeks her resignation on the basis that she had telephoned to say she was sick with a super infection but was found to be working at her gardening business. Dr Dawson received a response from Ms Ellery on 8 August 2003 on behalf of the applicant which asked for a delay to the meeting, explained that Ms Gardner was suffering a mental breakdown and offered an explanation as to why she had conducted her gardening business. Dr Dawson spoke to Dr Sampson the next day and the conversation cast doubt in his mind as to whether Ms Gardner had breast cancer as she had indicated. He then chose to terminate her services by letter on 12 August 2003.

45 I consider that it is clear from this series of events and from the evidence of the witnesses for the respondent that Dr Dawson had decided to terminate Ms Gardner's services once he found on 7 August 2003 that she had worked at her gardening business. He discovered this through the "trap" which Ms Siggs, with his approval, had set up. There is no evidence that Ms Gardner was otherwise seeking to work at her gardening business on that day or thereabouts. She had established the business for her brother and had advertised the business, in the full knowledge of the respondent. She had performed a limited amount of gardening work to that time. Having discovered that she had worked when she was off sick he was offended and accused her of gross dishonesty, asked for her resignation and had decided in my view to terminate her employment. That is the seriousness of the episode as he judged it. He then proceeded on that day or shortly thereafter, and certainly before he received Ms Ellery's response, to advertise for a replacement for Ms Gardner, albeit a part-time replacement. The gross dishonesty then was that Ms Gardner, in his mind, did not have a super infection and did not require rest. She was working elsewhere when she should have been working at the surgery and had been caught out. This dishonesty is what justified dismissal in his view. The question is whether the actions of Ms Gardner in misleading her employer amounted to a breach of the trust and confidence necessary for the employment relationship. The issue is also whether this breach warranted summary dismissal.

46 Dr Dawson did not know at that time that Ms Gardner was suffering depression or that she did not have breast cancer. Ms Gardner at that time did not know whether or not she had breast cancer. Seemingly Dr Sampson on 9 August 2003 could not have known that Ms Gardner did not have breast cancer otherwise why was Ms Gardner to go to the Breast Clinic in Perth for tests. Dr Dawson's doubts about Ms Gardner's honesty were further fuelled by his discussion with Dr Sampson. On his evidence she merely replied "news to me" in response to Dr Dawson's question "how is the breast cancer situation". These doubts were not put to Ms Gardner before her services were terminated and it was only after her termination that it was confirmed that she did not have breast cancer. Notwithstanding this it is clear in my mind that from about 2 July 2003 Ms Gardner had chosen to mislead her work colleague and then her employer about her medical condition. She stated that she had breast cancer and required surgery. As stated, I consider that she did this to extract sympathy, even though she said she did not want any, and to cover her absences; the real reason for these absences being her long standing depression. I have no doubts that in the small working environment in which Ms Gardner worked, where some of her colleagues had gone to some lengths to assist her, then it was not possible for Ms Gardner to remain in employment there.

47 Dr Dawson's doubts about Ms Gardner's honesty concerning her medical condition were confirmed. These are matters that I must take into account into assessing whether the dismissal was unfair. It is not a case of an employee seeking to protect their privacy from an employer. It is the case of an employee being dishonest to an employer and her work colleagues about her medical condition. In these circumstances I consider that Dr Dawson was right to conclude that the trust and confidence he required of the employment relationship had broken down irreparably. The test enunciated in *Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385 of a fair go all round is a balance of the rights of the employer and employee. I consider that Ms Gardner received a fair go in the assistance she received. The employer was repaid by a lack of honesty and was not afforded a fair go. I do not suggest that the trap set for Ms Gardner is how Dr Dawson should have approached the matter or that Ms Gardner's dismissal was procedurally fair. It was not. As is apparent from the Industrial Appeal Court decision in *Shire of Esperance –v- Peter Maxwell Mouritz* 71 WAIG 891 procedural unfairness alone does not necessarily make a dismissal unfair. For the above reasons then I would dismiss the application.

2004 WAIRC 12264

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARION RENEE GARDNER
	APPLICANT
	-v-
	KALDENT PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	FRIDAY, 6 AUGUST 2004
FILE NO	APPLICATION 1318 OF 2003
CITATION NO.	2004 WAIRC 12264

Result	Application dismissed
Representation	
Applicant	Ms L Ellery of Counsel
Respondent	Mr A Dungey of Counsel

Order

HAVING heard Ms L Ellery of counsel on behalf of the applicant and Mr A Dungey 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.

[L.S.]

(Sgd.) S WOOD,
Commissioner.

2004 WAIRC 12159

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JULIE ANNE GIBSON, CHRISTINE ERICA ROBERTS
	APPLICANTS
	-v-
	CHUBB SECURITY SERVICES LIMITED
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 30 JULY 2004
FILE NO/S	APPLICATION 1127 OF 2003, APPLICATION 1128 OF 2003
CITATION NO.	2004 WAIRC 12159

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal – Nature of employment relationship – Casual or Part-time Employment - Redundancy – Clerks (Commercial, Social and Professional Services) Award 1972 – Federal Certified Agreement - Industrial Relations Act 1979 (WA) s 29(1)(b)(i) & (ii) – Applications dismissed
Result	Applications dismissed
Representation	
Applicants	Mr G McCorry as agent
Respondent	Mr R Browning and later Ms L Nickels of Counsel

Reasons for Decision

1 The applicants sought pursuant to s.29(1)(b)(ii) of the *Industrial Relations Act, 1979* ("the Act") payment of annual leave, public holidays and redundancy as contractual benefits. The issue turns on whether the employees are casual or otherwise. The parties both submit that if the applicants were casual then the claims fall away. The applicants sought to join the Transport Workers Union as a party to these proceedings. The applicants also claim pursuant to s.29(1)(b)(i) of the *Act* that it was harsh, oppressive and unfair to terminate their services without paying them a redundancy benefit. The respondent says that not only are both employees casual by virtue of their contract but both employees have previously refused offers of permanent employment. Further the respondent says that they have been paid casual loadings over the life of their employment ranging between 18 and 30% and this is to cover public holidays, annual leave and redundancy situations. The respondent says that if the Commission were to find that they are not casual then there would be a double dipping in respect of payments. It is submitted by the respondent that the amount of double dipping in payment would amount for Ms Gibson to all but $571.04 and for Ms Roberts to all but $932. In other words the contractual benefits claimed are covered by the casual loadings paid except for the amounts just specified.

2 Ms Christine Roberts gave evidence that she was employed by Chubb Security as a Cashier for approximately 8 ½ years. She originally responded to an advertisement in the West Australian newspaper for a part time cashier [Exhibit A2]. She commenced working for the respondent on 14 February 1995. At interview she was advised of her conditions of employment and that she would be employed for 2 days a week for approximately 5 hours per day from 12 noon to 5 pm. When she first started working she worked Tuesdays and Fridays. She was paid weekly and her payslip referred to the Clerks (Commercial, Social and Professional Services) Award and to her employment being part time [Exhibit A3]. She worked 2 days a week for approximately 4 years. At one point she ceased working Tuesdays and worked Mondays instead. She was advised that that was her roster. Exhibit A4 also makes reference to part time.

3 Between February 1995 and February 1998 she says that she took annual leave and was not paid for it. She says to take leave she approached the supervisor and asked for time off and was advised either yes or no. When a public holiday fell on the day she was due to work she was expected to go in the next day. She never made any queries as to why she was not paid for annual leave and public holidays. She was told that she was a casual and she assumed that she was a casual. She says that Ms Gibson and she approached the pay office and queried the reference to part-time on her payslips. She says that they were advised they were not part time and that reference was removed from their payslips for the next pay. Ms Roberts exhibited her Group Certificates for the periods 1997/98 to June 2003 [Exhibit A6]. She also tendered a summary of earnings [Exhibit A7].

4 Ms Roberts says that a few years previously she was offered a part time position. At that time she was working only one day a week for personal reasons. That was in 1999. She worked Mondays. She says that Ms Margaret Princep put the offer to her.

Ms Roberts advised her at that stage that she was not interested. She believes that her status at that time was casual. She worked Mondays from 1999 onwards. Occasionally she was asked to come in during the school hours on a Tuesday. She was never advised at the end of her shift when to come in next. She worked between 5 to 12 or 13 hours depending on whether she was called in an extra day and towards the end of her employment her hours of work were 8am to 5 pm, prior to that she used to start about 9:00 or 9:30 am. She then worked till she finished. That was the pattern for approximately 7 years. She received 3 weeks notice of termination at the end of her employment, but was not paid redundancy pay. She approached the union about this. She did not approach the company because she heard casuals were not being paid redundancy.

5 Under cross-examination Ms Roberts said when she started work with Brambles initially she was not aware that she was paid a casual loading. She thinks that she worked through all of the first year without a break. She thinks that she has only taken holidays three times during the whole of her employment there. She is not sure as to when she recognised that she was termed a casual. She says that she was just under the impression she was a casual because she got no holiday pay or public holiday pay. She never approached the employer about her status. It did not bother her at the time. She says she was not aware that she was paid a casual loading until the time the EBA negotiations started. She says when she changed from two days a week to one day a week there was no mention in relation to her status. She assumed she was casual at that stage on the basis that she did not get annual leave. She was aware that she received a casual loading.

6 When she was first employed by Brambles she says she did not get any employment contract or letter of offer. She does not recall being told she was casual. She says, "I don't know that I was told that I was casual as such, but everybody was in the same position." When offered part time employment she refused it because she was only working one day a week and it did not seem to be worth it for her. She says that she was however a part-time employee and not a casual because she worked regular hours, and a regular roster and had a set day. At the time of her offer of part time employment she says as follows:

> "Everyone was offered the same - - everyone was in the same position; everyone was classed as a casual, and therefore everyone was offered - - the position of permanent part-time" (Transcript p.19).

7 Ms Roberts says she approached the pay office about the reference to part time on her pay slip They simply said the reference should not have been on the payslips. She says it was removed on the next payslip. She says at that point in time she was aware that she was casual. She says that the casual loading at the time of her employment has varied from something in the order of 30% down to about 18% or 20%. She says that her services were terminated by the business due to a downturn. At that time she approached the union about missing out on a redundancy payment. She was advised that because of her casual status she was not entitled to a redundancy payment. She says she resigned from the union when they did not do anything for her.

8 Ms Julie Anne Gibson gave evidence that her last day of work was 4 July 2003. She worked for Chubb Security Services as a cashier and did that job for approximately 11 years and 8 months. Originally she says a friend of hers worked in the job and told her that a job was available. She filled out an application form and the supervisor telephoned her. She cannot remember the name of the supervisor. She was advised that the job involved handling cash and counting cash. Her hours of work were two days a week between 12:30 pm and 5 pm. She was not told anything else regarding her terms and conditions of employment. She commenced working Monday and Friday. They were the days that the respondent wanted her to work. After about 3 or 4 years she commenced working an additional day, ie. Thursday. She worked that pattern for 2 or 3 years. After that time she returned to two days a week. She has also worked the pattern of a Wednesday and a Thursday, and a Thursday and a Friday. At the time of her termination she was working a Thursday and Friday. They were the days the respondent wanted her to work. When she worked Mondays, and if a public holiday fell on that day, she was required to work the following Tuesday. She was not paid for any days that she did not work. Ms Gibson says that she thought she was employed on the basis of being a casual (transcript p.23). She took leave 4 or 5 times whilst she was employed there. To take leave she approached the supervisor who advised either yes or no to the leave. She was not paid for the leave. She did not ask why she was not paid for leave. She tendered two pay slips [Exhibit A8] which included reference to the Clerks (Commercial, Social and Professional Services) Award. She also tendered a bundle of group certificates [Exhibit A9]. She tendered a summary of monies earned by her [Exhibit A10].

9 In relation to any of her part time work she says as follows :

> "I remember there was some question back in 1999 on - - particularly on Chris's payslip it was "Part-time", so it sort of raised the issue "Are we casual or part-time?". I also personally applied for a - - a loan at the time at the bank, and when I had to put down my working particulars someone there happened to - - when I told them what I - - how I worked, said, "Well, it sounds to me like you're not casual; you're part-time". So that's what brought it to a front. I went upstairs and spoke to Margaret Purdie" (transcript pp.25-26).

10 She says the accountant at the time advised her that she was a casual. In the year 2000 she received an offer of part time employment. She says she did not accept the offer as she had family commitments. She says:

> "I was doing two permanent days. At the time I had - - I did believe that, you know, they had something there to say that we could be - - we don't work for them Monday to Friday 7 am to 7 pm. I just didn't think that" (Transcript p.26)

Exhibit A11 is an internal memo that she received dated 15 February 2001. Parts of that letter read as follows:

> "Because of the nature of the business that we are now securing, Chubb Security Services in WA are working towards a cash room employing operatives who are willing and able to make themselves available for work 5 days per week between the hours of 5 o'clock in the morning till 10 o'clock at night Monday to Friday. We believe this will provide a greater degree of predictability of employee hours, enable us to control such issues as annual leave and sick leave, whilst at the same time servicing our customers' needs.
>
> ……..
>
> Should you still not elect to take permanent part-time status, then in the future you may run the risk as a casual employee of losing hours of work if other employees who have the status or *(sic)* Permanent or Permanent Part-Time are available and willing to work on days and/or at times you normally would.".

11 Ms Gibson says she thought it meant being available from 7 am to 7 pm and she could not be available for those scope of hours. She says she knew when to work because she had certain days. On her termination she was paid notice for her termination of 4 weeks. She was not paid redundancy. She asked Ms Margaret Princep from the pay office about non payment of redundancy and was advised that was only paid to part timers and not to casuals. She says she has since been paid pro-rata long service leave by the Company.

12 Under cross-examination Ms Gibson says she was aware she was employed under the Clerks (Commercial, Social and Professional Services) Award, because it was on her payslip.

13 Ms Gibson says she was paid by the hour and was in receipt of casual loading. She was aware the loading had some provision for holidays. She says her roster never changed.

14 Ms Gibson says she was involved in the EBA negotiations in 1999. These negotiations included the establishment of a part time category by the employer. She was aware through these negotiations the difference between part time employment and casual employment and the union was negotiating to put the category of part time employment into the EBA. As a result of those negotiations, a category of part time employment was put into the EBA by agreement and employees were offered to convert to part time. She does not recall whether she was offered that arrangement in 1999. However, she was offered part time employment and refused it. She says she has since found out that because she was working regular days, regular hours, it was "a mutual expectation for me to work, that I - excuse me - wouldn't be classified as a casual, I would be classified as a part-timer anyway" (Transcript p.32).

15 Ms Sally Collins gave evidence that she works as a cashier for Chubb Security Services. She is also a union representative at the workplace. She says when they first discussed in the workplace the transferring from casual to permanent employment all staff were spoken to and encouraged to apply for permanency. Everyone had the opportunity to become permanent where the offer was made more than once. Ms Collins says as a union representative she went around and spoke to everyone and encouraged them to apply for permanency as she considered their work would be more secure. Ms Collins spoke to both Ms Roberts and Ms Gibson. Neither of them wished to become permanent part time. They were given 3 opportunities. She says:

> "After the first round of redundancies we went back and let everyone know that the situation had changed, and that any more redundancies would predominantly affect the casuals first" (Transcript p.46).

16 Ms Margaret Princep gave evidence that she works as the Assistant Cashier and Manager for Chubb Security Services. She has worked for Chubbs since November 1994 when she commenced as a casual cashier. At one time she was a cash room union delegate for the EBA committee. In that capacity she spoke to both Ms Roberts and Ms Gibson about becoming permanent part time. All casual cashiers were being offered permanent part time status. After that time she became the cashier and supervisor and the management representative on that committee. In that capacity she also spoke to them about becoming permanent part time. Both Ms Roberts and Ms Gibson did not believe it was worth their while to become permanent part time. Ms Princep says she tried to persuade them on the grounds they would be paid annual leave and be guaranteed employment but they did not consider it worth while making the change. In early 2002 the respondent had a round of redundancies after losing the Westpac contract. At that time the union representatives in conjunction with the casual staff decided to protect the long term casuals. Redundancies were done on a first on last off basis. Casuals would be made redundant first followed by permanent part timers. Ms Princep says she tried to persuade both applicants to become permanent part time because their future would not be protected as long term casual employees if there is another round of redundancies.

17 Mr Grant Narvey gave evidence that he is the Operations Manager for Chubb Security Services. He has held the position since December 1995. In 1999 he instituted discussions with staff about an enterprise agreement. Ms Gibson was one of the members of the consultative committee formed to propose the enterprise agreement. One of the subjects discussed by the committee was part time employment. Agreement was reached that the company would offer permanent part time employment to employees who worked as little as 8 hours per week. Mr Narvey spoke to each employee concerned. He encouraged them to consider changing from casual status to permanent employment. Neither applicant accepted the offer. As part of those discussions staff were advised if they chose not to change that they could find themselves disadvantaged at a later stage in relation to employment, that is permanent employees would have a greater priority over them. He says that at the time of these negotiations he understood there were two categories of employment, casual or full time and the company wished to give all permanent status to part time employees. The company wished to have more controlled arrangements.

18 It is common ground that the Clerks (Commercial, Social and Professional Services) Award 1972 applied to the applicants. That award contains provisions for casual and part-time employees as follows:

> "25. - CASUAL EMPLOYEES
>
> (1) A casual employee shall mean an employee engaged and paid as such, and whose employment may be terminated by the giving of one hour's notice on either side, or the payment or forfeiture, as the case may be, of one hour's pay.
>
> (2) (a) A casual clerk may be employed at an hourly rate for a lesser period than four weeks and shall be paid while so employed, twenty-five percent in addition to the Weekly award rate prescribed by this award with a minimum engagement of four hours: Provided that, notwithstanding anything contained in this subclause, the basis and terms of employment of a casual clerk may be varied by agreement in writing between the employer and the Union.
>
> (b) The duration of the casual engagement may be extended to thirteen weeks in the event that the employee is engaged to cover for another employee who is absent on account of long service leave, annual leave, sick leave, injury compensable under the Workers Compensation and Assistance Act, or an authorised period of unpaid leave.
>
> (3) Subject to any agreement between the employer and the employee to the contrary, subclause (5) of Clause 7. - Hours, shall not apply to casual employees.
>
> (4) Notwithstanding the provisions of this clause the basis and terms of employment of casual clerks may be varied in any particular case by agreement in writing between the employer and the Union.
>
> 26. - PART-TIME EMPLOYEES
>
> (1) A part-time employee shall mean an employee who, subject to the provisions of Clause 7. - Hours, regularly works no more than 32 ordinary hours per week.
>
> (2) (a) At the time of engagement the employer and the employee shall agree to the number of ordinary hours to be worked by the employee in each week.
>
> (b) Such number of ordinary hours, once agreed, may be varied by either side giving the amount of notice required by Clause 14. - Contract of Service.
>
> (3) Progression through the incremental levels of the appropriate grade in subclause (2), of Clause 11. - Rates of Pay of this award, shall be strictly related proportionately in accordance with the number of hours worked, to the conditions prescribed in each establishment for full-time employees.
>
> (4) A part-time employee shall receive payment for wages, annual leave, holidays and sick leave on a pro rata basis in the same proportion as the number of hours regularly worked each week bears to 38 hours.
>
> (5) Subject to any agreement between the employer and the employee to the contrary, subclause (5) of Clause 7. - Hours, shall not apply to part-time employees".

19 It is also common ground that a federal certified agreement, the Chubb Security Services Limited Cash Room (Perth Branch) Enterprise Agreement 2003-2005 [Exhibit A12], applied to the applicants later in their employment. This was an agreement struck between the Transport Workers' Union and the respondent.

20 Each party quoted for the Commission the relevant law and criteria which apply in assessing whether an employee is casual (see *Serco (Australia) Pty Limited v John Joseph Moreno* 76 WAIG 937, *Squirrell v Bibra Lakes Adventure World Pty Ltd t/a Adventure World* 64 WAIG 1834, *The Metals and Engineering Workers Union Western Australia v Centurion Industries Ltd* (1996) 76 WAIG 1287). The Full Bench in the *Centurion* case outlined the criteria as follows:

> "(3) Certain indicia may be indicative of the nature of the contract, but they are not necessarily determinative taken alone. These may include:-
>
> (a) The classifying name given to a worker initially accepted by the parties.
>
> (b) The provisions of the relevant award.
>
> (c) The reasonable expectation that work would be available to him.
>
> (d) The number of hours worked per week.
>
> (e) Whether his employment was regular.
>
> (f) Whether the employee worked in accordance with a roster published in advance.
>
> (g) Whether there was a reasonable and mutual expectation of continuity of employment.
>
> (h)Whether notice is required by an employee prior to the employee being absent on leave.
>
> (i) Whether the employer reasonably expected that work would be available.
>
> (j) Whether the employee had a consistent starting time and set finishing time".

21 The evidence before the Commission is not greatly in dispute. Credibility is not an issue in these proceedings. It is clear that whilst the evidence for each applicant varies in terms of dates and days worked, importantly each applicant commenced work without a written contract, assumed they were casuals, were paid a casual loading, worked initially two set days a week, this later varied in amount and extra time could be worked, if one of their work days fell on a public holiday then they worked the next day, leave and public holidays were not paid, if leave was sought then a supervisor approved the absence, their payslips originally recorded that they were part-time and this was amended to casual when they queried the matter, they were aware of the enterprise negotiations which included making employees part-time and their jobs more secure, they were both offered part-time status and both rejected the offer for personal reasons, redundancies were made by the respondent and they initially survived as long-term casuals, later further redundancies occurred and they were made redundant, their complaint arose then as they were not paid redundancy pay unlike some of their colleagues who had accepted part-time work.

22 The respondent says that the applicants were casual as:

> "2.3 The evidence supports that the Applicants were casuals:
>
> (1) the number of hours worked per week were low and varied over time. Immediately prior to ceasing work for the Respondent the Second Applicant worked approximately 16 hours per week (*see transcript pages 10, 13 and 14*) and the First Applicant worked approximately 8 hours per week (*see transcript pages 22 and 33*);
>
> (2) the Applicants were not paid for leave or for public holidays (see transcript pages 10, 11, 14, 23 and 24);
>
> (3) the Applicants starting times varied (*see transcript pages 14-15*);
>
> (4) the Applicants understood they were casual (*see transcript pages 16, 18, 20, 23 and 48*);
>
> (5) both Applicants were paid by the hour and received a casual loading (*see transcript pages 20 and 30*);
>
> (6) both Applicants were offered the opportunity to become permanent part time employees and declined that opportunity (*see transcript page 17, 26, 32, 47 and 50*)."

23 In summary, it was submitted on behalf of the applicants, that the evidence displayed that they were not casual for the following reasons:

> "25) The evidence of the applicants' terms and conditions of employment entered into on commencement of employment with the Respondent – including Ms Roberts specifically applying for a part time position and being described on her payslips for several years as such – their being given regular work over long terms of specified days and hours each week, their being listed on a roster that did not change significantly over time, their seeking and being given periods of leave, and their self evident mutual expectation of continued employment, overwhelmingly indicate that, untrammelled by award prescription, the applicants were not casual employees.
>
> 26) No inferences can be drawn from the applicants' declining the "offers" of "permanent part time employment". At the time of making the offers Ms Gibson and Ms Roberts were already part time employees. Ms Gibson and Ms Roberts were entitled to decline what in law was nothing more than an offer to significantly vary the hours of work they would be expected to work and to reduce their remuneration in return for being given leave. It does not amount to admissions that they were in fact or law casual employees. Ms Gibson and Ms Roberts believed they were casual employees because that is what the Respondent told them they were.
>
> 33) Moreover, clause 25(1) (a) of the award limits the employment of persons as casuals to periods of less than 4 weeks except when the person is engaged to cover a person on long service leave or the union – [listed in Schedule C of the award to be the Federated Clerks Union of Australia] – agrees with the employer as to different terms and conditions for casual employees. There is no evidence that there was any agreement between that union and the employer for the applicants to be engaged as casual employees for a period longer than 4 weeks.
>
> 38) On each of those indicia, even if the award had permitted casual employment for a period of longer than 4 weeks, the evidence establishes that both of the applicants were engaged on single ongoing contracts of employment and that the characteristics of their working arrangements over a period of 8 and 11 years respectively are inconsistent with their being casual employees."

24 In terms of whether the applicant's employment was casual in nature at the time of dismissal I find that they were for the following reasons. Both applicants' has set days of work; hence they did not follow a posted roster as it was unnecessary. They worked additional time on occasion by agreement with the respondent. They took time off when they wished to, albeit

they approached their supervisor to ensure that it would be convenient. The amount of time they took off was not limited by any notion of annual leave. There was no reference to sick leave as both the respondent and the applicant's considered that they were casual. There is some limited evidence that Ms Roberts did not know that she was casual but I consider that a fair reading of the evidence shows that they both considered that they were casuals and the employees they worked with likewise considered they were casuals. They were paid a casual loading at all times. Each of these features suggest that for the bulk of the time at least the employment was conducted as if it were casual in nature by both parties. The fact that each employee had set days work is nothing more in my view than an agreed expectation by each party as to when it was mutually convenient to work. In fact the evidence, as stated, is that at times the days were adjusted also at mutual convenience.

25 The other factors in my mind which speak against the contract being casual in nature are that Ms Roberts initially applied for an advertisement for part-time employment; the applicant's pay slips originally recorded them as being part-time, the relationship was ongoing in the sense that it did not contain a series of contracts and the award prescription stipulates a period of 4 weeks for casual employment unless by agreement otherwise.

26 This evidence must also be balanced against the following facts. Both applicants were involved or at least fully aware of enterprise bargaining negotiations in 1999 and subsequent negotiations. A key part of those negotiations were to obtain more secure employment for the applicants and their fellow employees. Both applicants knew this to be so. They also knew that arising from the more recent negotiations the potential for redundancy was real and that part-time staff were to be more secure in their employment than casual staff. They were aware, or at least should have been aware, by reference to the agreement, that redundancy payments were available for part-time staff and not casual staff. They were approached on more than one occasion and encouraged to take up the offer of part-time employment. Both parties by doing this were clearly aware that the status of the applicants and their fellow employees at that time were considered to be casual in nature. Both applicants clearly chose not to take up the part time contract for personal reasons. Both applicants continued to be paid a casual loading and knew from the negotiations and their (the respondent's) offers that their ongoing employment was then not considered to be secure.

27 Whilst it is trite to say that someone cannot by mere label make the employment relationship something which at law it is not, one must also have regard, in common sense, to the manner in which the parties entered the relationship. Certainly at the time of dismissal and for some time previously, the applicants in full knowledge had rejected being part-time. If I weigh the factors covered above, including in particular the clearly expressed intention of the applicants to be casual, I must find that they were not part-time employees at the time of dismissal. For these reasons the claims for unfair dismissal and denied contractual entitlements for redundancy must fail.

28 I acknowledge that the argument for the applicants, prior to the offer of part-time employment in 1999 (on Mr Narvey's evidence), that they may have been part-time employees, is perhaps stronger. Ms Gibson says that she queried the pay office in 1999 regarding the mention of part-time on her payslips. Ms Roberts did also and I assume that was in 1999 in concert with Ms Gibson. I do not have evidence whether the timing of this coincided with, in the same year, Mr Narvey's discussion with the applicants to become part-time and the enterprise negotiations around that time. Ms Roberts says she applied for a part-time position, does not remember being told she was casual and the award has a 4 week limitation period. However, I do not find that the applicants were casuals during that period. Again it is clear that the parties did operate as if the relationship was casual and I consider that the evidence of Ms Gibson and Ms Roberts really sustains this point in that they were in fact surprised to find the reference to part-time on their payslips and queried it. If I am wrong on that point and wrong as to how I have weighed the relevant factors for casual employment, including the award, then the applicants would have resort to the Industrial Magistrate for payment of the leave provisions that they seek. It is clearly the Industrial Magistrate who holds the jurisdiction to enforce award provisions. It is common ground on Mr McCorry's submissions that the award applied, paragraph 29 of the applicant's submissions states as follows:

> "It is common ground that the Clerks (Commercial Social and Professional Services) Award 1972 applied to the applicants. Clause 25 of the award provides that a casual employee "*means an employee engaged and paid as such*"

I do not understand this submission to be that the respondent merely followed the award for convenience. I do not express any view on the issue of 'double counting' or offset as it is not necessary to do so, given my findings.

29 If I am wrong with respect to my finding of casual employment in the period leading to their offer of part-time employment in 1999, then I do not see how the contracts were not altered when both applicants rejected those offers sometime in 1999. Mr McCorry for the applicants submits that the offer was of no effect as they, in law, were already part-time employees. However, the offer was made on clear conditions to all employees. The contracts for all employees were potentially subject to alteration and the applicants clearly on their evidence rejected this. The respondents in my view, and having regard to my obligations under section 26 of the *Act*, are entitled to rely upon the applicants' rejection of the contract and act accordingly. They are entitled to treat the applicants as being casual because the applicants have told them that that is how they wish to be treated. It is not now for the applicants' to say that they did not wish to be casuals and were not casuals simply because other employees obtained a redundancy payment on termination.

30 For all these reasons I would dismiss both applications. Given my findings that both employees are in fact casual it is not necessary for me to consider the application seeking to join the Transport Workers Union as a respondent.

2004 WAIRC 12160

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JULIE ANNE GIBSON, CHRISTINE ERICA ROBERTS
	APPLICANTS
	-v-
	CHUBB SECURITY SERVICES LIMITED
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	FRIDAY, 30 JULY 2004
FILE NO/S	APPLICATION 1127 OF 2003, APPLICATION 1128 OF 2003
CITATION NO.	2004 WAIRC 12160

Result	Applications dismissed
Representation	
Applicants	Mr G McCorry as agent
Respondent	Mr R Browning and later Ms L Nickels of Counsel

Order

HAVING heard Mr G McCorry on behalf of the applicants and Mr R Browning and later Ms L Nickels 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 applications be and are hereby dismissed.

(Sgd.) S WOOD,
[L.S.] Commissioner.

2004 WAIRC 11733

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MONICA HOLLINGSWORTH
	APPLICANT
	-v-
	TOWN OF BASSENDEAN
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 24 MAY 2004
FILE NO/S	APPLICATION 631 OF 2004
CITATION NO.	2004 WAIRC 11733

Catchwords	Industrial law – Termination of employment – Harsh, oppressive and unfair dismissal – Acceptance of referral out of time – Application referred outside of 28 day time limit – Relevant principles to be applied – Commission satisfied applying principles that discretion should be exercised – Acceptance referral out of time granted – *Industrial Relations Act 1979* (WA) s 29(1)(b)(i), s 29(2), s 29(3), s 32.
Result	Application accepted out of time
Representation	
Applicant	Ms M Hollingsworth on her own behalf
Respondent	Mr S White as agent

Reasons for Decision
(Ex tempore)

1 The substantive application is one brought by Monica Hollingsworth pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA) ("the Act") by which she alleges that she was harshly, oppressively and unfairly dismissed on or about 12 December 2003 by the respondent, the Town of Bassendean.

2 Given that the application was filed on 7 May 2004 the application is obviously considerably out of time, in fact some five months beyond the 28 day time limit for commencing proceedings of this kind pursuant to s 29(2) of the Act. The Commission, however, has discretion under s 29(3) of the Act to consider whether or not it will accept such an application out of time if it forms the view that it would be unfair not to do so.

3 Because there was a dispute on some of the central facts that appear to arise in the matter, there was evidence from both the applicant and the respondent. The applicant, Ms Hollingsworth, testified that she was employed on 29 September 2003 as a home carer by the respondent to, as the Commission understands it, assist in the care of elderly persons in the respondent's community care centre. The applicant's duties were to provide, on her evidence, personal care, domestic care, transport and shopping assistance to elderly persons. Whilst the applicant was not entirely clear, she testified that her hours varied on a weekly basis. She might be required, on her evidence, to work weekends and other hours as requested by the employer.

4 The applicant testified that having attended an interview for employment with a Ms Vale of the employer she was offered and accepted the appointment at the interview and commenced employment the next day, presumably the interview taking place on or around 28 September 2003. The applicant's evidence was she commenced employment and worked diligently in her duties and her evidence was that there were no issues raised with her work performance during her period of employment with the respondent.

5 The applicant said that on or about 11 December 2003, following a discussion with Ms Vale, her supervisor, her employment was terminated by the employer ostensibly for two reasons. The first reason being that the applicant did not possess what was described as a Certificate Level Three in Aged Care and, secondly, that the applicant had not provided a police clearance, at least in a timely fashion, as was required by the employer. The applicant testified and in the application she filed averred that she was shocked to learn that her employment was not going to be continued by the respondent, firstly because she did not understand that the position of a Certificate Three in Aged Care was an inherent requirement or a prerequisite of her position and, secondly, that because of industrial action taken by the Western Australian Police Service and another event about which the applicant gave evidence, that is a break into her motor vehicle, there was some delay in obtaining her police clearance certificate. I might add, according to the papers in the

application, such was actually filed or provided to the employer on or about 11 December 2003. In relation to the position of Certificate Three, the applicant's evidence was that there was no requirement put to her at the time she was employed and moreover the respondent was aware that she did not possess a Certificate Level Three but possessed, apparently, a Certificate Level Two but it was acceptable for the applicant to move towards obtaining the latter certificate as her employment progressed.

6 Following the cessation of her employment, the applicant testified also that she suffered a period of hospitalisation due to a back injury that she suffered, which injury was known to the employer on the applicant's evidence. The applicant said that, by letter dated 15 March 2004, she complained to the respondent as to these issues and said that her dismissal, if there was one, was unfair. The Commission pauses to observe that there seems to have been no complaint by the applicant as to the termination of her employment prior to this time but the Commission notes, however, that the applicant's evidence was that at least for some of this time she was incapacitated.

7 The respondent's position is the requirement for possession of Certificate Level Three in Aged Care was a requirement of the position and this was discussed at the applicant's interview for employment. The essence of the submission from the employer was this was a prerequisite to the applicant's continuing and obtaining permanent employment with the applicant. The respondent said that this was reiterated by it to the applicant on several occasions. It appears from submissions in September 2003 and later in November 2003, although the Commission pauses to note there was no direct evidence of this, only hearsay evidence from the respondent's human resources manager and reference to letter from the employer to the applicant in relation to the Certificate Three issue.

8 As to the police clearance certificate issue, the respondent said that it made several requests of the applicant for this document to be produced prior to its eventual production in mid-December 2003. The respondent also says that given the applicant's failure to meet these conditions it did not continue with the applicant's employment beyond mid-December 2003.

9 As to the reasons for the delay in commencing these proceedings, the applicant says that she was not aware of her rights in relation to her ability to challenge her dismissal and she had suffered financial, and continues to suffer financial difficulties. The Commission notes in that regard that the applicant applied for and was granted fee relief by way of a waiver of the $50 application fee by a Deputy Registrar of this Commission on 7 May 2004, the date on which the application was filed. I also pause to note, however, that the applicant did give evidence that she consulted, it appears, a community legal centre in relation to the preparation of her letter of 15 March 2004, which is exhibit A1, but she said she did not take any steps to obtain advice in relation to commencing proceedings. And also her evidence was that she sought advice from the community legal centre as to whether she could obtain a waiver of the $50 filing fee. The applicant's evidence also was she held off commencing these proceedings because she was not in a financial position to do so at an earlier time prior to being aware of the ability to seek a waiver of the fee. As I have already observed, the applicant also testified that she was, because of an injury to her back, unable to attend to a number of matters in the earlier part of this year.

10 I turn to the consideration of the matter. The relevant principles in relation to applications of this kind have been recently restated in a decision of the Industrial Appeal Court in the matter of *Malik v Paul Albert, Director General, Department of Education of Western Australia*, [2004] WASCA 51. I apply the principles dealt with in that decision for the purposes of these proceedings and I simply add that in relation to applications of this kind also, that by s 26(1)(a) of the Act, the Commission is duty-bound to have regard to the substantial merits of the case in a matter of this kind in assessing whether under s 29(3) of the Act, the Commission's discretion should be exercised as to whether an extension of time, in effect, ought be granted. Of course, this does not require the applicant to establish in every case that she or he will succeed at the ultimate hearing of the matter but rather requires there to be something in the applicant's case that may lead to the Commission granting a remedy if the application is accepted out of time.

11 Nor also, might I add, does this require there to be evidence on each occasion an applicant seeks to invoke s 29(3) of the Act. This is because it may be apparent “on the papers”, as it were, that the applicant has an arguable case or there may be such common ground that such evidence is not necessary. I do not read the decisions referred to in *Malik* or *Malik* itself as authority for any contrary proposition.

12 In this case I consider the following issues. Firstly, the length of delay. The period of five months is obviously a lengthy delay. Secondly, the reason for the delay. The applicant says she was not aware of her legal rights, but I note that no steps were taken post the alleged termination of her employment in mid-December or 15 March 2004, but however the Commission does note the applicant's evidence both as to her financial position and as to her medical and physical incapacity which on the applicant's evidence required a period of hospitalisation in this period.

13 The applicant's evidence is also, and I accept, that at no material time was she aware of the 28 day time limit to commence these proceedings and only became aware of same when the proceedings were actually commenced by notice of application. I have also referred to the applicant's endeavours to raise sufficient funds to pay for the filing fee and the fact that she was not aware of the ability to waive that fee until some time after the termination of her employment.

14 In terms of steps taken by the applicant to contest her dismissal, I am satisfied on the evidence that the applicant has taken active steps to raise concerns with the respondent both orally and in writing and the Commission refers to exhibit A1 to A3 to that effect and also the evidence of the respondent's human resources manager who said that the applicant came to see her on several occasions to complain about her treatment and what she could do about it.

15 In relation to prejudice to the respondent, the respondent submits there is no real prejudice to it and I am satisfied there is none, at least on what is before the Commission. As to the merits, the Commission is, of course, at this stage only confronted with somewhat scant evidence as to the merits of the applicant's case, however in light of what is before the Commission, the Commission is of the view there is some substance to the allegations of the applicant as to unfairness, although there is no direct evidence from the respondent and therefore it is difficult to assess fully this issue. Even if I pause to note the applicant was casually employed, as appears to be the submission of the respondent that is no barrier to either a dismissal or an unfair dismissal or, indeed, reinstatement on well settled authority in this Commission. On that basis then I consider there may be a foundation for the applicant to obtain a remedy, but I put it no higher than that at this stage.

16 Given all of these circumstances, and although the application is out of time by a lengthy period, I am persuaded, given the circumstances of the applicant, that it would be unfair to not accept the application out of time and thereore the Commission will order, firstly, that the application be accepted out of time and, secondly, that the application be referred to a Deputy Registrar for conciliation pursuant to s 32 of the Act.

2004 WAIRC 11605

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MONICA HOLLINGSWORTH
	APPLICANT
	-v-
	TOWN OF BASSENDEAN
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 24 MAY 2004
FILE NO/S	APPLICATION 631 OF 2004
CITATION NO.	2004 WAIRC 11605

Result	Application accepted out of time
Representation	
Applicant	Ms M Hollingsworth on her own behalf
Respondent	Mr S White as agent

Order

HAVING heard Ms M Hollingsworth on her own behalf and Mr S White as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 ("the Act") hereby orders –

(1) THAT the referral of the herein application be and is hereby accepted out of time.

(2) THAT the application be referred to a Deputy Registrar for conciliation pursuant to s 32 of the Act.

(Sgd.) S J KENNER,
[L.S.] Commissioner.

2004 WAIRC 12074

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MONICA HOLLINGSWORTH
	APPLICANT
	-v-
	TOWN OF BASSENDEAN
	RESPONDENT
CORAM	COMMISSIONER S.J. KENNER
DATE	WEDNESDAY, 21 JULY 2004
FILE NO	APPL 631 OF 2004
CITATION NO.	2004 WAIRC 12074

Result	Order issued
Representation	
Applicant	Ms M Hollingsworth
Respondent	Mr S White as agent

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, 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.) S J KENNER,
[L.S.] Commissioner.

2004 WAIRC 12171

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FRANKLIN ISA
	APPLICANT
	-v-
	COOKS CONSTRUCTION PTY LTD CIVIL, MINING AND PLANT HIRE CONTRACTORS
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	MONDAY, 2 AUGUST 2004
FILE NO	APPLICATION 717 OF 2004
CITATION NO.	2004 WAIRC 12171

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal – Acceptance of referral out of time – Application referred outside of 28 day time limit – Relevant principles to be applied – Dismissal occurred during period of probationary employment –Acceptance of referral out of time not granted – *Industrial Relations Act 1979* (WA) s 23A, s 29(1)(b)(i),(2)&(3)
Result	Application to accept referral out of time dismissed
Representation	
Applicant	Appeared on his own behalf
Respondent	Mr D Fuszard

Reasons for Decision
(Given extemporaneously and edited by the Commissioner)

1 The purpose of this hearing is to deal with the applicant's claim, which is filed 2 days out of time, to see if that application ought be received in accordance with section 29(3) of the Industrial Relations Act 1979 ("the Act"). The test set out in the Act is that the Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so. Reference to section 29(1)(b)(i) of the Act is a reference to a claim of harsh, oppressive or unfair dismissal.

2 The Industrial Appeal Court, in *Malik v Paul Albert, Director General, Department of Education of Western Australia* 84 WAIG 683, sets out a range of tests that ought to be applied to consideration by the Commission as to whether or not it would be unfair not to accept the claim out of time. Those tests are set out slightly differently by each of the members of the Industrial Appeal Court. However, I think it is fair to say that they say, firstly, that time frames set out in legislation are, prima facie, required to be met. Secondly, fairness as to whether it would be unfair not to accept the application out of time are considerations of fairness not just to the employee but also to the employer. The tests also include the length of time that the application was delayed, the reason for the delay, whether the employee notified or indicated to the employer that there was to be a challenge to the dismissal, and also there must be some consideration of merit. If an application has no real prospect of success, then it would be quite inappropriate to grant the extension.

3 In this case, I am satisfied that the length of the delay is a very short time, that is, 2 days. That of itself is of some assistance to the applicant. As to the reason for the delay, I accept the evidence of Ms Heather Isa that she assisted the applicant to prepare his application, and it was left in her hands to file. However, due to illness and a miscalculation on her part, it was filed 2 days late.

4 The employer could not claim to have been taken by surprise at the application, on the basis that it was known to the respondent that the applicant intended to challenge the dismissal, and that is confirmed by the evidence of Mark Sidney Hatcher.

5 The question really comes down to the merits of the application.

6 The evidence before me tends to demonstrate, on one hand, that the applicant believed that his supervisor, Warren Illingham, had decided from the outset that he was not happy to have the applicant on site. On the other hand, there is a range of evidence presented on behalf of the respondent to indicate difficulties associated with the applicant's employment from the commencement, associated, initially, with his application for employment through to issues relating to competence and safety.

7 On the balance of probabilities, it would seem to me, taking account of all of the evidence that I have received, that the applicant's performance regarding his competence and his approach to safety was such as to cause the respondent to have real concerns in respect of the applicant. I also bear in mind the respondent's evidence that due to a shortage of available people in the industry, it takes people on for the purposes of giving them a chance to prove themselves. In this case this is what occurred with the applicant.

8 The applicant's contract of employment provided for a probationary period, and the applicant accepts that this was so. A period of probation is for assessment and training (see *Hutchinson v Cable Sands* 79 WAIG 951). It is clear from the evidence that the respondent had serious concerns about the applicant's competency and safety approach such that it was, during the course of the probationary period, entitled to not be satisfied that the applicant's performance would be satisfactory as to warrant proceeding beyond the probationary period.

9 I note, too, that one of the considerations that the Commission is to have in deciding a claim of harsh, oppressive or unfair dismissal, as set out in the Act at section 23A(2) is:

> "At the time of the dismissal, whether the employee was employed for a period of probation agreed between the employer and the employee, in writing or otherwise."

10 The legislature has not said, in including that provision, what that consideration by the Commission of the probationary period is to mean. However, on the basis that it has been specifically referred to, and taking account of the purpose of probation, it would be reasonable to conclude that the intention was that there is a greater onus on an employee on probation to demonstrate unfairness in the termination of employment on account of things such as length of service and expectations of ongoing employment.

11 In all of these circumstances, I find that it would be inappropriate to accept the application out of time, on the basis that it is unlikely that the applicant is able to demonstrate the merits of his claim such as to enable an extension to do justice between the parties. So, in the circumstances, the referral out of time will not be accepted.

2004 WAIRC 12172

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FRANKLIN ISA
	APPLICANT
	-v-
	COOKS CONSTRUCTION PTY LTD CIVIL, MINING AND PLANT HIRE CONTRACTORS
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	MONDAY, 2 AUGUST 2004
FILE NO	APPLICATION 717 OF 2004
CITATION NO.	2004 WAIRC 12172

Result	Application to accept referral out of time dismissed

Order

HAVING heard the applicant on his own behalf and Mr D Fuszard on behalf of the respondent, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT the application to receive the referral out of time be and is hereby dismissed.

(Sgd.) P.E. SCOTT,
[L.S.] Commissioner.

2004 WAIRC 12033

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LUKE WILLIAM JONES
	APPLICANT
	-v-
	H.A.R. PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	FRIDAY, 16 JULY 2004
FILE NO.	APPLICATION 432 OF 2004
CITATION NO.	2004 WAIRC 12033

Result	Declaration made the Applicant is owed a contractual benefit. Order made that the Respondent pay the Applicant $15,950.
Representation	
Applicant	In person
Respondent	No Appearance

Reasons for Decision

1 This is an application made under s 29(1)(b)(ii) of the Industrial Relations Act 1979 ("the Act"). Mr Luke William Jones ("the Applicant") claims that he is owed the sum of $15,950, being unpaid wages from 5 June 2003 to 20 August 2003. He also claims that he is owed the sum of $87,450, being the balance of wages owing for the term of his contract of employment. Both claims are made against H.A.R. Pty Ltd ("the Respondent"). The Applicant claims he is owed these sums, as sums to which he is entitled under his contract of employment, not being a benefit under an award or order.

2 This matter was listed for hearing on 8 July 2004. The Applicant appeared at the hearing. There was no appearance on behalf of the Respondent. The company extract for the Respondent states that a receiver manager was appointed to administer the Respondent on 12 January 2004. The Receiver Manager's name is Mr Oren Zohar of KordaMentha. The Associate to Commissioner Smith, wrote to Mr Zohar at KordaMentha on 19 May 2004, advising:

> "Pursuant to s 440D of the *Corporations Act 2001*, during the administration of a company, a proceeding in a court against the company or in relation to any of its property cannot be begun or proceeded with except with the administrator's written consent or with the leave of the Supreme Court.
>
> Could you please advise within seven (7) days of the date of this letter whether you consent to this applicant being proceeded with by the Commission."

3 Mr Zohar replied on 24 May 2004:

> "I refer to your letter dated 19 May 2004 in relation to the Company. I also refer to my appointment as Receiver and Manager of the Company on 12 January 2004 pursuant to a Registered Mortgage Debenture dated 12 October 2001 in favour of ANZ Banking Group Ltd.
>
> As the Company is in receivership, rather than administration, Section 440D of the Corporations Act 2001 does not apply, and my consent is not required for the application to proceed. However, in relation to the application and the Company's ability to pay any judgement which may be awarded, I advise that there are a number of secured creditors holding fixed

charges over the Company's property, and there are no floating assets available to meet liabilities to employee priority creditors."

4 Mr Zohar wrote a further letter on 31 May 2004, in which he stated:

"As previously advised in my letter of 24 May 2004, I was appointed by the ANZ Banking Group Ltd as Receiver and Manger [sic] of the Company on 12 January 2004. I understand that Mr Jones' employment was terminated in August 2003, prior to my appointment. In this regard, I note that Section 433 of the Corporations Act 2001 provides that a Receiver and Manager is only liable to pay employee entitlements outstanding at the date of appointment from the proceeds of floating charge assets. There are no such assets in this administration, and accordingly I see no point in attendance at the conference referred to in your letter.

I note that the directors' duties and responsibilities in relation to the affairs of the Company continue despite my appointment and you may wish to request their attendance at the conference. Their details are as follows:

Shayne and Rhonda Murray

27 Vakyrie Place

TWO ROCKS WA 6037"

5 Both Mr Murray and Mr Zohar were served with a notice of hearing. The notice of hearing was sent by the Commission on 18 June 2004. The notice of hearing stated that this application would be heard on 8 July 2004 at 9:30 am. There was no appearance on behalf of the Respondent or receiver manager at the hearing.

6 The Applicant testified that he was working in Carnarvon when he was approached by Mr Shayne Murray to purchase livestock on behalf of the Respondent and MGM Exports Pty Ltd. Following discussions with Mr Murray, the Applicant entered into a written contract of employment with the Respondent. The contract was signed by Mr Shayne Murray, who was the Respondent's General Manager. The contract provides that Mr Jones is to report directly to the General Manager. His position was a Livestock Manager. The express terms of the contract also stated: –

"2 year contract starting 1st September 2002"

7 Remuneration clause provided: –

"As per agreed with management @ $1,500.00 gross per week plus GST. Luke Jones to supply at his own cost – suitable vehicle and CDMA satellite telephone."

8 The written contract also sets out a termination clause which states: –

"Two weeks notice in writing. In case of disputes arising between employer and employee, that cannot be resolved to the satisfaction of both parties, either party may give two weeks notice. A ruling or advice may be sought from an independent body eg. *Chamber of Commerce and Industry* such advice or ruling will become final. If term of notice is not worked remuneration is forfeited."

9 The contract was signed by the Applicant and Mr Murray on 1 September 2002 and the Applicant commenced work on that date at the Respondent's Gingin abattoir. When asked why it was agreed that he would be paid $1,500 plus GST, the Applicant said that Mr Murray wanted to set the contract up that way, so that he (the Applicant) could claim his car and telephone expenses. The Applicant testified that he worked solely for the Respondent from 1 September 2002 until 21 August 2003 and he at all times reported to Mr Murray as the General Manager.

10 The Applicant says that he ceased being paid by the Respondent in June 2003. He continued to work. He says he is owed wages from 5 June 2003 to 20 August 2003. The Gingin abattoir was shut down in the middle of June 2003 and it reopened on 20 August 2003, under a lease agreement with another company, Haddleton Holdings Pty Ltd. The Applicant testified that he was instructed by Mr Murray to look after the abattoir whilst it was shut down and that there were three other staff, who continued to work at the abattoir during that period of time. In about mid July 2003, Mr Murray informed the Applicant that he intended to lease the abattoir and he had found a lessor who had agreed to take on the lease if he (the Applicant) would run it. Mr Murray also informed him that he thought that would be a fantastic arrangement as the Applicant could look after his (Mr Murray's) property. The Applicant asked whether he would continue to be paid and was informed by Mr Murray that he was sorting out the finance to get "us back on the road". The Applicant said because of these conversations he continued to work without pay. He received an amount of $2,000 from the Respondent on 18 July 2003. From 28 August 2003 until 30 January 2004, the Applicant was paid by Haddleton Holdings Pty Ltd. They continued to pay him under the same arrangement he had agreed with the Respondent for running the abattoir. When Haddleton Holdings Pty Ltd reopened the abattoir. However, the abattoir was shut down on 30 January 2004 and the Applicant ceased work.

11 The Applicant testified that he continued to have numerous conversations with Mr Murray about being paid for the period from 5 June 2003 to 20 August 2003. He said that Mr Murray kept saying that it would be all right "I'll be able to fix you up" but in about mid January 2004 Mr Murray ceased to answer his telephone. The Applicant sent his wage claim to the receiver manager on 30 January 2004, but received no response. Since the Applicant ceased work in January 2004, he has earned an amount of approximately $5,000 to $7,000 selling cattle. He has otherwise been unable to obtain employment.

12 Having heard the Applicant's evidence, I am satisfied that a declaration should be made that the Applicant is owed $15,950 as an amount pursuant to his contract of employment as unpaid wages. I will also make an order that the Respondent pay him that amount.

13 Whilst it is clear from the evidence that the Applicant was not given two weeks' notice in writing for termination of his contract of employment, it is also clear from the Applicant's evidence that the contract of employment came to an end when the abattoir was leased to Haddleton Holdings Pty Ltd and the Applicant commenced employment with Haddleton Holdings Pty Ltd on 22 August 2003. Further, it is also clear from the evidence given by the Applicant that the Applicant's employment with Haddleton Holdings Pty Ltd was entered into with the consent of the Respondent. The contract contemplates that both the Applicant and the Respondent can bring the contract to an end by giving notice. The Applicant did not do that prior to commencing employment with Haddleton Holding Pty Ltd. Whilst the termination was not effected in accordance with express terms of the contract, I am not satisfied that the contract of employment remained on foot, so as to entitle the Applicant to claim that he is owed payment of wages for the balance of contract until 31 August 2004. The Applicant with the Respondent's consent brought the contract to an end by commencing employment with another employer. Accordingly, I will dismiss the balance of the Applicant's claim for contractual benefits.

2004 WAIRC 12114

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LUKE WILLIAM JONES
	APPLICANT
	-v-
	H.A.R. PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	TUESDAY, 27 JULY 2004
FILE NO.	APPLICATION 432 OF 2004
CITATION NO.	2004 WAIRC 12114

Result	Declaration made the Applicant is owed a contractual benefit. Order made that the Respondent pay the Applicant $15,950.
Representation	
Applicant	In person
Respondent	No appearance

Order

HAVING heard Mr L W Jones and no appearance for the Respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby:

(1) DECLARES that the Applicant is owed a contractual benefit;

(2) ORDERS that the Respondent pay to the Applicant within 14 days of the date of this order, the sum of $15,950;

(3) ORDERS that the application is otherwise hereby dismissed.

[L.S.]

(Sgd.) J H SMITH,
Commissioner.

2004 WAIRC 11731

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BARRIE THOMAS KERTON
	APPLICANT
	-v-
	BANDABERRY PTY LTD - TRADING AS MANDURAH HOLDEN
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 15 JUNE 2004
FILE NO/S	APPLICATION 567 OF 2003
CITATION NO.	2004 WAIRC 11731

Catchwords	Industrial Law - Termination of employment – Harsh, oppressive and unfair dismissal – Principles applied – Applicant summarily dismissed – Lack of procedural fairness – Applicant harshly, oppressively and unfairly dismissed – Application upheld – Reinstatement impracticable – Compensation ordered – *Industrial Relations Act 1979* (WA) s 29(1)(b)(i), s 23A, s 26(1)(a), s 26(1)(c), s 23A(8)
Result	Application upheld. Order issued
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr G Miller as agent

Reasons for Decision

1 The respondent is a motor vehicle dealership based in Mandurah in this State. It is a dealership within the General Motors Holden motor company network. The applicant commenced employment with the respondent as a sales person on or about 11 September 2000. The applicant's employment came to an end summarily, on or about 19 April 2003 for misconduct, arising from an incident that occurred on that day. As a consequence of his dismissal, the applicant now brings this claim pursuant to s 29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act") seeking orders pursuant to s 23A of the Act.

Factual Background

2 The applicant testified that he attended for work on Saturday 19 April 2003 at about eight o'clock in the morning. The applicant had arrived at the yard that morning, in one of the respondent's vehicles, which was permitted by its policies. As he arrived, Mr Merks, the respondent's general sales manager, on observing the state of the vehicle which he considered to be unclean, requested the applicant to clean it in order that it could be in presentable condition for sale to prospective customers. The applicant testified that he then drove the vehicle into the cleaning bay to clean it, but did not do so immediately.

3 According to the applicant's evidence, shortly after, Mr Merks requested that the applicant see him in his office. The applicant went to Mr Merks' office at which time Mr Merks questioned the applicant regarding a used car deal the applicant had negotiated with a customer Mr Bain. There was some issue as to whether the applicant had sought Mr Merks' approval for the transaction, which was apparently the respondent's written policy. The applicant alleged that in discussing this matter, Mr Merks spoke to him in an abusive manner, and suggested that Mr Merks told him he was "nothing but a f... conman." The transaction was said to have cost the dealership about three or four thousand dollars in losses.

4 The applicant testified that Mr Merks continued to abuse him and use obscene language and he in response became irate and offended. He testified that he raised his voice and "gave as good as he got". The applicant's evidence was he tried to explain to Mr Merks that he may have been mistaken about the trade in vehicle transaction and he may have mistaken the transaction for another "deal" done.

5 Mr Merks, called to testify by the respondent, denied he was mistaken in relation to the deal. He said that the respondent's policies for used car sales were clear, and that for all trade-ins, he was required to inspect the trade-in vehicle and provide an estimate of value. This did not occur in relation to the Bain transaction.

6 Mr Merks' version of the events as they unfolded in his office was quite at odds with the applicant's. He testified that he spoke to the applicant about the paper work for the Bain transaction, and the applicant "blew up" and became abusive and aggressive. Mr Merks denied that he suggested the applicant was a conman or trickster but did say in cross-examination that he told the applicant that he had misled him on the transaction. Mr Merks denied that he used profane language to the applicant and moreover, said he was concerned for his safety. He said this because according to the evidence of Mr Merks, the applicant, when he "blew up", put his fist in Mr Merks' face and with his body bulk, given he was much larger physically than Mr Merks, pushed Mr Merks back into his office chair. Mr Merks testified the applicant was so loud, he thought everyone in the area could hear it. There was some suggestion in a statement prepared by Mr Merks, tendered as exhibit A6, and made on or about 23 April 2003, that on leaving his office, the applicant closed the sliding door so hard that it came of its mountings. This was not explored however, with Mr Merks in his testimony. Mr Merks did agree, that the applicant may have said to him that he "did not like being treated like shit."

7 Mr Merks denied that he also raised his voice, and said he remained generally calm because he was concerned the applicant was going to hit him.

8 After the applicant left the office, Mr Merks left his office and went over towards the new car manager's office, which was approximately 30 metres away in another building. By this time apparently, the applicant had gone back to his own office. Mr Merks testified that he informed the new car manager, Mr Spark, of what had just occurred. Mr Spark was also called to testify. He said that on the morning in question, he heard loud noises coming from the used car office building. He said there were some sales people in the area who were also within earshot of the incident. Mr Spark's evidence was that he in the main heard the applicant's voice, not that of Mr Merks. He said there was very bad language used, and some customers were also in the yard at the time. Mr Spark testified that Mr Merks told him what had happened and that there had been an altercation in his office. There was some suggestion that Mr Merks had or had attempted, to dismiss the applicant. Indeed, Mr Spark seemed to have the impression after he spoke with Mr Merks at this time that the applicant had already been dismissed.

9 In relation to the issue of a dismissal at this point, the evidence was somewhat equivocal. Mr Merks testified that he told the applicant after the altercation, that he could not work with him but also testified that he did not have the authority to "hire and fire", that being a matter for the dealer principal, Mr Van Dale.

10 After this initial incident, it seems that a further incident occurred, in Mr Kerton's office. Mr Merks went in to see the applicant, and requested he leave the premises. The applicant refused, taking the view that Mr Merks was not able to dismiss him. According to the applicant's version of events, he was out of his chair and Mr Merks stood near the back wall of the office. The applicant denied that he was engaging in any further threatening behaviour and they were standing about one metre apart.

11 This was not Mr Merks' evidence. He testified that again the applicant was abusing and threatening him, and had him up against the wall and was leaning over him with his larger body bulk and frame. According to Mr Spark, he heard loud and course language, and went in to the office. He testified that he saw the applicant standing over Mr Merks, and pushing him up against the wall. He said that as he approached them, they were touching and he pushed in between him to separate them. In terms of the shouting and language, it was Mr Spark's evidence, that it was not only the applicant who used course language, but the loudest and majority of it came from the applicant.

12 At some point during this incident, that was not entirely clear on the evidence, the dealer principal Mr Van Dale telephoned the office. He was apparently away from the office on holiday at the time, but had a practice to ring in to keep in contact. When he did this, he spoke with Mr Merks who informed of the events that morning. Mr Merks had informed him about the failure by the applicant to clean his motor vehicle when requested, but most importantly, the incident that occurred in the office and the applicant's threatening behaviour. According to Mr Van Dale, he did not regard the documentation of the Bain transaction as major, but was very concerned to hear of the abusive and threatening behaviour by the applicant. It was Mr Van Dale's evidence, that he supported Mr Merks' decision, that the applicant be dismissed. He accepted in evidence that he did not speak with the applicant to verify his version of events, prior to this decision being taken. Mr Van Dale also testified that Mr Merks did not inform him that the applicant thought he was accused of misleading Mr Merks at the outset of the meeting in the office.

Consideration

13 I turn now to consider some of the relevant principles in relation to matters of this nature. It is well settled in matters such as these that the test as to whether a dismissal is harsh, oppressive or unfair is whether the right of the employer to dismiss an employee has been exercised so harshly or oppressively such as to constitute an abuse of that right: *Miles v Federated Miscellaneous Workers Union of Australia, Industrial Union of Workers, Western Australian Branch* (1985) 65 WAIG 385.

14 Additionally, in assessing a claim such as the present matter, it is not the province of the Commission to assume the role of the manager, but to consider the dismissal objectively and in accordance with the obligations imposed on the Commission pursuant to s 26(1)(a) and 26(1)(c) of the Act. Moreover, in objectively assessing the circumstances of the case, the practical realities of the workplace need to be considered and a commonsense approach to the application of the statutory provisions should be adopted: *Gibson v Bosmac* (1995) 60 IR 1.

15 It is also the case in this jurisdiction, that the lack of any procedural fairness in matters such as these can be a most important circumstance, but a failure to afford it may not necessarily render a dismissal unfair if the result would have been the same in any event: *Shire of Esperance v Mouritz* (1991) 71 WAIG 891.

16 Additionally, in circumstances where a dismissal has been effected summarily for misconduct, there is an obligation on the employer to establish on the balance of probabilities that as a matter of fact the misconduct has occurred: *Newmont Australia*

Ltd v The Australian Workers Union, West Australian Branch, Industrial Union of Workers (1988) 68 WAIG 677. Whilst this has been described as an evidential burden, it has also been held that it does not require the employer to establish that summary dismissal for misconduct was "justified", but rather, requires the employer to establish by evidence, the existence of facts that would support the decision to dismiss summarily: *Shire of Esperance* per Kennedy J at 895. That is in the context of the present matter, it is for the respondent to establish by cogent evidence, the existence of facts to support its decision to summarily dismiss the applicant for misconduct. In my opinion, the evidential burden goes no further than this, as questions as to the procedure adopted by an employer to effect a dismissal for misconduct are matters relevant to an assessment overall of the fairness of a dismissal and the persuasive onus in this regard, remains with an applicant employee.

17 It is also the case, that a dismissal may be held to be harsh, oppressive or unfair, on the basis that it is either substantively or procedurally unfair: *Bostik (Australia) Pty Ltd v. Gorgevski* (1992) 41 IR 452. However, it is important to recognise that all of the circumstances must be taken into account, and in the case of misconduct, the gravity of the conduct must be balanced against any suggested failure to afford procedural fairness: *Byrne and Frew v. Australian Airlines Ltd* (1992) 45 IR 178: *Shire of Esperance* per Nicholson J at 899; *Bostik* per Gray J at 466.

18 For example, if it can be established that given the gravity of the conduct complained of, affording procedural fairness would not have altered the outcome in any event, then such a failure will not of itself, render a dismissal harsh, oppressive or unfair. Moreover, to conclude that procedural fairness alone may render a dismissal unfair, without considering the substantive performance or conduct issues surrounding the dismissal of an employee, and their gravity, would be to ignore the requirements of s 26(1)(a) of the Act, requiring the Commission in the exercise of its jurisdiction, to have regard to the substantial merits of the case. In each case, it is a matter of judgement in the exercise of a discretion as to the weight to be apportioned to substantive and procedural factors.

19 In this case, I am satisfied on the evidence and I find that there were three essential complaints by the respondent concerning the applicant's conduct. The first complaint, concerns allegations that the applicant failed to comply with the respondent's documented vehicle sale procedures, in particular regarding valuation approvals. The second issue is the allegation that the applicant failed to comply with a lawful and reasonable direction, to clean the motor vehicle the applicant was driving on 19 April 2003. The third issue, and in my opinion clearly the most serious, is the allegation that the applicant engaged in threatening and abusive behaviour towards his manager Mr Merks.

20 As to the first issue, I do not place much weight on the allegation that the applicant failed to comply with documentary procedures concerning the respondent's motor vehicle sales policy. It is not necessary for me to find conclusively whether or not there had been a failure to comply, although it appears that the lack of a pre-sale valuation being obtained from Mr Merks, may have contravened the respondent's policy. Furthermore, this did not appear to be a matter of any real concern to Mr Van Dale, when giving his evidence, about the incidents that occurred on the morning of 19 April 2003.

21 In relation to the second issue of the alleged failure to comply with the direction, on the evidence, I am not satisfied that there was a direction by Mr Merks for the applicant to clean the motor vehicle immediately, however I am satisfied that a direction was made that it be cleaned. It was apparent however, that other events intervened between the time of the applicant's arrival at the respondent's premises and the termination of the applicant's employment, which overtook this particular issue. In my opinion, I am not persuaded that great weight can be placed upon this matter and in any event, it was not raised by the respondent at the time, as a reason for the applicant's summary dismissal for misconduct.

22 It is the issue of the alleged threatening and intimidating behaviour that the Commission now turns to.

23 In relation to this issue, the only evidence as to the first incident is that of the applicant and Mr Merks. There were no witnesses to the altercation that took place between them in Mr Merks' office. There was evidence however, from Mr Spark, in relation to what he heard from where he was located, and the discussion he had with Mr Merks immediately after the first incident when Mr Merks walked from the used car office to Mr Spark's location. From the evidence, I am satisfied and I find that Mr Merks initiated the discussion with the applicant by suggesting to the applicant that he had misled Mr Merks about the Bain transaction. Whether or not Mr Merks used profane language in suggesting this, as asserted by the applicant, I am not able to specifically determine one way or another, as there was no independent witness to the events. However, I am satisfied on the evidence that whatever was said by Mr Merks, the applicant reacted and engaged Mr Merks in a loud and heated exchange. This fact was supported by the evidence of Mr Spark, who testified he could quite clearly hear, as apparently could others, raised voices. Importantly however, it was not only the applicant's voice that Mr Spark could hear, as he said both the applicant and Mr Merks were shouting, however the majority of the raised voices was the applicant's. Additionally, Mr Spark confirmed in his evidence, that at times, both used course language. I am simply not persuaded it was all a one sided incident, as the agent for the respondent submitted to the Commission.

24 I therefore do not accept Mr Merks' evidence, that throughout the initial stage of this incident in his office, he remained entirely calm as was asserted in his original statement and his oral testimony. I am persuaded however, that it was the applicant who was the dominant participant in the altercation between them. I also accept that Mr Merks was intimidated by the applicant as this was consistent with the evidence from Mr Spark that when he first saw Mr Merks when he came over from his office, he looked shaken.

25 The next issue is what occurred after the initial altercation in Mr Merks' office. The evidence was and I find that the applicant left Mr Merks' office, obviously in a very angry state, and I accept that he probably did slam the office door, and he then returned to his own work location. Thereafter, Mr Merks spoke with Mr Spark, who confirmed in his written statement, as I have observed above, made at about the time of the incident, that Mr Merks looked shaken. This evidence is consistent with what Mr Merks said had just occurred.

26 In the applicant's office, an extension of the altercation took place. I accept on the evidence, that when Mr Spark entered the office, he saw Mr Merks, standing up against the wall of the office, with the applicant standing over him and both were shouting. I am of the view on the evidence of Mr Spark, that the applicant was very close to if not touching the body of Mr Merks, such that Mr Spark had to get between them to separate the two men. I am satisfied on the evidence and I find, that in behaving in this way, the applicant engaged in threatening behaviour towards Mr Merks. There was also an obvious size difference between the applicant, who is a large man of large build, and Mr Merks, who is a person of smaller stature and slighter build. I accept on the evidence, that given the physical differences between the two men, that the applicant would have very much been "standing over" Mr Merks when in the larger office, during the second incident. I find accordingly

27 On the evidence as a whole, I also accept that as a result of this altercation, both in his office and in the larger office area occupied by the applicant that Mr Merks did feel threatened and intimidated by the applicant's behaviour. The obvious size differential between the two of them, no doubt contributed to this circumstance.

28 I am satisfied on the evidence that Mr Merks, backed up it seems by Mr Spark, told the applicant that he could not remain on the respondent's premises because of his behaviour. That is, that his employment was being summarily terminated at that point. This is so, notwithstanding some lack of clarity on the evidence, as to who had the lawful authority to engage and dismiss employees. It was Mr Van Dale's evidence, that managers in the positions of Mr Merks and Mr Spark, did have such authority, but as a matter of courtesy, he was usually informed of the proposed course of action. No issue however, was taken by the applicant concerning this matter, in the sense as to whether there was a valid termination of the employment contract or not.

29 I am also satisfied on the evidence, that at no time prior to the applicant's departure from the respondent's premises and hence his dismissal, did the respondent seek any explanation from the applicant as to the incidents that occurred in both Mr Merks' office and in the larger office occupied by the applicant. In other words, the applicant was not afforded the opportunity, to put his side of the events to the employer. Nor was there any consideration of other factors such as the applicant's work record, length of service or alternatives to dismissal. The issue that arises then is what is the consequence of this failure?

30 I am satisfied on the evidence, that whilst there may have been some level of provocation, in that the applicant considered he was being wrongly accused of misleading Mr Merks, his subsequent conduct towards Mr Merks, both in Mr Merks' office and later, in the larger office area, was unacceptable behaviour on any measure.

31 The issue in this matter is however, whether, if the applicant had been consulted by the respondent as to his view of events, and therefore been afforded procedural fairness, the outcome of the matter would have been any different. I have considered this matter carefully. On the assumption that the applicant would have informed Mr Van Dale that he considered he was provoked by Mr Merks, by being accused of misleading Mr Merks, and having regard to the evidence of Mr Spark, would Mr Van Dale's decision have been any different? In the circumstances, consideration needs to be given to the circumstances of the employee and that of the employer. From the perspective of the applicant, he has found himself in the position of having been dismissed and hence at the time, lost his livelihood. From the perspective of the employer, the circumstances were such that an employee engaged in inappropriate threatening and abusive behaviour, not only to a manager with authority over him and to whom he was responsible, but also within the earshot of other staff and customers of the respondent. The gravity of the conduct is to be taken into account by the Commission: *Bostick* at 17.

32 In the context of the present matter, I am satisfied that the absence of any inquiry at all as to the applicant's version of the events and consideration of alternatives did amount to procedural unfairness to the applicant. Had there been an investigation into the incident by Mr Van Dale, it would seem to me that the issue of provocation would have been a live issue. That is, it would have been necessary to hear from both the applicant and Mr Merks, and Mr Spark, before any judgement could be made as to whether the applicant was guilty of behaviour warranting dismissal, including summary dismissal, and importantly, whether there were any mitigating circumstances arising. This would also include any consideration of Mr Merk's conduct as well.

33 It is also the case that it is not in every instance of fighting or threatening behaviour in the workplace, that summary dismissal for misconduct will be justified: *Mt Newman Mining Co Pty Ltd v The Australian Workers Union, Western Australian Branch, Industrial Union of Workers* (1983) 63 WAIG 2397; *AFMEPKIU v Dampier Salt Operations Ltd 79 WAIG 2305; AFMEPKIU v John Holland Construction & Engineering Pty Ltd 79 WAIG 1302.* All of the circumstances of the case must be considered, as s 26(1)(a) of the Act plainly requires.

34 On balance, and having regard to the totality of the circumstances I am satisfied that the applicant has been, by the failure of the respondent to afford the applicant procedural fairness, deprived of the opportunity of putting issues to the respondent that may have caused it to consider alternatives to summary dismissal. Such factors could have included any conduct of Mr Merks in the incident, the applicant's length of service and work performance and any other relevant matters. I am therefore of the opinion that the applicant's dismissal was harsh, oppressive and unfair.

35 I now turn to the issue of remedy. The applicant does not seek reinstatement or re-employment and in the circumstances, I am satisfied that neither would be practicable. In relation to compensation for loss, I apply the principles in the well-known decision of the Full Bench of this Commission in *Bogunovich v Bayside Western Australia* (1999) 79 WAIG 8. I am satisfied, on the evidence given by the applicant, that after the dismissal which occurred, the applicant has actively sought alternative employment. Tendered as exhibit A5 was a letter from a job search assistance provider referring to the applicant having been a client and his job search activities since July 2003. As at the date of the hearing, the applicant had not been successful in obtaining alternative employment.

36 The applicant was remunerated on a base salary and commission basis. On the evidence before me, including that contained in exhibit A1, a summary of the applicant's payments over his period of employment at the respondent, that the applicant's average remuneration was some $885.48 per week, exclusive of payments made on termination of employment. An average rate of remuneration may be used for the purposes of determining compensation for loss: s 23A(9) Act. Given that the applicant has been unemployed since his dismissal to the date of the hearing, the applicant's total loss is $38,961.49. I find accordingly. I am satisfied that the applicant has not earned any other income that should be deducted from this figure. Given that from the applicant's loss any sums in lieu of notice should be deducted, the parties will be directed to confer on the final sum. The cap on compensation under s 23A(8) of the Act will then need to be applied.

2004 WAIRC 11731

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BARRIE THOMAS KERTON
	APPLICANT
	-v-
	BANDABERRY PTY LTD - TRADING AS MANDURAH HOLDEN
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 9 JULY 2004
FILE NO/S	APPLICATION 567 OF 2003
CITATION NO.	2004 WAIRC 11967

Catchwords	Industrial law - Termination of employment – Unfair Dismissal – Determination of quantum of compensation – Principles applied – Compensation to be ordered – *Industrial Relations Act 1979* (WA)
Result	Order issued
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr G Miller as agent and later Mr P Arns of counsel

Further Reasons for Decision

1 The Commission published its reasons for decision in this matter on 15 June 2004, finding the applicant to have been harshly, oppressively and unfairly dismissed. The Commission, at par 36 of its reasons, found that the applicant's total loss was $38,961.49. Given that it was not clear on the evidence before the Commission as to the nature of payments made on termination of employment, and hence deductions that may need to be to be made from established loss, the Commission directed the parties to confer on the final sum to be ordered. It was this issue, and only this issue, in relation to which further submissions were invited from the parties.

2 The applicant's agent filed a written submission on 28 June 2004 to the effect that, in its view, the payment received by the applicant on termination of his employment, incorrectly described as a "net redundancy payment" of $1,230.70 ($1,925.70 gross) should be deducted from any loss found by the Commission. According to the applicant's submission, this would lead to a loss of $37,035.79. Applying the statutory cap under s 23A(8) of the Industrial Relations Act 1979 ("the Act"), the final quantum of compensation should be $23,022.34.

3 The solicitors for the respondent, surprisingly, by a written submission filed on 29 June 2004, appeared to attempt to re-argue the issues concerning findings of fact and loss already made by the Commission. This course is now not open to the respondent and the respondent has not filed submissions in accordance with the Commission's direction. The respondent has not sought leave to re-open its case and in any event, there would seem little basis for such an application even if brought: *Watson v Metropolitan (Perth) Transport Trust* [1965] WAR 88; *Londonish v Gulf Pacific Pty Ltd* (1993) 45 FCR 128. Nor has it been suggested in the respondent's submissions that the Commission's reasons for decision require correction in a material particular to rectify an obvious error even if such a power is available to the Commission under the Act: *Aussie Online Limited (ACN 004 160 927) v John Lane* (2001) 81 WAIG 2511.

4 Some of the respondent's submissions were erroneously directed to assertions inconsistent with findings made by the Commission, in particular, the role of Mr Merks in relation to the incidents involving the applicant in the workplace. It is important to observe that the Commission has found that the altercation between the applicant and Mr Merks was not a one sided affair. Moreover, the respondent has submitted, contrary to the findings of the Commission, the applicant could have been fairly dismissed in any event by the giving of five weeks' notice, said to be reasonable given the terms of the Workplace Relations Act 1996 (Cth). The Commission rejects the respondent's submissions.

5 The further submissions of the parties have not resolved the issue of any deductions from the loss found by the Commission to have been caused by the applicant's unfair dismissal. From the terms of exhibits A1 and R7, whilst not clear, it seems that on termination of employment, the applicant received a gross commission payment of $965.69. Additionally, as the Commission has already found, an annual leave payment of $3,361.39 was also paid. This latter payment, accrued as an entitlement prior to dismissal, is not to be deducted from the applicant's loss. It seems that the other payment on termination of employment, that being $1,925.70 gross included the commission payment already noted. Therefore, it would seem that the appropriate deduction from the applicant's loss is the sum of $960.01, being the remainder of the $1925.70, once allowance is made for the commission payment made. Therefore, the applicant's total loss is $38,001.48. Capped under s 23A(8) of the Act this leads to a sum of $23,022.34 as six months compensation for loss.

6 An order now issues.

2004 WAIRC 12053

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BARRIE THOMAS KERTON
	APPLICANT
	-v-
	BANDABERRY PTY LTD - TRADING AS MANDURAH HOLDEN
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 20 JULY 2004
FILE NO/S	APPLICATION 567 OF 2003
CITATION NO.	2004 WAIRC 12053

Result	Declaration and Order issued
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr G Miller as agent and later Mr P Arns of counsel

Declaration and Order

HAVING heard Mr K Trainer as agent on behalf of the applicant and Mr G Miller as agent and later Mr P Arns of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby –

(1) DECLARES that the applicant was unfairly dismissed from his employment as a sales person on or about 19 April 2003.

(2) DECLARES that reinstatement or re-employment is impracticable.

(3) ORDERS that the respondent pay to the applicant as compensation for his loss the sum of $23,022.34 gross less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1936 and actually paid within 21 days of the date of this order.

(Sgd.) S J KENNER,
[L.S.] Commissioner.

2004 WAIRC 12173

ALLEGED UNFAIR DISMISSAL

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DARRYL LINTO
	APPLICANT
	-v-
	REPCOL LIMITED
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	MONDAY, 2 AUGUST 2004
FILE NO	APPLICATION 152 OF 2004
CITATION NO.	2004 WAIRC 12173

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal – Whether constructive dismissal or resignation – Intent of parties considered – No dismissal at the initiative of the employer – Application dismissed – *Industrial Relations Act 1979* (WA) s 23 & s 29(1)(b)(i)
Result	Application alleging unfair dismissal dismissed
Representation	
Applicant	Appeared on his own behalf
Respondent	Mr A Metaxas (of counsel)

Reasons for Decision

1 The applicant claims that he was harshly, oppressively or unfairly dismissed from his employment with the respondent. He seeks the maximum compensation available pursuant to s.23A of the Industrial Relations Act 1979.

2 The respondent is engaged in debt recovery and up until 2002, was a private company which had been established by Peter Fulvio Di Prinzio in 1973. In 1992, it was a prominent collection agency in Western Australia and about to embark on growth. The General Manager of the company had recently departed and Mr Di Prinzio had known of the applicant through the applicant's previous employment as Credit Manager with Aherns, and he offered the applicant the position of Operations Manager, which he accepted. At the time, the company had approximately 12 – 15 employees. Mr Di Prinzio undertook the marketing and client relations work, the applicant managed the operational requirements of the business and Mr Di Prinzio's wife was responsible for administration. Between the three of them they ran the business and the applicant was, in effect, the third rung of the small organisation.

3 The business developed and grew over the next few years and had offices in Sydney and Melbourne and had taken over a business called the Credit Smart Group in the Eastern States. In May 2002, it was Mr Di Prinzio's intention to fulfil his long time dream of having the company listed on the Australian Stock Exchange as a public company. By this time the applicant had become a director of the company. He was asked to resign that directorship for the purposes of the company being listed. He was offered a position as National Operations Manager commencing on 26 February 2002 and he signed a contract to that effect. This contract was to continue until 17 January 2005.

4 In the preparation for the listing of the company, additional business expertise was brought in, in the person of John Walter Wreford who had expertise in corporate structures, management and auditing. In addition, a company secretary or public officer was engaged. Over a relatively short period of time, the company expanded significantly and by the time the applicant's employment terminated in January 2004, there were approximately 60 people working in the Perth office, more than 30 in the Brisbane office and a total of 30 in the New South Wales and Victorian offices. The Queensland business was Credit Smart, a fully owned subsidiary of the respondent. In addition, the business was intended to develop an operation from India with the aim of employing people (initially 60 to 70 people) who would work via telephone.

5 As the company developed there were a number of restructures. In 2002, the applicant was the National Operations Manager reporting directly to Mr Di Prinzio. Reporting to the applicant were managers for Western Australia, Victoria and New South Wales. Mr Wreford was the Chief Operating Officer and he also reported directly to the Managing Director, and a number of positions reported to him.

6 By 6 January 2003, the structure had changed to take account of the growth of the business. At that point, the applicant was the National Operations Manager, and the state managers for Queensland, New South Wales, Victoria and Western Australia reported directly to him. The manager of Credit Smart reported directly to the Credit Smart director but also in a less formal

way to the applicant. There was also an informal reporting from the Asian operation to the applicant. The Asian National Operations Manager formally reported to Mr Wreford. The applicant still reported to Mr Di Prinzio, as did Mr Wreford.

7 On 2 June 2003, the arrangements were changed and Michael Park, who had been the Queensland manager, became the Eastern National Operations Manager with Queensland, New South Wales and Victorian state managers reporting to him. The applicant became the Western National Operations Manager/Asia, and Western Australia and Asia, as well as Credit Smart, reported directly to him. The applicant then was one of three directly reporting to Mr Di Prinzio, including Michael Park and John Wreford. There was also a position titled Communications which reported directly to Mr Di Prinzio. That position had no office reporting to it.

8 With the growth of the business, where all of the employees had formally been on one floor of the offices at 70 Hay Street, Subiaco, the number of employees now spilled over onto another floor. Level 1 now contained what has been referred to as an executive suite containing six small work stations and a board room, amongst other things. Mr Di Prinzio and Mr Wreford were on this floor whereas the applicant remained on the other floor with the operations staff. Both Mr Wreford and Mr Di Prinzio say that this arrangement left the applicant somewhat "out of the loop" in that he was not automatically able to participate in the banter that went on in the open plan executive suite or be automatically included in conversations. There appears to have been no suggestion that he was deliberately excluded and, communications by email and telephone and by his being invited to come to the board room or to meet with the other senior management personnel on their floor occurred frequently.

9 In the months prior to December 2003, a problem was identified with the recoveries of debts in New South Wales. The company had not been recovering costs for legal action to recover debt. This meant that the company was actually sacrificing legal costs for the purposes of recovery of debts and was an additional and unreasonable cost being worn by it. It was seen as a management issue and Mr Wreford and Mr Di Prinzio discussed how this could be better managed. Mr Wreford suggested the creation of an Operational Executive Committee. According to Mr Wreford and Mr Di Prinzio this committee, made up of Mr Di Prinzio, Mr Wreford and the applicant, was to have regular meetings between themselves an would jointly communicate with each of the other states by teleconference to provide better feedback and direction and to enable resources to be allocated immediately where necessary. The intention, according to them, was that the applicant's position would remain the same as it had been at that time, i.e. Western National Operations Manager/Asia. He would be a member of that committee, but he would also act as the committee's executive officer, taking notes and executing decisions. Both Mr Wreford and Mr Di Prinzio say that this would have enhanced his position.

10 Mr Di Prinzio and Mr Wreford say that they also wanted to highlight the requirements for compliance within the business by including within the applicant's title reference to his being the compliance manager. They say that as far as they were concerned there was no suggestion that he would be in any way diminished in responsibility, status or conditions. Further, he was to be relocated to the executive suite so that he could be "brought back into the loop".

11 The applicant and Mr Di Prinzio both gave evidence that during the course of the applicant's employment they had developed a close personal and working relationship, got on very well and socialised with each other's families. The applicant says that he did not feel that his relationship with Mr Di Prinzio had been in any way usurped or his position in the company undermined by Mr Wreford. On the contrary, he says that Mr Wreford has skills and experience that he does not have and that he did not see Mr Wreford's arrival in the company as a down grading of his own position, but saw Mr Wreford's participation as an enhancement to the company. He remained on the second level in the management structure below Mr Di Prinzio when the company expanded to float. He acknowledged that Mr Wreford has considerable skill in the use of the computer system, has a "big picture" approach, and that he, the applicant does not have these attributes. He saw no displacement of himself in the personal relationship with Mr Di Prinzio by Mr Wreford and refutes that he saw himself as being displaced as second in charge.

12 Mr Wreford says that on Thursday, 11 December 2003, he and Mr Di Prinzio met and discussed the broad format of the new arrangements and that it was he who contacted the applicant and invited him to come to the board room to meet with them. It appears that such an invitation was not unusual and was quite informal. He says that he explained to the applicant the concept that they were considering in respect of the operation of the Operational Executive Committee and that they wanted the applicant involved. He says that he explained to the applicant what that involvement would mean. He says that he was surprised at the negative and hostile response from the applicant. The applicant asked how it affected him and whether there was a job description. He said that he needed to think about the position. Mr Wreford says that he advised the applicant that the job description was functionally the same as his existing position but the applicant said that he wanted a job description, and wanted time to consider the matter. Mr Wreford could not understand this as it was still the same job description, the only real change was to the title in being Operations and Compliance Manager, and in participation in the committee, and told him so.

13 Mr Di Prinzio's evidence agrees with this description.

14 The applicant's evidence is that this was not the description of what was put to him. He believed that he was being offered a different position and that there was no alternative put to him if he refused to accept the position offered. He also believed that he did not have sufficient information about the new job, and believed that he was being pressured into accepting this position. He says that Mr Wreford said that it was a waste of time for him to be provided with a job description. The applicant says that he was not prepared to accept the position at that point, needed time to consider it and he wanted to consider it over the weekend. The applicant also says that he was not told that the purpose of the Operational Executive Committee was to have daily communications with the managers and to monitor their actions. He says that while Mr Di Prinzio and Mr Wreford informed him that they wanted him to be a member of the committee and to be its executive officer, it was not put to him that his responsibility was to drive the committee's processes. He says that they first said that they had a new position of Operations and Compliance Manager and that he was expected to answer straight away as to whether he wanted to accept that position. He denies that he was told that the position was exactly his current position except in respect of the Operational Executive Committee, the executive officer of the committee and relocation to the executive suite. He says that when they would not provide a job description he asked what the job expectations were, to which he received a response from Mr Wreford that it was to be higher profits and less expenses. He was surprised at hearing such a basic statement because that was the whole purpose of most operational functions. He says that he asked for more time until the Monday.

15 However, it is agreed between the witnesses that the next day, being 12 December 2003, the applicant was invited to meet Mr Di Prinzio and Mr Wreford in the board room and he again asked for a job description and persisted in asking for it. He agrees that Mr Wreford said to him to write his job description on the white board. He denies that he was told that he was to write that and add the executive committee and executive officer. He said no, he wanted to know what the new job was and he says that Mr Wreford became agitated.

16 Mr Wreford agrees that he asked the applicant to write his job description on the white board on the basis that all he was trying to point out to him was that his job description had not changed.

17 Both Mr Wreford and Mr Di Prinzio gave evidence that they were surprised at the applicant's reaction to the discussion.

18 The applicant also says that at one of the two meetings, either Thursday or Friday, he asked what would happen if he did not accept the position and from the answer he received, he believed that there was no alternative but for him to accept the position. On the other hand, Mr Wreford and Mr Di Prinzio suggest in their evidence that there was no position being suggested to the applicant other than the one he held, with some modification to its method of operation.

19 On Monday 15 December 2003, Mr Di Prinzio and the applicant were to meet some clients for lunch. In the car on the way to the lunch the applicant told Mr Di Prinzio that he had decided to resign. He says that he told Mr Di Prinzio that he was resigning because he was under duress regarding the new job and that he did not know what the job was about. He says that he also said to Mr Di Prinzio that he could not work with Mr Wreford and did not trust him. Mr Di Prinzio replied that they had worked together for two years and wanted to know the specifics of this lack of trust, to which the applicant says that he responded that he could not supply him with specifics. Mr Di Prinzio says that he was shocked to learn that the applicant was intending to resign and told him on the way back from lunch that he was not going to accept his resignation. The applicant commented to the effect that why didn't Mr Di Prinzio buy a little collection agency and put him in it to run it. It was agreed between them that Mr Di Prinzio's responded with a comment to the effect of why would he do that. Mr Di Prinzio says that he asked the applicant to think about the situation and the applicant's evidence confirms this. The applicant said no, he was going on a cruise on 6 February 2004 and would like to finish up at that point.

20 Later that afternoon, Mr Di Prinzio was to travel to Melbourne and he went to the airport departure lounge where he met Mr Wreford who was also going to Melbourne. He told Mr Wreford that the applicant had resigned and when asked why, he told Mr Wreford that the applicant said he could not work with Mr Wreford and could not trust him. Mr Wreford asked him what had he, Mr Wreford, done. Mr Di Prinzio said that he did not know but he needed to think about the situation. They did not discuss the matter further until returning to Perth from that trip at which point Mr Di Prinzio told Mr Wreford that he had decided that he would accept the applicant's resignation.

21 Mr Di Prinzio then discussed the matter with the applicant. He advised him that he would accept the resignation, he was concerned that the last part of the applicant's contract required him to work constructively and professionally with other executives, and in the circumstances of the applicant saying that he could not trust Mr Wreford, he thought that the situation could not be sustained and they agreed that the applicant would leave on 6 February 2004.

22 Mr Di Prinzio and Mr Wreford discussed the matter further. Mr Wreford thought that the applicant had a lot to contribute, had a lot of experience and expertise and, even if the applicant felt that he could not work with Mr Wreford, Mr Wreford suggested that the applicant could undertake consultancy work for the respondent. Mr Di Prinzio conveyed this to the applicant and said that when he got back from his cruise they should talk about the issue of consultancy. He told the applicant he could get more money for less work, and they both shook hands in the office.

23 Mr Di Prinzio says that sometime soon after, the applicant told him that he was not coming to the staff Christmas party. Mr Di Prinzio asked why, saying that he was still there as part of the business, still a National Operations Manager, so the applicant changed his mind and went to the party.

24 However, in the week after New Year the applicant asked to see Mr Di Prinzio in the board room and said to him that although he did not wish to offend or hurt him, he had recourse against the company for the way in which he had been treated. Mr Di Prinzio says that his response was that, after the time that they had worked together and their relationship, how could he not be offended and hurt and that he was so offended and hurt. The applicant says that when he spoke to Mr Di Prinzio in the New Year, he said that he told him that he thought that the company had not honoured their agreement to give him one month's written notice. In view of the way that they had treated him like a junior employee they had an obligation to honour that. Mr Di Prinzio responded to him that how could he not be offended by that.

25 Mr Di Prinzio considered the matter further and called the applicant to the board room the next day. He told the applicant that he had lost respect for their relationship, and that he was hurt and offended. The applicant asked whether he no longer trusted him. Mr Di Prinzio responded that he did not trust himself, with the hurt and offence that he felt, and would like the applicant to leave on the Friday, which was 9 January 2004.

26 At some later point, before the end of the week, Mr Di Prinzio asked the applicant if he would like a farewell function, the applicant said no, and they had virtually no further communications until the Friday. It appears, though, that one of the other management staff organised the staff to get together to say farewell to the applicant but Mr Di Prinzio and Mr Wreford were not advised of this function. It was not until Mr Di Prinzio looked around on the Friday afternoon and discovered that everyone was missing that he soon discovered that they were saying farewell to the applicant. He became annoyed that he had not been informed or invited and appears to have taken the manager who arranged the function to task for not informing him.

27 The applicant says that the job that he was offered, which he denies was his existing job with enhancements, was in fact advertised in the Western Australian Newspaper of 20 December 2003 as an Executive Officer, Operations and Compliance. The applicant says the position was eventually given to Caroline Dias, an internal applicant, who had not been long with the company, and who had very little knowledge of the company or of compliance and other procedures. She came into the applicant's office before his termination of employment and expressed her doubts about her capacity to do the job. He reassured her that she would be able to do it with assistance. He says that, apparently, she never took up the position and that an Operational Committee was established, and Michael Park became the National Operations Manager. The Applicant says that his own former role is now being performed by the Committee.

28 According to Mr Wreford and Mr Di Prinzio what occurred was that there was a separation across eastern and western operations was intended, however, because of the applicant's reaction and departure, the structure changed to accommodate that, and in the interim Mr Di Prinzio took over the role of the National Operations and Compliance Manager. Michael Park, the Eastern Operations Manager, became the National Operations Manager, moved to Western Australia and became the executive officer to the Operational Executive Committee. Caroline Dias was not to take on that role but was to be the note taker for the committee, in a sort of personal assistant role. The applicant does not accept that that occurred.

29 As Mr Metaxas for the respondent said in his closing submission, this is a sad outcome to a lengthy and productive relationship. The question, though, that needs to be dealt with first is whether or not there was a dismissal. I am not satisfied that there was a dismissal. What occurred appears to have been a misunderstanding. That misunderstanding arose partly because the applicant had ceased to trust Mr Wreford. When a proposal was put to him for his work to be performed through a different mechanism, he did not trust that. He did not comprehend what was put to him and in his suspicion, believed that he was being down graded. I am satisfied that that was not the intention of Mr Di Prinzio or Mr Wreford, and they were

genuinely mystified by his reaction. They could not understand his demand for a job description of what was being proposed when it was the same job but under a different arrangement.

30 Further, there was no alternative position offered to the applicant simply because what was being put to him was a changed arrangement in respect of his own job. There was no intention on the part of the respondent to diminish the applicant's responsibility or status. Further, he was to be moved to the executive suite to ensure that he was able to participate in the senior management discussions which took place on a day to day and informal basis. The applicant's decision to resign was that – a decision to resign. His lack of trust of Mr Wreford soured his view of the relationship and he appears not to have been prepared to accept Mr Wreford's word as to the arrangements being put to him. Given his long standing relationship with Mr Di Prinzio, this too is a sad situation.

31 Mr Di Prinzio's bringing forward of the applicant's date of departure does not constitute a dismissal. Mr Di Prinzio's asking the applicant to leave earlier was as a consequence of the applicant making comments to Mr Di Prinzio which, in circumstances which I have described and given the relationship between them, could not have other than offended Mr Di Prinzio and make their working relationship uncomfortable. The applicant was paid up until the date he had intended to depart.

32 In all of these circumstances I conclude that there was no dismissal and accordingly, there could be no unfairness in that termination of employment. The application will be dismissed.

2004 WAIRC 12174

ALLEGED UNFAIR DISMISSAL

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DARRYL LINTO
	APPLICANT
	-v-
	REPCOL LIMITED
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	MONDAY, 2 AUGUST 2004
FILE NO	APPLICATION 152 OF 2004
CITATION NO.	2004 WAIRC 12174

Result	Application alleging unfair dismissal dismissed
Representation	
Applicant	Appeared on his own behalf
Respondent	Mr A Metaxas (of counsel)

Order

HAVING heard the applicant on his own behalf and Mr A Metaxas on behalf of the respondent, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P.E. SCOTT,
[L.S.] Commissioner.

2004 WAIRC 12089

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PIETER LIPS
	APPLICANT
	-v-
	SUPERCHEAP AUTO PTY LTD (ABN: 64085395)
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 23 JULY 2004
FILE NO/S	APPLICATION 601 OF 2003
CITATION NO.	2004 WAIRC 12089

Catchwords	Industrial law - Termination of employment – Harsh, oppressive and unfair dismissal – Summary dismissal for misconduct – Whether lack of procedural fairness – Alleged offer of sale of prohibited drug in the workplace – Employee's "right to silence" – Right against self incrimination – Employee afforded every reasonable opportunity to respond to allegations – Principles applied – Applicant not harshly, oppressively or unfairly dismissed – Application dismissed – *Industrial Relations Act 1979* (WA) s 23A, s 29(1)(b)(i), s 26(1)(c); *Misuse of Drugs Act 1981* (WA)
Result	Application dismissed
Representation	
Applicant	Mr L Gandini of counsel
Respondent	Mr J Brits of counsel

Reasons for Decision

1 At all material times the applicant was employed as a service centre manager at the respondent's Rockingham store. The respondent is engaged in the industry of retail motor vehicle parts and service. The respondent, not long before the summary dismissal of the applicant, acquired the business from the applicant's previous employer, with whom the applicant commenced employment in or about January 1999.

2 On or about 8 May 2003, the applicant's employment was summarily terminated for misconduct. It was alleged by the respondent that the applicant had offered prescription drugs to staff members. The applicant denied this and now challenges the respondent's decision to dismiss him summarily for misconduct, and seeks orders pursuant to s 23A of the Industrial Relations Act 1979 ("the Act").

3 Given that the applicant's dismissal was summary, counsel for the respondent, Mr Brits, properly accepted that the respondent had a burden to establish that it was justified in summarily dismissing the applicant for misconduct, despite the overall persuasive burden being on the applicant to establish that his dismissal was harsh, oppressive or unfair for the purposes of the Act.

The Facts

4 The applicant was originally employed by the previous owner of the business in January 1999 as service manager at the Midland branch. The applicant then transferred for about four years to the Gosnells branch in the same capacity. The applicant testified that his duties as service manager were to book in vehicles for servicing, arrange and sell spare parts and liaise with customers etc. In May 2003, the respondent acquired the business. The applicant received a letter dated 17 April 2003, a copy of which was tendered as exhibit R1, confirming his appointment as workshop service manager with the respondent. A term of the applicant's employment included compliance with the respondent's policy and procedures an extract of which was tendered as exhibit R3. The possession, use or dealing in drugs of addiction or other restricted or dangerous substances, is described as a ground for summary dismissal for serious and wilful misconduct in the policy documents. The applicant acknowledged the existence of these policies and his understanding of them, as a part of the respondent's orientation program when they acquired the business. Tendered as exhibit R2 was the applicant's express acknowledgement of these matters.

5 On the applicant's evidence, as a consequence of a medical condition arising from his employment, the applicant was first prescribed dexamphetamine by his medical practitioner in about September 2002. The applicant testified that he notified his then employer of this and tendered as exhibit A1 a copy of a file note dated 19 September 2002, acknowledging this contact. Dexamphetamine is a class A medicine and is also a prohibited drug under the Misuse of Drugs Act 1981 (WA) ("the MD Act"). The consequence of this is a matter that I will return to later in these reasons.

6 According to the evidence, the applicant had arranged a period of annual leave in April 2003 and when he returned from this leave, he transferred to the respondent's Rockingham branch on or about 28 April. The applicant was at Rockingham for about three and a half days when he was approached by management concerning a complaint that had apparently been made by other staff concerning the applicant's conduct. The applicant was interviewed by Ms Dyer, a human resources officer. Ms Dyer has had about four years' experience in a human resources management position. She testified that there was a staff report to her that the applicant had offered and/or offered for sale, a prohibited substance. She testified that she received two written statements from employees, Mr Jason Clinch and Mr Liam Lambkin, both of which were tendered as exhibits R4 and R5 respectively. In these statements, it is alleged that on a Friday (2 May 2003), when looking for headache tablets at the location where the applicant worked, the applicant offered Mr Clinch "dexies" as they would keep him awake. In the case of Mr Lambkin, the applicant was said to have asked him if he wanted to buy some "dexies" and the applicant informed him that he sold these drugs for one dollar each.

7 Both Messrs Clinch and Lambkin were interviewed by Ms Dyer on 7 May 2003. A copy of various interview notes, with all of the relevant persons, was tendered as exhibit R6. During the interview, Mr Clinch was asked by Ms Dyer whether the comments made by the applicant were seriously made or in jest and Mr Clinch said that he did not consider the comments were made in jest. According to the interview, Mr Clinch said that the applicant offered him dexamphetamine twice and said that "he should try some". Mr Clinch also said that the applicant had the bottle of tablets in his hand. Mr Clinch said that he felt that if he had said yes to the applicant, the applicant would have given him some dexamphetamine. Mr Clinch said that he was aware what dexamphetamine was as he had it prescribed for him previously. Mr Clinch added that the applicant also told him that dexamphetamine keeps you awake.

8 According to the note of interview with Mr Lambkin, Ms Dyer asked him about his statement. Mr Lambkin informed her that he went to get some headache tablets from a drawer close to where the applicant was working. The applicant then said words to the effect "I have dexies and they are one dollar each." Mr Lambkin said that he told the applicant that he was already prescribed dexamphetamine as he has difficulties with his memory. According to the note of interview taken by Ms Dyer, Mr Lambkin was sure that the applicant said this to him. Additionally, when asked whether he thought the offer was genuine and not a comment made in jest, Mr Lambkin responded to the effect "I know he had them on him. He didn't really seem like that kind of person to sell them." Mr Lambkin also answered yes to a question put by Ms Dyer, as to whether the applicant would have given him dexamphetamine had he said yes.

9 Also tendered by consent as a part of exhibit R6, is a note of a telephone conversation between Ms Dyer and Mr Podolski who used to work with the applicant at the Gosnells branch. According to the note of telephone interview, Mr Podolski was informed that Ms Dyer was investigating an allegation that an employee had offered another employee a prescription drug. No particulars were provided. As soon as reference was made to "dex" or "dexies" in the conversation, Mr Podolski responded to the effect "it's not Lippsy is it?" When asked why he thought the applicant may be involved, Mr Podolski responded to the following effect "I know the Pieter takes them. We used to have a joke where Peter would ask did I want some and I would say yeah, yeah. And we would laugh. I never took any. He never sold any to me or anything like that. If that's all this is about, it is nothing. It would have happened at Gosnells not at Rockingham."

10 Ms Dyer testified that she interviewed the applicant early in the morning of 7 May in relation to the statements from Messrs Clinch and Lambkin. Ms Dyer testified that she asked whether the applicant wished to have a witness present and he said he did not. The respondent had another manager, a Mr Apollos, present during all interviews. Ms Dyer testified that she put the allegations that had been made to the applicant for his response. The record of interview records that the question put was "it has been alleged that you had offered team members a prescription drug known as "Dexies". What is your response to this?" No particularity was put to the applicant as to when these incidents were said to have occurred, where and in relation to whom. Ms Dyer said that the applicant replied to the effect that if there had been any such discussion with other employees, then it would only have been as a suggestion or in jest. Her evidence was there was no outright denial by the applicant during the course of the first interview, as to the fact that there had been a discussion with employees about these matters. The applicant also referred to Mr Podolski, who presumably, was the "Dave" at the Gosnells branch, referred to in the note of interview.

11 When Ms Dyer said that the specific allegation against him was that he offered "team members" at the Rockingham branch dexamphetamine, the applicant's response was to the effect "If you say offer or suggest. One of the floor staff said, towards mid afternoon, that the work was getting on top of him. I suggested that he should get on some of these as they will pick you up again." It was confirmed that the reference to "some of these" in the answer was dexamphetamine. The applicant in the record of interview denied that he was saying that statement should be taken to be offering the employee dexamphetamine. Nor did the applicant think that the other employee would have regarded what he said as an offer to supply dexamphetamine.

12 After the employees had been interviewed, the applicant was again interviewed on 8 May 2003. At the outset of the interview the applicant informed Ms Dyer that he had taken advice and wanted a letter from the respondent with particulars of who had made the allegations and when and where the conduct complained of had occurred. The applicant also advised Ms Dyer that as a result of his legal advice he was withdrawing any statement he had made at the previous interview. The applicant had apparently arranged for a witness to be present but the person concerned did not arrive. The applicant was content to proceed without this person being present none the less.

13 The applicant was informed by Ms Dyer that that respondent had further investigated the allegations. He was invited to say anything more that he wished to about the matters and the applicant replied that he had no comment. Ms Dyer then put to the applicant that the respondent had "substantiated that you offered the prescription drug Dex to 2 Rockingham team members. What is your response to this?" The applicant declined to comment. He was also informed by Ms Dyer that the respondent from its inquiries was of the view that the comments were not in jest and that an offer to sell the drug had been made. The applicant refused to comment in response to both allegations.

14 According to the evidence of Ms Dyer, the meeting adjourned briefly in order for Ms Dyer to make a telephone call to her superior. Following this, the meeting resumed and the applicant was informed that having considered his responses the respondent was of the view that the applicant's behavior constituted serious misconduct and that his employment was to be terminated summarily. Ms Dyer noted that the applicant's conduct was all the more serious because he was in a managerial position.

15 Also tendered as exhibit R8 was an unsworn statement from a Mr David Hughes, the then assistant branch manager at the Rockingham store. Mr Hughes was not called to give evidence. The content of his statement was therefore not able to be tested in cross-examination. Mr Hughes referred to the reports from Messrs Clinch and Lambkin and that Mr Clinch had come to see him and referred to being offered "dexies" by the applicant. There was also tendered as a part of exhibit R6 a further record of interview between Ms Dyer and another employee of the respondent, Ms Shiralee Geyer, who was also not called to testify. This interview note referred to both Messrs Clinch and Lambkin telling her that the applicant had offered them "Dexies". She suggested to Mr Clinch that he should report the matter to Mr Hughes the manager, which he then did some fifteen minutes or so later.

16 Ms Dyer was extensively cross-examined as to her evidence in these proceedings and the conduct of the investigation by the respondent at the time of the material events. Without reciting the evidence in any great detail the thrust of the challenge to Ms Dyer's evidence was to the effect that the investigation conducted by her was superficial and she did not probe the employees who reported the applicant's conduct to challenge their version of events and as counsel for the applicant put it, "to put them both under some pressure" as to their assertions. In particular, Ms Dyer said that she did not press Messrs Clinch and Lambkin as to the time of the events said to have occurred with the applicant and she did not go back and re-interview the employees after speaking with Mr Podolski on the telephone on 7 May 2003 as to whether the comments of the applicant were in jest or not. Ms Dyer testified that whilst she was not aware that the applicant had prescribed medication prior to the interviews with him, she was told by the applicant during the interviews that he took prescription dexamphetamine.

17 It was Ms Dyer's evidence that she considered that she asked sufficient questions to clarify the issues in dispute in her own mind and that she formed the view from the discussions with Messrs Clinch and Lambkin, that they believed the offer from the applicant was not in jest and that had the employees said "yes" to the applicant's questions then the dexamphetamine would have been given to them.

18 Messrs Clinch and Lambkin also testified and were subject to quite lengthy cross-examination. Mr Clinch had been employed at the respondent and its predecessor since about 1999. He had known the applicant for some time. Mr Clinch testified that on 2 May 2003 he went to the front counter to where the applicant was working in order to get some pain relief tablets because he was suffering "flu" symptoms. He said that the applicant asked him what he was doing and when he said that he was looking for some tablets the applicant asked him if he wanted some "dexies". Mr Clinch said no and the applicant said words to the effect "are you sure as they will keep you awake". Whilst in exhibit R4 Mr Clinch referred to the applicant having a bottle in his hand when he said these words to the applicant, in cross-examination, whilst initially hesitant on this point, said he was sure this was so. In passing, the Commission observes that Mr Clinch had some difficulty recollecting the events without refreshing his memory from the content of exhibits R4 and R6.

19 As to whether the applicant was acting in jest or was serious at the time of this conversation, Mr Clinch testified that at first he thought the applicant may have been joking but when he was offered a second time, he considered the offer to be a serious one. Moreover, in answer to questions put to him by the Commission Mr Clinch said that the applicant had a serious expression and did not appear to be joking. Despite being pressed in cross-examination about the events and in particular the content of exhibit R6, the interview notes with Ms Dyer, Mr Clinch maintained that its content is accurate as to what happened. After the incident, Mr Clinch testified that he went to speak to the team leader Ms Geyer and shortly after this, reported the matter to Mr Hughes. I pause to observe at this point that on the applicant's evidence, he had no conversation at all with Mr Clinch.

20 Mr Lambkin was also called to give evidence by the respondent. He testified in relation to what the applicant said to him when he went to get some pain relief tablets from where the applicant worked. Mr Lambkin testified that the content of his documented interview with Ms Dyer was correct and that he was asked by the applicant whether he wanted to buy some "Dexies" for one dollar per tablet. Mr Lambkin said that he was aware of these drugs as he has them prescribed for a medical condition and has problems with his long term memory. After this conversation, Mr Lambkin said that he spoke to Mr Clinch and also Mr Hughes about the incident. It seems on his evidence that Mr Lambkin made his statement on the request of Mr Hughes.

21 As with Mr Clinch, Mr Lambkin was extensively cross-examined. His evidence was tested against the statement he made and the content of the record of interview with Ms Dyer. The Commission observes that there were some inconsistencies between Mr Lambkin's testimony and the content of his statement. Additionally, perhaps due to the memory difficulties he said he experienced, Mr Lambkin had some trouble independently recollecting events as they occurred at the material times. Despite some of these issues, Mr Lambkin was quite emphatic in cross-examination when he said "the truth was I was offered drugs and I said no".

22 On the applicant's evidence, he strongly denied that he had ever offered anyone prescription drugs in the workplace. As I have already observed above, the applicant denied ever having spoken to Mr Clinch at all about these matters. The applicant did say that he spoke to Mr Lambkin at his work location when he was looking for headache tablets. It was the applicant's testimony

that he said to Mr Lambkin words to the effect that he (the applicant) had not had any "flu" illness since being prescribed dexamphetamine. He said this was the extent of his discussion with Mr Lambkin about these matters.

23 The only other occasions when the applicant testified he had mentioned "dexies" in the workplace was when he told the store "2IC" Mr Hughes about his prescription and also when he mentioned to a mechanic earlier in the week that he should "get on some of these as they will pick you back up again" (see statement ex R6). It was the thrust of the applicant's evidence on these matters that he would have only "suggested" the employees use dexamphetamine and he was not offering it to anyone. Whilst saying that he had not discussed these types of matters with anyone else in jest or otherwise, I pause to note that in cross-examination the applicant admitted he joked about "dexies" with Mr Podolski whose statement is referred to above. It was not clear on the evidence whether the applicant was in evidence in chief, only referring to the Rockingham store when he gave this evidence. In relation to Mr Podolski's statement, the applicant said he did not see it as an issue for jokes of this kind to be made.

24 The applicant's major complaint with the investigation undertaken by the respondent was that he was not given any particulars as to the specific incidents alleged against him as to who the complainants were and when and where the incidents were said to have taken place. He testified that he did not answer questions at the second interview and withdrew whatever he had said the day prior because of legal advice he had been given and because he was not given any detailed allegations.

25 Since the dismissal, the applicant said he had not been fit for work and had only made a couple of job applications as a result. He was aware that another company had taken over all of the service operations formerly undertaken by the respondent.

Consideration

26 In matters of this kind the onus to establish the overall unfairness of the dismissal is on the applicant. This is so, notwithstanding that given the respondent relies upon acts of misconduct to justify its actions a burden rests upon it to establish the grounds upon which it relied at the time of the applicant's dismissal. I adopt and apply the well known test in matters of this kind in *Bi-Lo Pty Ltd v Hooper* (1992) 52 IR 224 when the Full Bench of the Industrial Commission of South Australia said at 229:

> *"An employee is entitled to both substantive and procedural fairness in respect of a dismissal. Substantive fairness will be satisfied if the grounds upon which dismissal occurs are fair grounds. Broadly speaking a dismissal will be procedurally fair if the manner or process of a dismissal and the investigation leading up to the decision to dismiss is just.*
>
> *Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as was within its power, before dismissing the employee, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that having done those things the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged; and that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable."*

27 The ratio of *Bi-Lo* has been adopted and applied by the Full Bench of this Commission on numerous occasions: *Tip Top Bakeries v Transport Workers Union* (1994) 74 WAIG 1729; *Western Mining Corporation Ltd v Australian Workers Union* (1997) 77 WAIG 1079; and *West Australian Branch, Australasian Meat Industry Employees Union, Industrial Union of Workers, Perth v Geraldton Meat Exports Pty Ltd* (2001) 81 WAIG 2523.

28 In cases such as these, it is not for the Commission to place itself in the position of the employer as at the time of the dismissal, and to substitute its own opinion for that of the employer at the time that its opinion was formed. That is, it is not for an employer to subsequently prove on the balance of probabilities, that the misconduct complained of actually occurred, but rather, for it to establish that at the time of the dismissal, the employer acted reasonably, that is, that it had a sound basis upon which to form its views that the misconduct had occurred after a proper investigation and that the employer has not otherwise acted capriciously or harshly. The circumstances of the employment relationship must always be considered, that is, in matters of this kind, a practical and commonsense approach to the application of the test of fairness must be adopted. It must also be borne in mind, that s 26(1)(c) of the Act requires the Commission to have regard for the interest of not just the employee, but also the employer. Applying this practical test, in cases such as the present, it would not be reasonable to expect employers to investigate matters to the standards expected of the police or other investigatory bodies. What is required is that it be demonstrated that any investigation undertaken was reasonable in the circumstances, and that the affected employee has been accorded procedural fairness.

29 In this case, the allegations made by Messrs Clinch and Lambkin, as to the applicant's conduct in the workplace, were plainly serious allegations. The possession or use of a prohibited drug as prescribed by the MD Act, is a simple offence, and its possession with an intent to sell or supply, or an offer to sell or supply such a drug, is an indictable offence under the MD Act. Dexamphetamine is specifically listed as a prohibited drug in Schedules III and V of the MD Act. It is therefore plain, that conduct in relation to prohibited drugs, not otherwise excused under the MD Act, is a very serious matter. Certainly in my opinion, it is not a matter about which jokes should be made in the workplace. This is so, notwithstanding that neither counsel dealt with the issue of the MD Act in their submissions.

30 Relevant also in the context of these proceedings, but also not referred to by counsel, is an employee's right to silence under the contract of employment. In this case, the uncontested evidence was that the applicant, at the commencement of the second interview on 8 May of 2003, declined to answer any questions put to him Ms Dyer, and expressly disavowed any statements made by him during the course of the interview on the previous day. The issue of an employee's right to silence under a contract of employment, is the subject of an article by Mr G J McCarry entitled *The Employee's Right to Silence* ALJ Vol 57 7 November 1983 at 607. The learned author in this article sets out the common law position in relation to both prospective and current employees, and also deals with the issue of self-incrimination. As a general proposition, current serving employees are not obliged to admit derelictions of duty when asked: *Bell v Lever Bros Ltd & Ors* [1932] AC 161 per Lord Atkin at 228. Some qualification to this general proposition was enunciated by Gleeson CJ, Gaudron and Gummow JJ in *Concut Pty Ltd v Worrell* (2000) HCA 64 in cases where a fiduciary duty arises.

31 In *Associated Dominion Assurance Society Pty Ltd v Andrew & Anor* (1949) 49 SR (NSW) 351 Herron J said at 357 - 358 as follows:

> *"A duty lies upon an employee in general terms to give information to his employer such as within the scope of his employment and which relates to the mutual interest of employer and employee. If an employee is requested at a proper time and in a reasonable manner to state to his employer facts concerning the employee's own actions performed as an employee, provided that these relate to the master's business, the employee is bound, generally speaking, to make such disclosure..."*

32 This is qualified by the general requirement that the question to the employee be both reasonable and fair. A further but important qualification to this general statement of the law is that a direction or request to an employee to answer questions that will incriminate the employee, will not constitute a lawful request or direction, and will not be one that an employee is obliged to obey: *Re Dispute Board of Fire Commissioners Re Reports* [1971] AR (NSW) 615 at 618; *Adami v Maison de Luxe Ltd* (1924) 35 CLR 143. It has also been held, that a refusal to answer questions relating to an employee's activities may itself constitute misconduct justifying dismissal: *Associated Dominion; Patty v Commonwealth Bank* [2000] FCA 1072 per Ryan J.

33 I first turn to the question of witness credibility, given the conflicts in the evidence between the applicant and the respondent. Perhaps the most significant conflict in the evidence was the assertion by the applicant that he had no discussions of any kind with Mr Clinch in relation to dexamphetamine, whether such comments were in jest or serious. This stands in stark contrast to the evidence of Mr Clinch, who testified as outlined above. Although they were not called to give evidence on behalf of the respondent, there is reference in exhibit R6 to Ms Dyer's discussion at the Rockingham store with Ms Geyer in which she referred to being informed by both Messrs Clinch and Lambkin, that the applicant had discussed dexamphetamine with both of them. There is also exhibit R8, the unsworn statement from Mr Hughes, the assistant branch manager at Rockingham. This statement refers to a report to him by Mr Clinch on 2 May that the applicant had offered him dexamphetamine. Whilst Mr Hughes was not available for cross-examination, and nor for that matter was Ms Geyer, and hence such statements can only be given limited weight, they do to an extent, corroborate the evidence of Mr Clinch that he did indeed have such a discussion with the applicant. Also at times the evidence from Messrs Clinch and Lambkin was somewhat vague and they seemed to require reference to be made to their statements to recall events, however I accept that both of them have had their own difficulties with memory at times as outlined in their evidence and this may have influenced their ability to recall events from mid 2003.

34 However, notwithstanding these general reservations about the evidence as it was given, on the critical issue as to whether or not the conversation with Mr Clinch and the applicant took place, I tend to the view that it did, given the corroboration of the written statements tendered in evidence. It is also the case that both Messrs Clinch and Lambkin, each referred to the other's conversation with the applicant in their own testimony. There was also the evidence from Ms Dyer as to what she was told at the time by both employees. There was no evidence before the Commission, nor any real suggestion by counsel for the applicant, that either Messrs Clinch or Lambkin had any ulterior motive in making the reports that they did at the time, which would colour their evidence in these proceedings. Additionally, both Messrs Clinch and Lambkin, when giving their evidence, said that they appreciated the seriousness of the allegations that they made at the time, when this issue was raised by counsel for the applicant in cross-examination.

35 Accordingly, where there is a conflict between the evidence on these issues of the applicant and the respondent, I prefer the evidence of the respondent on this occasion. I am therefore satisfied and I find that the applicant did make statements to the effect as was said by both Messrs Clinch and Lambkin, as outlined in the records of interview contained in exhibit R6. That is, I am satisfied on balance that the applicant did make the statements that were said by Messrs Clinch and Lambkin to have been made by him to both of these employees.

36 One of the central issues arising in this matter was whether such statements were made "in jest" or whether they were made with a serious intention. Of course, the issue for the Commission is not whether as a matter of fact this was the case, but whether, at the time that the respondent made its decision to dismiss the applicant that it had a genuine and reasonable belief, based upon reasonable grounds, that this was so. In relation to this issue, the evidence of Ms Dyer, supported by the evidence of Messrs Clinch and Lambkin, was to the effect that because the statements were made to the employees more than once, they had the distinct impression that the offers were real and not made in a joking fashion. Importantly, for present purposes, the applicant did not deny that there were any discussions with any employees in relation to "dexies". Furthermore, there was no denial that there was some discussion about "dexies" "selling for $1 each in school yards". The reported interview note contained at exhibit R6, refers to the note that the applicant "would have" suggested that the employees use these drugs whilst not actually offering them.

37 The difficulty in this case is there is a fine line between how one person may perceive a comment made by another, as opposed to how another person may perceive the same statement. In this case, the situation was also made less clear by reason of the statement of Mr Podolski, to the effect that he and the applicant engaged in joking banter about the applicant's dexamphetamine. Whilst it might be said that the respondent's investigation could be criticised for not having followed this matter up again with Messrs Clinch and Lambkin, and some criticism may be fairly open as to the level of detail put to the applicant during the interview by Ms Dyer, it is clear from the nature of the responses from the applicant during the first interview, that he had a broad appreciation for the issues that were put to him by the respondent. Whilst it is the case in my view, that Ms Dyer could have pressed Messrs Clinch and Lambkin further as to the particulars of the allegations that they made, it must be borne in mind that their interviews with her are to be read in conjunction with statements that they both made at or about the time of the events. There was no suggestion on the evidence that the written statements that they prepared, which were exhibits R4 and R5, were other than contemporaneous notes made at or shortly after the incidents in question.

38 Faced with that information, and the views of the two employees in question that the applicant was not acting in a joking manner when the relevant statements were made, and moreover, that dexamphetamine would have been given to them had they responded positively to the statements made by the applicant, in my opinion, it can only be concluded on balance that the decision taken by the respondent at the time was one reasonably open to it on all of the material available to the respondent at that time.

39 I now turn to the issue of the applicant's refusal to answer questions during the course of the second interview on 8 May 2003. Whilst it was not put as such at the time, or indeed on the evidence or in the submissions from counsel, in my view, given that dexamphetamine is a prohibited drug under the MD Act, and the unlawful possession and/or offering to sell or supply it constitutes an offence and in certain circumstances a serious indictable offence, then the applicant arguably would not be obliged to answer such questions on the grounds of self incrimination, given the authorities to which I have referred above.

40 What is then the significance of this? In my opinion, there can be no doubt that the applicant was afforded every reasonable opportunity to explain the relevant events, to have a witness present during the course of the meetings, and to put his side of the story. On all of the information available to the respondent, whilst as I have observed the investigation could have been better handled in part, the process engaged in was reasonable and in my opinion the applicant was not denied procedural fairness. It is against that standard that the respondent's conduct must be judged.

41 Given these circumstances, I am not able to conclude that the respondent's decision to dismiss the applicant was harsh, oppressive or unfair. Accordingly, the application is dismissed.

2003 WAIRC 09213

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PIETER LIPS
	APPLICANT
	-v-
	SUPERCHEAP AUTO PTY LTD (ABN: 64085395)
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 29 AUGUST 2003
FILE NO	APPLICATION 601 OF 2003
CITATION NO.	2003 WAIRC 09213

Result	Direction issued
Representation	
Applicant	Ms J Boots of counsel
Respondent	Mr J Brits as agent

Direction

HAVING heard Ms J Boots of counsel on behalf of the applicant and Mr J Brits of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs –

1. THAT each party shall give an informal discovery by serving its list of documents by 19 September 2003.
2. THAT discovery is to include the production by the respondent of the following documents or classes of documents:
   (i) the applicant's personal file, from the date on which the applicant commenced employment with the respondent's predecessor, Marlows; and
   (ii) the applicant's time and wages records, from the date on which the applicant commenced employment with the respondent's predecessor, Marlows, to the present.
3. THAT inspection of documents shall be completed by 26 September 2003.
4. THAT the applicant file and serve further and better particulars of claim by no later than 3 October 2003, in relation to the applicant's contractual benefits claims with quantification.
5. THAT the parties give notice to one another a list of witnesses they require to attend at the proceedings for the purposes of cross-examination no later than 14 days prior to the date of hearing.
6. THAT the matter be listed for hearing for one day.

(Sgd.) S J KENNER,
[L.S.] Commissioner.

2004 WAIRC 12098

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PIETER LIPS
	APPLICANT
	-v-
	SUPERCHEAP AUTO PTY LTD (ABN: 64085395)
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 23 JULY 2004
FILE NO/S	APPLICATION 601 OF 2003
CITATION NO.	2004 WAIRC 12098

Result	Application dismissed
Representation	
Applicant	Mr L Gandini of counsel
Respondent	Mr J Brits of counsel

Order

HAVING heard Mr L Gandini of counsel on behalf of the applicant and Mr J Brits of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

(Sgd.) S J KENNER,
[L.S.] Commissioner.

2004 WAIRC 12032

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CORALIE NICHOLLS
	APPLICANT
	-v-
	MGM EXPORTS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	FRIDAY, 16 JULY 2004
FILE NO.	APPLICATION 434 OF 2004
CITATION NO.	2004 WAIRC 12032

Result	Declaration made the Applicant is owed contractual benefits. Orders made that the Respondent pay the Applicant $7,400 and $3,800.
Representation	
Applicant	In person
Respondent	No appearance

Reasons for Decision

1 This is an application made under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act"). Coralie Nicholls ("the Applicant") claims that she is owed the sum of $7,400 for 7 weeks' and 2 days' wages from the week ending 8 July 2003 until the week ending 26 August 2003, by MGM Exports Pty Ltd ("the Respondent"). She also claims that she is entitled to be paid the sum of $3,800 being 19 days' pay as accrued annual leave from 9 September 2002 until 21 August 2003. The Applicant says these are benefits to which she is entitled under her contract of employment, not being a benefit under an award or order.

2 This matter was listed for hearing on 8 July 2004. The Commission's file records that the Respondent was sent a notice of hearing on 18 June 2004. The notice stated this application was listed for hearing on 8 July at 9:30 am. The Applicant appeared at the hearing. There was no appearance made on behalf of the Respondent.

3 The Applicant testified that she was employed by the Respondent as its Quality Assurance Manager from 9 September 2002 until 21 August 2003. Her role was to comply and keep up-to-date a quality assurance manual for the company's abattoir at Gingin. Her terms of employment were negotiated with Mr Shayne Murray, the Respondent's General Manager. The Applicant agreed with Mr Murray that she would be paid $1,000 a week. The Applicant said that she worked five days a week and her duties were carried out partly at the abattoir and partly at home where she worked using her computer. She says she was paid $1,000 for each week's work from 9 September 2002, except from 8 July 2003, when she ceased to be paid. She, however, continued to work after that date as she was informed by Mr Luke Jones, who worked as the Livestock Manager at the abattoir, that she was still employed until Mr Murray found a lessee for the abattoir. During the period from the week ending 8 July 2003 until 26 August 2003 the Applicant continued to compile and update the quality assurance manual. An auditor from the Australian Quarantine Inspection Service audited the manual each month during that period of time.

4 At the end of August 2003, a lessee took over the abattoir and the Applicant continued to work at the abattoir as its Quality Assurance Manager and she was paid $1,000 a week by the lessee until 30 January 2004, when the abattoir was closed.

5 I am satisfied that the Applicant has proved that she is due and is owed an amount of seven weeks' and two days' pay, which is a total of 37 days' pay. Thirty-seven days' pay at $1,000 per week equals an amount of $7,400. I will make an order that the Respondent pay the Applicant $7,400. I am also satisfied that the Applicant was employed for a total period of 11 months and 2 weeks by the Respondent. Accordingly, I will also make an order she be paid 19 days' annual leave at the rate of $1,000 a week, which equals an amount of $3,800.

2004 WAIRC 12115

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CORALIE NICHOLLS
	APPLICANT
	-v-
	MGM EXPORTS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	TUESDAY, 27 JULY 2004
FILE NO.	APPLICATION 434 OF 2004
CITATION NO.	2004 WAIRC 12115

Result	Declaration made the Applicant is owed contractual benefits. Order made that the Respondent pay the Applicant $7,400 and $3,800.
Representation	
Applicant	In person
Respondent	No appearance

Order

HAVING heard Ms C Nicholls and no appearance for the Respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby:

(1) DECLARES that the Applicant is owed contractual benefits;

(2) ORDERS that the Respondent pay to the Applicant within 14 days of the date of this order, the sum of $7,400; and

(3) ORDERS that the Respondent pay to the Applicant within 14 days of the date of this order, the sum of $3,800.

(Sgd.) J H SMITH,
[L.S.] Commissioner.

2004 WAIRC 12192

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARIA NOCIFORA
	APPLICANT
	-v-
	TELETHON INSTITUTE OF CHILD HEALTH RESEARCH
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	TUESDAY, 3 AUGUST 2004
FILE NO	APPLICATION 77 OF 2004
CITATION NO.	2004 WAIRC 12192

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal –Application referred outside of 28 day time limit – Acceptance of referral out of time not granted – Industrial Relations Act 1979 (WA) s 29(3)
Result	Application dismissed
Representation	
Applicant	Mr G A Laceranza of Counsel
Respondent	Ms M Saraceni of Counsel

Reasons for Decision

1 The applicant, Ms Maria Nocifora, made application to the Commission pursuant to section 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") alleging that she had been harshly, oppressively and unfairly dismissed by the respondent, the Telethon Institute of Child Health Research. The date of termination in the application is 7 January 2004. The application was lodged in the Commission on 16 January 2004. It is common ground, however, that the date of termination was in fact 12 December 2003. Therefore the application was lodged one week out of time.

2 Section 29(3) of the *Industrial Relations Act 1979*, is a provision which provides for a discretionary decision by the Commission to accept an application beyond the 28 days time limit where, in the Commission's view, it would be unfair not to do so.

3 Section 29 of the Act, in part, reads as follows:

> "(2) Subject to subsection (3), a referral under subsection (1)(b)(i) is to be made not later than 28 days after the day on which the employee's employment is terminated.
>
> (3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so".

4 Prima facie, however, by virtue of the time limit, a matter is required to be within time unless of course there is good reason for it not to be so, and in that sense all applications are to be treated expeditiously. The decision of the Industrial Appeal Court in *Malik v Paul Albert, Director General, Department of Education of Western Australia* set down the criteria to be considered by the Commission. The factors to be taken into account are whether there is an acceptable explanation for the delay, the merits of the substantive application, whether the applicant took steps to make it clear to the respondent that he or she contested the termination, and the prejudice to the respondent.

5 Ms Nocifora gave evidence in chief by way of an affidavit [Exhibit A1]. She was employed as a Research Assistant, Scheduling and Co-ordination, from 3 November 2003 to 12 December 2003. Her primary task was to contact families to schedule appointments between the families and an examiner. It was an administrative job. The program which she worked on investigated speech impediments in children. Her immediate supervisor was Ms Erika Hagemann, the Co-ordinator of the study. The head of the study was Associate Professor Kate Taylor.

6 Ms Nocifora says that she mistook the date of termination on advice from her solicitor and assumed that it was 7 January 2004, which is the date to which she was paid. She says that only a matter of weeks into her employment the attitude of her supervisor Dr Taylor changed upon discovering that she did not have an honours degree and because Ms Nocifora had suggested that she would like to be employed in an examiner's position. Following this she says that it was suggested that she should resign and when she chose not to resign she was put under a discriminatory and stressful performance review.

7 In late November 2003 she had a meeting with Dr Taylor when she indicated that if the opportunity arose she would be more interested in the position of an examiner. She denies that she expressed dissatisfaction with her position. In late November she also had a meeting with Ms Julia Emmerson, the Human Resource Manager, when her performance was discussed. Ms Nocifora says that she was advised that the Institute was not happy with her daily work output, the number of personal telephone calls which she made and the manner in which she dealt with the families. She says that that was their opinion. She was offered two options; to leave or to undergo a four week performance review. She presented a third option; namely that she

had a two year contract with a six month probationary period and she should work that six month period and then they could decide what they wanted to do.

8 She says that she never accepted a four week review, it was forced upon her. She says that she then participated in three performance review meetings under duress. Ms Nocifora says that she was given insufficient instruction about her duties. She denies that she had a meeting with Dr Taylor whereby her duties were explained. She says she did have a meeting of approximately three hours with Ms Hagemann and Ms Emmerson when her duties were explained. It was a very detailed meeting. She does not believe that her performance improved after that meeting as she considered that her performance was good from the beginning. Arising from the meeting goals were set for her such as to liaise more closely with the examiners. Ms Nocifora says that she had already done so. She says that they (presumably her supervisors) had not done their homework. She says that she was ridiculed and all the allegations against her were fabricated.

9 She says that another goal established for her was to have more empathy with the families and children which she contacted. She considers that she was already doing this. At a meeting on 23 November 2003 she read a letter [Exhibit R1] to her supervisors and indicated that she found the criticism instructive and not a barrier to her performance. However, she says that the whole process only made her feel inadequate, it did not help her and she did not wish to participate. She agrees that she was told that there would be a six week performance review process to end on 7 January 2004 (Transcript p.16). This was conveyed to her in a letter [Exhibit R2]. She was offered the support of an employee assistance program through Prime which she did not use.

10 Ms Nocifora says that she met all the goals set for her but was told that her attitude and motivation were wrong. She says that at that time she could not take any more of the meetings. The applicant had a performance review meeting on 8 December 2003 and went to the doctor the next day. At that time a colleague advised her of her options for redress against the employer's actions. This included the Commission and a union. She did not adopt these options. The next review meeting was scheduled for 12 December 2003. Ms Nocifora says she was anxious and sent an email saying she could not attend. In the email she asks for natural justice and says that she was not given a fair go from the start. She denies that she received any professional advice in drafting the email. She had decided by 10 December 2003 not to attend the meeting. She attended work on 10 and 11 December 2003. Ms Emmerson and Dr Taylor separately contacted her to encourage her to attend the performance review meeting on 12 December 2003. Ms Nocifora says that she replied that if the meeting was fairly conducted then she would attend the meeting (Transcript p.35). She understood that she was given a direction to attend the meeting but says that she was in a very anxious state.

11 Ms Nocifora says that Ms Emmerson then sent her an email advising her that Mr Ginbey, the Administration Manager, wanted to speak to her in his office. Ms Nocifora attended that meeting with Ms Sarah Beveridge as a support person. Mr Ginbey encouraged her to attend the performance review meeting and Ms Emmerson advised her that there were important consequences for her employment if she did not attend. She says that she advised them that she was not prepared to go to the meeting and discuss her work performance because it was never discussed fairly. She then left the meeting as in her mind there was nothing further to discuss. Ms Nocifora returned to her office and was visited by Ms Emmerson and Dr Taylor who advised that her employment was terminated. She was then escorted from the building and said goodbye to her friends on departure.

12 Ms Nocifora received her letter of termination on 17 December 2003. The grounds for dismissal, as expressed in the letter, were her unsatisfactory work performance and her refusal to participate in the review of her performance. She was paid entitlements through to 7 January 2004. Ms Nocifora spoke to her lawyer on 12 December 2003. The next discussion she had with her lawyer was 24 December 2003 at a social gathering. She then signed her application for unfair dismissal in her solicitor's office on 13 January 2004. The applicant says that her solicitor told her that a 28 day time limit applied for applications to the Commission; she cannot remember when she was told this.

13 Ms Nocifora says that about two and a half weeks after she started her employment, ie about mid-November, she attended a meeting with Ms Emmerson and Dr Taylor where she was accused of lying at interview about her qualifications. At that meeting she says that Dr Taylor suggested that she leave her employment. At that time also Ms Nocifora mentioned that she would be interested in an examiner's position. The applicant says that Dr Taylor replied:

> "Well, if that's what you wish to do, there will be some positions coming up in July because two contracts are going to expire, I suggest then you leave now and apply for those positions then" (Transcript p.59).

Ms Nocifora says that the next morning she advised Dr Taylor that she wanted to stay in her position and she says Dr Taylor "went feral" (Transcript p.60). After that Ms Nocifora says that later in the day Dr Taylor indicated that she did not want to work with Ms Nocifora anymore as she changed her mind all the time.

14 The applicant says that at a meeting on 20 November 2003 Ms Hagemann read out a list of complaints about her performance. One complaint was that she was coming late to work. In addition, Ms Nocifora says that the conversations which she had with other staff were relayed back to her at this meeting as criticism. She was also told that she was not spending enough time on the telephone talking to the families. She says that she was not criticised for her performance on the main tasks of scheduling and data management.

15 No evidence was called on behalf of the respondent.

16 Ms Saraceni for the respondent submitted that the application was filed one week out of time, the applicant knew full well what remedies she could pursue and chose for whatever reason not to pursue them in time. Ms Saraceni submitted that the applicant did nothing to contest the dismissal with the respondent other than file her application late. In relation to the merits of the application Ms Saraceni submitted that the applicant was under probation and underwent a performance review early in her employment for substandard performance. The applicant in her own letter [Exhibit R1] said that she found the criticism instructive and not a barrier to her performance; she then refused to participate further in the review. In so doing she failed to comply with a lawful and reasonable direction. Ms Saraceni submitted that Ms Nocifora manipulated and planned her own dismissal.

17 Mr Lacarenza for the applicant submitted that the delay was explainable as she understood she had 28 days after 7 January 2004 in which to lodge her application; that date being the end of her period of termination pay. Ms Nocifora was in effect summarily dismissed on 12 December 2003. The delay in the application was also because her solicitor's office was shut over the Christmas break. He submitted that there was no evidence before the Commission to decide whether her performance was good or not. She sought advice soon after her termination about her rights. Mr Lacarenza says that Ms Nocifora was dismissed because Dr Taylor discovered that she did not have an honours degree, after that the respondent acted so as to force Ms Nocifora from her job. In that respect the termination could be seen to be a constructive dismissal.

18 It is clear from the evidence that Ms Nocifora knew of her rights under the Act on at least 12 December 2003. She knew that she had been dismissed on that day and had to hand back her security pass and was escorted from the building. Her evidence often lacked directness, and was vague as to when she became aware of her rights to claim for unfair dismissal. However, she spoke to Mr Lacarenza on 12 December 2003 and again on at least two occasions prior to signing her application in his offices

on 13 January 2004. Given her ready resort to counsel it is not adequate in my view to claim that she was under the impression that she had 28 days from 7 January 2004 in which to lodge her application, or to claim that she was delayed as her solicitor's offices were shut for the Christmas break. She made no attempt either on 12 December 2003 or shortly thereafter to challenge her dismissal with the respondent. The respondent became aware when the application was lodged. The delay is not long and hence, subject to the merits of the application, the prejudice to the respondent is not great. It is simply the expense of having to defend the application. These factors when taken together weigh against the application being accepted for referral out of time.

19 The other factor to be considered is the substantive merits of the application. It must be remembered that Ms Nocifora was a probationary employee. The contract provides for two weeks notice on termination. She complains that she was on probation for six months and wanted to be tried in the position for that period of time before the respondent decided whether to continue to employ her. She also complains that she was not trained sufficiently. Very early in her employment she was put under a six week period of performance review. The complaints about her performance on her evidence were that she came in late, had poor motivation and attitude, did not speak appropriately to the families which she scheduled for appointments and needed to establish a better relationship with the examiners. She evidenced two emails from two examiners, who complimented her on her efforts, to disprove the latter allegation. She says generally that the complaints against her were fabricated.

20 Ms Nocifora attended several performance review meetings and then refused to attend again. She says that she had sought medical attention, was stressed and that the meetings were not conducted fairly. She gives no detail about this other than she denies the complaints made against her and says that the respondent, on discovering that she did not have an honours degree and accusing her of deceiving them at interview, then set out to force her to resign. She was offered by her employer access to an employee assistance program but did not take up the offer. She says in a letter to her supervisor that she found the comments on her performance instructive and not a barrier to her performance. She says also in that letter that she does not accept the two options put to her by her employer, instead she puts firmly a third option which is much more favourable to her.

21 What is important in my view is that the letter of 23 November 2003 makes no mention of the actions of Dr Taylor on 19 and 20 November 2003 about which Ms Nocifora complains in her evidence [Exhibit A1] and under cross-examination. Paragraph two of the letter states the complaints made against her and Ms Nocifora rejects each one. In the letter Ms Nocifora does state that the respondent complained that they were misled at interview about her prior practical experience (not her qualification). What the letter does not say is that Dr Taylor went "feral" in the meeting, or that the respondent was forcing her to resign, or that Dr Taylor indicated that she "wanted nothing to do" with Ms Nocifora and could not work with her in the future. These statements which are all part of Ms Nocifora's evidence cannot be viewed as "instructive", which is the comment made by Ms Nocifora in her letter a matter of days after the supposed comments by Dr Taylor. It is clear from this, as it is clear to me from having witnessed Ms Nocifora give evidence, that much of her statements are embellished and inconsistent and cannot be relied upon.

22 In the end Ms Nocifora wanted to control her own performance review and then refused a lawful and reasonable direction to attend a meeting on 12 December 2003. This was even after she had been encouraged several times to attend and advised of the consequences for not attending. This all occurred whilst she was on probation. In my view there is no basis to the applicant's claim for unfair dismissal (*Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385). Hence, together with the factors considered above, I find that it is not unfair not to accept her application being out of time. Accordingly, I would order that the application be dismissed.

2004 WAIRC 12193

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARIA NOCIFORA
	APPLICANT
	-v-
	TELETHON INSTITUTE OF CHILD HEALTH RESEARCH
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	TUESDAY, 3 AUGUST 2004
FILE NO	APPLICATION 77 OF 2004
CITATION NO.	2004 WAIRC 12193

Result	Referral out of time not accepted; application dismissed
Representation	
Applicant	Mr G A Lacerenza of Counsel
Respondent	Ms M Saraceni of Counsel

Order

HAVING heard Mr G A Lacerenza of counsel on behalf of the applicant and Ms M Saraceni of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby:

(1) DECLARES that it would not be unfair not to accept Ms Nocifora's referral under s.29(1)(b)(i).

(2) ORDERS that the application be dismissed.

(Sgd.) S WOOD,
Commissioner.

[L.S.]

2004 WAIRC 12282

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN WILLIAM POLINELLI
	APPLICANT
	-v-
	MCKEAGG'S WATER CART HIRE PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	MONDAY, 9 AUGUST 2004
FILE NO/S	APPL 427 OF 2004
CITATION NO.	2004 WAIRC 12282

Result	Application granted
Catchwords	Denied contractual benefit – employee not paid for hours worked – water cart driver – Industrial Relations Act s 29(1)(b)(ii)
Representation	
Applicant	Mr J.W. Polinelli
Respondent	No appearance

Reasons for Decision
(Extemporaneous)

1 Mr Polinelli has brought a claim to the Commission that he is entitled to a benefit under his contract of employment which has not been paid to him by his employer, McKeagg's Water Cart Hire Pty Ltd (the respondent).

2 I am satisfied from Mr Polinelli's sworn evidence before me that he was employed as water cart operator by the respondent on the basis of $20 per hour.

3 I am satisfied that Mr Polinelli was required to complete, and did complete on a daily basis, daily dockets which were handed to a client, BGC Contracting and that those dockets were the system of payment.

4 Mr Polinelli produced two dockets 3221 and 3222, 10 and 11 January 2004 respectively and he claimed he had not been paid for the work done and specified in those dockets. I have no reason to doubt Mr Polinelli's evidence although he was in the witness box for only a short time and I have not had the advantage of seeing him cross-examined. Nothing that Mr Polinelli said struck me as being inherently improbable. He stated that he filled out the dockets; that there was an hour meter on the truck, the times of which he recorded on the dockets, and also there was at least some supervision or the ability by BGC Contracting to supervise the work that he did. Further, during the time that he was employed, none of the daily dockets that he completed were ever queried. There is nothing in the material that is before me that would call into question that evidence.

5 It is a fact that the respondent, which was McKeagg's Transport but is now McKeagg Water Cart Hire Pty Ltd has not filed a Notice of Answer; for that reason there is no challenge to Mr Polinelli's claim by the respondent.

6 I am satisfied that Mr Polinelli has completed the work for which the daily dockets stand as evidence and that accordingly he has shown that he was entitled to the sum of $460 and I propose to make an order that McKeagg's Water Cart Hire Pty Ltd pay Mr Polinelli the sum of $460.

7 The record shows that in discussions between Mr McKeagg and my Associate Mr McKeagg did not, apparently, challenge that the money was owed. However, he claimed that Mr Polinelli had been overpaid on previous occasions.

8 In fairness to the respondent I put to Mr Polinelli the particular daily dockets to which Mr McKeagg had referred. Mr Polinelli's evidence was that he had not been overpaid and whilst I accept that that is his opinion, I also accept his evidence that at least on the occasions when two of the alleged overpayments occurred, they being towards the middle and the end of November 2003, the respondent never queried with Mr Polinelli that he had been overpaid on those dockets even though he remained in its employ until 10 or 11 January 2004. There might be some delay in those dockets being forwarded to McKeagg's Water Cart Hire Pty Ltd, but there does not appear to have been during Mr Polinelli's time of employment from 17 November 2003 to 11 January 2004 any query of any of the dockets which are now challenged.

9 Mr Polinelli has also explained in relation to four of the dockets, and perhaps the fifth docket, why the hours that he put in might have differed from the hours signed for; he referred to matters such as changing tyres and changing headlight bulbs and a problem with blown seals on the second PDO that, to my mind, show adequate explanations why hours on the dockets might differ from the hours signed for.

10 On the balance of the evidence that is before me I do not accept that Mr Polinelli has been overpaid and there is nothing to indicate that in fairness any setting-off should occur of the $460 that is due.

11 Accordingly, I propose now to make the following orders. The first order will be a declaration that Mr Polinelli is entitled to a sum of $460 gross for work performed on 10 and 11 January 2004 from McKeagg's Water Cart Hire Pty Ltd. An order will issue that McKeagg's Water Cart Hire Pty Ltd forthwith pay Mr Polinelli that sum. The order will provide that the payment be made to the bank account held by Mr Polinelli into which his wages were usually paid. I will also make an order that the transcript of these proceedings be produced and sent to McKeagg's Water Cart Hire Pty Ltd and also to Mr Polinelli if he requests a copy for his information.

12 Order accordingly.

2004 WAIRC 12283

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN WILLIAM POLINELLI
	APPLICANT
	-v-
	MCKEAGG'S WATER CART HIRE PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	MONDAY, 9 AUGUST 2004
FILE NO/S	APPL 427 OF 2004
CITATION NO.	2004 WAIRC 12283

Result	Application granted
Representation	
Applicant	Mr J.W. Polinelli
Respondent	No appearance

Order

HAVING HEARD Mr J.W. Polinelli 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 -

(1) ORDERS that the name of the respondent be changed to read: McKeagg's Water Cart Hire Pty Ltd;

(2) DECLARES that John William Polinelli is entitled to the sum of $460 gross for work performed on 10 and 11 January 2004 for McKeagg's Water Cart Hire Pty Ltd; and

(3) ORDERS THAT:

(a) McKeagg's Water Cart Hire Pty Ltd forthwith pay John William Polinelli the sum of $460 gross for work performed on 10 and 11 January 2004 to be paid into the bank account held by John William Polinelli; and

(b) The transcript of these proceedings be produced and sent to McKeagg's Water Cart Hire Pty Ltd.

(Sgd.) A R BEECH,
[L.S.] Senior Commissioner.

2004 WAIRC 11982

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ERICSON POULOSE
	APPLICANT
	-v-
	WA AUTO TRANSPORT
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	WEDNESDAY, 14 JULY 2004
FILE NO/S	APPLICATION 1696 OF 2003
CITATION NO.	2004 WAIRC 11982

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal – Whether applicant an employee or independent contractor – Principles applied – Applicant independent contract – No Jurisdiction – Application dismissed – Industrial Relations Act 1979 (WA) s 29(1)(b)(i)
Result	Application alleging unfair dismissal dismissed
Representation	
Applicant	On his own behalf
Respondent	Mr C Barker

Reasons for Decision

1 This is an application by Ericson Poulose ("the applicant") pursuant to s29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act"). The applicant alleges that he was unfairly dismissed from his position as a truck driver with WA Auto Transport ("the respondent"). The respondent denies that the applicant was unfairly terminated.

Background

2 The applicant worked with the respondent between 1 October 2003 and 31 October 2003. The applicant was provided with a truck by the respondent to pick up and deliver vehicles between car yards. The applicant maintains that he was an employee but the respondent maintains that the applicant was a subcontractor to the respondent.

Applicant's Evidence

3 The applicant stated that he had a discussion with the respondent's owner Mr Clinton Barker in September 2003 about working with the respondent. When a truck later became available the applicant was told that he could lease one of the respondent's trucks as the applicant did not have sufficient funds to purchase a truck. The applicant was also informed that he would be paid monthly and that he would receive his first payment on 15 November 2003. The applicant gave evidence that he was not aware of the amount that he was to be paid. The applicant stated that the respondent allocated him a truck and he commenced employment on 1 October 2003. During his employment with the respondent he was contacted on his mobile phone to advise him where to pick up and deliver cars. The applicant stated that the respondent paid for tyres that needed repair and the applicant asked Mr Barker to pay for fuel for the truck. The applicant worked Monday to Friday and sometimes Saturday each week between the hours of 7.00am and 8.00pm. The applicant stated that on 31 October 2003, which was his last day of work, he was asked to drop off the truck at Mr Barker's house that evening but as he was unable to do so he dropped it off on Saturday. The applicant stated that after receiving a call from Mr Barker he visited Mr Barker on Sunday 2 November 2003. The applicant was advised during this visit that as he was too slow, he was not undertaking his job properly and as he was not answering his phone the respondent had to 'put him off'. The applicant stated that he was not paid any money for the work that he undertook with the respondent.

4 Under cross examination the applicant was asked if it was difficult to contact him on Tuesday 28 October 2003. The applicant agreed that he was contacted by the respondent on the afternoon of 28 October 2003 about not being available to undertake his normal duties. It was put to the applicant that when Mr Barker told him that day that the respondent had lost an important customer due to the respondent not being able to contact the applicant, the applicant said "shit happens". The applicant stated that he did not state these words to Mr Barker. The applicant also denied that during this conservation he was told that he was to cease working with the respondent on Friday 31 October 2003.

5 Subsequent to ceasing employment with the respondent the applicant obtained alternative employment from December 2003 onwards.

6 The applicant is not seeking reinstatement but wants unspecified compensation for his unfair termination.

Respondent's Evidence

7 Mr Barker gave evidence that he entered into a subcontract arrangement with the applicant based on the normal arrangement that the respondent had with its other subcontractors. Mr Barker stated that a subcontractor would purchase one of the respondent's trucks for approximately $15,000 and this payment entitled the person to ownership of the truck and a three year contract to pick up and deliver cars on behalf of the respondent and the respondent would take 25% of each driver's earnings for arranging the deliveries. Subcontractors had to be available to operate between 8.00am and 5.00pm Monday to Friday. Mr Barker gave evidence that outside of these hours the person could do whatever they wanted with the truck.

8 Mr Barker stated that when a truck became available the applicant was unable to pay for the truck. The applicant maintained however that he would have money to pay Mr Barker for the truck when he sold approximately $70,000 worth of cleaning equipment he owned. On this basis Mr Barker came to an arrangement with the applicant whereby the applicant would pay the respondent $5,000 up front for a deposit on the truck and he would then pay off the balance from his ongoing income from undertaking deliveries. Mr Barker advised the applicant that the first month's earnings were always withheld for contingencies and that every subsequent fortnight a payment for the amount earned would be paid to the applicant. Mr Barker stated that subcontractors normally earned approximately $2,000 per fortnight and that each subcontractor was responsible for obtaining an Australian Business Number and any taxation obligations including the Goods and Services Tax. Mr Barker stated that the subcontract arrangement would normally be confirmed in writing but this did not occur in this instance as the applicant had not paid for the truck.

9 As the applicant was unable to raise the $5,000 deposit Mr Barker arranged for the applicant to pay rent of $175 per week for his truck out of which the respondent paid the truck's insurance and registration and for normal 'wear and tear' items. Mr Barker stated that under this arrangement the applicant was responsible for the payment of fuel or extra damage to the truck or cars that he was carrying.

10 Mr Barker stated that the applicant worked well in the first two weeks and was prompt with his pick ups and deliveries. Mr Barker stated that in the third week of October 2003 the applicant started disappearing for hours at a time and taking longer to complete deliveries. Around this time the applicant informed Mr Barker that he was having difficulty making fuel payments so Mr Barker lent him approximately $550. As Mr Barker was concerned about the applicant's cash flow, on two occasions Mr Barker offered the applicant the option of becoming an employee and being paid wages instead of buying the truck and subcontracting to the respondent. The applicant declined these offers. Around this time the applicant's truck was vandalised and the respondent paid for tyres to be repaired. Mr Barker stated that the applicant was becoming slower and slower with his deliveries and the respondent was becoming increasingly concerned that the applicant was unavailable for lengthy periods. As a result deliveries were not being undertaken and the respondent lost three customers.

11 Mr Barker gave evidence that during a telephone discussion with the applicant on the afternoon of Tuesday 28 October 2003, when asked by the respondent about his absences the applicant maintained that he was experiencing personal problems and he needed time to sort out these issues. Mr Barker told the applicant that he was there to service customers, that the respondent would lose business and that it 'wasn't good enough'. The applicant replied that 'shit happens'. Mr Barker then told the applicant that he had had enough and told the applicant to cease working with the respondent on 31 October 2003.

12 Mr Barker stated that the applicant worked as normal for the next three days and even though the applicant was expected to return the truck on the Friday of that week the applicant maintained that he still wanted to purchase the truck. Mr Barker reiterated to the applicant that he was finishing work with the respondent on the 31 October 2003. On the weekend the applicant dropped off the truck and trailer to Mr Barker's house and Mr Barker gave the applicant a cheque for ramps that the applicant had bought for the truck that week.

13 Mr Barker gave evidence that during the four weeks that the applicant worked with the respondent he earned a gross amount of $4,453. After deductions were made for the lease of the truck, invoice books, 25% commission for the respondent, repayment of money lent to the applicant for fuel, damage to vehicles and the cost of the ramps the applicant was left with an amount of $1,226.22. These earnings and deductions were confirmed by the contents of Exhibit R1. Mr Barker confirmed that in the event the applicant was paid an amount of $1,400 nett in full and final settlement of a claim he lodged with the Department of Consumer and Employment Protection in relation to work undertaken by the applicant for the respondent (Exhibit R2). The applicant acknowledged that he would accept $1,400 for the amount owing to him in a letter dated 10 February 2004 (Exhibit R2). Mr Barker stated that the respondent's business was no longer trading due to a loss of customers and an inability to obtain truck drivers.

14 Mr Daniel Sadler worked with the respondent from time to time and was with Mr Barker on Tuesday 28 October 2003 when Mr Barker had a telephone discussion with the applicant. Mr Sadler confirmed that the applicant had been unavailable for some hours that day and when pressed about this issue he responded to Mr Barker by saying "shit happens". The applicant

was then advised by Mr Barker to return the truck to him at the end of the week. Mr Sadler was also present when Mr Barker had a discussion with the applicant prior to the applicant commencing employment with the respondent. Mr Sadler stated that during this discussion the applicant confirmed that he would sell equipment to raise money to purchase the truck and that he was happy to rent the truck until this money was available. Mr Sadler stated that the applicant agreed that he would pay $5,000 up front to the respondent for the truck and the remainder was to be paid out of his earnings.

Submissions

15 The applicant maintains that he was wrongly dismissed and not given any notice that he was to be terminated. As he was an employee he is therefore due compensation for his termination.

16 The respondent maintains that at all times the applicant was a subcontractor to the respondent. As the applicant did not honour the requirements of the arrangement he had with the respondent, the contract between the parties was brought to an end by the respondent. Even though the giving of notice was not necessary under the respondent's arrangements with the applicant the applicant was advised on Tuesday 28 October 2003 that his services were no longer required as at 31 October 2003 because the applicant's behaviour presented too much of a risk for the respondent's ongoing business.

Findings and Conclusions

Credibility

17 I have concerns with the evidence given by the applicant. It is my view that the applicant was deliberately not forthcoming about the specifics of his working relationship with the respondent and about the events which transpired between himself and Mr Barker. For example, the applicant was not forthcoming about his receipt of the payment for the work that he undertook with the respondent. It was only when asked that the applicant agreed that he had been paid for the work he completed whilst working with the respondent. On this basis it is my view that the applicant's evidence is unreliable. In contrast Mr Barker and Mr Sadler gave evidence that was consistent, direct and in my view honest. Therefore, where there is any conflict in the evidence I have no hesitation in accepting the evidence of Mr Barker and Mr Sadler in preference to the evidence given by the applicant.

Was the applicant an employee or a subcontractor?

18 If the applicant was not an employee of the respondent then the Commission has no jurisdiction to deal with this claim. On the basis of the evidence and taking into account the indicia outlined in *Hollis v Vabu Pty Ltd* (2001) HCA 44, I make the following findings when assessing whether or not the applicant was a subcontractor to the respondent or an employee.

19 The right of the employer to control what the employee shall do and how the employee shall do it is a significant test in determining the employment relationship (*Stevens v Brodribb Sawmilling Co Pty Ltd* (1985–1986) 160 CLR 16; *The Australian Builders' Labourers' Federated Union of Workers, Western Australian Branch v PB and KA Brajkovich Pty Ltd* (1990) 71 WAIG 23). In this instance the applicant had full control of the way in which he undertook his duties. This is indicative of a contract for service.

20 Another element in determining the nature of the employment relationship is the organisation test. The question to determine is whether or not the applicant was an integral part of the respondent's business (*Stevens v Brodribb Sawmilling Co Pty Ltd* (op cit)). In my view the applicant was operating his own business as the more jobs he undertook, the greater his income would be and the applicant had some discretion when working both within and outside of agreed hours. Even though the applicant's work was arranged by the respondent and the respondent's name was on the truck driven by the applicant, these are the only elements which point to the applicant being part of the respondent's operations.

21 The applicant was paid in a manner consistent with a subcontract arrangement as the applicant was paid for each completed job and the applicant had a taxation arrangement which is indicative of a contract for service. Further the applicant was not paid a weekly wage as is the case for a contract of service and the amount the applicant was earning was not restricted to payment for labour only.

22 Other indicia which point to the applicant conducting his own business include the applicant being in the process of purchasing the truck he used to pick up and deliver vehicles and being responsible for its running costs. I find that prior to the working relationship between the respondent and the applicant commencing the applicant agreed to purchase the truck from the respondent and that an amount of $5,000 up front was to be paid for the truck with the rest to be paid from his ongoing income. I also accept that the applicant was responsible for the payment of fuel and any damage to the truck. I note that when the applicant was faced with difficulties in meeting these payments he was given the opportunity by the respondent to convert to an employee arrangement however this was rejected by the applicant.

23 Having considered the relevant authorities and after carefully reviewing the way in which the applicant worked for the respondent, I conclude that the employment relationship points to a contract for service and therefore I find that the applicant was not an employee between the period of 1 October 2003 and 31 October 2003. The Commission therefore does not have jurisdiction to deal with this claim.

24 If I am wrong in reaching this conclusion, which I do not concede, and if the applicant was employed under a contract of service, in my view it was open for the respondent to terminate the applicant given the applicant's erratic behaviour and frequent absences from work in the last two weeks of his very short work history with the respondent.

25 An order will now issue dismissing the application.

2004 WAIRC 11983

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ERICSON POULOSE
	APPLICANT
	-v-
	WA AUTO TRANSPORT
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	WEDNESDAY, 14 JULY 2004
FILE NO/S	APPLICATION 1696 OF 2003
CITATION NO.	2004 WAIRC 11983

Result Application alleging unfair dismissal dismissed

Order

HAVING HEARD Mr E Poulose on his own behalf and Mr C Barker on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders –

THAT this application be, and is hereby dismissed for want of jurisdiction.

[L.S.] (Sgd.) J L HARRISON, Commissioner.

2004 WAIRC 12166

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER TREVOR SANDERCOCK
	APPLICANT
	-v-
	E.J POWELL & CO
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	MONDAY, 2 AUGUST 2004
FILE NO	APPLICATION 715 OF 2004
CITATION NO.	2004 WAIRC 12166

Catchwords	Claim for unfair dismissal – Refusal to employ – No employer/employee relationship – Commission lacks jurisdiction – Application referred outside of 28 day time limit – Relevant principles to be applied – Acceptance of referral out of time not granted – *Industrial Relations Act* 1979 (WA) s 29(1)(b)(i),(2)&(3)
Result	Application claiming harsh, oppressive and unfair dismissal struck out for want of jurisdiction
Representation	
Applicant	Appeared on his own behalf
Respondent	Mr E Rea (as agent)

Reasons for Decision
(Given extemporaneously and edited by the Commissioner)

1 The applicant claims that he has been harshly, oppressively or unfairly dismissed from his employment with the respondent. The application was filed out of time and has not yet been accepted pursuant to s.29(3) of the Industrial Relations Act 1979 ("the Act"). The parties have submitted to me a statement of agreed facts in the following terms:

> "1. The Applicant was approached by Mr Sean Powell (managing partner for the Respondent) at the beginning of April 2004 to discuss the prospect of employment with the Respondent in the role of Farm Manager.
>
> 2. On 18 April 2004 Mr Powell arranged for the Applicant to attend the Respondent's office for an interview.
>
> 3. At the conclusion of the interview Mr Powell verbally agreed to employ the Applicant.
>
> 4. The agreement to employ was not evidenced in writing nor was there a written contract of employment.
>
> 5. Mr Powell and the Applicant agreed on a commencement date of 14 June 2004.
>
> 6. Mr Powell informed the applicant on 30 April 2004 of the Respondent's decision to withdraw the offer to employ."

2 The applicant informed the Commission this morning that he never commenced employment with the respondent.

3 The situation is that on 18 April 2004, the parties had an agreement that the applicant would be employed by the respondent, commencing employment in about 7 or 8 weeks. Six weeks prior to the employment commencing, the respondent withdrew the offer to employ. In those circumstances, there was never an employer/employee relationship between the parties, although there had been an agreement to employ which was withdrawn before commencement. The relationship never became one of employer and employee. The withdrawal of an offer to employ does not constitute a dismissal from employment.

4 I refer to the decision of Commissioner Beech in *Sharon Lee Dean v Edward Beale Salon* (2001) 81 WAIG 3125, where an almost identical situation arose.

5 I note that the refusal to employ is an industrial matter. However, section 29(1)(b) provides that individual employees have the capacity to refer only particular industrial matters to the Commission, one of them being a claim of harsh, oppressive or unfair dismissal from employment. There is no capacity for an individual employee to refer to the Commission any industrial matter and, in this case, a refusal to employ. The only matters which can be referred by the individual are those which relate to dismissal from employment or denied contractual benefits. As I have noted, in this case there was no dismissal.

6 As to the issue of an employer/employee agreement, the applicant acknowledges that although the intention of the parties was to enter into negotiations to resolve an employment relationship, he agrees that it was not for the purpose of establishing an employer/employee agreement as it is provided for within Part VID of the Act. Therefore, while there might be reference to employer/employee agreements, they are not of the type that would bring this matter before the Commission.

7 In all of those circumstances, then, the application ought be struck out on the basis that the applicant has no capacity to bring the matter before the Commission. In any event, the application is out of time. Section 29(3) of the Act provides for the Commission to accept a referral by an employee, that he has been harshly, oppressively or unfairly dismissed from his employment, which is out of time if the Commission considers that it would be unfair not to do so. In this particular case, as there is no jurisdiction as the applicant is unable to bring the application of this nature, then it is inappropriate to receive the application in the first instance that basis the application will be struck out.

2004 WAIRC 12167

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER TREVOR SANDERCOCK
	APPLICANT
	-v-
	E.J POWELL & CO
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	MONDAY, 2 AUGUST 2004
FILE NO	APPLICATION 715 OF 2004
CITATION NO.	2004 WAIRC 12167

Result Application claiming harsh, oppressive and unfair dismissal struck out for want of jurisdiction

Order

HAVING heard the applicant on his own behalf and Mr E Rea (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT this application be, and is hereby struck out.

(Sgd.) P.E. SCOTT,
[L.S.] Commissioner.

2004 WAIRC 12235

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER SAYER
	APPLICANT
	-v-
	FALL PREVENTION & RESCUE T/A FALLRIGHT INTERNATIONAL
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	WEDNESDAY, 4 AUGUST 2004
FILE NO	APPLICATION 601 OF 2004
CITATION NO.	2004 WAIRC 12235

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal –Application referred outside of 28 day time limit – Acceptance of referral out of time not granted – Industrial Relations Act 1979 (WA) s 29(3)
Result	Application dismissed
Representation	
Applicant	Mr P Sayer
Respondent	Mr D Jones as agent

Reasons for Decision

1 The applicant, Mr Peter Sayer, made application to the Commission pursuant to section 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") alleging that he had been harshly, oppressively and unfairly dismissed by the respondent, Fall Prevention & Rescue t/a Fallright International. The date of termination in the application is 30 September 2003. The application was lodged in the Commission on 27 April 2004. There are two date stamps on the application and I will accept the earlier date stamp, and not challenge its accuracy, notwithstanding that the application in the signature block bears a date of 30 April 2004. This slight variation in date is of limited consequence. The application then was lodged approximately six months out of time.

2 Section 29(3) of the *Industrial Relations Act 1979*, is a provision which provides for a discretionary decision by the Commission to accept an application beyond the 28 days time limit where, in the Commission's view, it would be unfair not to do so.

3 Section 29 of the Act, in part, reads as follows:

"(2) Subject to subsection (3), a referral under subsection (1)(b)(i) is to be made not later than 28 days after the day on which the employee's employment is terminated.

(3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so".

4 Prima facie, however, by virtue of the time limit, a matter is required to be within time unless of course there is good reason for it not to be so, and in that sense all applications are to be treated expeditiously. The decision of the Industrial Appeal Court in *Malik v Paul Albert, Director General, Department of Education of Western Australia* 84 WAIG 683 set down the criteria to be considered by the Commission. The factors to be taken into account are whether there is an acceptable explanation for the delay, the merits of the substantive application, whether the applicant took steps to make it clear to the respondent that he or she contested the termination, and the prejudice to the respondent.

5 Mr Sayer was a good, straightforward witness. Mr Sayer's relevant evidence is that he sought to challenge the fairness of his termination when he discovered through word of mouth, ie some truck drivers and others, that the respondent in late February 2004 had employed another person (Craig) in his previous position of Dispatch Supervisor. He expected Mr McCormack, the proprietor of the business, to have contacted him and to have re-offered him the position. He says in his application that he was still unemployed at that time.

6 Mr Sayer's evidence is also that on 30 September 2003 he was called into the office and advised that his position was made redundant due to a downturn in the business, that there were no alternative positions available and that he would be terminated forthwith and paid his entitlements. He queried his entitlements and was paid additional monies. He said goodbye to friends and this was punctuated by Mr McCormack who asked him to leave. His duties, contract of employment and letter of termination with final payments are Exhibits R1, R2 and R3 respectively. He says that he was shocked. He did not challenge his termination or the reason given. There was some downturn in the business at that time but goods were still coming in and out and he was busy for eight hours a day.

7 Mr Sayer says that a colleague and friend, Ms Senior, who worked for the respondent as the Production Manager advised him four days later that she was doing his job aswell as her own job. In other words the two jobs had been merged. Mr Sayer says that Ms Senior left the company three months later as she found the combined jobs too hard and she was not happy with the company. Mr Sayer does not know whether Craig took on the combined jobs. It is the respondent's submission, put to the applicant and unchallenged, that the combined jobs continue to be performed by one person.

8 The Commission did not require the respondent to give evidence. On the applicant's evidence alone, which is at its highest, the application must be dismissed for the following reasons. The termination payments made to Mr Sayer are in accordance with the contract and are appropriate. Two jobs were combined into one and continued to be performed as such. Ms Senior performed the dual roles after Mr Sayer left. In that way this must clearly be seen as a situation whereby Mr Sayer's job was made redundant. Mr Sayer does not suggest that he should have been asked to do the remodelled job and not Ms Senior. Mr Sayer was advised and there was a discussion, albeit brief, in relation to the alternatives, of which there were none. Hence s.41 of the *Minimum Conditions of Employment Act 1993* has not been breached. On its face then the termination of Mr Sayer's employment contract by reason of redundancy cannot be said to be unfair.

9 In addition to this Mr Sayer did not challenge in anyway his termination. The respondent did not hear of any challenge until the application was lodged in the Commission. The application was lodged six months late; a considerable delay. Importantly however Mr Sayer's grounds for unfairness are that he was not offered the position in late February 2004 when Craig was employed. At that point in time he formed a view as to the unfairness. This has little bearing on fairness of the actual termination, but Mr Sayer chose to wait a further two months, well past a notional 28 day time limit, to lodge his application. There is clear prejudice to the respondent in accepting such an application which in my view is misconceived and considerably out of time.

10 In all of these circumstances, based on Mr Sayer's evidence, I find that it is not unfair not to accept the application out of time. I would then order that the application be dismissed.

2004 WAIRC 12236

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER SAYER
	APPLICANT
	-v-
	FALL PREVENTION & RESCUE T/A FALLRIGHT INTERNATIONAL
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	WEDNESDAY, 4 AUGUST 2004
FILE NO	APPLICATION 601 OF 2004
CITATION NO.	2004 WAIRC 12236

Result	Referral out of time not accepted; application dismissed
Representation	
Applicant	Mr P Sayer
Respondent	Mr D Jones as agent

Order

HAVING heard Mr P Sayer on his own behalf and Mr D Jones on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby:

(1) DECLARES that it would not be unfair not to accept Mr Sayer's referral under s.29(1)(b)(i).

(2) ORDERS that the application be dismissed.

[L.S.]

(Sgd.) S WOOD,
Commissioner.

2004 WAIRC 12055

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STELLA SILLIGARDOS, ATHENA SILLIGARDOS
	APPLICANTS
	-v-
	COAST TO COAST THE GOLDEN ROAST - WA / THE PERFECT TASTE
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	TUESDAY, 20 JULY 2004
FILE NO/S	APPLICATION 419 OF 2003, APPLICATION 420 OF 2003
CITATION NO.	2004 WAIRC 12055

Catchwords	Industrial Relations Act 1979 (WA) s.29(1)(b)(i) & (ii) - Termination of employment – Harsh, oppressive and unfair dismissal – Downturn in business – Minimum Conditions of Employment Act 1993 s.41 – Applications dismissed
Result	Applications dismissed
Representation	
Applicants	Mr K Trainer as agent
Respondent	Mr G McCorry as agent

Reasons for Decision

1 These are applications made pursuant to s.29(1)(b)(i) and (ii) of the *Industrial Relations Act, 1979* ("the Act"). By amended further and better particulars of claim dated 10 November 2003 Ms Stella Silligardos seeks compensation for unfair dismissal in the amount of $17,807.17 and a denied contractual entitlement in the form of payment in lieu of notice being $1,538.46. An amended further and better particulars of claim dated 10 November 2003 was filed on behalf of Ms Athena Silligardos seeking compensation for unfair dismissal in the amount of $4,352.98 and a denied contractual entitlement of $1,564.12. These matters were adjourned part heard and on resumption the parties advised the Commission that the contractual entitlements claim related to Ms Athena Silligardos had been resolved. Ms Stella Silligardos is the mother of Athena.

2 Evidence in the matter was given by the applicants, Ms Stella and Ms Athena Silligardos and for the respondent by Mrs Dawn Cleary, who with her husband owned and ran the business.

3 The evidence of Ms Stella Silligardos is that prior to working for the Cleary's she had worked in the business for six years, three years full-time and three years as a casual. The business was involved in catering. During her casual employment she held another full time position at the Uniting Church Homes as a cook. Whilst working as a casual Mr Paul Cleary offered her a full time position as the floor manager in the Malaga factory on a salary of $40,000 per year. She gave two weeks notice with the Uniting Church and started with the respondent full-time at the beginning of January 2003. There is no document detailing her terms and conditions of employment; there is only a letter that the respondent sent to her bank [Exhibit A1]. Her duties involved packing jobs and ensuring everything was done properly. She also attended at functions. She made suggestions to the Cleary's in relation to marketing but nothing came of it. Between 1 January 2003 and 6 March 2003 she says that they spoke about the business, but the Cleary's did not mention any problems, financial or otherwise. She worked from Wednesday to Sunday. Her days off were Monday and Tuesday; on some occasions she would have Sunday off.

4 She had a discussion with Mr Cleary on 7 March 2003 at the factory in Malaga. She approached Mr Cleary as he seemed upset and she inquired into the matter. Mr Cleary said that Mandurah and the regions were not doing well, there were problems and that he was going to pull the pin. He said that he no longer needed a manager, he could run the regions from Perth and he had people willing to travel to the regions. She asked about her daughter Athena, who was working in Mandurah, and received no response. She asked Mr Clearly to leave Athena in Mandurah until July 2003. He replied that he was pulling her out now. She understood that he did not require Athena to work in Mandurah or take care of the regions. She is not aware of Mr Cleary offering Athena any work in Malaga. On the same day she asked Mr Cleary about her job status and he told her that he would not terminate her services and that she was an asset to the company.

5 Ms Stella Silligardos worked that weekend. She arrived at work on the Monday to unload some equipment from an earlier job. Mr Cleary called her into the office and Mrs Cleary and he advised her that her job was finished as they could no longer afford to employ her. They told her that she could work until the end of the month or finish that weekend and they would pay her out. She was shocked, began to cry and asked them why they were doing this. They replied that they were happy with her work but they could not afford her. She next attended the Malaga premises for work on the Wednesday. She queried Mr Cleary again about his decision. She then worked from Wednesday, 12 March to Saturday, 15 March. During this time she felt like an outsider around Mr and Mrs Cleary and that they were a bit cold.

6 Ms Stella Sillligardos was unable to recall when she told Athena about her employment but she advised Athena that Mr Cleary was pulling her out of Mandurah and that he required everything back as soon as possible. She says that she used the respondent's van to bring Athena back to Perth in the week following 15 March 2003. She wrote to Mr and Mrs Cleary on 18 March 2003 [Exhibit A2] complaining that she had been unfairly dismissed and claiming a lump sum payment for termination and superannuation. She says that she was not paid till the end of the month and did not receive a separation certificate. She received a response to her letter from the respondent [Exhibit A3]. She says that she never had any discussions with Mr Cleary regarding restructuring of the business. She did have discussions with the Cleary's' about the business being quieter than they had expected. She says that Athena was not offered any casual work. She denies tendering a resignation.

7 After finishing with the respondent she says that she searched the papers for alternative work and registered with Centrelink. She found part time work doing demonstrations in supermarkets and also did some work for Showbag services prior to the Royal Show.

8 Ms Stella Silligardos says that Mr Cleary offered her casual work. She advised him that she required something steady and he told her that he could only give her work as jobs came up. She was never contacted in regards to any jobs. During her final week of employment she had some of the Friday off to attend an interview. On 17 March 2003 she went into work and agrees

that she told the respondent that she was too upset to continue working for the company. She says that she told Mr and Mrs Cleary that she could not work with the way things were and she asked Mr Cleary to pay her up to the end of the month.

9 Under cross examination Ms Stella Silligardos says in relation to her termination of employment that perhaps she and Mr Cleary could have come to some arrangement to get something to live on. She agrees that Mr Cleary did offer her casual work if and when it became available. She denies that he offered her cleaning work on Mondays. She agrees that on 7 March Mr Cleary told her that Mandurah and the regions were not performing and that he was pulling Athena out and managing the regions from Perth. She asked Mr Cleary if there was a problem with Athena and he said no. She put a proposition to Mr Cleary that Athena be allowed to stay in Mandurah until July and he said no (Transcript pg 44-45). She did not tell Athena until some time later and is unable to recall when this was. When she attended at the factory on Monday, 10 March 2003, Mr and Mrs Cleary told her that her job was finished as they could not afford to keep her. She says they told her, "you can finish now or you can - - and we'll pay you to the end of the month" (Transcript pg 45). She says also that they said, "you can finish now or you can go on till the end of the month" (Transcript pg 46). She told them that she would keep working until the end of the month. She later decided that she could not continue to work as they were treating her like an outsider. She says on 17 March she told Mr and Mrs Cleary that she was too upset to continue working and she left that day and requested final monies to be paid by the end of the week. Athena was with her at that time and the following day they collected Athena's belongings from Mandurah. She says that she could not continue to work there because of the way they were treating her.

10 Ms Athena Silligardos gave evidence that from 11 January 2003 she was employed as a regional manager. Prior to this in November and December of 2002 she worked for the respondent on a casual basis. In the first week of January 2003 she had some discussions with Mr Cleary about moving to Bunbury to work. It was decided instead that she would be based in Mandurah and manage the region for there, with some administrative support from the Malaga office. Mr and Mrs Cleary came up with a contract which included a payment of $80 per job, delivery fee, travel fee, management fee and an hourly rate of $13.90 [Exhibit A8]. She ran the business from a rental property in Mandurah. The respondent paid for half of the rent and expenses for the house. She continued paying rent up until 15 March 2003.

11 Between 24 January and 7 March she says she received no feedback from the respondent and did not see a decline in the orders. Her mother Stella contacted her by telephone on 10 March 2003 to advise her of a meeting she had with the Cleary's. The Cleary's had advised her mother that they were no longer employing managers; that they would run the business themselves and that she (Athena) was to be pulled out of Mandurah. The next day Athena came to Perth with equipment for the respondent to clean. She says she was not being paid to clean the equipment. Athena and her mother went into the business on the Tuesday, 11 March 2003. She says that her mother advised the Cleary's that she could not work under the conditions; she could not work to the end of the month and she would finish on Saturday, 15 March 2003. The Cleary's advised that they understood and felt the same. Athena says that Mr Cleary then told her that her last day would be 15 March. There was no offer of casual employment. She then did not work prior to her final day of work and between the Tuesday and the Saturday she stayed with her mother. Ms Athena Silligardos says that she did a function on 15 March in Collie and on the Monday used the work van to collect her belongings from Mandurah. She then dropped the van at the Malaga factory that day. She does not recall if anyone was there. She says that her mother organised with Mr Cleary to borrow the work van. Athena then wrote to the respondent on 18 March 2003 [Exhibit A15]

12 She says that after the meeting with the Cleary's on 11 March 2003 she understood that the respondent was unhappy with her work and she was being dismissed as she was not doing a good job. She had no contact with the respondent while in Mandurah. After her employment finished she enrolled at Centrelink and checked the West Australia and community newspapers and placed her name at a number of agencies. In April 2003 she found a casual bar job at the Osborne Park Hotel and since her termination she has earned $6,652.30. Following her termination she did not receive any calls from Mr Cleary regarding casual work. She denies that she was a casual worker and says that from 11 January 2003 she was employed by the respondent on permanent part time arrangement. She says there was no discussion regarding financial difficulties or a restructure.

13 She says that in relation to the Tax File Declaration [Exhibit A24] the 2002 form has her signature and her ticks. She says that the signature on the 2003 form is not hers and the ticks are not hers; her ticks are straight lines that do not have a little tail. She does not recall filling out the 2003 form.

14 Under cross examination she says that her initial discussion with Mr Cleary involved being remunerated for each function, plus a manager's fee, delivery, travel, cleaning and 15% of net profit. She says that the arrangement changed from an hourly rate to being paid $80 per function no matter how many hours were worked. She says in the discussion with Mr Cleary in early January the boundaries were discussed, ie $1 a head fee, a $20 delivery fee, $13.90 per hour for travel which was later reduced to $10. She was advised of this change by her mother and accepted the change. She was also to be paid for the cleaning of the equipment and for the packing of jobs. She found a house in Mandurah and it was agreed that the respondent would pay for half of the rent and reimburse her for expenses arising from running the business out of the house.

15 In relation to the meeting on 11 March Ms Athena Silligardos says:

> "On the 11th Paul mentioned to me that the 15th was my last job, in Collie, and that he was pulling me out, and that Mandurah was running from Perth, but never mentioned anything about me having ongoing work with him.
>
> ……..
>
> Okay. He hasn't said anything about terminating your employment, has he?---He never offered me any other work. He never said that, Mandurah is only going to be run from here and you'll still be running it from up here.
>
> He never said anything about terminating your employment, did he?---He never offered me more work. He stopped my employment" (Transcript pg 116)

16 She says that the signature on the 2003 Tax file declaration [Exhibit A24] does not look like hers and she does not recall signing the form. She agrees that the ticks in her notice of application to the Commission have little hooks, and she did this as the application was a legal document. For the 2003 form she simply filled in her name and address.

17 Mrs Dawn Patricia Cleary gave evidence that, together with her husband, they became proprietors of the business on 26 October 2002. Both Stella and Athena Silligardos were employed on a casual basis by the previous owner. The Cleary's came into the business at a very busy period and the Silligardos' helped them get over the Christmas period. Ms Stella Silligardos was offered the position of floor manager in the factory. She was to be responsible for going out and assisting on jobs and for staff training. She was employed on an annual salary of $40,000, working 5 days a week, with 4 weeks annual leave. She commenced this position on 1 January 2003.

18 During January/February the business was slow and Mrs Cleary expressed her concerns to Stella. The financial position of the company was extremely worrying. The Cleary's went to see their chartered accountant, Haines Norton, and advised them of

their concerns. They received advice from the accountants that they would need to restructure and that it should be done sooner rather than later. She discussed various options with Mr Cleary, including her obtaining a job elsewhere. It was decided that that was not an option and that staff positions would have to be restructured. A decision was made to close the Mandurah operation and run it from Malaga. It was the respondent's intention to retain Stella but on a reduced basis and this was discussed with her on 11 March 2003. Stella was upset about this and asked the Cleary's to give her anything as she had a mortgage to pay. She was told that she was part of the team and that she would be on the top of the list for weekend work. She worked again on 15 March 2003.

19 Mrs Cleary saw Stella next on 17 March 2003 when she came in with Athena. During this meeting Stella advised that she was too upset to continue working. She told the Silligardos' that there was plenty of work for them. Stella indicated that she had made her decision and she was leaving. She says that she got the impression from Athena that she did not want to work for the company. Mrs Cleary apologised for what had happened and said that there was work available. She says that they had in their minds to offer the Silligardos' alternative hours but the decision was taken out of their hands as they were leaving the company. She was surprised upon receiving the applicants letters [Exhibits A2 & A15] as they had said they no longer wanted to work for the company.

20 Ms Athena Silligardos approached Mr Cleary in late December early January regarding the managers position in Bunbury. The arrangement was for Athena to operate in the managers position from Mandurah with responsibility for the Mandurah/Bunbury region. Administration was to be handled at head office in Malaga and Ms Silligardos would prepare the food and go on site to jobs. Her conditions involved a hourly rate, a management fee per head, 15% of net profit, 50% of the cost of the rental property, a $20 delivery fee and a travelling fee which was changed from $13.90 to $10. In relation to Athena returning from Mandurah Mrs Cleary says that there were discussions with Mr Cleary and Stella was aware of a reduction in bookings. Mrs Cleary says that on 11 March 2003 Stella seemed happy with the fact that Athena would be returning from Mandurah. During that week Stella advised her that Athena would not be returning to work after 15 March 2003, this occurred on probably the Thursday or Friday prior to the meeting. On 17 March Stella advised her that Athena and she would no longer work for the company. She says she was already aware that Athena was not going to continue but had no idea that Stella would not continue. She does not agree with Stella's recollections of events on 17 March 2003 and further does not agree with Athena's recollections of her termination.

21 Under cross examination she says that Athena's position was to be bought back from Mandurah to Malaga, everything else was to be the same, except her living arrangements and working from the factory. This would save the respondent $70 a week in rent and meant the van was in the Malaga factory. On 11 March 2003 Stella advised her by telephone that 15 March 2003 would be Athena's last day of work. In relation to Stella's employment Mrs Cleary discussed with her that she would get jobs as they came in and that she would be the prominent person to get work. She could no longer afford to pay her a weekly salary due to financial pressures. She says she did not wish to lose either of the Silligardos, it was a financial decision, she had no difficulty with Stella's work and termination was never on her mind. She says the respondent became aware in early 2003 of the financial difficulties but did not raise it as they thought they would be able to rectify the situation.

22 Under cross examination Mrs Cleary says that they took over the business on 28 October 2002. A due diligence was carried out covering the last 3 to 4 years. On taking over the business there were approximately 10 casual employees. The staffing situation was discussed with the head franchisee in Canberra and subsequent to that Ms Stella Silligardos was offered a full time management position. She says that leading up to Christmas she worked on a casual basis of three times a month. Mr Cleary made the offer to Ms Stella Silligardos as a manger on a full time basis, she was not involved in the discussion. In relation to Athena Silligardos she was offered a manager's position in Mandurah on a casual basis; there was no management contract. She does not dispute that Athena Silligardos was a manager, she however disputes that she was employed on a permanent basis.

23 In a discussion involving Mr and Mrs Cleary and Stella Silligardos they advised her that her position was not to continue in its current capacity. She was to be employed on the same basis but her hours would be cut considerably. There was no discussion about a casual position; the discussion simply related to hours being considerably reduced. She was to have work every weekend.

24 There was never any discussion with Ms Athena Silligardos in respect of her being removed from Mandurah. All discussions were done in the presence of her mother. Mrs Cleary says she spoke to Stella regarding Athena's future work. She says Athena would have been offered the work in Bunbury operating from Malaga and this was offered during discussions with the Silligardos' around 10 and 11 March 2003. She says it was made clear that Athena would continue to work in the Bunbury area but on shorter hours as the Bunbury operation was still to operate and that there were considerable bookings.

25 There was never any discussion on a one to one basis with Athena Silligardos. The issue of returning to Malaga was only ever discussed with her mother. She says that they had had discussions with Stella Silligardos previously and she was aware of the problems with the business.

26 On 14 March 2003 Stella Silligardos advised her that Athena would not work for the company after 15 March 2003. Then on 17 March 2003 both Silligardos' came to the office and stated that they both wished to leave the company. They were told there were hours to be offered but they said no. She says that Stella implied that they found it difficult to stay with the company. She denies that Stella Silligardos said to her that the working circumstances were very difficult or that she was unable to work under those circumstances.

27 It is difficult to reconcile some of the evidence in this matter concerning dates of conversations and who was involved. Some of this difficulty arises from the method of questioning and a misunderstanding of questions by each witness. Having said that I would favour the evidence of Mrs Cleary to that of Stella Silligardos and particularly Athena Silligardos. Mrs Cleary's recall of events appeared less hesitant, more detailed and was supported by the documentation tendered.

28 It is clear from the evidence of Mrs Cleary and [Exhibit R2] that the business experienced a downturn in profit which required cost-cutting initiatives by the Cleary's. Whilst both Stella and Athena Silligardos could rightly feel aggrieved having only months prior to their termination left a job or moved their residence on the promise of ongoing work, this does not alter the financial difficulty that the business was facing. The business could no longer afford to employ Ms Stella Silligardos as a full-time manager or to run an additional operation from Mandurah. In was then that the position of Ms Stella Silligardos was made redundant. The position of Ms Athena Silligardos was transferred back to Perth from Mandurah and the operation for the South-West was to be run from the Malaga factory.

29 It is common ground, notwithstanding some inconsistency within the evidence of Ms Stella Silligardos, that either she was to be paid to the end of the month or was to work to the end of the month. This was a reasonable period of notice given the nature of the job performed, the qualifications held, the length of service and the age of Ms Stella Silligardos (*Antonio Carlo Tarozzi v WA Italian Club (Inc)* 71 WAIG 2499). The contract was a verbal contract and there is no evidence as to the amount

of notice to be paid under the contract. It is clear from the evidence of Mrs Cleary and Ms Stella Silligardos that on 17 March 2003 Ms Stella Silligardos advised that she could no longer work for the respondent. In that way although the applicant's contract had been terminated earlier, her contract as manager having been substantially changed, Ms Stella Silligardos decided to end her employment on 17 March 2003 and not to work out any notice period, or to continue to work in a different capacity for the respondent. She says that she could not continue to work there in the circumstances. The circumstances as I see them were that the income she had been receiving would not be ongoing and she would need to gain alternate employment to survive. I do not accept that the attitude of the Cleary's somehow changed towards Ms Stella Silligardos so as to make her working environment unpleasant. There is no specific evidence about this allegation.

30 There is a difference between the parties as to how the business was going at that time and whether the Cleary's could have offered Ms Stella Silligardos anything better. As stated, I accept that the business was not sufficiently profitable and that the Cleary's acted on advice from their accountants. There were of course ongoing catering jobs that needed to be completed. Both Ms Stella Silligardos and Ms Athena Silligardos maintain that they were not offered ongoing employment. I do not so find. I find that they were offered ongoing employment as casual employees. I should clarify that somewhat. It is clear in my view that the communication in respect of Ms Athena Silligardos' employment was largely done by the Cleary's through her mother. Evidence about this is inconsistent but having seen the witnesses I am confident that communication about Ms Athena Silligardos was directed through her mother. It is clear that Ms Stella Silligardos was not happy with the situation as it affected both herself and her daughter and there was not going to be enough income to support them. Both of the Silligardos' finished catering jobs on 15 March 2003. Mrs Cleary says that she got the clear impression from the Silligardos' on 17 March 2003 that they did not wish to continue working for the respondent. By the evidence of Ms Stella Silligardos, the way that mother and daughter acted in concert and their departure on that day I consider that Mrs Cleary was right to conclude that they did not intend to work anymore for the respondent. I consider that this is the answer to the complaint that they were not offered any further work. Rather it is the case in my view that they made it clear that they did not want to continue working for the respondent given the substantial changes that were to be made to their working arrangements or terms and conditions.

31 Ms Stella Silligardos had had most of the week and weekend to consider what she wanted to do. The Cleary's had said that they could not do more than offer her preference for catering work, including working weekends. Ms Stella Silligardos wrote to Mr Cleary the day after she had advised him that she could not work for him anymore and challenged him about her contract, certain payments, her dismissal and her separation certificate. She says in that letter [Exhibit A2] that she had received professional advice. I consider it probable that Ms Stella Silligardos received that advice in the lead up to her decision to finish her employment with the Cleary's early.

32 I should add that it is the case that the Cleary's moved quickly to address the financial difficulty faced by the business and to advise the applicant's about the impact it would have on their employment arrangements. The only offer they could make was casual employment to continue to do the functions that were booked and those which arose. They made this offer and in that way they cannot, in my view, be found to have transgressed section 41 of the *Minimum Conditions of Employment Act 1993*, except that the discussion concerning Ms Athena Silligardos was not held directly with her. In the circumstances I do not find this point to be highly relevant.

33 There is an issue as to whether Ms Athena Silligardos was a casual employee. Her contract [Exhibit A8] describes her as a manager and sets an hourly rate of pay. The employment declaration [Exhibit A24] stipulates that she was a casual employee. This is notwithstanding her unsatisfactory evidence about the nature of her ticks. There are payslips [Exhibit A23] which show varying and quite limited numbers of hours. Her work was geared to arranging the functions as they arose. She has various terms in her contract which reimbursed certain expenses as they arose and included a share of profits. Ms Athena Silligardos had on her own evidence been engaged as a casual prior to going to Mandurah. Weighing these factors it is the case in my view that Ms Athena Silligardos' employment was indeed casual, and I so find. If I am wrong on this point then in my view it has no practical effect on the claim in any event. There is no evidence as to the amount of hours she may have continued to work from Malaga, but as I have found there was the offer of further work. Ms Athena Silligardos had approximately one week of work from the time she was notified, through her mother, of the change in her work, until she chose to depart. That was sufficient notice in all the circumstances.

34 For all of the above reasons I find that the applicant's were not unfairly dismissed (*Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385) and that the claim for denied contractual benefit By Ms Stella Silligardos has not been made out. I woul order that the applications be dismissed.

2004 WAIRC 12056

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STELLA SILLIGARDOS, ATHENA SILLIGARDOS
	APPLICANTS
	-v-
	COAST TO COAST THE GOLDEN ROAST - WA / THE PERFECT TASTE
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	TUESDAY, 20 JULY 2004
FILE NO/S	APPLICATION 419 OF 2003, APPLICATION 420 OF 2003
CITATION NO.	2004 WAIRC 12056

Result	Applications dismissed
Representation	
Applicants	Mr K Trainer as agent
Respondent	Mr G McCorry as agent

Order

HAVING heard Mr K Trainer on behalf of the applicants and Mr G McCorry on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the applications be and are hereby dismissed.

[L.S.]

(Sgd.) S WOOD,
Commissioner.

2004 WAIRC 12187

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JUNE SINGH
	APPLICANT
	-v-
	WOMEN'S LAW CENTRE OF WA (INC)
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	MONDAY, 5 JULY 2004
FILE NO	APPLICATION 213 OF 2004
CITATION NO.	2004 WAIRC 12187

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal – Redundancy – Mitigation – Calculation of loss - Application dismissed – Industrial Relations Act 1979 (WA) s 29(1)(b)(i)
Result	Application dismissed
Representation	
Applicant	Ms J Singh
Respondent	Mr S Harben of Counsel

Reasons for Decision
(Given extemporaneously and subsequently edited by the Commissioner)

1 This is an application made pursuant to s.29(1)(b)(i) of the Western Australian *Industrial Relations Act 1979* ("the Act"). The applicant Ms June Singh was employed as a Bookkeeper from April 2002 to 29 January 2004. On 29 January 2004 Ms Singh's services were terminated; the respondent submits that the job was made redundant.

2 The applicant claims, in her application, that her dismissal was unfair for the following reasons:

> "Annexure "C"
>
> On 11 December 2003 I was informed that my position was to be made redundant effective from 29 January 2004 on the grounds that the Women's Law Centre had decided to restructure two administrative positions to ensure there was full time administrative backup for the switchboard. The position was advertised on 13 December 2003 in the West Australian Newspaper a copy of the advertisement is annexed hereto and marked with the letter "A".
>
> On the 22 January 2004 I received a letter from the Women's Law Centre confirming the redundancy a copy of the letter is annexed hereto and marked with the letter "B".
>
> I am currently employed part time by the Northern Suburbs Community Legal Centre (NSCLC) in the capacity of Bookkeeper. On or about the 16 January 2004 the Manager of the NSCLC informed me, and I verily believe it to be true, that the Women's Law Centre had employed an existing casual employee to fill the redundant position. She also informed me that my position would be filled by a bookkeeper one day a week at a level 5 SACS Industry Award. My termination letter clearly states that a level 4 position was being recruited and that it was a combined position see attached annexure "B"
>
> Given the above
>
> It is my belief that I have been unfairly dismissed on the following grounds:
>
> (1) The new position, that of - Reception/Bookkeeping has not been restructured since the position of Legal Receptionist and that of Bookkeeper are still being maintained separately which is exactly the same as it had been prior to restructuring.
>
> (2) There was never an issue with my performance and neither were their any issues with funding to argue a case for restructure.
>
> (3) The advertisement clearly states that "we welcome full and part-time applications and are happy to consider job sharing arrangements" which defeats the whole purpose of restructuring as I was permanent part time and one of the two receptionists were permanent part time and the other was casual.
>
> (4) The two positions that of receptionist and bookkeeper, were classified as level 2 and a level 5 SACS award part time respectively. The proposed new position was a combined level 4 SACS Award. The funding for both the existing and proposed positions was sufficient and amounted to basically the same amount of funding. Accordingly there was no reason to abolish the existing positions based on funding.
>
> (5) The position advertised is for a level 4 SACS Award. However the award stipulates that the position has to be a level 5 SACS Award as one of the responsibilities is to assist with the preparation of or to prepare organization or program budgets in liaison with management. Accordingly my position should not have been made redundant and advertised as a level 4 SACS Award.

(6) Of the 4 positions advertised 3 positions were granted to internal staff. One of whom was the casual receptionist and just out of school and was granted the legal receptionist position who has no accounting experience. This I do know to be true as we have worked together. I had asked her if she was applying for the job and her reply to me was that she did not know the accounting package MYOB. This however brings into question the recruiting process as it appears to be based on cronism and not on skills.

(7) As there were never any issues concerning my competency or performance of my duties, all the facts and evidence clearly indicates that restructuring was used as a basis to unfairly dismiss me. The new position of bookkeeper was never offered to me, despite the fact that I have the skills and competency to do the job.

(8) The letter of termination clearly is evidence that I was not offered the position as the organization declined my services when I offered my services to carry on working for them as stated in the fourth paragraph of the letter.

(9) At the time of being informed of my termination Lea advised me of the new restructured position of my role as bookkeeper and legal receptionist role been combined. At this point in time I contended with her that it requires totally different skills —that of accounting and legal reception. I further contended with her that it would be impossible to find someone with these combined skills and that of a level 4 Sacs Award. She was totally adamant that this is what she wanted.

(10) Furthermore, considering such a huge recruitment process (approximately half the staff) management must have planned this well in advance and approved at their monthly meetings with the last meeting held on the 27 November 2003.

(11) It is my belief that the advertisement was placed for the new position with Market Force for the West Australian prior to me being informed that I was to be made redundant. Accordingly Management must have already determined the position was to go without discussing this with me.

(12) The job could never have been offered to me on the 11 December 2003 as it needed to be written up by Market Force to be accepted by West Australian by their placement deadline to be published in the newspaper on Saturday, 13 December 2003.

(13) To further substantiate my claim the receptionist at the time, Ms J. Collins, who was also made redundant, was told after the advertisement was placed on the 13 December 2003 as she only works part-time Mondays to Wednesdays. Lea specifically told me that she will be advising Jacquelyn Collins on Monday which was the 15 December 2003.

(14) Despite the contents of the letter dated the 22 January 04 from Women's Law Centre that I accepted the offer of redundancy it was not made clear to me that I could apply for the new position furthermore the job was never offered to me.

Given the above facts and evidence, it is my submission that this was a constructive dismissal using restructuring as a means."

3 Evidence was given by the applicant and for the respondent by Ms Lea Anderson, the Manager of the Women's Law Centre.

4 The evidence of Ms Anderson is that the Centre needed to restructure, given its budget, and to retain the services of the legally qualified staff. To do this these two staff would need to be paid more. In conjunction with that Ms Anderson considered that the centre did not require the same continuing amount of bookkeeping and that the bookkeeping/administrative/reception duties would be amalgamated from two positions into one. She put this proposal to the Board of the Centre who, on 27 November 2003, decided to adopt her recommendations. Both Ms Singh and Ms Collins the receptionist were consequently made redundant. The evidence of Ms Singh does not counter this evidence except that Ms Singh suggests that the respondent was attempting to get her out of employment by failing to offer her necessary training and that as the bookkeeper, and in effect the person who constructed the budget, then Ms Singh was in the best position to know the finances of the Centre. The Centre in her view did not need to be restructured or need less bookkeeping services.

5 The first question to be addressed is whether this is truly a redundancy (refer *Dellys v Elderslie Finance Corporation Ltd* 82 WAIG 1193 (IAC)). It is open for the employer to restructure their business; it is open for the employer to make decisions such as a reduction in bookkeeping and an increase in administration. Where there is a conflict in evidence, I prefer the evidence of Ms Anderson to Ms Singh as being more certain and more straightforward. In short, on the issue of redundancy I accept that the employer made through their Board of Management, which they are entitled to and properly able to do, decisions in relation to the restructuring of the workforce for reasons of budget, for reasons of increase in administration and to decrease the amount of bookkeeping. They are decisions that the employer is entitled to make and nothing in Ms Singh's evidence challenges the fact that they were decisions properly made by the Board.

6 I find then that Ms Singh's position was made redundant. It is a small organisation and accordingly it is understandable that, given this decision, Ms Singh's employment was terminated. A full-time position was created and Ms Singh was able to apply for it. She did not apply and was not able to engage in a full-time position because she had considerable work elsewhere. There is a total lack of evidence and rationale as to how this could possibly be construed as a constructive dismissal. The only evidence is a suggestion that through the exclusion of training there was some intention on the part of the employer to, in fact, end Ms Singh's contract. That is something which happened in mid-November 2003. Ms Singh was still in employment up until 29 January 2004 and there is nothing in the evidence to suggest by any shape or form that the employer was acting so as to breach the contract so as to cause Ms Singh to leave her employment. In my view the submission that Ms Singh was constructively dismissed is misguided.

7 In terms of the redundancy then, there are two facets that I turn to. First the termination payment. A fair termination payment does not make a dismissal fair, but an inadequate payment may make a redundancy unfair. In this case the payment is manifestly adequate. Ms Singh was paid 8 weeks notice and 4 weeks redundancy. This is not in accordance with the contract but is in accordance with the contract as followed (I put it in those terms) by the respondent. The respondent chose to apply the federal Social and Community Services – Western Australia Award 2002 and its terms. For employment of this type, for this length of service, and given the circumstances of the applicant (her age and qualifications), the payment of 8 weeks notice as implied notice and the payment of 4 weeks redundancy as implied redundancy are manifestly fair as payments.

8 The next issue is whether the respondent complied with section 41 of the *Minimum Conditions of Employment Act 1993 (MCE Act)*, being an implied term of the contract. It is apparent from the Industrial Appeal Court decision in *Garbett v Midland Brick Company 83 WAIG 893* that a breach of that condition of the contract may cause a wrongful dismissal; but that a wrongful dismissal does not necessarily cause a dismissal to be unfair. In this circumstance the evidence of Ms Anderson is that because of her duties interstate; because both Ms Singh and she worked part-time; and because Ms Anderson needed to speak to the paralegal staff (which was the first cornerstone in making the restructuring effective); then for all of those reasons Ms Anderson did not speak to Ms Singh for some 15 days. There is no time limit placed in section 41 of the *MCE Act*; it is "as soon as reasonably practicable". In the circumstances, as soon as reasonably practicable brought the respondent to 11

December 2003. There is nothing unfair in leaving the discussion to that date, either procedurally or otherwise. I note also the decision in *Shire of Esperance –v- Peter Maxwell Mouritz* 71 WAIG 891 in respect to procedural fairness alone does not generate necessarily an unfair dismissal.

9 I do not find there to be a breach of section 41 of the *MCE Act*. I should add in respect to that there is a discrepancy in evidence between Ms Singh and Ms Anderson in respect of what was discussed at the meeting on 11 December 2003. I note the letter of 22 January 2004 as being important. In that letter there is reference to an offer to contract back-services which was not accepted by the respondent and I note that there is reference to the new combined position and it reads:

> "because you were not available to work fulltime and that the position was being offered at a lesser Award classification than Level 5 SACS Industry Award..."

These are matters that, in my view, go to lend some support to Ms Anderson's evidence that it was the applicant who chose not to or did not want to work for a level 4 contract and wished to challenge, in fact, the basis of the restructuring. In other words, Ms Singh did not want the new job, she simply wanted to retain her old job which had been abolished.

10 The other factor to be mentioned is that the advertisements were plainly available from the weekend shortly after 11 December 2003. It was open for Ms Singh to apply for the full-time position. Ms Singh did not apply. In all the circumstances this cannot be deemed to be a dismissal that was unfair (*Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385).

11 The claim for one week's notice is a claim misconstrued. Eight weeks' notice was, in fact, paid and worked.

12 If I am wrong on the matters that I have just mentioned, and if it could be construed as an unfair dismissal, I then turn to the question of loss. In respect of loss, the onus lies on the applicant to seek to mitigate her loss. It is the evidence of Ms Singh that, in fact, she sought to mitigate that loss as early as 8 December 2003, prior to being advised that she was being made redundant. In other words she had prior knowledge that something was happening in the agency, albeit not directly from the employer, at that stage. She took on another job which was, on her evidence, 3 days per week, prior to termination. Those 3 days I do not count into the mitigation for loss because for a short period she held the two jobs concurrently; but it is her evidence that immediately following her termination she took on that same job at the level of 4 days per week. If my calculations are right, that would mean that whereas she was normally working 3 days per fortnight for the respondent, she had now accrued 2 additional days per fortnight with her new employer, which was an employer she worked for at the time of dismissal. So these two additional days would cause theoretically a loss of one day per fortnight for the applicant.

13 The amount to be taken into account then as an offset, and it must be taken into account as per the *Dellys* decision, is the four weeks of redundancy; Ms Singh having worked out her notice. Four weeks of redundancy on the applicant's wage would mean a payment of about 6 days. So over the course of 6 fortnights, that loss effectively would have been offset by the redundancy payment. That would have covered basically the period February, March and May. It is also the applicant's evidence that she was able to take on as much work as she wished for the Balga Centre and, in fact, through the month of June took on work at the rate of 5 days per week.

14 Given those facts, which are plain from the evidence of the applicant, there is, in my view no loss suffered by the applicant through her dismissal to the time of hearing. Loss only being a factor to consider if the dismissal could be construed as unfair which I do not believe it can be. I should add that I do not believe at all that the relationship could be reinstated. I have found that the applicant was properly made redundant and I do not believe, given the circumstances to date and given the applicant has taken on substantial employment since that time, that the relationship should or could be reinstated.

15 For all of those reasons I would dismiss the application.

2004 WAIRC 12188

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JUNE SINGH
	APPLICANT
	-v-
	WOMEN'S LAW CENTRE OF WA (INC)
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	TUESDAY, 3 AUGUST 2004
FILE NO	APPLICATION 213 OF 2004
CITATION NO.	2004 WAIRC 12188

Result	Application dismissed
Representation	
Applicant	Ms J Singh
Respondent	Mr S Harben of Counsel

Order

HAVING heard Ms J Singh on her own behalf and Mr S Harben of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the application be and is hereby dismissed.

(Sgd.) S WOOD,
[L.S.] Commissioner.

2004 WAIRC 12270

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DINO PAUL SEBASTIAN TOMASI
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 9 AUGUST 2004
FILE NO/S	APPLICATION 1601 OF 2003
CITATION NO.	2004 WAIRC 12270

Catchwords	Industrial law – Termination of employment – Harsh, oppressive and unfair dismissal and denied contractual benefits – Whether applicant's employment covered by the Government Railways Locomotive Enginemen's Award 1973 – Principles applied – Commission lacks jurisdiction – Application dismissed – *Industrial Relations Act 1979* (WA) s 23(3)(d), s 29(1)(b)(i), s 29(1)(b)(ii) & s 37(1)(a); *Government Railways Act 1904* (WA) s 73, s 73(4), s 77 & s 83.
Result	Application dismissed. Order issued
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr S Majeks

Reasons for Decision

1 The applicant brings these proceedings pursuant to s 29(1)(b)(i) and (ii) of the *Industrial Relations Act* 1979 ("the Act") alleging he was unfairly dismissed and denied contractual benefits on the termination of his employment on or about 14 October 2003.

2 A preliminary issue arises as to whether the applicant's claim is within the jurisdiction of the Commission.

Contentions of Parties

3 The respondent submitted that at all material times, the applicant's employment was covered by the Government Railways Locomotive Enginemen's Award 1973 - 1990 No 13 of 1990 ("the Award"). It therefore submitted that under ss 73 and 77 of the Government Railways Act 1904 ("the GR Act"), there existed a right of appeal for the applicant to an Appeal Board ("a Board"). Accordingly, the respondent submitted that by reason of s 23(3)(d) of the Act, there exist provisions under the GR Act, dealing with the matter of the dismissal of an employee and an appeal from the applicant's dismissal and therefore, the Commission does not have jurisdiction.

4 The applicant on the other hand, challenged the respondent's contention that the applicant was at the time of his dismissal, an employee covered by the Award, and therefore within the jurisdiction of a Board. In short, the applicant contended that as at the date of the applicant's dismissal, he was a "re-deployee", being surplus to the respondent's train driving requirements, and was engaged in duties not covered by the Award. Therefore, as the submission went, the relevant provisions of the GR Act did not apply to oust the jurisdiction of the Commission.

Consideration

5 Determination of this preliminary issue, involves a consideration of the relevant provisions of the legislation and the Award. Firstly, the GR Act relevantly provides in ss 73 and 77 as follows:

"73. Authority may appoint and dismiss certain officers

(1) The Authority may suspend, dismiss, fine, transfer without payment of transfer expenses, or reduce to a lower class or grade, any specified award employee, and the Minister cannot give any direction as to the exercise of those powers except in the cases of such offices and services as are prescribed.

(2) The Authority may —

(a) in any case where a specified award employee has for any act or omission been suspended —

(i) fine;

(ii) reduce to a lower class or grade;

(iii) dismiss; or

(iv) transfer without payment of transfer expenses, that employee, notwithstanding and in addition to such suspension; and

(b) in any case where the Authority considers the circumstances warrant, by way of punishment for an act or omission reduce a specified award employee to a lower class or grade and also transfer him without payment of transfer expenses,

but except as provided in this subsection the Authority shall not inflict on any specified award employee more than one form of punishment for the same offence:

Except that, if the act or omission involved the employee's driving of a motor vehicle and the employee was punished for it under the Road Traffic Act 1974, the Authority may inflict on that employee the punishment referred to in paragraph (a)(iii), or either or both of the punishments referred to in paragraph (a)(ii) and (iv), but not the punishment referred to in paragraph (a)(i).

(3) Notwithstanding anything in this section, to the extent that there is in the case of a specified award employee who is a member of the Senior Executive Service within the meaning of the Public Sector Management Act 1994 [4] an inconsistency between this Act and that Act that Act shall prevail.

(4) In this section —

***"specified award employee"** means a person who was employed under this section immediately before it was amended by the Public Transport Authority Act 2003 section 126 and, when that amendment took effect, became an employee of the Authority but only if the person's employment was, before the amendment took effect, and continues to be, covered by —*

(a) the Government Railways Locomotive Enginemen's Award 1973-1990 No. 13 of 1990 ; or

(b) the Railway Employees Award No. 18 of 1969 . …

77 . Appeal

Any person who, being permanently employed on a Government Railway, is, under section 73, —

(1) fined; or

(2) reduced to a lower class or grade; or

(3) dismissed; or

(4) suspended from employment in such circumstances as to involve loss of pay; or

(5) transferred by way of punishment involving loss of transfer expenses,

may, in the prescribed manner, appeal to an Appeal Board constituted as hereinafter provided, except where the person is the occupant of an office prescribed under section 73 as one in respect of which the exercise of any of the powers referred to in that section is subject to the Minister, in which case the person shall not have a right of appeal to an Appeal Board so constituted, but the person may in manner prescribed by the regulations appeal to a Stipendiary Magistrate.

No person shall be deemed "permanently employed" within the meaning of this section unless he has been continuously employed for 6 months."

6 Furthermore, s 83 of the GR Act is also relevant, dealing with the powers of a Board, and that provides as follows:

"83 . Powers of Appeal Board

The Appeal Board may confirm, modify, or reverse any decision appealed against, or make such other order thereon as they think fit, and the decision of the Appeal Board shall be final.

The Appeal Board may fix the costs of any appeal, and direct by whom and in what proportions they shall be payable, and in every case costs shall be awarded against an appellant whose appeal is considered frivolous.

All costs awarded against an appellant shall be recoverable as a debt due to the Crown.

All costs awarded to an appellant shall be payable by the Authority."

7 The relevant provision of the Act in this matter is s 23(3)(d) which relevantly provides as follows:

"(3) The Commission in the exercise of the jurisdiction conferred on it by this Part shall not —

(a)…

(b)…

(c)…

(d) regulate the suspension from duty in, discipline in, dismissal from, termination of, or reinstatement in, employment of any employee or any one of a class of employees if there is provision, however expressed, by or under any other Act for or in relation to a matter of that kind and there is provision, however expressed, by or under that other Act for an appeal in a matter of that kind;"

8 What this provision means is that if there exists under another statute, provision for dismissal from or termination of employment, and an appeal from a matter of that kind, then the Commission is not to exercise its jurisdiction to regulate that same issue. I am satisfied that given the nature of these proceedings, if s 23(3)(d) has application, then the Commission, by inquiring into and dealing with the present application, would involve "regulating" the issue of the applicant's dismissal, such as to attract this provision.

9 The essential issue to be determined in this matter is whether at the material times, the applicant was a "specified award employee" for the purposes of s 73(4) of the GR Act.

10 The respondent's evidence is unchallenged and it is as follows. The applicant commenced employment with the respondent as a temporary porter on 7 November 1985 and he became a permanent employee on 14 October 1987 under the Railway Employees' Award No 18 of 1969. Subsequently, in September 1994, the applicant was appointed to the position of driver, having satisfactorily passed the required examinations. His employment then became subject to the Award.

11 In July 2000, following a review of its operations and requirement for drivers, some qualified drivers were appointed as "driver's assistants (qualified)", which included the applicant. His employment continued to be regulated by the Award, on the respondent's evidence. Apparently, the appointment of drivers and driver's assistant positions was based upon seniority. Annexure C to the affidavit of Mr Majek is a letter dated 6 July 2000, confirming the applicant's appointment as a "Driver's Assistant (qualified)". Thereafter, according to the respondent, the applicant became surplus to requirements and was given specified duties in order to continue gainful employment. The respondent's evidence was that despite this, the applicant's classification and employment status was maintained up until the termination of his employment. Further, the applicant was not a registered employee for redeployment purposes, under the Public Sector Management Act 1994. It seemed not to be in issue that from time to time, the applicant engaged in duties involving primarily those of car park surveillance at Claisebrook and perhaps other locations. I find accordingly.

12 I now turn to a consideration of relevant provisions of the Award. Clause 4 - Area and Scope of Award provides as follows:

"(1) This Award shall apply only to workers employed by the employer in and about the workings of the State Railways and, subject to necessary adjustments to be agreed upon between the employer and the union, in and about the workings of any other railway over which the employer may work traffic under an agreement giving it running powers; provided that in the event of the parties being unable to arrive at such an agreement, the matter may be referred to the Western Australian Industrial Commission for decision.

(2) If electric or other power is installed by the employer as a substitute for steam haulage, workers eligible for membership of the union shall be employed to operate under the new power."

13 Additionally, cls 5(4) dealing with interpretation and 14(3) with wages are also relevant, and they relevantly provide as follows:

"(4) "Driver's Assistant (Qualified)" means a worker qualified in driver's duties but not appointed as a driver…

(3) Fireman or Driver's Assistant qualified in driver's duties and Driver's Assistant (qualified):

(a)	*(i)*	*First year*	*601.80*
	(ii)	*Second year*	*619.00*
	(iii)	*Third year and thereafter*	*631.80*
(b)		*When acting as a driver*	*647.30"*

14 It is trite to observe, that determining whether an employee is within the reach of an award involves a consideration of the scope clause, the respondents to the award and the classification and wages clauses as may be relevant. In the present case, cl 4 of the Award does not specify the relevant classification to which the Award has application. However, by s 37(1)(a) of the Act, an award, whilst having effect according to its terms, shall extend to and bind all employees employed in any calling mentioned in the award in the industry or industries to which the award has application. Therefore, by operation of s 37(1)(a)(i) of the Act, the Award applies to all employees employed by the employer in the classifications specified in the Award, and who are "in and about the workings of the State Railways". It is also the case, that in establishing the classification of an employee and whether he or she falls within the scope of an award, one considers the substantial nature of the employment and the purpose to be achieved by it: *Federated Clerks' Union of Australia, WA Branch v Cary* (1977) 57 WAIG 585 at 586 per Burt J; *Doropoulos v Transport Workers Union of Australia, WA Branch* (1989) 69 WAIG 1290 at 1293.

15 On the facts of this case, it is not in dispute that in July 2000 the applicant was appointed to the position of "Driver's Assistant "(Qualified)" as that position is defined in cl 5(4) of the Award. From about this time, it would appear that the applicant was not actually engaged on driving duties. Interestingly, the definition of "Driver's Assistant (Qualified)" in cl 5(4), contemplates an employee who is qualified, having passed the required examinations, to be a driver, but is not one appointed to or engaging in driving duties. This definition is to be contrasted, for example, to that of "Driver's Assistant" in cl 5(3), which is defined to mean "a worker qualified and is required to work as the second person on a locomotive and includes locomotive trainee so qualified and fireman."

16 Reading the Award as a whole, I note also the terms of cl 6 - Qualifications, cl 7 - Examinations and cl 8 - Promotion. It would seem from the combined effect of these clauses, that an employee can be promoted from "driver's assistant (qualified)" to a driving position, by engaging in acting driving duties or in accordance with any vacancy that may arise from time to time. It seems to me, the combined effect of these provisions of the Award, when taken in context, is such that the classification "Driver's Assistant (Qualified)", is attained on the holding of the requisite qualification in driver's duties, even though the person concerned may not be appointed as a driver. That is, putting it another way, it is the attainment of the driver's qualification, which is the essential ingredient in the classification. If this proposition be correct, then taking the terms of cl 4(1) of the Award, together with the definition of "Driver's Assistant (Qualified)", an employee could be so classified, having attained the required qualifications, but be engaged on duties other than driving, as long as those duties are performed "in and about the workings of the State Railways".

17 On this construction, in my opinion, the applicant, it being common ground that he was a "Driver's Assistant (Qualified)" for the purposes of the Award, could be engaged in ancillary duties without taking him outside of the area and scope of the Award, when read as a whole, and when read together with s 37 of the Act. Whilst it is certainly not decisive, I note the respondent's evidence that the applicant remained so classified and remunerated, for the duration of his employment until his termination in October 2003.

18 In my opinion therefore, the Award at all material times, "covered" the applicant's employment, in the sense that he was amenable to and bound by the Award: *Re-Election in Australian Colliery's Staff Association (NSW Branch)* (1990) 37 IR 286.

19 For the above reasons, I am therefore satisfied that the applicant as at the date of the termination of his employment, was a "specified award employee" for the purposes of s 73(4) of the GR Act. Accordingly, by s 23(3)(d) of the Act, at the time of the applicant's dismissal, the GR Act provided for matters such as dismissal and an appeal from such a dismissal, and the Commission should not therefore entertain the applicant's claim.

20 The application is dismissed.

2004 WAIRC 12269

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DINO PAUL SEBASTIAN TOMASI
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 9 AUGUST 2004
FILE NO/S	APPLICATION 1601 OF 2003
CITATION NO.	2004 WAIRC 12269

Result	Application dismissed
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr S Majeks

Order

HAVING heard Mr K Trainer as agent on behalf of the applicant and Mr S Majeks 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.

2004 WAIRC 12309

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TEWAI KATHLEEN POPPET TURNBULL
	APPLICANT
	-v-
	COOKS CONSTRUCTION PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	THURSDAY, 5 AUGUST 2004
FILE NO/S	APPL 383 OF 2004
CITATION NO.	2004 WAIRC 12309

Result	Application out of time dismissed.
Catchwords	Termination of employment - Harsh, oppressive and unfair dismissal - Acceptance of referral out of time - Application referred outside of 28 day time limit - Relevant principles to be applied - Commission satisfied applying principles that discretion should not be exercised - Acceptance of referral out of time not granted - Industrial Relations Act 1979 (WA) s 29(1)(b)(i),(2)&(3)
Representation	
Applicant	Mr F. Brunalli (as agent)
Respondent	Mr D. Fuszard

Reasons for Decision
(Extemporaneous)

1 By this application Ms Kathleen Turnbull claims that she was unfairly dismissed by the respondent but her application was lodged six days' out of time. For her application to be accepted by the Commission, she needs to show that it would be unfair not to accept it.

2 In order to assess whether it would be unfair not to accept the application, there are a number of matters to be considered. One of those is the length of time that the application is out of time. I calculate that to be a period of some six days. I do not consider that to be a long period of time although that of itself is not determinative. However, on the evidence that is before me, during the period from Ms Turnbull's dismissal forward she had by various means informed the respondent that she was unhappy with the dismissal that occurred.

3 According to her statement she telephoned Marvel Loch and the Head Office and spoke to Mr Fuszard afterwards on 3 March 2004 and up to and including 15 March 2004. I find therefore that even though the application was lodged on 23 March 2004, up until at least 15 March 2004 the respondent was aware that Ms Turnbull was unhappy with her dismissal. It seems to me that there was not any prejudice to the respondent over the six days' extra that it took for the application to be lodged.

4 I also note that Mr Fuszard has not suggested that there was any particular prejudice to the respondent from the period of the six days and I therefore find that the six days is not of itself a significant reason not to accept the application.

5 One of the other matters to consider is the merit of the claim and indeed almost all of the argument that was before me on this occasion was about the merit of the claim.

6 In relation to the merit I find that Mr Brunalli, on behalf of Ms Turnbull, was quite correct in his submission that the first driving test done with Steve (I did not record his surname and I intend no discourtesy referring to him just as Steve) was not a fair test. That is because the evidence is that in Steve's truck Ms Turnbull could not reach the brake pedal but on the second test in a different truck with Mr Garbin she could, just, reach the brake pedal with the seat fully adjusted.

7 If as Mr Garbin suggested in his evidence that the inside of the cabs of all of the trucks are the same size, I am left with the question in my mind as to why in Steve's truck Ms Turnbull could not reach the brake pedal; the only reason that I can think of, on the evidence before me, is that the seat in Steve's truck was not fully adjusted.

8 Mr Gbyl's evidence was that he requested the workshop to adjust the seat and that he believed it had been adjusted but the direct contrast between Ms Turnbull reaching the brake pedal in Mr Garbin's truck and not Steve's truck suggests that there was some difficulty with the seat adjustment in Steve's truck. Therefore, had the dismissal or the reason for the dismissal rested only on the result of the first test with Steve then Ms Turnbull would have some merit to her application that the test was not a fair test.

9 I ask you to bear in mind that even if Ms Turnbull was successful from that regard, all that Steve had assessed was her driving position. Ms Turnbull had not driven the truck at that stage and even if her driving position had been as it was subsequently in Mr Garbin's truck, there would still have been the issues that Mr Garbin referred to and I will come to those issues shortly.

10 The point that I wish to make is that even if the first test with Steve had gone as well as the second test with Mr Garbin, Ms Turnbull would only then have commenced her training and she would still have been on probation. The evidence of Mr Gbyl is that in all other respects, at least the ones that he referred to, Ms Turnbull's personality and presentation was such that he felt confident that she was appropriate for the job. Nevertheless she would still have been required to undergo a period of

training and also be on probation and under the *Industrial Relations Act 1979* the fact that somebody was under probation is a factor that must be taken into account; it is not clear that an employee will necessarily pass a period of probation.

11 However, the dismissal that occurred did not rest only on the result of the first test with Steve. There was also the second subsequent test undertaken by Mr Garbin. I want to place on record that I applaud the respondent for being prepared to re-test Ms Turnbull in response to her request. From my perspective I do not think the respondent had anything to lose in re-testing and it was appropriate that it did so in this case.

12 The evidence of Mr Garbin was quite clear. In order for Ms Turnbull to drive around the waste pit area, she had to adopt a driving position that was potentially unsafe over a 10 or 11 hour shift; her driving position which included a lack of foot support, a lack of lower back support and difficulty reaching the two-way radio handset.

13 Mr Brunalli attacked Mr Garbin's evidence on the basis that Mr Garbin was not a medical man and that criticism was valid, however, I accept Mr Garbin as a person with experience in trucks because of the training position that he holds and I therefore accept his evidence that Ms Turnbull had to adopt a potentially unsafe driving posture.

14 I also add that there is at least some evidence that a person called Chelsea with whom Ms Turnbull had driven had hurt her back. The circumstances are not clear however, on the evidence that I have before me, a back injury in truck driving in this particular company is not something that never occurs. Mr Garbin's assessment that Ms Turnbull's driving posture was potentially unsafe appears to have some foundation.

15 In relation to Ms Turnbull's evidence, as she has it in her statement, that she "completed all tasks without any problems" on the second test, I accept Mr Garbin's evidence that it is one thing to drive in an open area where the second test was done but it would be another to drive in the mine for a long shift. That evidence is also supported by the video evidence of the narrowness of the mineshaft.

16 It is well known that safety issues are vital in the workplace and that is equally if not especially so in underground mining. In this case the evidence of Mr Gbyl, Mr Digrandi and Mr Garbin is that it would be unsafe for Ms Turnbull to drive in the mine in the manner that has been described. There is no evidence from Ms Turnbull that that would not be the case.

17 I can only conclude therefore that it would be potentially unsafe for Ms Turnbull to drive in the mine itself in the manner that Mr Garbin described. That is the evidence before me; it must therefore be the conclusion that is open.

18 Mr Brunalli made a submission that not all the cabs of all the trucks are the same however, that submission is not made out. There is no evidence that there are other trucks on site with any different internal cab dimensions. To the contrary, there is the direct evidence of Mr Garbin that the internal cab dimensions are all the same. Therefore if Mr Garbin says that truck O11 was the same as the other trucks and that Ms Turnbull's driving position was still potentially unsafe, I am obliged to accept Mr Garbin's evidence.

19 It follows that on this evidence, even if the first driving test done with Steve had been satisfactory and had given the same result as the second test with Mr Garbin, Ms Turnbull would still have been observed driving in a posture that was potentially unsafe.

20 Therefore, on the issue of merit, if Ms Turnbull's case was allowed to go forward, it cannot be said that her case is strong in showing that her dismissal was unfair.

21 I specifically raise the point that was made by Ms Turnbull in her statement that she left her previous job in order to work for the respondent; that she had had a medical and that she was accepted by the respondent, at least at the early stages; and why was that so if she was considered to be too short? However, I accept Mr Fuszard's answer that it is inappropriate merely to make an estimation of a person's ability to do a job based upon an observation of their physical size. Fairness does require an actual work test and this was done ultimately by Mr Garbin.

22 I also accept the evidence that the respondent was genuinely looking for drivers without experience for the reasons that were given and therefore that the respondent would have kept Ms Turnbull on if these issues had not existed.

23 On balance, I am not positively satisfied by Ms Turnbull's case that it would be unfair not to accept her application out of time and for the reasons that I have given therefore, her application is not accepted and it will be dismissed.

2004 WAIRC 12310

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TEWAI KATHLEEN POPPET TURNBULL
	APPLICANT
	-v-
	COOKS CONSTRUCTION PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	WEDNESDAY, 11 AUGUST 2004
FILE NO/S	APPL 383 OF 2004
CITATION NO.	2004 WAIRC 12310

Result	Application out of time dismissed.
Representation	
Applicant	Mr F. Brunalli (as agent)
Respondent	Mr D. Fuszard

Order

HAVING HEARD Mr F. Brunalli (as agent) on behalf of the applicant and Mr D. Fuszard on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby order -

THAT the application is hereby dismissed.

(Sgd.) A R BEECH,
[L.S.] Senior Commissioner.

SECTION 29(1)(B)—Notation of—

Parties		File Number	Commissioner	Result
Adrian Scharenguivel	Midas Asia Pacific Pty Ltd	513/2004	Kenner C	Discontinued
Alison Marie Tindale	Royal Life Saving Society	1559/2003	Smith C	Discontinued
Arnold Dann	Noongar Enterprise Aboriginal Corporation Lesley James Hansen	205/2003	Coleman CC	Discontinued
Benjamin Garry Peter	Country Homes Furniture	461/2004	Wood C	Discontinued
Bradley Caleb Maisey	Lacq // Tech Pty Ltd	524/2004	Gregor C	Discontinued
Brian Stephen Montgomery	Shire of Cue	491/2004	Gregor C	Discontinued
Cameron Guy Fullerton	SPB Marketing	624/2004	Scott C	Discontinued
Carmen Rebecca Oliver	Steven Zoccoli Pty Ltd	503/2004	Wood C	Discontinued
Christine Allen	Suzanne McGrechan, Modal Pty Ltd	1513/2003	Gregor C	Discontinued
Clara Elizabeth Jennings	Compass Group (Aust) Pty Ltd operating as ESS - Eurest	1852/2003	Kenner C	Dismissed
Clarissa Anne Dyke	A E Components Pty Ltd	484/2004	Coleman CC	Discontinued
Daniel Michael Lawrence	Morgan & Co Pty Ltd	312/2004	Scott C	Discontinued
Dave Morton-Owen	S & K Knickel Gardening Service	506/2004	Gregor C	Discontinued
David Adam Duff	Limoncello Cafe	1547/2003	Harrison C	Discontinued
Deborah Margaret Bowen	Central TAFE	389/2004	Harrison C	Discontinued
Deborah Maxine Wilson	Competitive Foods Aust	1571/2003	Harrison C	Discontinued
Denise Lee Galluccio	David Bosch	1459/2003	Harrison C	Discontinued
Donna Louise Murrie	Cityway Pty Ltd t/as Atlas Pest Control ABN: 48 072 204 169	1827/2003	Gregor C	Discontinued
Donna Poon	Ross Calnan of Roy Weston - Ross Cainan Team	529/2004	Gregor C	Discontinued
Dorothy April Harris	Calae Pty Ltd A.C.N. 106 179 006 T/F V and P Clarkson Family Trust ABN 15 119 605 277 T/A The Grape Gallery	211/2004	Wood C	Discontinued
Dr Diane Faulkner-Hill	Derbarl Yerrigan Health Service Inc	551/2004	Kenner C	Discontinued
Eleanor May Ambrose	Director General, Department of Education and Training	1931/2003	Gregor C	Discontinued
Elsa Derschow	St Cecilia's College	51/2004	Wood C	Discontinued
Fernando Moreira C Da Costa Martins	Gascoyne Gold	1038/2003	Harrison C	Discontinued
Gary Bishop	Bae Systems Australia Ltd	1485/2003	Wood C	Discontinued
Grant David McMillan	The Cakebox (ABN 38192 786 788) Pierlink Pty Ltd	382/2004	Gregor C	Discontinued
Hartley Noel Smithwick	Aussie Marine Exports	304/2004	Kenner C	Discontinued
Hudson Jorge Dottori De Cerqueira	Goldy Motors Pty Ltd	511/2004	Wood C	Discontinued
Ian David Catchlove	Oakbay Nominees Pty Ltd ACN 083 836 846 t/as C.A.Concepts & Signs	402/2004	Kenner C	Discontinued
Ian Dennis Screech	F.G.W. Corporation Pty Ltd	179/2004	Wood C	Discontinued
J Nicolaidis	Australian Removers and Storage Pty Ltd t/a Chess Wilson Removals and Wilson Archives Pty Ltd	655/2004	Wood C	Discontinued
James Michael Roberts	Filip Sydoruk Electrical Construction & Maintenance	852/2004	Coleman CC	Discontinued
Jason Reddin	Rangewell Pty Ltd T/As Furniture Bazaar	680/2004	Wood C	Discontinued
Jennifer Carol Parrin	Anglican Health and Welfare Services trading as Anglicare WA	1517/2003	Harrison C	Discontinued

Parties		File Number	Commissioner	Result
Jennifer Hogue	Baker Oil Tools Asia Pacific a division of Baker Oil Tools (Australia) a division of Baker Hughes Australia Pty Ltd	119/2004	Kenner C	Discontinued
Joanne Marie Rowe	Captain Cook Cruises	916/2003	Harrison C	Discontinued
John Joe Cardosa	Morton Seed & Grain Pty Ltd	1681/2003	Wood C	Discontinued
John Robert Knight	Quick Brick Cartage	31/2004	Harrison C	Discontinued
Katarina Solcanyova	Mastercare Property Services	500/2004	Wood C	Discontinued
Kellie Louise Porcaro	David Lee	617/2004	Gregor C	Discontinued
Kelly Donna Yates	The Metabolism Centre Pty Ltd	1580/2003	Wood C	Dismissed
Kenneth Lindsay Waugh	Darrell Crouch & Associates Pty Ltd	146/2004	Smith C	Discontinued
Kim Michelle Sherratt	Consolidated Business Media Pty Ltd	812/2004		Discontinued
Kim Michelle Tovey	BAC Enterprises Pty T/As Body Active Consultancy	681/2004	Gregor C	Discontinued
Kirsty Burgess	EyeQ Optometrists Pty Ltd	1561/2003	Wood C	Discontinued
Krista Griffiths	Repcol Commercial Investigators	669/2004	Gregor C	Discontinued
Krszstof Gagatek	Blowflex Moulding Pty Ltd	504/2004	Kenner C	Discontinued
Leah Anne Maddren	Kracm Pty ltd T/A Century 21 New North Realty	1363/2003	Harrison C	Discontinued
Lena Harris	Neil Garvey ,Blue Ginger Hair Salon	1047/2003	Harrison C	Discontinued
Linda Hay	Joseph and Elizabeth Kraslan t/a Joe's Bus Charter	505/2004	Harrison C	Discontinued
Linda Taylor	Community Vision Incorporated	605/2004	Scott C	Discontinued
Lisa Harwood	Fortron Insurance Group	644/2004	Harrison C	Discontinued
Lorri Brazier	Elliott Wave Research	479/2004	Gregor C	Discontinued
Lynnette Dorothy Lewis	WA Government /WA Country Health Service	525/2003	Wood C	Discontinued
Margaret Baltatzidis	Perth Metalwork Company Pty Ltd	1734/2003	Beech SC	Discontinued
Maria Kozak	Zane Norman Family Trust	1426/2003	Harrison C	Discontinued
Mark Christopher Patience	Tenix Defence Pty Ltd	443/2004	Beech SC	Discontinued
Mark Craig Parmenter	Benara Nurseries,Russell James-Manager	1017/2003	Harrison C	Discontinued
Matthew Shaun O'Neill	Bridging the Gap (South) Inc.	377/2004	Wood C	Discontinued
Michael Curr	Paruna Sanctuary Ltd T/as Australian Wildlife Conservancy	415/2004	Scott C	Discontinued
Michael James McLellan	The Owners of Mandurah Spinaway Gardens Strata Plan 19463	1704/2003	Wood C	Discontinued
Michael Sandes	Maptek Pty Ltd	672/2004	Gregor C	Discontinued
Michal Koleszko	Cooling Bros. Glass Company Pty Ltd	386/2004	Wood C	Discontinued
Michelle Carey	Donnelle Enterprises Pty Ltd t/as Dewsons	309/2004	Gregor C	Discontinued
Minola Costello	Garama Pty Ltd trading as Club 234	1313/2003	Harrison C	Discontinued
Mr Ashleigh Murray Smith	Layfind Holdings PTY LTD Trading As Terrain Earthmoving	613/2004	Kenner C	Discontinued
Mr David Owen Cunningham	Graces Tavern Exmouth	494/2004	Beech SC	Discontinued
Mr David Robert Denham	JFK Engineering Pty Ltd ACN 090 503 790	324/2004	Kenner C	Discontinued
Mr Ian John Hallybone	Aurora Corporation Pty Ltd t/a Pacific Safety Wear	702/2004	Smith C	Discontinued
Mr Jeffery Kulen - Smith	Paul Albert, Director General, Department of Education and Training	189/2004	Kenner C	Discontinued
Mr Jeffrey Hamilton Stewart	Barnco Pty Ltd t/as Featurline Furniture	207/2004	Kenner C	Dismissed
Mr Keith G Hough	Mills Park Bowling and Recreation Club (Inc) ABN 46 470 528 254	711/2004	Kenner C	Discontinued
Mr Mark Gordon Mcpherson	Howard Smith Managing Director Of Gadean Footwear	714/2004	Kenner C	Discontinued
Mr Matthew Taylforth	The Goldpoint Trust trading as Signs and Lines	566/2004	Kenner C	Discontinued
Mr Philip Ashley Ross Keane	Mr B.P Clare	313/2004	Beech SC	Discontinued
Mr Phillip John Parkin	Franlori Pty Ltd	682/2004	Beech SC	Discontinued

Parties		File Number	Commissioner	Result
Mr Rodney Francis O'Dea	JAM (Western Australia) Pty Ltd t/as Brumbys Bicton	660/2004	Kenner C	Discontinued
Mr Ron Williams	Liquid Engineering 2003 Pty Ltd	960/2003	Kenner C	Discontinued
Mr Salim Harly	Consolidated Business Media Pty Ltd	799/2004	Kenner C	Discontinued
Mr Stanley Peter Piekacz	Mr Joe De-Pinho & Mrs Maria De Pinho	208/2004	Beech SC	Discontinued
Mr Stephen Alexander Ikin	All States Warranty Network P/L	652/2004	Kenner C	Discontinued
Mr Steven Michael Geddes	Sonya Lighting	661/2004	Beech SC	Discontinued
Mr Vernon James Brabazon	Nintirri Neighbourhood Centre	283/2004	Beech SC	Discontinued
Mrs Elizabeth Gai Camilleri	Stegbar Pty Limited	693/2004	Kenner C	Discontinued
Mrs Sarah Louise Twaites	ASAPS Transit/FAB Specialised Cleaning	679/2004	Kenner C	Dismissed
Ms Adele Cherie Judkins	Head Studio Urban Retreat	618/2004	Kenner C	Discontinued
Ms Leesa Barnard	ERCEG McIntyre Pty Ltd (ACN 065 077 438) t/as Seasons Funerals, Just Cremations and Essential Cremations	458/2004	Smith C	Discontinued
Ms Marija Vujcic	Downing Teal Pty Ltd	55/2004	Kenner C	Discontinued
Ms Rasma Jaudzems	Ironcat Tyres & Mechanical Services	1595/2003	Beech SC	Discontinued
Ms Rosemary Jordan	E. John Cranfield t/a ZMS Pty Ltd	556/2004	Kenner C	Discontinued
Ms Sara Jade Hubbard	BS Newton & Co Pty	1901/2003	Kenner C	Discontinued
Murray Wood	Seven Network (Operations) Limited	47/2004	Harrison C	Discontinued
Paul Davidson	Rugs-A-Million Pty ABN 92060 596 769	982/2003	Harrison C	Discontinued
Pavel Arturo Meza	Airlite Group	666/2004	Harrison C	Discontinued
Philippa Leigh O'Shannassy	WMC Resources Ltd	349/2004	Kenner C	Discontinued
Quintin Ruggiero	Candle ICT	148/2004	Wood C	Discontinued
Quintin Ruggiero	DMR Consulting Pty Ltd	149/2004	Wood C	Discontinued
Rachel O'Neill	Astrazeneca Pty Ltd	317/2004	Gregor C	Discontinued
Rangi William Albert Hei Hei	West City Carpentery	1840/2003	Gregor C	Discontinued
Rebecca Stevanovski	Magic Couriers	385/2004	Wood C	Dismissed
Rebeka Ruth Long	BP Roadhouse Lake Clifton	583/2004	Wood C	Discontinued
Richard Philip Ernestine	WA's 1st Choice Real Estate	510/2004	Harrison C	Discontinued
Ross Albert Oreo	Farnor Tyres	221/2004	Beech SC	Discontinued
Russell John Hartmann	Cleansweep	1404/2003	Harrison C	Discontinued
Sandra Boon	Doubleview Harmoney Child Learing Centre	478/2004	Gregor C	Discontinued
Scott Alexander Pleiter	Maptek Pty Ltd	545/2004	Harrison C	Discontinued
Shirley June Bickford	Vincent De Villers of Millepede International Ltd	403/2004	Gregor C	Discontinued
Sonia Bird	Spotless	355/2004	Smith C	Discontinued
Stephen Popaduk	Gavinio Restaurant	361/2004	Gregor C	Discontinued
Stewart Craven	General Manager,SNF (Australia) Pty Ltd ABN 050 056 267	935/2003	Harrison C	Discontinued
Susan Ann Meheux	Noel Hunter	297/2004	Wood C	Discontinued
Susan Margaret Scanlon	Tammy Porter t/a Mulberry Cards and Gifts	411/2004	Gregor C	Discontinued
Susan Marie Chambers	Schenker Australia Pty Ltd	217/2004	Harrison C	Discontinued
Susheela Vivian	Velez Pty Ltd T/as Topic Caterers	370/2004	Harrison C	Discontinued
Tara Leslie Teghtmeyer	Genevieve Montgomerie & Fleur Fitzpatrick Trading As Peppermint Promotions	91/2004	Harrison C	Discontinued
Terence John Houston	Nuncio Gumina	1521/2003	Harrison C	Discontinued
Terrence Leonard Barrett	Barrett Hay Pty Ltd (ACN 068326536)	248/2004	Wood C	Discontinued
Walace Duarte	Centrecare Goldfields	413/2004	Harrison C	Discontinued
Warren Edward Burr	Tony Chua	299/2004	Gregor C	Discontinued
Wayne Lindsay Clancy	Fuchs Lubricants (Australasia)	538/2004	Harrison C	Discontinued
Wen Linda Liu	Vihenthi Co Pty Ltd	1514/2003	Harrison C	Discontinued
Zak Harvey	Consolidated Business Media	795/2004	Kenner C	Discontinued

CONFERENCES—Matters arising out of—

2004 WAIRC 12052

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS' UNION OF AUSTRALIA (WA BRANCH)
	APPLICANT
	-v-
	BHP BILLITON IRON ORE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	MONDAY, 19 JULY 2004
FILE NO	C 128 OF 2004
CITATION NO.	2004 WAIRC 12052

Result	Order issued
Representation	
Applicant	Mr D Schapper of Counsel
Respondent	Mr R Lilburne of Counsel on behalf of BHP Billiton Iron Ore Pty Ltd
Intervener	Mr S McClean on behalf of Integrated Group Ltd t/as Integrated Workforce

Order

WHEREAS the above mentioned matter came on for a conciliation conference pursuant to section 44 of the Industrial Relations Act 1979 *(the Act)*; and

WHEREAS the applicant Union in conference on 13 July 2004 sought to amend the application to seek a declaration of joint employment of their member, Mr Brandis, by BHP Billiton Iron Ore Pty Ltd and Integrated Group Ltd; and

WHEREAS the Commission convened a conference on 14 July 2004 and directed the attendance of Integrated Group; and

WHEREAS the parties and intervener have no objection to the following orders;

NOW THEREFORE having heard Mr D Schapper on behalf of the applicant, Mr R Lilburne on behalf of the respondent and Mr S McClean on behalf of the intervener, and pursuant to my powers under Section 27(1)(j) and (m) of the Act.

I hereby order:

1. THAT the Applicants' name be corrected by deleting The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia, Western Australian Branch and inserting The Construction, Forestry, Mining and Energy Union of Workers;
2. THAT Integrated Group Ltd t/as Integrated Workforce be joined as a second Respondent.

[L.S.]

(Sgd.) S WOOD,
Commissioner.

2004 WAIRC 11519

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN GRAIN HANDLING SALARIED OFFICERS ASSOCIATION (UNION OF WORKERS)
	APPLICANT
	-v-
	CO-OPERATIVE BULK HANDLING
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 18 MAY 2004
FILE NO/S	C 98 OF 2004
CITATION NO.	2004 WAIRC 11519

Result	Recommendation issued
Representation	
Applicant	Mr N Devine
Respondent	Mr A Cameron as agent

Recommendation

WHEREAS on 3 May 2004 the applicant applied to the Commission for a conference pursuant to s 44 of the Industrial Relations Act 1979 ("the Act");

AND WHEREAS on 18 May 2004 the Commission convened a conference between the parties pursuant to s 44 of the Act;

AND WHEREAS at the conference the Commission was informed that the applicant and the respondent are in dispute in relation to the return to work of its member Ms R Taylor following a period of absence on workers compensation commencing 1 December 2003;

AND WHEREAS the applicant informed the Commission that Ms R Taylor is fit to return to work in her position as manager metro grain centre and wishes to return to this position but the parties are in dispute in relation to the interpretation of medical reports concerning the circumstances of Ms R Taylor's return to her pre-injury position;

AND WHEREAS the respondent informed the Commission that based on medical advice Ms R Taylor may not be fit to return to the position due to the nature of the position and the requirement to interact with other management of the respondent;

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 recommends –

(1) THAT the parties confer in relation to the issues identified in the final paragraph of the report of Dr Victor Cheng of 26 March 2004, in relation to the possible accommodation of Dr Cheng's views about the requirements of the position of manager metro grain centre of the respondent, in accordance with the position description provided to the Commission and any other requirements of the position.

(2) THAT alternatively, the parties confer as to the prospect of an alternative role within the respondent for Ms R Taylor such as process coordinator.

(3) THAT in the interim pending the outcome of these discussions Ms R Taylor continues to receive her remuneration for the position of manager metro grain centre.

(4) THAT the matters in dispute will be the subject of a report back s 44 compulsory conference at the expiration of 14 days from the date hereof.

(Sgd.) S J KENNER,
[L.S.] Commissioner.

2004 WAIRC 12111

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF WORKERS)
	APPLICANT
	-v-
	ANGLICAN HOMES (INC)
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	MONDAY, 26 JULY 2004
FILE NO.	C 30 OF 2004
CITATION NO.	2004 WAIRC 12111

Catchwords	Industrial Law (WA) agent not registered pursuant to s 112A – *Industrial Relations Act 1979* (WA), ss 31 and 112A.
Result	Declaration made. Another union is not entitled to appear as agent for the Applicant for the purposes of s 31 of the *Industrial Relations Act.*
Representation	
Applicant	Mr M Swinbourn (as agent)
Respondent	Ms J Auerbach (of counsel)

Reasons for Decision

1 On 21 May 2004, the Commission made a declaration that Mr Matthew Dean Swinbourn, an employee of the Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch ("ALHMWU"), is not entitled to appear as agent for the Hospital Salaried Officers Association of Western Australia (Union of Workers) in C 30 of 2004. In reasons for decision delivered on 18 May 2004, the Commission held at [24]:

> "If Mr Swinbourn was not being paid directly or indirectly for this work I would have formed a different view. Further, my decision in this matter does not deal with the situation whereby an employee or an officer of an organisation appear on behalf of their employer in a matter, who also has a warrant to appear on behalf of another organisation in the same matter."

2 On 6 July 2004, Mr Dan Hill, the Secretary of the Health Services Union of Western Australia (Union of Workers) ("the Union"), filed a warrant stating the ALHMWU (in person and/or by way of an officer, employee of the ALHMWU, who may be authorised to act or appear for the ALHMWU), is hereby authorised to appear and act for the Union (previously, Hospital Salaried Officers' Association of Western Australia (Union of Workers)).

3 It has not been disputed by the ALHMWU or the Union that the ALHMWU does not have standing in its own right to appear in this matter.

4 In my view, the warrant filed on 6 July 2004, is not authorised by s 112A of the *Industrial Relations Act 1979* ("the Act") or s 31 of the Act. Section 112A(3)(c) only authorises an employee or officer of an organisation to act on behalf of the organisation that they are an officer of or employed by. As foreshadowed in [24] above, the circumstances of this case are different to a situation such as where an organisation files an application to register an industrial agreement to which they are a party under s 41 of the Act and another registered organisation authorises the same officer by warrant to appear on their behalf, as the second organisation is also a party to the industrial agreement. As set out in [24] I make no judgment as to whether that practice is authorised under the Act. In such a case both organisations have standing to appear. In this matter the ALHMWU, its officers and employees have no standing to be heard except that they have been purportedly authorised to appear as agent

for the Union by the warrant filed by the Union on 6 July 2004. Under s 31(2) of the Act an organisation can only appear by a natural person.

5 In light of these reasons, I am of the view that the ALHMWU cannot appear as a corporate body (see s 60 of the Act) and unless an officer or employee of the ALHMWU is a certificated legal practitioner or they are not being paid directly or indirectly for appearing as agent for the Union in this matter that person is not entitled to appear as agent for the Union for the purposes of s 31 of the Act. I will make an order reflecting these reasons for decision.

6 In light of the terms of the warrant I will also make an order changing the name of the Applicant.

2004 WAIRC 12140

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF WORKERS)
	APPLICANT
	-v-
	ANGLICAN HOMES (INC)
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	WEDNESDAY, 28 JULY 2004
FILE NO.	C 30 OF 2004
CITATION NO.	2004 WAIRC 12140

Result	Declaration made. Another union is not entitled to appear as agent for the Applicant for the purposes of s 31 of the *Industrial Relations Act.*
Representation	
Applicant	Mr M Swinbourn (as agent)
Respondent	Ms J Auerbach (of counsel)

Declaration

HAVING heard Mr M Swinbourn, as agent, on behalf of the Applicant and Ms J Auerbach, of counsel, on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* ("the Act") hereby:

(1) ORDERS that the name of the Applicant be deleted and that be substituted therefor the name, Health Services Union of Western Australia (Union of Workers) ("the Union");

(2) DECLARES that the Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch ("the ALHMWU"), as an organisation incorporated under s 60 of the Act, is not entitled to appear as agent for the Union in this matter;

(3) DECLARES that unless an officer or employee of the ALHMWU is a certificated legal practitioner or they are not being paid directly or indirectly for appearing as agent for the Union, that person is not entitled to appear as agent for the Union in this matter for the purposes of s 31 of the Act.

(Sgd.) J H SMITH,
[L.S.] Commissioner.

CONFERENCES—Matters referred—

2004 WAIRC 12087

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
	APPLICANT
	-v-
	THE HON. ATTORNEY GENERAL
	RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	THURSDAY, 22 JULY 2004
FILE NO/S	CR 58 OF 2004
CITATION NO.	2004 WAIRC 12087

CatchWords	Agreement between officers of Department and Union to reclassify Canine Handlers - Order sought that Minister observe the terms of the agreement - Whether agreement by Department made without authority of relevant Minister - industrial Relations Act 1979 s.44(9); Prisons Act 1981 s.13(1),(4)
Result	Application for an order adjourned
Representation	
Applicant	Mr J. Welch and with him Mr D.R. Seal
Respondent	Mr D. Matthews (of counsel) and with him Ms V. Jabr

Reasons for Decision

1 The matter referred for hearing and determination is the claim of the union that at the instigation of the Department of Justice a meeting was held on 22 December 2003 to discuss the classification of the position of canine handler. An agreement was reached at that meeting that the position would be reclassified from level 2 to level 3. In those circumstances the officers concerned agreed that they would not press for retrospectivity to July 2000 which they were doing as part of internal appeals which they had lodged. The union maintained that the Department of Justice now refuses to honour the agreement. The union seeks an order that the Department of Justice honour the agreement reached to reclassify the position of canine handler to level 3.

2 The Department of Justice's primary position is that the officers who represented the Department at that meeting had no delegated authority to make the agreement which would have required approval by the Executive Director. That approval was not given. The Department of Justice opposes the order sought.

3 The union's evidence was given primarily by Mr David Seal who has been employed by the union as an industrial relations practitioner, sometimes as a consultant, sometimes as a member of the full-time staff, to assist the union in industrial relations. The prime project in which he has been involved since August 2000 has been the progress of the Industrial Officers' review. Prison Officers who were called Industrial Officers have been re-titled as Prison Officers (Vocational and Support). The position of canine handler is a position within this group.

4 Mr Seal outlined the history of the efforts by the union to have the Industrial Officer classifications re-valued. His own initial involvement in the Industrial Officers' review began during the negotiations that led up to the 1997 Enterprise Bargaining Agreement when he was then an employee of the then Ministry of Justice. The EBA resulted in an agreed obligation on the parties to implement the review and complete it by 31 December 1997. He traced the change from the three groups of Industrial Officers at that time: group zero, group 1 and group 2, to the present structure with five levels. The change from the three groupings to the five levels was agreed; however there was no agreement on where the Industrial Officers would be placed within the new structure.

5 In 1999 a working party was formed consisting of Mr Seal, Mr Keith Johnson representing the union and Mr Steve Newell from the Department. It visited seven prisons and interviewed somewhere in the vicinity of 80 Industrial Officers. It completed its review in January or February 2000. The process of transferring Industrial Officers from the groups to the levels had not been completed by the time Mr Seal left the Department of Justice in April 2000.

6 Mr Seal was employed by the union in August 2000. Mr Seal was told the union was concerned that the Industrial Officers' review had not progressed since he had left and the union was contemplating taking the matter to the Commission to have it reinstituted. Mr Seal then made sure that that the *Gaol Officers' Award 1998* was amended to put in the new structure and also to provide transitional arrangements for those classifications of work (of which the canine handler is an example) where an all-up rate of pay made it impossible to provide a position in the new structure. After the structure was inserted into the award Mr Seal and the Department of Justice developed a questionnaire to establish the work value of a particular job. The Department of Justice's representative at that time was Mr Frank Furey; Mr Cardy, who is now Manager of Human Resources for the prisons division subsequently became involved and then, when it was agreed the union and the Department of Justice would continue down this path, the Department of Justice provided Ms Van Hamersveld, a senior officer within human resources to assist in the distribution of the questionnaire and the development of the JDFs.

7 Mr Seal and Ms Van Hamersveld visited all prisons and had meetings with all Industrial Officers across the State advising them of how the process would be dealt with. The Industrial Officers would complete the questionnaire; the draft JDF would then be prepared; they would be given the opportunity to provide feedback; there would be Prison Superintendent input into the situation and when it was agreed it would be signed off and accepted. This would then become the basis upon which the transfer and assessment of work value would take place. This was done and the determination was published in September 2003.

8 There was also an agreed process of review and appeal against the determination. Appeals had to be lodged within one month at the union office and also with Mr Gardner at the Department. The appeal is an internal process: the first stage is a meeting with the Department of Justice where the Departmental representatives were Mr Newell and Mr Gardner. No other members of senior management were present. Mr Seal would attend with an appellant where the appellant was a member of the union. Mr Seal's evidence was that decisions were made on the appeals at those meetings, signed off and sent to the appellants.

9 Thirty six officers lodged appeals against their placements including 8 Industrial Officers from the canine handling squad. Eighteen or 19 appeals not involving Canine Handlers have been resolved at the first stage of the appeal and those appellants are now being paid in accordance with the outcome. Out of the 36 appeals only 4 remain ready to proceed to the next stage which involves Commission proceedings.

10 In the case of the 8 Industrial Officers from the canine handling squad the determination had transferred them from group 1 to level 2. This meant that they substantively remained at the same classification. Mr Seal's evidence was that due to his knowledge of what he believed to have been significant changes in the Canine Handlers' job one of the points that he had made throughout the negotiation process with the Department of Justice was that he did not want the Department to just transfer group 1 to level 2 and say, "We've done a review". Mr Seal had said the Department must take into consideration changes in work value; if the Canine Handlers were not reclassified the union "will be taking this matter all the way to the Commission".

11 Mr Seal's evidence was that the first stage of Canine Handlers' appeals, their meeting with the Department, was scheduled for 23 January 2004. However at a meeting on 22 December 2003 an agreement with the union was reached to reclassify them to level 3. For that reason the scheduled meeting with the Department was withdrawn and the 8 appeals were withdrawn by the officers. It is this agreement which is the subject of this application.

12 However before giving evidence about this meeting Mr Seal gave evidence of a parallel issue which had arisen and with which he was dealing at the time of that meeting. Earlier in the year on Easter Saturday 2003 he had been contacted by a representative of the union and told that the Canine Handlers believed a decision had been made by the Department of Justice to introduce a canine handler position at Bandyup Regional Prison. Canine Handlers are part of the Special Services Branch which is based at Canning Vale. There had been no negotiation or consultation about this decision. Mr Seal stated that it was a very contentious decision; he had been aware that the union and the Department "had just come out of the problems of 2002" [which the Commission understands to be a reference to the State-wide strike which had occurred in September 2002]. He told the Canine Handlers:

> "We must follow due process. Due process will allow us to achieve what it is we wish to achieve rather than some other way". (transcript p. 21)

13 Mr Seal then contacted Mr Connolly about this issue and also about the reclassification issue. Mr Connolly was Mr Seal's usual primary contact at the Department. Mr Connolly in turn arranged for Mr Seal to meet with Mr Schilo, the Superintendent of the Special Services Branch.

14 Mr Seal met with Mr Schilo and told him the decision was a significant departure from what had been initially agreed in regards to the classification of the Canine Handlers and that the union would be expecting an increase in remuneration. Mr Schilo indicated to Mr Seal that the Department had been considering that and there was support at the level of General Manager, Public Prisons for the reclassification of the positions. A position would be created and Canine Handlers rotated through it. Mr Seal suggested that the appropriate way to do that would be for the position created to be paid a temporary special allowance (equivalent to a level 3). This was agreed.

15 Mr Seal had also met with Mr Cardy on 5 May 2003 and raised the issue with him because Mr Seal wanted the negotiations to be expeditious and achieve an outcome. His evidence was at that meeting Mr Cardy had told him there was no reason to be concerned, that it had been raised with the General Manager, Public Prisons who supported the proposition, the temporary special allowance was going to be paid, but the process required certain paperwork to be submitted by the SSB.

16 However, as time passed nothing seemed to be happening as agreed and Mr Seal raised the issue again at meetings on 30 June, 7 July and again on 24 July 2003 when he had been told the Department was still having problems getting the paperwork completed and he had been assured it would be followed up. Mr Seal had indicated it was critical that the matter be resolved because, "it was an indication of how successful our dispute resolution process and our new approach to industrial relations would be" (transcript p. 23, 24). Mr Seal tendered a series of emails in the proceedings culminating in an email from Mr Cardy on 19 November 2003 (exhibit no.5) indicating in relation to the Bandyup position that the Department was pursuing a reclassification which was being currently looked at by Mr Newell and that discussions with the union had taken place.

17 As a result, at the time of the meeting on 22 December 2003 the union had been dealing with two issues: the appeals lodged in September 2003 by the 8 officers and the payment of the agreed temporary special allowance for the canine handler at Bandyup Regional Prison. (The Commission notes that at time of this hearing, the temporary special allowance has yet to be paid.)

18 The meeting on 22 December 2003 occurred after the General Manager, Public Prisons, Ms Shuard wrote to the union on 9 December 2003 (exhibit 6). Her letter states:

> "Classification of Canine Handlers
>
> As you would be aware the Department is in the process of placing Canine Handler positions in Regional Prisons.
>
> The Department is of the opinion that these new positions and amendments to the positions in the metropolitan area should have the current salary classification reviewed.
>
> As this will have an effect on a whole unit and not an individual, the Department is seeking to discuss this independently of the current reclassification process and seek a meeting to discuss this issue."

19 Mr Seal's evidence was that his experience told him this letter from the General Manager, Public Prisons set out the position of the Department. Dealing with the matter as the letter proposed was entirely consistent with the process by which the union and the Department had resolved other issues in the past: the initial classification of Canine Handlers; work camp supervisors; when a new classification of "Senior Officer, Work Camps" in Wyndham was introduced in 2003; other reclassifications, for example an officer at Bunbury; and the payment of a special allowance to the officer in charge of the abattoir.

20 On 18 December 2003 Mr T. Matthews, a Project Officer with the SSB, wrote to Mr Seal (exhibit 7) stating:

> "David,
>
> As per our discussion this morning, a meeting has been scheduled for Monday 22 December 2003 at 1030 hours at the SSB conference room, to discuss the reclassification of canine handlers to IO3. Am arranging for Steve Newell, Pat Tyson and Gail Raven to attend. Any problems please call.
>
> Regards
>
> Terry Matthews"

21 Mr Seal's evidence was that prior to the meeting, members of the canine handling squad advised him what was going to happen at the meeting: they had been told they were to be reclassified and they had indicated to the management that if level 3 was assured then they would not push for the retrospectivity that was possible out of their appeals. Mr Seal told them he would not prejudice the outcome that they wanted although he would raise an element of retrospectivity in regards to the Bandyup position because that had been going since Easter.

22 The meeting was held. It was attended by Mr Seal and Mr Secker for the union and by Mr Schilo and Mr T. Matthews for the Department of Justice. Mr Tyson may also have been in attendance. Both Mr Seal and Mr Secker gave evidence of what occurred at that meeting. Neither Mr Schilo nor Mr T. Matthews were called by the respondent to give evidence. The respondent's evidence came from Mr Terrence Simpson, the Executive Director, Prisons. Mr Simpson's evidence was that although he was not at the meeting, he was advised that an offer was put by Mr Schilo that the Canine Handlers be reclassified

to level 3 and that an agreement was reached on that basis. That evidence is entirely consistent with the evidence of Mr Seal and Mr Secker regarding the agreement reached at that meeting.

23 I therefore find as a fact that an agreement was reached between the union and the Department of Justice that Canine Handlers would be reclassified to level 3. I also find that at that meeting Mr Seal pressed for a retrospective payment of the level 3 increase for the Bandyup position. He was advised by either Mr Schilo or Mr T. Matthews that they had no instructions on that particular issue and would have to get advice but neither Mr Schilo nor Mr T. Matthews said that they needed to seek instructions regarding the agreed reclassification. The meeting also discussed the JDFs to be used and Mr Seal and Mr Secker were told that it was important to resolve this matter quickly because the Department wished to advertise the vacancies and also pay the officers concerned as soon as possible in January 2004. Mr Seal and Mr Secker believed that all matters associated with the Canine Handlers had been satisfactorily resolved except for retrospectivity in regards to the Bandyup position.

24 I also find as a fact that as a result of that agreement the 8 appeals lodged by the Canine Handlers were no longer pursued.

25 Therefore, at the conclusion of the meeting, the union believed, and was fully entitled to believe, that it had reached an agreement with the Department of Justice, that the Canine Handlers would be reclassified to level 3 and that the union would be advised whether this would be done with any retrospective payment from the date the position commenced operations at Bandyup Regional Prison. This was confirmed by the union in a letter to the respondent on the same day (exhibit 8). The next day, Mr T. Matthews e-mailed Mr Seal and Mr Secker the JDF and fitness criteria for Canine Handlers to be reclassified and advertised early in January 2004 and requested the union's confirmation in writing of the union's agreement (exhibit 9).

26 However, nothing then happened until 20 February 2004 when the union's letter of 22 December 2003 was replied to by Mr Cardy (exhibit 11). The letter advised the union that the normal process for reclassifications within the Department required a submission outlining the change in work value to be made to the relevant Executive Director who had the delegation to approve the reclassification or not. It advised that the respondent was currently collecting further information in relation to the canine handler positions to enable the Executive Director Prisons to adjudicate upon the proposed reclassifications and that the union would be advised in due course of the outcome.

27 On 16 April 2004 Mr Simpson wrote to the union (exhibit 12). The letter advised that the respondent argued that the agreement reached on 22 December 2003 was "ultra vires [the Industrial Officer Classification Committee in Schedule B of the *Gaol Officers' Award 1998 No. 12 of 1968*] and thus invalid". The letter advised that the agreement reached was done without the appropriate authority of the Executive Director Prisons and was therefore not binding upon the respondent. The letter advised that the respondent proposed that it and the union now seek to reach consensus on whether the benchmark positions agreed to in 2001 for the conversion process from the 3-tier to the 5-tier model remained contemporary, agree on the criteria for those benchmark positions, and develop a process for reclassification. The canine handler positions could then be assessed against those benchmark positions in accordance with the agreed reclassification process and classified accordingly.

28 The letter concluded by advising that in relation to the union's concerns about negotiating with the Department of Justice and the authority borne by departmental representatives, Mr Simpson had instructed senior staff of the need to ensure that all negotiations are carried out in the context of the authorities contained within the Department's scheduled delegations and of the need to ensure that parties negotiating with the Department are advised of that requirement early in negotiations. The letter offered to discuss the matter further if the union requested.

29 Mr Simpson's evidence in the proceedings was that under the *Public Sector Management Act 1994* the Director General, Department of Justice had delegated powers to the Executive Director (s.33 and s.36(1)(c)). However, under the *Prisons Act 1981* the power vested in the Minister for Justice may be delegated under s.13 to the Director General but to no other person. Mr Simpson stated that the Department's approach with respect to all positions including those under the *Prisons Act 1981* has tended to be guided by the delegations under the *Public Sector Management Act 1994*. He has recently learned that this is not the case.

30 Mr Simpson had approved the recommendation by Ms Van Hamersveld for the classification of Canine Handlers at the point of transition to level 2. He had understood that a number of appeals had been lodged but the appeals by Canine Handlers had not been pursued. The Department would have no objection to the appeals being re-instituted and pursued including for back-pay.

31 Mr Simpson spoke of the prison drug strategy announced by the Hon. Attorney General and funded in the 2003/04 budget. Amongst its initiatives was the expansion of the canine section to provide an additional four Canine Handlers, additional dogs, the placement of a canine handler and dog permanently at Bandyup Regional Prison, and for an additional four dogs to be placed permanently at primarily regional prisons, as opposed to the previous administrative structure where all Canine Handlers are based at the SSB in Canning Vale. The major implication for the positions at Bandyup and the four regional centres was that they would not be under the direct day-to-day supervision of the coordinator of the canine squad and not be subject to the same level of professional oversight as the officers based at Canning Vale. The then Acting General Manger Public Prisons had indicated to Mr Simpson that prior to filling those positions she wished to review the classifications to see whether there was any difference in work value between those positions and the positions based at Canning Vale.

32 Mr Simpson's evidence was that he was unaware of the meeting of 22 December 2003 prior to it occurring. He had not spoken to Mr Schilo or to Mr T. Matthews before the meeting. Neither had anyone more senior to Mr Simpson spoken to them prior to the meeting. He became aware of the proposal that the canine handling officers be reclassified on 12 February 2004 when he received a Classification Assessment Report from Mr T. Matthews (exhibit B). Mr Simpson stated that he was surprised because he had only been aware of a review of the positions to be out-posted not of the existing positions. The Assessment Report did not have the detail to enable an assessment of changed work value and significant changes in work value since the earlier classification was endorsed to enable a comparative work value with comparable positions in the Department structure. This was necessary to maintain a proper relativity between comparable positions in the organisation. This detail would be necessary for an assessment to be made whether the reclassification would give rise to a host of inequities and flow-on applications.

33 He therefore referred the document to Mr Cardy for a proper work value assessment to be done. That was then done by Mr T. Matthews. The result showed the requirements for level 3 were possession of a trade qualification and it was not seen that the canine handler positions were comparable with those other positions that were classified level 3.

34 Mr Simpson made it clear that it was not appropriate for someone at the level of Mr Schilo to be making decisions in relation to the classification of officers within the Department because of the issues of relativities, the impact on the Department as a whole as distinct from the canine handling section, and also whether it would have serious budgetary implications.

35 When he was cross-examined, Mr Simpson stated that he himself may not have had meetings with the union more than two or three times in the last 12 months and it was therefore not unusual for negotiations to occur between the respondent and the union in his absence. He stated that the General Manager, Public Prisons has the operational responsibility for all prison officers and most frequently represents the Department of Justice at a senior level in negotiations with the union. From time to time the Director Regional Prisons, Prison Superintendents and the Director of Human Resources had also participated in such discussions.

36 Mr Simpson confirmed that Mr Schilo is a senior member of staff with a considerable level of experience. Mr Simpson was asked by Mr Welch:

> "Then in exhibit 6 we have another person we've mentioned, Ms Shuard. She indicates that she then wants to have a meeting. So we have two steps, do we not? We have the assistant director of human resources and then we have the general manager of public prisons and they both indicate that this process should move forward. In that context is it not reasonable for the union to assume that when they go to a meeting a couple of days later or a couple of weeks later, which you've indicated is a consequence of the letter from Ms Shuard, that the people the department sends will be aware of what's about to take place and be in a position to negotiate for it?

Mr Simpson answered:

> ---That may well have been a reasonable assumption under the circumstances. Yes."

(transcript p. 90)

37 He stated that in his experience with negotiations with WAPOU in particular, and other unions as well, quite frequently when agreement is reached in principle at negotiating meetings the union has to seek confirmation of those points agreed, often from the union council. It is recognised on both sides that the people who are in attendance at a meeting are not normally those who have the final say over the subject matter discussed.

38 Mr Simpson stated that he had discussed the matter with Mr Schilo on one occasion and understood that Mr Schilo believed he had been authorised by the Acting General Manager, Public Prisons to make the agreement and that he had been assigned that task.

39 Mr Simpson conceded that the perception of good faith in negotiations is very important. It was put to him that the Department had breached that good faith and he responded that he believed the misunderstanding was unfortunate and that he would have preferred that it had not occurred.

40 In response to a question from the Commission Mr Simpson stated that under s.13 of the *Prisons Act 1981*, which deals with the conditions of employment, i.e. classification, of prison officers, only the Minister or her delegate, the Director General, can approve classifications.

41 That is the summary of the evidence before the Commission.

42 In his closing submissions on behalf of the Hon. Attorney General Mr D. Matthews conceded that there is uncontroverted evidence that an agreement was reached between the union and Mr Schilo and Mr T. Matthews at the meeting on 22 December 2003. However, it was not an agreement between the union and the Minister for Justice. Mr Schilo and Mr T. Matthews did not have the power to agree to alter the classification of prison officers. That power is found in s.13(1) of the *Prisons Act 1981* as follows:

> "The Minister may engage prisons officers as employees and, subject to any industrial award or agreement that is applicable in relation to a particular case or class of cases, persons so engaged shall be employed on such terms and conditions as the Minister, on the recommendation of the Public Service Commissioner, determines."

43 The respondent argued that by s.13(4) the Minister may by instrument in writing signed by her delegate to the Chief Executive Officer her powers under s.13(1). No such power to determine terms and conditions of employment of prison officers had been delegated to Mr Schilo or Mr T. Matthews and nor could a valid delegation be given to them. The purported reclassification did not occur under any process provided for by the *Gaol Officers' Award 1998 No. 12 of 1968* or the 2003 EBA.

44 The respondent stated that it is contrary to good public policy to allow the will of Parliament to be defeated by an agreement which is not in accordance with the relevant legislation and the agreement reached in this matter was contrary to, or not in accordance with, the *Prisons Act 1981*. The agreement therefore should not be enforced by the Commission as requested.

45 Mr D. Matthews pointed to the evidence that the letter setting up the meeting referred to the position at Bandyup and that Mr Schilo and Mr T. Matthews were only involved regarding the position at Bandyup. Further, there is no evidence that anyone more senior than Mr Schilo was aware of the agreement which had been reached. The Minister accepts there needs to be a relationship of trust between the Department and the union. However, the Department of Justice is established for public purposes and spends public money. The public interest is protected by courts bringing the Department into line if it spends money not authorised by the *Prisons Act 1981*.

46 Mr D. Matthews submitted that in this case, the expectations of the Canine Handlers have been dashed, however they do not suffer any real detriment. They agreed not to pursue a domestic appeal process. On the evidence before the Commission, their appeal process is able to be reactivated. The Commission should look at the evidence of detriment to the members of the union rather than to the union itself.

47 For the union, Mr Welch stressed the reasonable industrial expectation that parties who bargain in good faith and reach an agreement should have that agreement honoured. The union asks for an order to issue that the respondent honour the agreement it has reached. The union regards the respondent as having "welched" on the agreement. For its part, the union has acted reasonably and indeed officers concerned have dropped their appeals in consideration of the agreement and are not pressing for retrospectivity. The union refers to the objects of the *Industrial Relations Act 1979* to:

> "(a) promote goodwill in industry and in enterprises within industry;
>
> (aa) to provide for rights and obligations in relation to good faith bargaining"

48 The union pointed to the history as outlined by Mr Seal and Mr Secker regarding the ongoing review and reclassification of these Prison Officers (Vocational and Support). The meeting at which the agreement was struck was one initiated by the then acting General Manger, Public Prisons. An offer to reclassify the Canine Handlers to level 3 if there was no retrospectivity involved was made and accepted. Neither Mr Schilo nor Mr Mathews stated that they needed to seek instructions on the offer

that was made; only on the request by Mr Seal for retrospectivity to the start of the dispute for the position to be located at Bandyup. Therefore, given the long build up, the emails and other correspondence between the union and the Department, the union had reasonably come to the view that the Department's representatives had the authority to settle the dispute. The union pointed out that Mr Simpson is not in fact the Chief Executive Officer of the Department of Justice and therefore the powers referred to now must have been delegated to him.

49 The union also stressed that the Department's position was not promoting goodwill. Rather, the Commission should be concerned with promoting good faith bargaining and here was an example of a bargain made in good faith. If the bargain is not honoured it would lead to these officers being treated unfairly. It would be a significant problem if the bargain is not completed because it will call into question the relations between the parties.

50 Mr Welch stated that in law, there is a promissory estoppel such that it is not open to the Department to withdraw from the clear promise that was made. Both Mr Welch and Mr D. Matthews referred to a number of legal authorities which are dealt with as necessary in what is to follow.

Commission's conclusions

51 The facts of the matter are not in dispute. The evidence given by Mr Seal and Mr Secker for the union, and by Mr Simpson for the respondent, have not been in conflict in any material point. I place on record my appreciation for the evidence given. In particular, the evidence of Mr Seal of the history of the renaming of Industrial Officers and the steps taken by the Department and the union to secure a reclassification of Prison Officers (Vocational and Support) was detailed and thorough. Indeed, the union as the applicant in this matter is fortunate to have the services of Mr Seal given his experience of the history from both sides. I find that history is as Mr Seal has related in his evidence: not only were Mr Cardy, Mr Schilo and Mr T. Matthews not called to give evidence but also the cross-examination of Mr Seal did not challenge his evidence of the history and his conversations with those persons. I accept Mr Seal's evidence.

52 There is no dispute that an agreement was reached at the meeting on 22 December 2003. For the Department, through the Director, Public Prisons, not to honour the agreement when:

1. In the context of the dispute regarding the canine officers claim to be re-classified which had been discussed with Departmental officers a meeting to discuss the classification of Canine Handlers was arranged at the initiative of the Department through the then acting General Manger Public Prisons;
2. the General Manger Public Prisons has the operational responsibility for all prison officers and most frequently represented the Department of Justice at a senior level in negotiations with the union;
3. this form of meeting had been used to settle similar claims in the past;
4. the agenda of the meeting was confirmed by the Department itself to be the re-classification of Canine Handlers to level 3;
5. the Department itself had advised the Canine Handlers directly that they were to be reclassified;
6. the Department representatives who attended the meeting and formally made the offer to reclassify the Canine Handlers included the Superintendent of the Canine Handlers, who genuinely believed he had the authority of the Department to make the offer;
7. the union participated and bargained in good faith precisely because it wanted to follow due process and not take other action; and
8. the Director Public Prisons was unaware until recently that the proper delegated authority to re-classify prison officers was only to the Chief Executive Officer of the Department,

has very serious implications.

53 It is agreed from the evidence that it is important that there be trust between parties to an industrial relationship. That seems a rather obvious point to make but also one that cannot be lightly passed over. The union and the respondent, through the Department of Justice, had had a bitter and acrimonious industrial dispute in September 2002. Whilst centred at Hakea Prison, the dispute extended State-wide. It is a matter of record that the parties were simply unable to resolve the dispute without the intervention of the Commission. The dispute was not resolved until approximately January 2003. Writing as the Commissioner with the direct experience of the dispute in 2002 referred to in the evidence of Mr Seal, the importance of trust between the Department and the union after that dispute cannot be overstated. If the agreement reached between the union and the Superintendent of the Canine Handlers at a meeting called with the authority of the General Manager, Public Prisons is not to be honoured by the Department the trust slowly re-established since that dispute may well be lost. It will be a sad day for industrial relations between the parties.

54 It may well call into question the validity of any future offers made by the Department to settle industrial disputes. Even if the loss to the Canine Handlers can be remedied by the re-institution of their appeals including seeking retrospectivity, I have no doubt the Department's refusal to honour an agreement reached will be relied upon by the union or its members in a future dispute when offers are made by the Department. The misgivings of the union have already prompted Mr Simpson in his letter to refer to "the union's concerns about negotiating with the Department of Justice and the authority borne by departmental representatives". Unless Departmental officers' respective authorities to make offers is clearly known, the Chief Executive Officer of the Department may well need to attend negotiations in person.

55 There is a sound public policy that agreements freely entered into in settlement of an industrial dispute should be honoured. The *Industrial Relations Act 1979* includes in its objects the promotion of goodwill in industry and in enterprises within industry; encouraging employers, employees and organisations to reach agreements appropriate to the needs of enterprises within industry and the employees in those enterprises; and encouraging, and providing means for, conciliation with a view to amicable agreement, thereby preventing and settling industrial disputes.

56 It was quite reasonable for the union to have assumed that Mr Schilo had the authority to make the offer to reclassify the Canine Handlers. Mr Schilo was a person well known to both Mr Seal and Mr Secker. He had previously acted in senior positions within the Department. The offer of reclassification therefore was entirely consistent with the discussions that had occurred between the parties. Even if Mr Seal and Mr Secker had asked Mr Schilo whether he had the authority to make the offer to reclassify Canine Handlers to level 3, Mr Schilo would have answered that he did have that authority. I conclude therefore that Mr Schilo and Mr T. Matthews acted in complete good faith and no criticism can be validly levelled at them for making the offer that they did. The evidence before the Commission suggests that the limit on the Departmental officers'

authorities set by s.13(4) of the *Prisons Act 1981* has only recently been understood at the most senior levels within the Department itself. It is the Department which has created the situation in which it finds itself.

57 The Department's refusal to honour the agreement prompts the union to ask for an order compelling the respondent to honour the agreement. The Commission has the power under s.44(9) read with s.23 of the Act to make the order sought. Whether such an order should be made is an exercise of the Commission's discretion. This raises a number of issues arising from the reasons for the refusal.

58 If the reason is because Mr Simpson was aware only of a review in relation to the positions that were to be out-posted and unaware of any review occurring in relation to the existing positions then it would still be open to the Chief Executive Officer to approve the agreement after the event. A mere failure of the Department to follow proper procedure for the approval of the re-classification ought be able to be remedied now.

59 If Mr Schilo had had the authority of the Chief Executive Officer of the Department to make the offer then the Chief Executive Officer would be a party to it and the union would have a strong argument for the order to be made. In industrial relations the equity, good conscience and substantial merits of the case would be likely to lead the Commission to require the Chief Executive Officer to honour an agreement made with his authority provided that to do so would not require the respondent to act contrary to the law: In *The Minister for Education and another v. The Civil Service Association of WA* (1997) 77 WAIG 2185 the Commission issued orders that the Hon. Minister for Education grant permanency to temporary Level 1 ministerial employees employed in schools continuously for at least two years and that the Director General, Education Department grant permanent status to all Level 1 contract and temporary public servants with two years' continuous service. The orders were made following an undertaking given by the Education Department as part of the settlement of an EBA. It was established in a subsequent appeal that to honour the undertaking and comply with the orders would have obliged the Minister and the Director General of Education respectively to act contrary to their obligations under s.64 of the *Public Sector Management Act 1981* and the orders made were quashed on appeal.

60 As the Full Bench stated in the appeal, the Commission should be slow to allow a party who freely gave an undertaking to resile from that undertaking, however the Commission does not have the power to make an order directing an employer to act contrary to an Act of Parliament; it is therefore not in accordance with equity, good conscience and the substantial merits of the case to do so. Undertakings cannot be given and enforced contrary to the law.

61 In this case the offer was made, and the agreement reached, without the authority of the Minister or the Chief Executive Officer. The union asks for an order obliging the Minister to honour an agreement reached between the union and two of her Departmental representatives. The issue for consideration is that to make the order simply because an agreement was reached at the meeting of 22 December 2003 would mean that the control of the terms and conditions of employment of prison officers would no longer be under the control of the Minister or the Chief Executive Officer as Parliament has decided. It would mean that contrary to s.13 of the *Prisons Act* the Director General might be obliged to observe any agreement about the terms and conditions of employment of Prison Officers genuinely entered into by his Departmental officers and the union whether or not he agreed with those agreements. It would give Departmental officers and not the Chief Executive Officer the power to control the terms and conditions of employment of Prison Officers. That is not correct in law.

62 It would be as if a branch delegate of the union concluded an agreement with the Department without the knowledge of the union or its State Council and the Minister sought an order from the Commission requiring the union to observe the terms of the agreement. To require the union to honour the agreement would be to deny the authority of the State Council to make that decision.

63 Although Mr Welch said the doctrine of estoppel applies in these circumstances, estoppel cannot grant powers that were not provided for by legislation. Estoppel might prevent the Chief Executive Officer from refusing to implement an agreement to which he was a party. Where he was not a party to the agreement estoppel would enable Departmental officers to exercise powers they did not have by preventing the Chief Executive Officer from denying the agreement (*Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 per Gummow J at 208). To oblige the Minister to comply with an agreement which she did not enter into and has rejected would be to deny the Minister the discretion which Parliament entrusted to her under the *Prisons Act 1981*. The courts will not act to enable this to occur as the Supreme Court of WA in *Adams v. Executive Director, Fisheries WA*, 21 February 2000 [2000 WASC 34] recently observed.

64 The Commission is not a court of law. Rather, it is a statutory tribunal with a duty to decide the matters that come before it according to equity, good conscience and the substantial merits of the case. However it will not be consistent with that duty to deny the Minister the discretion which Parliament entrusted to her under the *Prisons Act 1981*. If the order sought is simply made because an agreement was reached at the meeting of 22 December 2003 it will encounter the same difficulties as the orders against the Hon. Minister for Education and the Director General, Education Department referred to earlier encountered.

65 Notwithstanding the strong moral position of the union the equity and good conscience in this matter permits no other conclusion. This is all the more so when any detriment suffered by the Canine Handlers is able to be remedied: the appeals by the eight officers are able to be reinstituted including for back pay so that they will be returned to no worse a position than if the agreement had not been made.

66 Therefore for the Commission to conclude that an order should issue as sought, it will need to be satisfied about more than simply that an agreement not involving the Chief Executive Officer was reached at the meeting of 22 December 2003. As observed during the proceedings, although the order sought would oblige the Minister to observe the terms of the agreement, it would be effectively an order of the Commission that the Canine Handlers be re-classified from level 2 to level 3. Mr Simpson's evidence was that the agreement may itself have serious ramifications beyond that decision. A decision made with authorisation would have appreciated the wider implications for the Department, implications beyond merely the canine handling section, arising from the reclassification.

67 For the Commission to conclude in accordance with s.26(1) of the Act that the equity, good conscience and substantial merit of the case lies in making the order sought in these circumstances the Commission will need to accurately assess at least the issues referred to in the proceedings: whether a non-trade classification can be level 3; whether other level 2 Prison Officers (Vocational and Support) may rely upon the reclassifications and seek also to be reclassified; what the potential is for flow on; and what the budgetary implications are for the Department. These issues will arise in the context of the Commission's obligation to apply principle 6 of the State Wage Principles. If they are satisfactorily addressed then an order of the Commission may validly override the discretion vested in the Minister for that reason and not merely because of the fact of an agreement to which she was not a party and of which she had no knowledge.

68 Accordingly the matter is to be adjourned. If the union advises the Commission that the Canine Handlers have reinstituted the appeals which they had abandoned and this application is to be closed an order will issue discontinuing this application. If the

union advises that it seeks now to bring evidence supporting the merit of the agreed re-classifications to the Commission, the application will be restored to the lists.

69 The minute of an order adjourning the matter and providing for it to be re-listed upon the request of either party now issues.

2004 WAIRC 12154

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS	**APPLICANT**
	-v-	
	THE HON. ATTORNEY GENERAL	**RESPONDENT**
CORAM	SENIOR COMMISSIONER A R BEECH	
DATE	FRIDAY, 30 JULY 2004	
FILE NO/S	CR 58 OF 2004	
CITATION NO.	2004 WAIRC 12154	

Result	Application adjourned
Representation	
Applicant	Mr J. Welch and with him Mr D.R. Seal
Respondent	Mr D. Matthews (of counsel) and with him Ms V. Jabr

Order

HAVING HEARD Mr J. Welch and with him Mr D.R. Seal on behalf of the applicant and Mr D. Matthews (of counsel) and with him Ms V. Jabr 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 adjourned.

2. THAT the application may be re-listed at the request of either party.

(Sgd.) A R BEECH,
[L.S.] Senior Commissioner.

CONFERENCES—Notation of—

Parties		Commissioner/ Conference Number	Dates	Matter	Result
Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch	ABC Developmental Learning Centres	Harrison C CR 26/2004	N/A	Alleged unfair dismissal	Dismissed
Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch	ABC Developmental Learning Centres	Harrison C CR 27/2004	N/A	Alleged unfair dismissal	Dismissed
Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch	Anglican Homes (Inc)	Beech SC CR 86/2004	19/04/04, 26/05/04, 20/07/04	Disciplinary action	Referred

Parties		Commissioner/ Conference Number	Dates	Matter	Result
Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch	Burswood Resort (Management) Ltd	Harrison C CR 124/2004	N/A	Alleged unfair dismissal	Discontinued
Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A. Clerical and Administrative Branch	Community Arts Network Western Australia Ltd	Kenner C C 76/2004	N/A	Unfair dismissal of union member	Discontinued
Civil Service Association of Western Australia Incorporated	Director General, Department of Justice	Scott C PSACR 37/2003	N/A	Alleged overpayment of leave entitlements	Dismissed
Civil Service Association of Western Australia Incorporated	Government Employees Superannuation Board (GESB)	Scott C PSAC 25/2004	N/A	Employment Status Of Union Member	Concluded
Civil Service Association of Western Australia Incorporated	The Director General, The Department of Culture and the Arts	Scott C PSAC 18/2004	N/A	Reversion to full time employment of a Union member	Concluded
DORIC Constructions (Australia) Pty Ltd and Nationwide Roofing Pty Ltd	The Construction, Forestry, Mining and Energy Union of Workers	Gregor C C 131/2004	N/A	Industrial action	Concluded
Hospital Salaried Officers Association of Western Australia (Union of Workers)	Department of Health	Scott C PSAC 40/2003	37872	Classification of Finance Officer	Concluded
Protec International Group Pty Ltd and Doric Constructions (Australia) Pty Ltd	The Construction, Forestry, Mining and Energy Union of Workers	Gregor C C 137/2004	29/06/04, 6/07/04	Industrial action	Concluded
The Australian Workers' Union, West Australian Branch, Industrial Union of Workers	BHP Newman Operations	Wood C C 125/2004	4/06/04, 10/06/04, 2/07/04	Raising speed limits and chages to the use of spotters	Concluded
The Australian Workers' Union, West Australian Branch, Industrial Union of Workers	Fine Enterprises Pty Ltd T/as Gull Kiara	Harrison C CR 181/2003	N/A	Alleged unfair dismissal	Dismissed
The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	Total Hose (Australia) Pty Ltd	Gregor C C 134/2004	N/A	Termination of employment of a union member	Concluded
The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, W.A. Branch	Sotico	Gregor C C 158/2004	N/A	Annual leave	Concluded
Western Australian Grain Handling Salaried Officers Association (Union of Workers)	Co-operative Bulk Handling	Kenner C C 98/2004	N/A	Denial of contractual benefits	Discontinued

CORRECTIONS—

CORRIGENDUM

Whereas an error occurred in the publication of Table 1 of Appendix III in the List of Appendices of the Western Australian Industrial Gazette covering period 13 December, 2003 to 11 June, 2004, Volume 84, Part 1, at page15, the correct Appendix III is republished hereunder.

Dated at Perth this 9th day of August 2004.

J. SPURLING,
Registrar.

APPENDIX III

MINIMUM WAGE - WESTERN AUSTRALIA

WEEKLY RATES FOR ADULT WORKERS UNDER APPROPRIATE AWARDS AND INDUSTRIAL AGREEMENTS OF THE WESTERN AUSTRALIAN INDUSTRIAL COMMISSION.

Editor's Note:
Table 1 = Weekly Rates of Pay for adult workers under appropriate Awards and Industrial Agreements.
Table 2 = Minimum Weekly Rates of Pay for all state adult employees set by the Minister for Labour Relations under The Minimum Conditions of Employment Act 1993. (see (d) below)
Table 3 = Minimum Weekly Rates of Pay for all state adult employees set by the Commission In Court Session under The Minimum Conditions of Employment Act 1993. (see (e) below)

TABLE 1

Date of Operation	Locality	Males $	Females $	W.A.I.G. Reference	
				Vol	Page
26th October, 1970	Whole of State	49.00	—	50	825
26th October, 1971	do	51.50	—	51	1029
26th June, 1972	do	53.50	—	52	445
8th June, 1973	do	57.00	—	53	595
17th September, 1973	do	61.50	—	53	1081
31st May, 1974	do	69.00	57.90	54	411
1st May, 1975	do	82.50	72.10	55	535
30th June, 1975	do	82.50	80.10	55	535
15th May, 1976	do	94.20	91.50	56	788
15th August, 1976 (a)	do	97.40	94.60	56	1131
15th November, 1976 (a)	do	99.80	97.00	56	1789
15th February, 1977 (a)	do	106.40	103.60	57	7
15th May, 1977 (a)	do	108.80	106.00	57	7
15th August, 1977 (a)	do	111.40	108.60	57	7
29th December, 1977	do	114.10	111.20	58	111
28th February, 1978	do	116.90	114.00	58	471
7th June, 1978	do	118.30	115.50	58	927
12th December, 1978	do	123.00	120.10	59	7
27th June, 1979	do	126.90	123.90	59	1009
4th January, 1980	do	132.60	129.50	60	281
14th July, 1980	do	138.20	134.90	60	1327
9th January, 1981	do	143.30	139.90	61	153
7th May, 1981	do	148.50	144.90	61	847
16th November, 1981(b)	do	151.20	151.20(b)	61	1894
7th February, 1983	do	169.80	169.80	63	379
6th October, 1983	do	182.40	182.40	63	2207
6th April, 1984	do	189.90	189.90	64	847
6th April, 1985	do	194.80	194.80	65	657
4th November, 1985	do	202.20	202.20	66	4, 136
1st July, 1986	do	206.90	206.90	66	1139
10th March, 1987	do	216.90	216.90	67	435
5th February, 1988	do	222.90	222.90	68	949
9th September, 1988	do	229.60	229.60	68	2412
1st October, 1989	do	248.80	248.80	69	2913
24th September, 1991	do	268.80	268.80	71	2748
30th November, 1992	do	275.50	275.50	73	4
12th June, 1998 (d)	do	373.40	373.40	78	2579
1st August 1999	do	385.40	385.40	79	1847
1st August 2000	do	400.40	400.40	80	3379
1st August 2001	do	413.40	413.40	81	1721
1st August 2002	do	431.40	431.40	82	1369
1st August 2003	do	448.40	448.40	83	1899
4th June 2004	do	467.40	467.40	84	1521

(a) Declaration by Commission - No General Order issued. Amendments to be made on application by parties.

(b) From 16th November, 1981 the Commission in Court Session announced that one minimum wage for adult employees regardless of sex should apply.

(c) Statement of Principles- Amendment to be made on application of Parties

(d) As of 1st December 1993 the setting of the Minimum Weekly Rates of Pay became the responsibility of the Minister for Labour Relations under the Minimum Conditions of Employment Act 1993 as reported by order published in the Western Australian Government Gazette and applies to all employees in the State.

(e) As of 1st August 2002 the setting of the Minimum Weekly Rates of Pay under the Minimum Conditions of Employment Act, 1993 became the responsibility of the Commission in Court Session by virtue of the Labour Relations Reform Act 2002 No. 20 of 2002.

TABLE 2

MINIMUM WEEKLY RATES OF PAY FOR ALL STATE ADULT EMPLOYEES UNDER THE MINIMUM CONDITIONS OF EMPLOYMENT ACT 1993 (d)

				G.G. REFERENCE	
				DATE	PAGE
3rd December, 1993	do	275.50	275.50	3/12/93	6464
29th August, 1994	do	301.10	301.10	29/8/94	4465
29th September, 1995	do	317.10	317.10	29/9/95	4697
29th October, 1996	do	332.00	332.00	29/10/96	5753
10th November, 1997	do	335.00	335.00	10/11/97	6203
7th December, 1998	do	346.70	346.70	7/12/98	6545
1st March, 2000	do	368.00	368.00	1/3/00	1007
22nd March, 2001	do	400.40	400.40	22/3/01	1475
29th April 2002	do	413.40	413.40	29/4/02	2181

TABLE 3

MINIMUM WEEKLY RATES OF PAY FOR ALL STATE ADULT EMPLOYEES UNDER THE MINIMUM CONDITIONS OF EMPLOYMENT ACT 1993 (e)

Date of Operation	Locality	Males $	Females $	W.A.I.G. Reference	
				Vol	Page
1st August, 2002	do	431.40	431.40	82	1369
5th June 2003	do	448.40	448.40	83	1899
4th June 2004	do	467.40	467.40	84	1521

2004 WAIRC 12121

CLERKS' (WHOLESALE & RETAIL ESTABLISHMENTS) AWARD NO. 38 OF 1947

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES, W.A. CLERICAL AND ADMINISTRATIVE BRANCH

APPLICANT

-v-

SWAN BREWERY COMPANY LIMITED & OTHERS

RESPONDENT

CORAM COMMISSIONER S WOOD
DATE OF ORDER TUESDAY, 27 JULY 2004
FILE NO APPLA 449 OF 2003
CITATION NO. 2004 WAIRC 12121

Result Correction order issued
Representation
Applicant Mr S Bibby
Respondent Mr P Moss on behalf of the warranted respondents

Correction Order

WHEREAS an error occurred in the Order dated 1 July 2004 issued in Application 449A of 2003, 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 Award referred to as being varied should be the Clerks' (Wholesale and Retail Establishments) Award No. 38 of 1947 and not the Clerks' (Wholesale and Retail Establishments) Award No. 3 of 1947.

(Sgd.) S WOOD,
[L.S.] Commissioner.

PROCEDURAL DIRECTIONS AND ORDERS—

2004 WAIRC 12084

MOTOR VEHICLE (SERVICE STATION, SALES ESTABLISHMENTS, RUST PREVENTION AND PAINT PROTECTION) INDUSTRY AWARD NO. 29 OF 1980

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	APPLICANT
	-v-
	AMGAS HENDERSON SERVICE STATION & OTHERS
	RESPONDENTS
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	THURSDAY, 22 JULY 2004
FILE NO.	APPLICATION 263 OF 2004
CITATION NO.	2004 WAIRC 12084

Result	Award varied
Representation	
Applicant	Mr M D Llewellyn
Respondents	Ms N Thomson as agent on behalf of Respondents for whom warrants were filed Mr G Miller on behalf of Motor Trades Association of WA and as agent on behalf of Respondents for whom warrants were filed

Order

HAVING heard Mr M D Llewellyn on behalf of the Applicant and Ms N Thomson as agent on behalf of Respondents for whom warrants were filed and Mr G Miller on behalf of Motor Trades Association of WA and as agent on behalf of Respondents for whom warrants were filed, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

(1) THAT APPL 263 of 2004 be divided into two parts to be numbered APPLA 263 of 2004 and APPLB 263 of 2004 respectively;

(2) THAT APPLA 263 of 2004 be that part of APPL 263 of 2004 that relates to the Leading Hands, Overtime, Vehicle and Country Work Allowances of the Award; and

(3) THAT APPLB 263 of 2004 be that part of APPL 263 of 2004 which relates to the remaining variations to the Award.

(Sgd.) J H SMITH,
[L.S.] Commissioner.

2004 WAIRC 12274

ALLEGED UNFAIR DISMISSAL

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HENRIETTA MCCARTHY
	APPLICANT
	-v-
	SIR CHARLES GAIRDNER HOSPITAL
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	MONDAY, 9 AUGUST 2004
FILE NO	APPLICATION 488 OF 2003
CITATION NO.	2004 WAIRC 12274

Result Application for discovery granted in part

Order

HAVING heard the applicant on her own behalf and Ms Corinne Drew on behalf of the respondent, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

1. THAT the respondent shall notify the applicant of the proper name of the person the applicant has identified as Lesley Tugby by 2.00pm today.

2. THAT at the conclusion of the hearing of this matter scheduled for Wednesday and Thursday the 11th and 12th days of August 2004, the matter shall be adjourned sine die to enable the evidence of Marisa Duffield and Alanna Moore to be heard.

(Sgd.) P.E. SCOTT,
[L.S.] Commissioner.

2004 WAIRC 10762

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES RON WILLIAMS

APPLICANT

-v-

LIQUID ENGINEERING 2003 PTY LTD

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE WEDNESDAY, 25 FEBRUARY 2004
FILE NO/S APPLICATION 960 OF 2003
CITATION NO. 2004 WAIRC 10762

Result Direction issued
Representation
Applicant Mr R Grayden of counsel
Respondent Mr D Jones as agent

Direction

HAVING heard Mr R Grayden of counsel on behalf of the applicant and Mr D Jones as agent 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 file and serve upon the respondent an amended notice of application no later than 10 March 2004.

2. THAT each party shall give an informal discovery by serving its list of documents by 10 March 2004.

3. THAT inspection of documents shall be completed by 17 March 2004.

4. 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. Any documents sought to be referred to by witnesses in their witness statements must be annexed to those statements.

5. THAT the parties file and serve upon one another any signed witness statements upon which they intend to rely no later than 21 days prior to the date of hearing.

6. THAT the parties file and serve upon one another any signed witness statements in reply upon which they intend to rely no later than 14 days prior to the date of hearing.

7. THAT the matter be listed for hearing for one day.

8. THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
[L.S.] Commissioner.

2004 WAIRC 11989

HOSPITAL SALARIED OFFICERS (DENTAL THERAPISTS) AWARD, 1980

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF WORKERS)
	APPLICANT
	-v-
	J. ARNOLD AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	WEDNESDAY, 14 JULY 2004
FILE NO.	APPLICATION 1471 OF 2003
CITATION NO.	2004 WAIRC 11989

Result	Order made to substitute the name of the Applicant.
Representation	
Applicant	Mr G Bucknall
Respondents	Mr M O'Connor (as agent)

Order

HAVING heard Mr G Bucknall on behalf of the Applicant and Mr M O'Connor as agent on behalf of some Respondents to the Hospital Salaried Officers (Dental Therapists) Award, 1980 the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby –

ORDERS that the name of the Applicant be deleted and that be substituted therefor the name, Health Services Union of Western Australia (Union of Workers).

(Sgd.) J H SMITH,
[L.S.] Commissioner.

2004 WAIRC 12025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOYCE WONG-LEE
	APPLICANT
	-v-
	THE MINISTER FOR HEALTH, AS THE METROPOLITAN HEALTH SERVICE BOARD
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	FRIDAY, 16 JULY 2004
FILE NO	APPLICATION 1531 OF 2003
CITATION NO.	2004 WAIRC 12025

Result	Application dismissed

Order

WHEREAS this is an application for the determination of a grievance referred under Section 95(3) of the Public Sector Management Act 1994; and

WHEREAS the application was listed for hearing and determination on the 13th and 14th days of January 2004; and

WHEREAS on the 8th day of January 2004, the Applicant's representative advised the Commission that the parties had reached agreement in principle in respect of the application and requested that the hearing dates be vacated; and

WHEREAS on the 10th day of May 2004, the Commission convened a conference for the purpose of conciliating between the parties the dispute as to the final terms of the agreement; and

WHEREAS at the conclusion of the conference the applicant sought time to consider her position in respect of the application; and

WHEREAS on the 14th day of July 2004, the Applicant's representative filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P.E. SCOTT,
[L.S.] Commissioner.

2004 WAIRC 12108

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	APPLICANT
	-v-
	TOTAL MARINE SERVICES PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	MONDAY, 26 JULY 2004
FILE NO/S	APPL 322 OF 2004
CITATION NO.	2004 WAIRC 12108

Result	Application for a Declaration pursuant to s.42H discontinued
Representation	
Applicant	Mr M. Llewellyn
Respondent	Mr A. Cameron (as agent)

Order

WHEREAS an application was lodged in the Commission pursuant to s.42H of the *Industrial Relations Act 1979*;

AND WHEREAS the application was listed for hearing on 13 April 2004;

AND WHEREAS the Commission adjourned the hearing into a conference;

AND WHEREAS the Commission adjourned the conference on the understanding that the parties hold private discussions and report back to the Commission on 4 May 2004;

AND WHEREAS the applicant subsequently advised the Commission that an agreement had been reached between the parties and that it wished to discontinue the application;

AND HAVING HEARD Mr M. Llewellyn on behalf of the applicant and Mr A. Cameron (as agent) on behalf of the respondent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order -

THAT the application be discontinued.

(Sgd.) A R BEECH,
[L.S.] Senior Commissioner.

2004 WAIRC 12135

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ARMANDO ANTONIA DIMASI
	APPLICANT
	-v-
	PREMIER BUILDING SOLUTIONS
	RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 28 JULY 2004
FILE NO/S	APPLICATION 395 OF 2004
CITATION NO.	2004 WAIRC 12135

Result	Order issued

Order

WHEREAS on 14th July 2004 the Respondent applied to the Commission for interlocutory orders pursuant to the *Industrial Relations Act, 1979;* and

WHEREAS on 19th July 2004 the matter was listed for hearing and determination and was adjourned and the Commission directed the parties to confer and exchange documents and granted liberty to apply to the parties for future interlocutory orders; and

WHEREAS on 28th July 2004 the Respondent advised the Commission that the Applicant had not provided the Respondent with the requested documents; and

WHEREAS the application is listed for hearing and determination for 2nd August 2004; and

WHEREAS the Commission has decided to issue an order that the Applicant provide all details of private work undertaken by the Applicant or any associated Company or other legal trading or legal entity in which the Applicant has or had any interest during his period of employment with the Respondent.

NOW THEREFORE the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, ex parte, hereby orders:

1. THAT the Applicant provide all details of all private work undertaken by the Applicant or any associated Company or other legal trading or legal entity in which the Applicant has or had any interest during his period of employment with the Respondent, including:
   (a) any monetary amount received by the Applicant or associated Company or other entity;
   (b) any invoices or receipts received or tendered, and
   (c) contact details including name and address of client/customer.
2. THAT the above information be provided to the Respondent by 12 noon on Thursday 29th July 2004.

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

2004 WAIRC 12152

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ARMANDO ANTONIA DIMASI
	APPLICANT
	-v-
	PREMIER BUILDING SOLUTIONS
	RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY, 30 JULY 2004
FILE NO/S	APPLICATION 395 OF 2004
CITATION NO.	2004 WAIRC 12152

Result Order issued

Order

WHEREAS on 19th July 2004 the matter was listed for hearing and determination and was adjourned and the Commission directed the parties to confer and exchange documents and granted liberty to apply to the parties for future interlocutory orders; and

WHEREAS on 29th July 2004 the Applicant applied to the Commission for further and better particulars and production of documents pursuant to the *Industrial Relations Act, 1979;* and

WHEREAS on 29th July 2004 the Applicant advised the Commission that the Respondent had not provided the Applicant with the requested particulars and documents; and

WHEREAS the application is listed for hearing and determination for 2nd August 2004; and

WHEREAS having granted liberty to the parties to apply the Commission has decided to issue an order that the Respondent provide:

1. In respect of item 31 of the amended Notice of Answer filed on 14th July 2004,
   (a) A separate description of each and every item of material making up the amount of $8640.00;
   (b) A separate description for each and every item listed in response to (a) above, the value of that item;
2. In respect of each item listed in response to 1(a) above, all documents in whatever form for each of the items listed including but not limited to invoices or other evidence of purchase order;
3. In respect of item 31 of the amended Notice of Answer filed on 14 July 2004, provide a separate description of each component and full particulars for the calculation of the value ($2880.00) assigned to the use of the plant and equipment;
4. Details of the amount received, allowed as trade in or any other value assigned to the panel saw owned by the Applicant at the time of its disposal by whatever means.

NOW THEREFORE the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, ex parte, hereby orders:

1. In respect of item 31 of the amended Notice of Answer filed on 14th July 2004
   (a) a separate description of each and every item of material making up the amount of $8640.00;
   (b) a separate description for each and every item listed in response to (a) above, the value of that item;
2. In respect of each item listed in response to 1(a) above, all documents in whatever form for each of the items listed including but not limited to invoices or other evidence of purchase order;
5. In respect of item 31 of the amended Notice of Answer filed on 14 July 2004, provide a separate description of each component and full particulars for the calculation of the value ($2880.00) assigned to the use of the plant and equipment;
6. Details of the amount received, allowed as trade in or any other value assigned to the panel saw owned by the Applicant at the time of its disposal by whatever means.
7. THAT the above information be provided to the Applicant by 6.00pm on Friday 30th July 2004.

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

2004 WAIRC 11738

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIANE FAULKNER-HILL
	APPLICANT
	-v-
	DERBAL YERRIGAN HEALTH SERVICE INC
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 15 JUNE 2004
FILE NO/S	APPLICATION 551 OF 2004
CITATION NO.	2004 WAIRC 11738

Result	Direction issued
Representation	
Applicant	Mr N Devine as agent
Respondent	Mr G Stubbs of counsel

Direction

HAVING heard Mr N Devine as agent on behalf of the applicant and Mr G Stubbs 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 each party shall give an informal discovery by serving its list of documents by 6 July 2004.
2. THAT inspection of documents shall be completed by 13 July 2004.
3. THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
[L.S.] Commissioner.

2004 WAIRC 12141

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PHILLIP LAURENCE BARNES
	APPLICANT
	-v-
	GE COMMERCIAL CORPORATION (AUSTRALIA) PTY LTD (ACN 000 974 747)
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	WEDNESDAY, 28 JULY 2004
FILE NO.	APPL 588 OF 2004
CITATION NO.	2004 WAIRC 12141

Result	Order for discovery made
Representation	
Applicant	Mr G Stubbs (of counsel)
Respondent	Mr T Chin (of counsel)

Order

HAVING heard Mr G Stubbs of counsel on behalf of the Applicant and Mr T Chin 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. The Applicant to file and serve on the Respondent, his list of all relevant documents in his possession, custody or power within 14 days of the date of this order, including but not limited to:
   (a) All medical certificates and reports in relation to the Applicant's motor vehicle accident on or around 28 March 2004 up to and including 14 June 2004.
   (b) Documents evidencing payment of any compensation or the like to the Applicant, including in relation to lost wages, as a result of the motor vehicle accident that occurred on or around 28 March 2004. These documents should include all documents up to and including the date of discovery.
   (c) Copies of any document, letter, facsimile, file note or the like evidencing the provision of advice to the Respondent as to the Applicant's absence from work including the provision of medical certificates to the Respondent. This order is limited to the absence that commenced on or around 29 March 2004.
   (d) Copies of all notes, including file notes and diary notes taken in relation to conversations held by the Applicant with Mr Shane Smith or any other employee of the Respondent in relation to SOT logs and procedures, stock checks, floor inspections or performance issues.
   (e) Copies of any documents including timetables, schedules and diary entries relating to appointments to conduct stock checks and floor inspections.

(f) Copies of documents in relation to the Applicant's attempts to mitigate any loss subsequent to termination by the Respondent, including any applications for employment and responses thereto.

2. The Respondent to file and serve on the Applicant, their list of all relevant documents in their possession, custody or power within 14 days of the date of this order, including but not limited to:

(a) The Applicant's personnel file, duty statement and contract of employment.

(b) The Applicant's pay records for the period from 14 April 2003 to 14 April 2004, including all records relating to commissions and bonuses paid or may have been payable to the Applicant save for the termination.

(c) The Applicant's annual, sick and other leave records for the period from 1 September 2003 to 14 April 2004.

(d) All notes, memoranda, letters, e-mails, telephone message recordings and the like relating to any annual, sick and other leave taken by the Applicant in the six months prior to the termination.

(e) All notes, memoranda, letters, e-mails and the like relating to any disciplinary actions, counselling, performance issues and termination in respect of the Applicant.

(f) All internal policies, directives, memoranda, letters, e-mails, notes, telephone message recordings and the like relating to SOT logs which the Respondent will rely on at the hearing of this matter.

(g) All directions, notes, memoranda, letters, e-mails, telephone message recordings and the like issued in relation to stock checks which the Respondent will rely on at the hearing of this matter.

(h) All notes, memoranda, statements, letters, e-mail, telephone message recordings and the like made by the Respondent in relation to the investigation which led to the termination of the Applicant in respect of the stock levels and stock checks at Bruce Ford Equipment, Sea Sport Marine, Aqua Technics, Team Freedom and Electronic Interiors.

(Sgd.) J H SMITH,
[L.S.] Commissioner.

2004 WAIRC 12232

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR RONALD JAMES HILLIER
	APPLICANT
	-v-
	THE MINISTER FOR PUBLIC SECTOR MANAGEMENT
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	WEDNESDAY, 4 AUGUST 2004
FILE NO	APPL 732 OF 2003
CITATION NO.	2004 WAIRC 12232

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS on 21 May 2003 the applicant lodged an application in the Western Australian Industrial Relations Commission pursuant to s.95(3) of the *Public Sector Management Act 1994*;

AND WHEREAS a Notice of Discontinuance was filed in the Commission on 3 August 2004;

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

2004 WAIRC 12229

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NAOMI LOUISE LENNOX
	APPLICANT
	-v-
	THE MINISTER FOR PUBLIC SECTOR MANAGEMENT
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	WEDNESDAY, 4 AUGUST 2004
FILE NO/S	APPL 733 OF 2003
CITATION NO.	2004 WAIRC 12229

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS on 21 May 2003 the applicant lodged an application in the Western Australian Industrial Relations Commission pursuant to s.95(3) of the *Public Sector Management Act 1994*;

AND WHEREAS a Notice of Discontinuance was filed in the Commission on 3 August 2004;

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

2004 WAIRC 12227

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	MELANIE ANNE SLINGER
	APPLICANT
	-v-
	THE MINISTER FOR PUBLIC SECTOR MANAGEMENT
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	WEDNESDAY, 4 AUGUST 2004
FILE NO	APPL 734 OF 2003
CITATION NO.	2004 WAIRC 12227

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS on 21 May 2003 the applicant lodged an application in the Western Australian Industrial Relations Commission pursuant to s.95(3) of the *Public Sector Management Act 1994*;

AND WHEREAS a Notice of Discontinuance was filed in the Commission on 3 August 2004;

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

2004 WAIRC 12224

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	ALAN RUSSELL SNEDDON
	APPLICANT
	-v-
	THE MINISTER FOR PUBLIC SECTOR MANAGEMENT
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	WEDNESDAY, 4 AUGUST 2004
FILE NO	APPL 735 OF 2003
CITATION NO.	2004 WAIRC 12224

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS on 21 May 2003 the applicant lodged an application in the Western Australian Industrial Relations Commission pursuant to s.95(3) of the *Public Sector Management Act 1994*;

AND WHEREAS a Notice of Discontinuance was filed in the Commission on 3 August 2004;

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

2004 WAIRC 12241

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHARI LOUISE POPE
	APPLICANT
	-v-
	THE MINISTER FOR PUBLIC SECTOR MANAGEMENT
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	THURSDAY, 5 AUGUST 2004
FILE NO	APPL 736 OF 2003
CITATION NO.	2004 WAIRC 12241

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS on 21 May 2003 the applicant lodged an application in the Western Australian Industrial Relations Commission pursuant to s.95(3) of the *Public Sector Management Act 1994*;

AND WHEREAS a Notice of Discontinuance was filed in the Commission on 3 August 2004;

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

2004 WAIRC 12242

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR MICHAEL JOHN CANNON
	APPLICANT
	-v-
	THE MINISTER FOR PUBLIC SECTOR MANAGEMENT
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	THURSDAY, 5 AUGUST 2004
FILE NO	APPL 737 OF 2003
CITATION NO.	2004 WAIRC 12242

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS on 21 May 2003 the applicant lodged an application in the Western Australian Industrial Relations Commission pursuant to s.95(3) of the *Public Sector Management Act 1994*;

AND WHEREAS a Notice of Discontinuance was filed in the Commission on 3 August 2004;

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

2004 WAIRC 12243

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR MICHAEL J BEASLEY
	APPLICANT
	-v-
	THE MINISTER FOR PUBLIC SECTOR MANAGEMENT
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	THURSDAY, 5 AUGUST 2004
FILE NO	APPL 738 OF 2003
CITATION NO.	2004 WAIRC 12243

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS on 21 May 2003 the applicant lodged an application in the Western Australian Industrial Relations Commission pursuant to s.95(3) of the *Public Sector Management Act 1994*;

AND WHEREAS a Notice of Discontinuance was filed in the Commission on 3 August 2004;

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

2004 WAIRC 12197

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR BRADLEY RAYMOND FREEMAN
	APPLICANT
	-v-
	THE MINISTER FOR PUBLIC SECTOR MANAGEMENT
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	TUESDAY, 3 AUGUST 2004
FILE NO	APPL 739 OF 2003
CITATION NO.	2004 WAIRC 12197

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS on 21 May 2003 the applicant lodged an application in the Western Australian Industrial Relations Commission pursuant to s.95(3) of the *Public Sector Management Act 1994*;

AND WHEREAS a Notice of Discontinuance was filed in the Commission on 3 August 2004;

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

2004 WAIRC 12245

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SERENA KING
	APPLICANT
	-v-
	THE MINISTER FOR PUBLIC SECTOR MANAGEMENT
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	THURSDAY, 5 AUGUST 2004
FILE NO	APPL 740 OF 2003
CITATION NO.	2004 WAIRC 12245

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS on 21 May 2003 the applicant lodged an application in the Western Australian Industrial Relations Commission pursuant to s.95(3) of the *Public Sector Management Act 1994*;

AND WHEREAS a Notice of Discontinuance was filed in the Commission on 3 August 2004;

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

2004 WAIRC 12198

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR MARK JOHN REDHEAD
	APPLICANT
	-v-
	THE MINISTER FOR PUBLIC SECTOR MANAGEMENT
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	TUESDAY, 3 AUGUST 2004
FILE NO/S	APPL 751 OF 2003
CITATION NO.	2004 WAIRC 12198

Result	Application Discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS on 21 May 2003 the applicant lodged an application in the Western Australian Industrial Relations Commission pursuant to s.95(3) of the *Public Sector Management Act 1994*;

AND WHEREAS a Notice of Discontinuance was filed in the Commission on 3 August 2004;

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

2004 WAIRC 12206

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR JEFF MOORE
	APPLICANT
	-v-
	THE MINISTER FOR PUBLIC SECTOR MANAGEMENT
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	WEDNESDAY, 4 AUGUST 2004
FILE NO	APPL 755 OF 2003
CITATION NO.	2004 WAIRC 12206

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS on 21 May 2003 the applicant lodged an application in the Western Australian Industrial Relations Commission pursuant to s.95(3) of the *Public Sector Management Act 1994*;

AND WHEREAS a Notice of Discontinuance was filed in the Commission on 3 August 2004;

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

2004 WAIRC 12208

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR LOURDES BAPTISTA FRANCIS
	APPLICANT
	-v-
	THE MINISTER FOR PUBLIC SECTOR MANAGEMENT
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	WEDNESDAY, 4 AUGUST 2004
FILE NO	APPL 778 OF 2003
CITATION NO.	2004 WAIRC 12208

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS on 21 May 2003 the applicant lodged an application in the Western Australian Industrial Relations Commission pursuant to s.95(3) of the *Public Sector Management Act 1994*;

AND WHEREAS a Notice of Discontinuance was filed in the Commission on 3 August 2004;

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

2004 WAIRC 12209

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR PAUL NAUGHTON
	APPLICANT
	-v-
	THE MINISTER FOR PUBLIC SECTOR MANAGEMENT
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	WEDNESDAY, 4 AUGUST 2004
FILE NO	APPL 783 OF 2003
CITATION NO.	2004 WAIRC 12209

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS on 21 May 2003 the applicant lodged an application in the Western Australian Industrial Relations Commission pursuant to s.95(3) of the *Public Sector Management Act 1994*;

AND WHEREAS a Notice of Discontinuance was filed in the Commission on 3 August 2004;

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

2004 WAIRC 12203

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WILLIAM JAMES WARRELL
	APPLICANT
	-v-
	WHEATBELT ABORIGINAL CORPORATION
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	WEDNESDAY, 4 AUGUST 2004
FILE NO	APPLICATION 883 OF 2004
CITATION NO.	2004 WAIRC 12203

Result	Application to accept referral out of time granted

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the Industrial Relations Act 1979 filed beyond the 28 days allowed by the Act; and

WHEREAS on the 2nd day of August 2004, the Respondent filed a Notice of Answer and Counter Proposal in respect of the application wherein the Respondent stated that it does not oppose the application being accepted out of time; and

WHEREAS the Commission has considered the matter in light of the tests set out in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (IAC) 84 WAIG 683 and the requirements of Section 29(3) of the Industrial Relations Act 1979, and concluded that in the circumstances, it would be unfair not to accept the application notwithstanding that it was referred to the Commission out of time;

NOW THEREFORE, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT the application to receive the referral out of time be and is hereby granted.

(Sgd.) P.E. SCOTT,
[L.S.] Commissioner.

2004 WAIRC 12273

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LESLEY CAROL FARRELL
	APPLICANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	FRIDAY, 6 AUGUST 2004
FILE NO	APPL 994 OF 2004
CITATION NO.	2004 WAIRC 12273

Result Direction Order issued

Order

PURSUANT TO the powers conferred on it by Part IIB of the *Police Act 1892* and the *Industrial Relations Act 1979*, the Commission hereby orders –

1. That the Appellant file two copies in the office of the Registrar, and serve one copy of the Notice of Application of Appeal on the Respondent within seven (7) days of the date of this order.

2. Within twenty-eight (28) days of the date of this Order the Respondent shall file three copies of an answer in the office of the Registrar and serve one copy on the Appellant.

3. The Respondent's answer shall set out –

   (a) The Respondent's reasons for deciding to take removal action, together with a summary of facts or issues of law relied upon by the Respondent including any relevant matters set out in section 33Q(4) of the *Police Act 1892* and

   (b) any matters the Respondent wishes to raise in reply to the Appellant's case.

4. At the time of filing an answer, the Respondent shall file in the office of the Registrar and serve on the Appellant:

   (a) a list and copy of all materials that were examined and taken into account by the Respondent in making his decision to take removal action; and

   (b) a copy of the notices given by the Respondent under section 33L(1) and (3) of the *Police Act 1892*.

5. Within twenty one (21) days of filing an answer the parties shall file with the Registrar

   (a) a list and copy of any new evidence agreed to be adduced by consent of the parties; and

   (b) a list and copy of any other new evidence sought to be adduced and the grounds on which leave will be sought to tender that evidence.

6. Liberty to apply.

(Sgd.) W S COLEMAN,
On Behalf of the
[L.S.] Western Australian Industrial Relations Commission.

2004 WAIRC 12117

METAL TRADES (LABOUR HIRE) AWARD 2002

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	ADECCO, ACCESS PERSONNEL, ALPHA PERSONNEL
	RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	TUESDAY 27TH JULY 2004
FILE NO	A 3 OF 2003
CITATION NO.	2004 WAIRC 12117

Result Order for Restricted Service issued ex parte

Order

WHEREAS on 26th July 2004 Select Industrial applied for an order for substituted or restricted service relating to their application to dismiss matter A3 of 2003 insofar as it relates to Select Industrial; and

WHEREAS on 27th July 2004, the Commission ex parte decided to issue an order for restricted service requiring Select Industrial to serve The Secretary, The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch; Mr M Borlase for the Western Australian Chamber of Commerce and Industry; Mr S. Heathcote, Clayton Utz Lawyers for Patterson Enterprises; Mr T. Lyons, Gibson Lyons Lawyers for Blue Collar People; Mr P. Watson, Fisher Cartwright Berriman for Adecco, Recruitment Solutions and Manpower; and Mr A. Dzieciol, Fiocco's Lawyers for The Food Preservers' Union of Western Australia, Union of Workers.

NOW THEREFORE the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, ex parte, hereby orders:

THAT Select Industrial will serve a copy of this order and the application lodged on 26th July 2004 to dismiss matter A3 of 2003 insofar as it relates to Select Industrial on the following named parties to the proposed new award:

1. The Secretary, The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch, 121 Royal Street, East Perth, WA 6004
2. Mr M Borlase, Western Australian Chamber of Commerce and Industry, 180 Hay Street Perth WA 6000
3. Mr S Heathcote, Clayton Utz, "QV1" 250 St George's Terrace Perth 6805
4. Mr T Lyons, Gibson Lyons Lawyers, Level 6, 33 Barrack Street Perth WA 6000
5. Mr P Watson, Fisher Cartwright Berriman, Lawyers & Consultants, 274B James Street, Northbridge WA 6003.
6. Mr A. Dzieciol, Fiocco's Lawyers, 25 Barrack Street, Perth WA 6805.

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

ENTERPRISE BARGAINING AGREEMENT—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Activ Foundation Supported Employees Wages Agreement 2004 AG 121/2004	19/07/2004	Activ Foundation Inc.	The Disabled Workers' Union of Western Australia	Scott C	Agreement Registered
Carringtons Traffic Services / CFMEUW Industrial Agreement 2002-2005 AG 115/2004	13/07/2004	The Construction, Forestry, Mining and Energy Union of Workers	Carrington's (WA) Pty Ltd t/a Carringtons Traffic Services	Gregor C	Agreement Registered
Doug Buckey's Carpet Court / CFMEUW Industrial Agreement 2002-2005 AG 116/2004	13/07/2004	The Construction, Forestry, Mining and Energy Union of Workers	The Trustee for DC Buckey Family Trust t/a Doug Buckey's Carpet Court	Gregor C	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Education Assistants General Agreement 2004 AG 108/2004	21/06/2004	Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch , The Director General of the Department of Education and Training	(Not applicable)	Harrison C	Agreement Registered
Fish Feast Canning Vale SDA Agreement 2003 AG 57/2004	15/06/2004	The Shop, Distributive and Allied Employees' Association of Western Australia	Danset Holdings Pty Ltd	Harrison C	Agreement Registered
Fish Feast Halls Head SDA Agreement 2003 AG 51/2004	15/06/2004	The Shop, Distributive and Allied Employees' Association of Western Australia	Clyde Corporation Pty Ltd	Harrison C	Agreement Registered
Fish Feast Malaga SDA Agreement 2003 AG 56/2004	15/06/2004	The Shop, Distributive and Allied Employees' Association of Western Australia	Coslati Investments Pty Ltd	Harrison C	Agreement Registered
Inghams Poultry Processing (Osborne Park) Enterprise Agreement 2003 AG 290/2003	N/A	Inghams Enterprises Pty Ltd	The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	Kenner C	Discontinued
Inghams Poultry Processing (Osborne Park) Enterprise Agreement 2003 AG 101/2004	20/07/2004	Inghams Enterprises Pty Ltd	The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	Kenner C	Agreement Registered
Midland Brick Enterprise Agreement (WA) 2004 AG 41/2004	22/07/2004	The Federated Brick, Tile and Pottery Industrial Union of Australia (Union of Workers) Western Australian Branch	Midland Brick Company Pty Ltd	Gregor C	Agreement Registered
Morley Glass & Aluminium / CFMEUW Industrial Agreement 2002-2005 AG 117/2004	13/07/2004	The Construction, Forestry, Mining and Energy Union of Workers	The Trustee for MGA Unit Trust t/a Morley Glass & Aluminium	Gregor C	Agreement Registered
Newmast Commercial Painters / CFMEUW Industrial Agreement 2002-2005 AG 118/2004	13/07/2004	The Construction, Forestry, Mining and Energy Union of Workers	Dalind Pty Ltd t/a Newmast Commercial Painters	Gregor C	Agreement Registered
NK Ceilings (1992) Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 22/2004	14/07/2004	The Construction, Forestry, Mining and Energy Union of Workers	NK Ceilings (1992) Pty Ltd	Gregor C	Agreement Registered
Public Service General Agreement 2004 PSAAG 2/2004	30/07/2004	Civil Service Association of Western Australia Incorporated , Department of Indigenous Affairs & Others , Department of Consumer and Employment Protection , Department of Agriculture	(Not applicable)	Scott C	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
St Hilda's Anglican School For Girls (Inc)(Enterprise Bargaining) Agreement 2004 AG 123/2004	15/07/2004	St. Hilda's Anglican School For Girls Inc , The Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers , Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch	(Not applicable)	Harrison C	Agreement Registered
St John of God Pathology Enterprise Agreement 2004 AG 126/2004	2/08/2004	St John Of God Pathology (a Division Of St John Of God Health Care Inc.)	Health Services Union of Western Australia (Union of Workers)	Scott C	Agreement Registered
Stirling Stainless Steel Enterprise Agreement 2004 AG 120/2004	2/08/2004	Stirling Stainless Steel	The Shop, Distributive and Allied Employees' Association of Western Australia	Harrison C	Agreement Registered
Turbo Cranes / CFMEUW Industrial Agreement 2002-2005 AG 153/2003	N/A	The Construction, Forestry, Mining and Energy Union of Workers	Brett Newhill t/a Turbo Cranes	Coleman CC	Discontinued

PUBLIC SERVICE APPEAL BOARD—

2004 WAIRC 11990

AGAINST THE DECISION TO TERMINATE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LUKE ARNOLD

APPLICANT

-v-

HONOURABLE CLIVE BROWN, MINISTER FOR STATE DEVELOPMENT AS EMPLOYING AUTHORITY FOR THE DEPARTMENT OF INDUSTRY AND TECHNOLOGY

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
CHAIRPERSON - COMMISSIONER P E SCOTT

DATE OF ORDER WEDNESDAY, 14 JULY 2004

FILE NO PSAB 10 OF 2004

CITATION NO. 2004 WAIRC 11990

Result Appeal to the Public Service Appeal Board withdrawn by leave

Order

WHEREAS this is an appeal pursuant to section 80I the Industrial Relations Act 1979; and

WHEREAS on the 8th day of July 2004, the Appellant's representative filed a Notice of Discontinuance in respect of this appeal; and

WHEREAS on the 13th day of July 2004, the Respondent consented to the appeal being withdrawn;

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders:

THAT this appeal be, and is hereby withdrawn by leave.

(Sgd.) P E SCOTT,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2004 WAIRC 12169

AGAINST THE DECISION TO TERMINATE MADE ON 20/11/2003

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TOUHID CHAWDHURY
	APPELLANT
	-v-
	ROTTNEST ISLAND AUTHORITY
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER P E SCOTT – CHAIRMAN MR B HEWSON – BOARD MEMBER MS R SHADBOLT – BOARD MEMBER
DATE	MONDAY, 2 AUGUST 2004
FILE NO	PSAB 13 OF 2003
CITATION NO.	2004 WAIRC 12169

Catchwords	Public Service Appeal Board – Appeal against decision to terminate employment – Dismissal occurred during period of probationary employment – Issues in relation to applicant's performance – Procedural fairness considered – Principles applied – Applicant not harshly, oppressively and unfairly dismissed – Application dismissed – *Industrial Relations Act 1979* (WA) s 80I
Result	Appeal dismissed
Representation	
Appellant	Appeared on his own behalf
Respondent	Mr R Heaperman and with him Mr K Chinnery

Reasons for Decision

(Given extemporaneously and edited by the Public Service Appeal Board)

1 The appellant was employed pursuant to a contract of employment with the respondent. That contract provided for a 3 month probationary period. The appellant's role was as Supervisor Bike Hire at the respondent's bike hire facility on Rottnest Island.

2 The appellant commenced his employment on 25 August 2003 and the employer brought it to an end on 20 November 2003, in the final week of the 3 month probationary period.

3 The evidence demonstrates, and we find, that the appellant received a statement of his duties and responsibilities soon after he commenced employment and they were explained to him. Mr Robert Smithson, another supervisor who was an experienced supervisor, was to provide day-to-day training and he did so.

4 During the course of the 3 months' probation, the appellant had a number of issues associated with his performance and competence brought to his attention, and he was reminded of the need to satisfactorily complete the probationary period.

5 The issues drawn to his attention included issues of unsatisfactory performance such as lack of invoicing for ferry hire bikes; not dealing with stock ordering as required and within a reasonable time; not satisfactorily dealing with a subcontractor on the premises without the appellant informing himself of who the person was; and not getting involved in the work of the bike shop with customers, and dealing with them when necessary.

6 At no time during the probationary period did the appellant display the appropriate level of competence for the position. We find that during the 3 months' probationary period, the appellant did not demonstrate the level of work performance as was reasonably required of him.

7 The period of probation is one for an employee to demonstrate that he or she can fulfil the requirements of the job and fit in in the organisation. We refer to the decision of the Full Bench in *Hutchinson v Cable Sands* (WA) Pty Ltd 79 WAIG 2635.

8 There is no requirement for a formal warning during the probationary period.

9 An extension of a probationary period might be provided where an employer requires further time to assess an employee's competency, or for other reasons, but there is no requirement to extend the probationary period if the employer has had a reasonable opportunity to assess an employee.

10 In this case, the respondent was entitled to come to a conclusion as to the appellant's probationary period and his performance, and was entitled to find that he was not satisfactory to continue as a permanent employee. Therefore, there is no demonstration that the respondent was unfair in its treatment of the appellant, either in the probationary period, or in the process leading to the termination of employment.

11 Accordingly, the appeal will be dismissed.

2004 WAIRC 12170

AGAINST THE DECISION TO TERMINATE MADE ON 20/11/2003

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TOUHID CHAWDHURY
	APPELLANT
	-v-
	ROTTNEST ISLAND AUTHORITY
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER P E SCOTT – CHAIRMAN MR B HEWSON – BOARD MEMBER MS R SHADBOLT – BOARD MEMBER
DATE	MONDAY, 2 AUGUST 2004
FILE NO	PSAB 13 OF 2003
CITATION NO.	2004 WAIRC 12170

Result	Appeal dismissed

Order

HAVING heard the appellant on his own behalf and Mr R Heaperman and with him Mr K Chinnery on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders:

THAT this appeal be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2004 WAIRC 12179

AGAINST THE DECISION TO TERMINATE MADE ON 6/5/2004

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EDIE SWAN WILSON
	APPLICANT
	-v-
	ANIMAL RESOURCES CENTRE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD CHAIRPERSON - COMMISSIONER P E SCOTT
DATE OF ORDER	MONDAY, 2 AUGUST 2004
FILE NO	PSAB 9 OF 2004
CITATION NO.	2004 WAIRC 12179

Result	Appeal to the Public Service Appeal Board withdrawn by leave

Order

WHEREAS this is an appeal pursuant to section 80I the Industrial Relations Act 1979; and

WHEREAS on the 27th day of July 2004, the Appellant filed a Notice of Discontinuance in respect of this appeal; and

WHEREAS on the 28th day of July 2004, the Respondent consented to the appeal being withdrawn;

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders:

THAT this appeal be, and is hereby withdrawn by leave.

(Sgd.) P E SCOTT,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 74 of 2003	Vivian Edgar Hendricks	Minister for Health, East Metro Health Service	Scott C.	Upheld	06/08/04
PSA 75 of 1999	Mervin Michael Anderson	Minister for Health, East Metro Health Service	Scott C.	Upheld	06/08/04

CUMULATIVE CONTENTS HEADINGS

* Denotes New Heading

Annual Report of the Chief Commissioner
Agreements—Industrial—Retirements from
Awards/Agreements—Application for
Awards/Agreements—Application for variation of—No variation resulting
Awards/Agreements—Consolidation by Registrar
Awards/Agreements—Consolidation of
Awards/Agreements—Interpretation of
Awards/Agreements—Variation of (see also Public Service Arbitrator and Coal Industry Tribunal)
Boards of Reference—Decisions of
Cancellation of Awards/Agreements/Respondents
Cancellation of Orders
Ceremonial Addresses
Commission in Court Session—Appeals against decisions of Boards of References
Commission in Court Session—Matters dealt with
Conciliation Orders (Section 32 Matters)
Conferences—Matters arising out of (refers to matters agreement between parties is reached)
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Editor's Note: The Registrar wishes to advise that as from January 2004, the format of the "Cumulative Digest" published at the back of the Western Australian Industrial Gazette has changed to incorporate "Catchword Phrases", please refer to the Notice at (83WAIG3937).

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Industrial law - Termination of employment - Harsh, oppressive and unfair dismissal - Acceptance of referral out of time - Application referred outside of 28 day time limit - Relevant principles to be applied - Commission satisfied applying principles that discretion should be exercised - Acceptance referral out of time granted - Industrial Relations Act 1979 (WA) s 29(1)(b)(2)(3), s32 - Ms M Hollingsworth -v- Town of Bassendean - APPL 631 of 2004 - KENNER C - 24/05/04 - Government Administration 2646

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Application re contractual entitlements - Declaration made the Applicant is owed a contractual benefit - Order made that the Respondent pay the Applicant $15,950 - Mr LW Jones -v- Har Pty Ltd (Shayne Murray) - APPL 432,434 of 2004 - SMITH C - 16/07/04 - Other Services 2650

Industrial Law - Termination of employment - Harsh oppressive and unfair dismissal - Principles applied - Applicant summarily dismissed - Lack of procedural fairness - Applicant harshly, oppressively and unfairly dismissed - Application upheld - Reinstatement impracticable - compensation ordered - Industrial Relations Act 1979 (WA) s29(10(b)(i), s23A, s26(1)(a)(c) s23A(8) - Mr BT Kerton -v- Bandaberry Pty Ltd - Trading As Mandurah Holden - APPL 567 of 2003 - KENNER C - 15/01/04 - Motor Vehicle Rtlg & Services 2652

Termination of employment - Harsh oppressive and unfair dismissal - Whether constructive dismissal or resignation - Intent of parties considered - No dismissal at the initiative of the employer - Application dismissed - Industrial relations Act 1979 (WA) s23, 229(1)(b)(i) - Mr D Linto -v- Repcol Limited - APPL 152 of 2004 - SCOTT C - 02/08/04 - Business Services 2657

Industrial Law - Termination of employment - Harsh oppressive and unfair dismissal - Summary dismissal for misconduct - Whether lack of procedural fairness - Alleged offer of sale of prohibited drug in the workplace - Employee's "right to silence" - Right against self incrimination - Employee afforded every reasonable opportunity to respond to allegations - Principles applied - Applicant not harshly oppressively or unfairly dismissed - Application dismissed - Industrial Relations Act 1979 (WA) s23A, s29(b)(i), 26(1)(c), Misuse of Drugs Act 1981 (WA) - Mr P Lips -v- Supercheap Auto Pty Ltd (ABN: 64085395) - APPL 601 of 2003 - KENNER C - 23/07/04 - Motor Vehicle Rtlg & Services 2660

Declaration made the Applicant is owed contractual benefits - Orders made that the Respondent pay the Applicant $7,400 and $3,800 - Ms CD Nicholls -v- MGM Exports Pty Ltd (Shayne Murray) - APPL 434 of 2004 - SMITH C - 16/07/04 - Other Services 2666

Termination of employment - Harsh, oppressive and unfair dismissal - Application referred outside of 28 day time limit - Acceptance of referral out of time not granted - Industrial Relations Act 1979 (WA) s29(3) - Dismissed - Ms M Nocifora -v- Telethon Institute of Child Health Research - APPL 77 of 2004 - WOOD C - 03/08/04 - Other Services 2667

Denied contractual benefit - Employee not paid for hours worked - Water cart driver - Industrial Relations Act 29(1)(b)(ii) - Application granted - Mr JW Polinelli -v- McKeagg's Transport - APPL 427 of 2004 - BEECH SC - 09/08/04 - Services to Mining 2670

Termination of employment - Harsh oppressive and unfair dismissal - Whether applicant an employee or independent contractor - Principles applied - Applicant independent contract - No Jurisdiction - Application dismissed - Industrial Relations Act 1979 (WA) s29(1)(b)(i) - Mr E Poulose -v- W.A Auto Transport - APPL 1696 of 2003 - HARRISON C - 14/07/04 - Road Transport .. 2671

Claim for unfair dismissal - Refusal to employ - No employer/employee relationship - Commission lacks jurisdiction - Application referred outside of 28 time limit - Relevant principles applied - Acceptance of referral out of time not granted - Industrial Relations Act 1979 (WA)s 29(1)(b)(i)(2)(3) - Struck out for want of jurisdiction - Mr PT Sandercock -v- E.J Powell & Co - APPL 715 of 2004 - SCOTT C - 02/08/04 – Agriculture 2674

Termination of employment - Harsh, oppressive and unfair dismissal - Application referred outside of 28 day time limit - Acceptance of referral out of time not granted - Industrial Relations Act 1979 (WA) s 29(3) - Application dismissed - Mr P Sayer -v- Fall Prevention & Rescue t/a Fallright International - APPL 601 of 2004 - WOOD C - 04/08/04 - Other Services 2675

Industrial Relations Act 1979 (WA) s29(1)(b)(i)&(ii) - Termination of employment - Harsh oppressive and unfair dismissal - Downturn in business - Minimum Conditions of Employment Act 1993 s41 - Applications Dismissed - Ms A Silligardos -v- Coast to Coast The Golden Roast - WA / The Perfect Taste - APPL 419,420 of 2003 - WOOD C - 20/07/04 - Food Retailing 2677

Termination of employment - Harsh, oppressive and unfair dismissal - Redundancy - Mitigation - Calculation of loss - Application dismissed - Industrial Relations Act 1979 (WA) s29(1)(b)(i) - Ms J Singh -v- Women's Law Centre of WA (Inc) - APPL 213 of 2004 - WOOD C - 05/07/04 - Community Services 2681

Industrial law - Termination of employment - Harsh, oppressive and unfair dismissal and denied contractual benefits - Whether applicant's employment covered by the Government Railways Locomotive Enginemen's Award 1973 - Principles applied - Commission lacks jurisdiction - Application dismissed - Industrial Relations Act 1979 (WA) s23(3)(d), s29(1)(b)(i), s29(1)(b)(ii) & s37(1)(a); Government Railways Act 1904 (WA) s73, s73(4), s77 & s83 - Mr DPS Tomasi -v- Public Transport Authority - APPL 1601 of 2003 - KENNER C - 09/08/04 - Other Transport 684

Termination of employment - Harsh, oppressive and unfair dismissal - Acceptance of referral out of time - Application referred outside of 28 day time limit - Relevant principles to be applied - Commission satisfied applying principles that discretion should not be exercised - Acceptance of referral out of time not granted - Industrial Relations Act 1979 (WA) s29(1)(b)(i), (2) & (3) - Application out of time dismissed - Ms TK Turnbull -v- Cooks Construction Pty Ltd - APPL 383 of 2004 - BEECH SC - 05/08/04 - General Construction 2687

Industrial Law (WA) - Agent not registered pursuant to s112A - Industrial Relations Act 1979 (WA), ss31 and 112A - Declaration made - Another union is not entitled to appear as agent for the Applicant for the purposes of s31 of the Industrial Relations Act - Hospital Salaried Officers Association of Western Australia (Union of Workers) -v- Anglican Homes (Inc) - C 30 of 2004 - SMITH C - 26/07/04 - Health Services 2693

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Agreement between officers of Department and Union to reclassify Canine Handlers - Order sought that Minister observe the terms of the agreement - Whether agreement by Department made without authority of relevant Minister - Application for an order adjourned - Industrial Relations Act 1979 s.44(9); Prisons Act 1981 s.13(1), (4) - Western Australian Prison Officers' Union of Workers -v- The Hon. Attorney General C/- Department of Justice - CR 58 of 2004 - BEECH SC - 22/07/04 - Government Administration..... 2694