Western Australian

Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 1 TUESDAY, 25 JANUARY, 2005 Vol. 85—Part 1

THE mode of citation of this volume of the Western Australian Industrial Gazette will be as follows:—

85 W.A.I.G.

CONTENTS APPEAR AT THE END OF THIS PUBLICATION

LONG SERVICE LEAVE—Standard Provisions—

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

1.—Right to Leave.

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

2.—Long Service.

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

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

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

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

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

Section 6 reads—

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

(a) that other corporation—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) Where a corporation—

(a) is the holding company of another corporation;

(b) is a subsidiary of another corporation;

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

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

(5) Such service shall include—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.—Period of Leave.

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

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

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

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

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

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

(i) by his death;

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

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

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

(i) by his death; or

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

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

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

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

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

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

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

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

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

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

4.—Payment for Period of Leave.

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

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

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

(4) The rate of pay—

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

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

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

5.—Taking Leave.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.—Records to be Kept.

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

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

8.—Special Board of Reference.

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

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

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

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

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

9.—State Law.

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

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

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

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

10.—Exemptions.

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

*Editor's Note.
The Judgment and General Order as prescribed by section 94A was published in 58 WAIG Part 1 Subpart 2 at Page 116.
There was no Schedule of Exemptions.

INDUSTRIAL APPEAL COURT—Appeal against decision of Full Bench—

[2004] WASCA 312

JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	:	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	:	PERSONNEL CONTRACTING PTY LTD T/AS TRICORD PERSONNEL -V- THE CONSTRUCTION FORESTRY MINING AND ENERGY UNION OF WORKERS [2004] WASCA 312
CORAM	:	STEYTLER J (PRESIDING JUDGE) EM HEENAN J SIMMONDS J
HEARD	:	1 NOVEMBER 2004
DELIVERED	:	22 DECEMBER 2004
FILE NO/S	:	IAC 7 OF 2004
BETWEEN	:	PERSONNEL CONTRACTING PTY LTD T/AS TRICORD PERSONNEL Appellant AND THE CONSTRUCTION FORESTRY MINING AND ENERGY UNION OF WORKERS Respondent

ON APPEAL FROM:

Jurisdiction	:	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram	:	SHARKEY P, BEECH SC, SMITH C
Citation	:	THE CONSTRUCTION FORESTRY MINING AND ENERGY UNION OF WORKERS -v- PERSONNEL CONTRACTING PTY LTD T/AS TRICORD PERSONNEL
File No	:	FBA 40 of 2003

Catchwords:

Industrial law - Labour hire agency - Whether in relation to agency two workers were employees or independent contractors - Application of common law test for finding employment relationship - Whether document headed "Agreement to Contract" created employment relationship - Whether document headed "Independent Contractors Agreement" created employment relationship

Courts and Judges - Appeals jurisdiction - Industrial Appeals Court - Jurisdiction to hear appeal from Full Bench - Decision of Full Bench that worker was an "employee" for the purposes of the *Industrial Relations Act* 1979 (WA) - Decision of Full Bench that the matter before it was an "industrial matter" for the purposes of the *Industrial Relations Act* 1979 (WA)

Legislation:

Industrial Relations Act 1979 (WA), s 7(1), s 24, s 90, s 91(1)

Interpretation Act 1984 (WA), s 18, s 19(1)(a), s 19(2)(f)

Occupational Health and Safety Act 1984 (WA), s 19(4)

Result:

Appeal allowed

Category: B

Representation:

Counsel:

Appellant	:	Mr P P McCann
Respondent	:	Mr H Borenstein SC & Mr T J Dixon

Solicitors:

Appellant	:	Hotchkin Hanly
Respondent	:	Construction Forestry Mining & Energy Union of Workers

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

Accident Compensation Commission v Odco Pty Ltd [1990] 64 ALJR 606
Adam v Newbigging (1888) 13 App Cas 308
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321
Australian Mutual Provident Society v Allan (1978) 52 ALJR 407
Buck v Bavone (1976) 135 CLR 110
Building Workers' Industrial Union of Australia v Odco Pty Ltd (1991) 29 FCR 104
Cam & Sons Pty Ltd v Sargent (1940) 14 ALJ 162
Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd (1931) 46 CLR 41
Corporation of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135
Drake Personnel Ltd v Commissioner of State Revenue (2000) 2 VR 635
Ermogenous v Greek Orthodox Community of SA Inc (2002) 209 CLR 95
Ex parte Delhasse; In re Megevand (1878) 7 Ch D 511
Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540
Hollis v Vabu Pty Ltd (2001) 207 CLR 21
Humberstone v Northern Timber Mills (1949) 79 CLR 389
Lister v Romford Ice & Cold Storage Co Ltd [1957] AC 555
Marshall v Whittaker's Building Supply Co (1963) 109 CLR 210
Massey v Crown Life Insurance Co [1978] 2 All ER 576
Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611
Narich Pty Ltd v Commissioners of Pay-roll Tax (NSW) [1983] 2 NSWLR 597
Northern Sandblasting Pty Ltd v Harris (1997) 188 CLR 313
R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd (1952) 85 CLR 138
Re Polites; Ex parte Construction, Forestry, Mining and Energy Union (2002) 117 FCR 212
Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16
TNT Worldwide Express (NZ) Ltd v Cunningham [1993] 3 NZLR 681
United Construction Pty Ltd v Birighitti [2003] WASCA 24
Zuijs v Wirth Bros Pty Ltd (1955) 93 CLR 561

Case(s) also cited:

Abdalls v Viewdaze Pty Ltd (2003) 122 IR 215
Attorney-General (NSW) v Perpetual Trustee Co Ltd (1952) 85 CLR 237
Borg v Troubleshooters Available Pty Ltd (1995) 75 WAIG 2852
Climaze Holdings Pty Ltd v Dyson (1995) 13 WAR 487
Country Metropolitan Agency Contracting Services Pty Ltd v Slater (2003) 124 IR 293
Damevski v Guidice [2003] FCAFC 252
Housing Industry Association Ltd v Murten [2004] WASCA 139
Leighton Contractors Pty Ltd v Panizza, unreported; FCt SCt of WA; Library No 950562; 19 October 1995
Mason & Cox Pty Ltd v McCann (1999) 74 SASR 438
Matthews v Cool or Cosy Pty Ltd [2003] WASCA 136
Re Porter (1989) 34 IR 179
Stephen G May T/A Little Muppets Child Care Centre [2004] WASCA 133
Thompson v Brunel Energy Pty Ltd (2001) 81 WAIG 3155
Vetter v Lake Macquarie City Council (2001) 202 CLR 439
Waters v Public Transport Corporation (1991) 173 CLR 349
Western Australian Builders Labourers, Painters & Plasterers Union v Florida Exclusive Pools (1996) 77 WAIG 4
Williams v Bill Williams Pty Ltd [1971] 1 NSWLR 547
Zurich Australian Insurance Ltd v Amec Services Pty Ltd, unreported; FCt SCt of WA; Library No 980139; 31 March 1998

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1 **STEYTLER J (PRESIDING JUDGE)**: I have had the advantage of reading the judgments of EM Heenan J and Simmonds J. I will not repeat what each has said about the circumstances giving rise to this appeal.

2 As appears from the other judgments, the appeal raises two principal questions. The first is whether this Court has jurisdiction to hear it. The second, which assumes a favourable answer to the first, is whether the Full Bench of the Industrial Relations Commission ("the Full Bench") erred in finding that two workers, Kevin Bartley and Craig Fowler, were employees of the appellant and not independent contractors.

3 As to the first question, s 24 of the *Industrial Relations Act 1979* provides that:

> "(1) The Commission has jurisdiction to determine in any proceedings before it whether any matter to which those proceedings relate is an industrial matter and a finding by the Commission on that question is, subject to sections 49 and 90, final and conclusive with respect to those proceedings.
>
> (2) A determination under subsection (1) is not a decision for the purposes of section 49 or 90 unless and until -
>
> (a) those proceedings have been concluded; or
>
> (b) leave to appeal is granted by the Commission making that determination."

4 Section 49 provides for appeals to the Full Bench from the decision of a single Commissioner and s 90(1) gives to this Court a limited jurisdiction to hear appeals from the Industrial Relations Commission ("the Commission"). That section reads as follows:

> "(1) Subject to this section, an appeal lies to the Court in the manner prescribed from any decision of the President, the Full Bench, or the Commission in Court Session -
>
> (a) on the ground that the decision is in excess of jurisdiction in that the matter the subject of the decision is not on an industrial matter;
>
> (b) erroneous in law in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making the decision appealed against; or
>
> (c) on the ground that the appellant has been denied the right to be heard,
>
> but upon no other ground."

5 The respondent, as I understood its argument, makes the following contentions:

(a) So long as the matter before the Commission is an industrial matter then, on the proper construction of s 90(1), findings made in respect of that matter are immune from challenge in this Court unless they fall within s 90(1)(b).

(b) In this case there were two industrial matters before the Commission, one being an application under s 29 concerning an alleged unfair dismissal and the other arising out of the service on the appellant by the respondent of a notice of intention to initiate bargaining for an industrial agreement under s 42 of the Act.

(c) Consequently, even though, in the course of dealing with those matters, the Full Bench found that Messrs Bartley and Fowler were employees of the appellant and although such a finding was necessary, in each of the cases before the Commission, for the matter to be an "industrial matter" as defined in s 7 of the Act (the relevant terms of which have been set out in the judgment of Simmonds J), those findings are immune from challenge under s 90(1)(a).

(d) It is not contended on behalf of the appellant that the Full Bench misconstrued any provision of the Act. The appellant contends only that the Full Bench made factual errors or misapplied accepted common law tests imported by the Act for the purpose of determining whether or not an employment relationship existed. Accordingly, s 90(1)(b) has no application.

(e) There is no suggestion that s 90(1)(c) has any application.

(f) The appeal is consequently incompetent.

6 As to propositions (a), (b) and (c), it was common cause that the relevant provisions of the definition of "industrial matter" in s 7 are such that neither of the matters before the Full Bench could be characterised as an industrial matter unless it involved the relation of employer and employee. Consequently, on the respondent's argument, the Commission could give itself jurisdiction by an erroneous finding of fact as regards the existence of that relationship and there could be no appeal to this Court in respect of that error unless it involved "an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order" for the purposes of s 90(1)(b).

7 Senior Counsel for the respondent sought to bolster this submission by reference to the legislative intention which, he said, might be derived from a comparison between the form which s 90(1)(a) and (b) now take and that which those provisions took prior to the amendment effected by the *Labour Relations Reform Act 2002* and also from the second reading speech made by the responsible Minister at the time of that amendment.

8 Prior to the amendment, s 90(1) of the Act read as follows:

> "(1) Subject to this section, an appeal lies to the Court in the manner prescribed from any decision of the President, the Full Bench, or the Commission in Court Session on the ground that the decision is erroneous in law or is in excess of jurisdiction but upon no other ground."

9 I can find no support for the respondent's contention in the contrast between the provisions of that section and those of the section as it now exists. It seems to me that the only legislative intention which might be divined from the change is that, by the amendment, the legislature sought to limit appeals on jurisdictional issues to those in which the decision was not on an industrial matter (like Simmonds J, I read the word "on" as meaning "with respect to"), to limit appeals on errors of law to those concerning errors of the kind now identified and to preserve a right of appeal on the ground of a denial of the right to be heard.

10 Similarly, the Minister's second reading speech (the relevant portion of which is extracted in the judgment of Simmonds J) lends no support to the respondent's contentions. Like Simmonds J, it seems to me that it does no more than indicate an intention that a jurisdictional error arising from the fact that "the matter the subject of the decision is not on an industrial matter" has been singled out as an "important … jurisdictional matter".

11 That the legislature has seen fit generally to confine the jurisdiction of the Commission to "industrial matters" (see s 23(1) of the Act) has, as I have said, the consequence that in each of the cases concerned in this appeal there must have been the relationship of employer and employee. If, in either case, the relationship did not exist, the Commission had no jurisdiction in respect of it. Consequently, the existence of the employer/employee relationship was a "jurisdictional fact" in the commonly accepted terminology of the case law in this area: see, for example, ***Corporation of the City of Enfield v Development Assessment Commission*** (2000) 199 CLR 135; ***Minister for Immigration and Multicultural Affairs v Eshetu*** (1999) 197 CLR 611 at 651; ***Re Polites; Ex parte Construction, Forestry, Mining and Energy Union*** (2002) 117 FCR 212 at 231 and 236; and ***Graham Barclay Oysters Pty Ltd v Ryan*** (2002) 211 CLR 540 at [183]. Moreover, given the language of the relevant provisions (s 23(1) and the definition of "industrial matter" in s 7), the jurisdictional fact is one which is required "objectively" (as to which see Aronson, Dyer and Groves: *Judicial Review of Administrative Action*, 3rd ed (2004) at 228 - 229) to exist and not one of which the decision-maker need merely be subjectively satisfied (*cf*, for example, ***Eshetu***, above; ***Buck v Bavone*** (1976) 135 CLR 110 at 118 - 119; and ***Corporation of the City of Enfield***, above, at 149 - 150).

12 In such cases, on judicial review (or on an appeal such as this) the reviewing Court, when considering the issue of jurisdiction, decides for itself the question whether the fact "in truth" exists (see ***Corporation of the City of Enfield*** at 155, per Gleeson CJ, Gummow, Kirby and Hayne JJ, and see, generally, Aronson, Dyer and Groves, above, at 228 - 288) and its decision in that respect necessarily prevails over that of the impugned decision-maker.

13 There being nothing in s 90 of the Act (or any other of the provisions of the Act to which reference has been made) which should be taken to displace these principles, I am satisfied that this Court has jurisdiction and that the appeal is competent.

14 That brings me to the second question, whether the workers Kevin Bartley and Craig Fowler were employees of the appellant or independent contractors.

15 The principles to be applied in answering a question of this kind are not in doubt.

16 Traditionally, the so-called "control test", measuring the degree of control which the person engaging the worker is able to exercise over the worker, has been regarded as important: see, for example, ***Humberstone v Northern Timber Mills*** (1949) 79 CLR 389 and ***Zuijs v Wirth Bros Pty Ltd*** (1955) 93 CLR 561.

17 In ***Stevens v Brodribb Sawmilling Co Pty Ltd*** (1986) 160 CLR 16 at 24, Mason J said that:

> "A prominent factor in determining the nature of the relationship between a person who engages another to perform work and the person so engaged is the degree of control which the former can exercise over the latter. It has been held, however, that the importance of control lies not so much in its actual exercise, although clearly that is relevant, as in the right of the employer to exercise it: *Zuijs v Wirth Bros Pty Ltd* (1955) 93 CLR 561 at p 571; *Federal Commissioner of Taxation v Barrett* (1973) 129 CLR 395 at p 402; *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 at p 404. In the last-mentioned case Dixon J said:
>
> 'The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's orders and directions.'"

18 However, his Honour went on to say (at 24) that:

> "[T]he existence of control, whilst significant, is not the sole criterion by which to gauge whether a relationship is one of employment. The approach of this Court has been to regard it merely as one of a number of indicia which must be considered in the determination of that question: *Queensland Stations Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539 at p 552; *Zuijs' Case*; *Federal Commissioner of Taxation v Barrett* (1973) 129 CLR at p 401; *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 at p 218. Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee."

19 Similarly, in that case, Wilson and Dawson JJ said (at 35):

> "The classic test for determining whether the relationship of master and servant exists has been one of control, the answer depending upon whether the engagement subjects the person engaged to the command of the person engaging him, not only as to what he shall do in the course of his employment but as to how he shall do it: *Performing Right Society Ltd v Mitchell and Booker (Palais de Danse) Ltd* [1924] 1 KB 762. The modern approach is, however, to have regard to a variety of criteria. This approach is not without its difficulties because not all of the accepted criteria provide a relevant test in all circumstances and none is conclusive. Moreover, the relationship itself remains largely undefined as a legal concept except in terms of the various criteria, the relevance of which may vary according to the circumstances."

20 In ***Hollis v Vabu Pty Ltd*** (2001) 207 CLR 21 at 40 - 41 Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ pointed to the increasing difficulty in applying the control test in more modern times. In the course of referring to the history of that test, they quoted (at [43]) the following passage from Glass, McHugh and Douglas, *The Liability of Employers in Damages for Personal Injury*, 2nd ed (1979), pp 72 - 73:

> "The control test was the product of a predominantly agricultural society. It was first devised in an age untroubled by the complexities of a modern industrial society placing its accent on the division of functions and extreme specialisation. At the time when the courts first formulated the distinction between employees and independent contractors by reference to the test of control, an employer could be expected to know as much about the job as his employee. Moreover, the employer would usually work with the employee and the test of control and supervision was then a real one to distinguish between the employee and the independent contractor. With the invention and growth of the limited liability company and the great advances of science and technology, the conditions which gave rise to the control test largely disappeared. Moreover, with the advent into industry of professional men and other occupations performing services which by their nature could not be subject to supervision, the distinction between employees and independent contractors often seemed a vague one."

21 McHugh J pointed out, in that case at 50 [71], that "The right to supervise or direct the performance of a task cannot transform into a contract of service what is in substance an independent contract …".

22 ***Hollis*** was a case which involved an issue of vicarious liability. There, the Court placed some emphasis on the question whether the workers in that case (they were couriers) were carrying on a trade or business of their own or were serving the employer in its business. Distinctions of this kind go back some time in this context. In ***Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd*** (1931) 46 CLR 41 at 48 (in a passage since quoted in ***Hollis*** at 39) Dixon J said, of an independent contractor, that:

> "[t]he work, although done at [the principal's] request and for his benefit, is considered as the independent function of the person who undertakes it, and not as something which the person obtaining the benefit does by his representative standing in his place and, therefore, identified with him for the purpose of liability arising in the course of its performance. The independent contractor carries out his work, not as a representative but as a principal."

23 Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ, in ***Hollis***, after considering what had been said by Dixon J, went on to say (at 39):

> "This statement merits close attention. It indicates that employees and independent contractors perform work for the benefit of their employers and principals respectively. Thus, by itself, the circumstance that the business enterprise of a party said to be an employer is benefited by the activities of the person in question cannot be a sufficient indication that this person is an employee. However, Dixon J fixed upon the absence of representation and of identification with the alleged employer as indicative of a relationship of principal and independent contractor. These notions later were expressed positively by Windeyer J in *Marshall v Whittaker's Building*

> *Supply Co* (1963) 109 CLR 210 at 217. His Honour said that the distinction between an employee and an independent contractor is 'rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own'. In *Northern Sandblasting* (1997) 188 CLR 313 at 366, McHugh J said:
>
> 'The rationale for excluding liability for independent contractors is that the work which the contractor has agreed to do is not done as the representative of the employer.'"

24 Where the parties have defined their relationship by a clause in a contract made between them, that clause will be given weight (if it is not a sham), although it will not be determinative. In ***Australian Mutual Provident Society v Allan*** (1978) 52 ALJR 407, the Privy Council said (at 409) that a term of this kind cannot be given effect if it contradicts the effect of the agreement as a whole. Their Lordships applied the following statement by Lord Denning MR in ***Massey v Crown Life Insurance Co*** [1978] 2 All ER 576 at 580:

> "The law, as I see it, is this: if the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label upon it … On the other hand, if their relationship is ambiguous and is capable of being one or the other [that is, either service or agency], then the parties can remove that ambiguity, by the very agreement itself which they make with one another. The agreement itself then becomes the best material from which to gather the true legal relationship between them."

25 This passage was cited with approval by the Privy Council in ***Narich Pty Ltd v Commissioners of Pay-roll Tax (NSW)*** [1983] 2 NSWLR 597 at 607 (see also ***Building Workers' Industrial Union of Australia v Odco Pty Ltd*** (1991) 29 FCR 104 at 126).

26 In ***Stevens***, at 37, Wilson and Dawson JJ said that "the actual terms and terminology of the contract will always be of considerable importance". More recently, in ***Hollis***, at 45, Gleeson CJ and Gaudron, Gummow, Kirby and Hayne JJ reiterated (citing ***R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd*** (1952) 85 CLR 138 at 150 - 151; ***Adam v Newbigging*** (1888) 13 App Cas 308 at 315; ***Ex parte Delhasse; In re Megevand*** (1878) 7 Ch D 511 at 526, 528, 532 and ***TNT Worldwide Express (NZ) Ltd v Cunningham*** [1993] 3 NZLR 681 at 699) that such terms are not of themselves determinative as parties cannot deem the relationship between themselves to be something it is not.

27 That brings me to the application of these principles to the circumstances of this case, set out in some detail in the judgment of Simmonds J.

28 As has been explained by Simmonds J, with whom I am, in this respect, in general agreement, the characterisation of the relationship between each of the workers and the appellant must proceed by reference to the totality of that relationship, including the system operated and work practices imposed by the appellant and, of course, an analysis of the terms of the contract entered into by each of the two workers with the appellant. All of these matters have been set out in some detail in the judgments of EM Heenan J and Simmonds J.

29 In his judgment, EM Heenan J has mentioned that each contract obliged the worker, once an offer of work was accepted during the period of engagement, to undertake it in a timely, professional manner, using such professional skills as are necessary to complete the work appropriately with a high standard of workmanship. Because the appellant conducts a business providing labour for hire to third parties in circumstances in which the task to be performed and its performance is determined by the third party (in this case, Hanssen Project Management Pty Ltd which, under its contract with the appellant was able to "direct" the workers supplied by the appellant), there was no great scope for day-to-day supervision of that work by the appellant. However, as EM Heenan J points out, each worker was obliged by his contract with the appellant to comply with work safety laws and regulations, to follow safe working practices, to avoid harassment and to report difficulties encountered in the performance of the work to the appellant. Either party to the contract had the right to terminate the work, or the engagement, by giving not less than one hour's notice to the other (the appellant's right to terminate the work in that way being, in EM Heenan J's opinion, as effective a measure of its control as can be imagined). Also, Pt 7 of each contract provides that:

> "The Contractor will not during any Work either directly or indirectly provide services to or be engaged with, any business or activity involving Clients which is competitive with any business carried on by the Company with its Clients."

30 "Client" is defined in Pt 1 to mean a client of the appellant and "Work" is defined in that Part as meaning "work which the Company refers, or makes available, to the Contractor on a day to day basis … as part of the Engagement".

31 EM Heenan J has also mentioned that the work carried out by the two workers is performed for the business of the appellant under an organised and repetitive system, this being a factor which, in his Honour's opinion, is more consistent with the workers so supplied working in the business of the appellant than with each of them conducting businesses of their own, notwithstanding the absence of several of the conventional indicia of the employer/employee relationship.

32 Other matters which might be taken to support the existence of an employer/employee relationship include the fact that one of the two workers concerned was supplied with a safety vest on which the appellant's name appeared (although, as Simmonds J has said, there was no evidence that this vest was required), both workers were required to present themselves for work in a "neat, clean and tidy" way, there were detailed safety prescriptions of the kind described by Simmonds J and there were prohibitions in respect of alcohol and drugs and even "practical jokes and horseplay". Also, the two men were paid an hourly rate calculated by reference to a rate provided by the appellant to its client and the resulting amount, calculated from a record of hours worked, was paid into their accounts. Neither had invested capital in assets used for their work (other than in respect of the few items supplied by them) or in any separate business. Neither of them was in partnership with anyone else.

33 On the other hand, there are indicia which point away from the existence of an employment relationship. Many of these have been mentioned by Simmonds J. They include the provision by the two men of some materials needed for their work (the limited nature of what was provided makes this a matter of no great significance), the absence of any provision for such items as annual leave and sick leave, the fact that the workers were responsible for their own public liability insurance (although the appellant was willing to arrange this on their behalf under its existing insurance policy) and the fact that the appellant deducted income tax on what was paid to the workers on a PAYG basis (applicable to independent contractors) and not on a PAYE basis (applicable to employees), although the appellant had made an arrangement accordingly with the Australian Taxation Office.

34 Next, cl 7(b) of the appellant's "Personnel Contracting Guide", incorporated into each contract of employment, appears to contemplate that a contractor might "… [choose] to leave the site early", in which event the guaranteed minimum short-term hire payment, equal to that for four hours' work, is not applicable.

35 Also, each of the contracts entered into by the workers provides that, during the engagement, the worker "must … consider and may, at its discretion, accept and agree to undertake such Work as is referred by the Company from time to time". There

is consequently no obligation to agree to undertake any work which is offered. Indeed, the Guide expressly provides that the worker has the right "to accept or decline any work offered" to him or her. Part 5 of each contract records that the appellant does not guarantee that it will be able to provide work to the worker.

36 While there is the prohibition to which I have earlier referred in Pt 7 of the contract, that prohibition operates only "during any Work" (I have said how that term is defined) and, as will be apparent, is limited in its ambit to businesses or activities which are competitive with the appellant's clients. Consequently, when not involved in any "Work" for the appellant, as defined, each worker is able to work for any other person or entity and, during any period of "Work", is able to work, also, for others who are not clients of the appellant or competitive with the appellant in respect of those clients, so long, of course, as this does not result in the worker breaching one or more of the other provisions of the contract (as, for example, that requiring him to complete work in a timely, professional manner). So much is expressly recorded by Pt 2 of the agreement which provides that, subject to the provisions of the agreement, the worker "may provide services to any other person or entity during the Engagement".

37 Finally, in this respect, I have mentioned that each worker, like the appellant, is able to terminate any "Work", or the engagement, at his own discretion and at any time, by giving not less than one hour's notice of termination.

38 That brings me, next, to the manner in which the parties have themselves characterised their relationship.

39 Recital B of each contract provides that "the Contractor is a self-employed individual, carries on an independent business and provides labour services". The parties are, throughout, referred to as "the Company" and "the Contractor" respectively. The contractor's remuneration is described as "fees", rather than wages or salary. Part 9 of each contract reads as follows:

> "The relationship between the Company and the Contractor is that of principal and contractor. The Company may assign the benefit of this Agreement to any subsidiary of the Company.
>
> Nothing in this Agreement will be taken as constituting the Contractor an employee or servant of the Client or the Company or any of its subsidiaries. The Contractor will not represent himself as being an employee of the Company at any time, or as being in any way connected with the business of the Company unless he is doing Work for the Company."

40 There can be no doubt that the intention of the parties, as it appears from each contract, was to categorise the relationship as one of principal and independent contractor and not as one of employer and employee. While, as the cases make plain, that, of itself, cannot be determinative, this is, in my respectful opinion, a case in which the "label" put upon their relationship by the parties does not contradict the effect of the agreement as a whole and in which the other indicia to which I have referred (and which have been referred to in the judgments of EM Heenan J and Simmonds J) do not point clearly in any one direction. Rather, they seem to me to be ambiguous or uncertain as regards the true relationship of the parties, many of the provisions referred to by EM Heenan J being, in my respectful opinion, of potential application to both employees and independent contractors (as, for example, those requiring the worker to undertake the work in a timely, professional manner, to undertake it to a high standard of workmanship, to comply with work safety laws and regulations, to follow safe working practices and to report difficulties encountered in the performance of the work to the appellant).

41 In such a case, and in circumstances in which (contrary to what was said by the Full Bench) there is, in my respectful opinion, little to suggest that the label applied by the parties is a sham (and a good deal to suggest that it is not), it seems to me that the evident intention of the parties should be given effect and that the relationship between them should, in each case, be found to be that which they have been at some pains to describe, namely, that of independent contractor and principal and not that of employer and employee.

42 I would consequently allow the appeal on the grounds identified by Simmonds J (with whom I am, as I have said, in general agreement), set aside the judgment of the Full Bench and restore the judgment of the Commission at first instance to the effect that both applications be dismissed for want of jurisdiction.

43 **EM HEENAN J**: This is an appeal pursuant to s 90 of the *Industrial Relations Act* from a decision of the Full Bench of the Industrial Commission dealing with two applications for relief under the Act brought respectively by Mr Kevin Bartley seeking relief for alleged unfair dismissal and by the Union on behalf of Mr Craig Fowler seeking to institute a claim for higher wages and improved conditions. Both men had been engaged by Personnel Contracting Pty Ltd t/as Tricord Personnel under arrangements which the appellant had as a labour hire agency for the provision of labour to various building sites.

44 Before Gregor C the claims were dismissed on the grounds that neither was an "industrial matter" and hence the Commission did not have jurisdiction. This conclusion followed from the learned Commissioner's conclusion that the relationship between the appellant and each of the two "contractors", was not that of employer/employee but, rather, that of principal and independent contractor. The Full Bench of the Commission unanimously upheld the appeal from that decision concluding that the relationship between the appellant and the two contractors was that of employer and employee and thereupon remitted the applications for hearing before a single Commissioner.

45 In this Court the respondent submitted that the appeal was not competent because, according to the submission, under s 90(1) an error alleging excess of jurisdiction must relate to the subject matter of the application to the Commission. On this argument the subject matters of the original applications were, respectively, a claim for unfair dismissal and a claim for higher wages or other improved working conditions, both of which were recognised industrial matters. In the respondent's submission a determination of whether or not the particular relationship between an applicant and respondent was that of employer and employee was a matter of fact or, alternatively, not an issue of law which went to jurisdiction and, hence, no appeal lay under s 90(1)(a) of the Act. Similarly, it was submitted that no appeal lay under s 90(1)(b) of the Act because any alleged error of law relating to whether or not the disputants were employee/employer did not involve a matter of construction of any Act or order but, rather, was restricted to the application of common law principles to the particular facts established by the evidence. In this regard the respondent relied upon the dissenting judgment of Anderson J in ***United Construction Pty Ltd v Birighitti*** [2003] WASCA 24 accepting that the decision of the majority in that case, Scott and Hasluck JJ was to the contrary.

46 In my opinion this Court does have jurisdiction to entertain and determine this appeal. There are some complexities in determining the ambit of the scope of appeal under s 90(1) since the amendments effected by s 126 of the *Labour Relations Reform Act* (No 20 of 2002) which recognised that an appeal will not lie in every case of excess of jurisdiction but only in relation to errors or excesses of jurisdiction relating to a determination of whether or not the case involves an "industrial matter".

47 The determination by the Full Bench that there was an "industrial matter" in this case turns on the issue of whether or not the relationship between the parties was that of employer/employee and I do not consider how that finding can be categorised as other than one going to jurisdiction on a question of whether or not the case involved an "industrial matter". Consequently, I

consider that the appeal is competent within s 90(1)(a) of the Act. I also consider that it is competent under s 90(1)(b) of the Act on the basis that the determination of whether or not the applicants before Gregor C were employees and the appellant was an employer involves the determination and application of the meaning of those terms as they are employed in the *Industrial Relations Act* especially in relation to the conduct of a labour hire agency. There is no doubt that common law concepts of employer and employee are adopted and applied by the language of the Act but that does not mean that a determination of whether or not an individual is an employee or an individual or a corporation is an employer does not involve the proper interpretation of the statute. In this respect I gratefully adopt and apply the approach taken by Hasluck J in ***United Construction Co Pty Ltd v Birighitti*** (*supra*) when his Honour said:

> "[102] As to the first ground of appeal, I recognise that much of the reasoning of the Full Bench is devoted to a review of common law principles bearing upon the contentious issue. Nonetheless, it is quite clear that both the Industrial Magistrate and the Full Bench were conscious that at the end of the day the operative point of reference was the definition of 'employee' in the *Long Service Leave Act*. The issue presented to the Industrial Magistrate by the respondent's particulars of claim at the outset was whether he could be characterised as an employee within the meaning of the *Long Service Leave Act* during the relevant four year period. It is well known that in the field of industrial legislation including statutes concerning workers compensation that special and extended meanings are given to terms bearing upon master and servant relationships. Accordingly, a term such as 'employee' cannot be regarded simply as a term with an ordinary meaning so that, in accordance with proposition two of the *Collector of Customs'* case [*Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280] mentioned earlier, the ordinary meaning of the word can be regarded as a question of fact."

and

> "[103] In the circumstances of the present case, I consider, having regard to the propositions set out in the *Collector of Customs'* case, that the meaning of the term 'employee' as it is used in the *Long Service Leave Act* is a technical legal term which should be characterised as a question of law. It was not possible ultimately to resolve that question of law without being conscious of and giving proper weight to the way in which the term 'employee' was defined and used in the *Long Service Leave Act*. Likewise, it was not possible to determine whether there had been sufficient continuity of employment without taking account of and construing the provisions concerning that concept set out in s 6 of the *Long Service Leave Act*."

48 The contractual arrangements between the appellant and each of its contractors are set out in the agreement between the appellant and Mr Bartley of 16 June 2003 (AB 182 - 184) which expressly adopts and includes the guidelines contained at AB 166 - 174. By this contract it is established that the contractor is to be offered work by the appellant and, if that offer is accepted, becomes obliged during the engagement to undertake the work in a timely and professional manner using such professional skills as are necessary to complete the work appropriately with a high standard of workmanship - Pt 4. The work may be terminated on either side simply by giving one hour's notice although such termination will not necessarily terminate the engagement.

49 By Pt 7:

> "The contractor will not during any work either directly or indirectly provide services to or be engaged with, any business or activity involving clients, which is competitive with any business carried on by the company with its clients."

It follows from this that, during the engagement, if an offer of work is accepted the contractor is required to work for the business of the appellant. I do not consider that there is any doubt but that the appellant conducts the business of providing labour for hire to third parties under circumstances where the nature of the task to be performed and its performance is determined by the third party notwithstanding that the appellant, at all times, retains a right of termination on one hour's notice. The guidelines contain detailed provisions about the obligation to comply with work safety laws and regulations, to follow safe working practices, to avoid harassment and to report difficulties encountered in the performance of the work to the appellant. These are directions which the contractor is obliged to observe (contract Pt 4(b)) and the appellant at all times can effect a termination or suspension of the work or engagement by the provisions of Pt 7 of the contract.

50 To my mind this confers upon the appellant rights of control which, upon the classical tests referred to by McHugh J in ***Hollis v Vabu Pty Ltd*** (2001) 207 CLR 21 at 40 and at 48 per McHugh J characterise the appellant as an employer. See also ***Drake Personnel Ltd v Commissioner of State Revenue*** (2000) 2 VR 635.

51 In ***Accident Compensation Commission v Odco Pty Ltd*** [1990] 64 ALJR 606 and in ***Drake Personnel Ltd v Commissioner for State Revenue*** (*supra*) at 653 emphasis was placed on the fact that the employment agency firms which supplied alleged contractors to carry out various tasks for the customers of the employment agencies were in reality carrying on a business which involved the provision of services to their customers. In ***Odco Pty Ltd*** (*supra*) at 612, Mason CJ, Brennan, Dawson, Toohey and McHugh JJ said:

> "And a notion that the supply of services and the performance of work referred to in s 9 are necessarily distinct and separate concepts is not borne out by examination of the provisions. Likewise, the notion that the person supplying the services or the person supplying the services of persons is necessarily different from the person performing the work cannot be made out. It is a mistake to read the expression 'for or in relation to the performance of work', where it appears in s 9(1) and elsewhere, as doing anything more than qualifying the content or scope of the word 'services'. All that the expression is saying is that 'services' must be work-related; it is not stipulating that the services are wholly distinct from the work or that the supplier of the services is a person other than the performer of the work."

Obviously, those observations were directed to the terms of s 9 of the *Accident and Compensation Act (1985)* (Vic) but they are capable of wider application. In the present case I do not consider that it can be doubted that Tricord Personnel was in the business of supplying men to undertake construction work, in this case building formwork, for builders and construction companies in need of such labour services. The business of the appellant, therefore, involved the supply of men who would contract with it on the terms exemplified by the agreement between the appellant and Mr Bartley in the incorporated guidelines. Supply of Mr Bartley to the builder in these circumstances was the provision of services which it was the business of the appellant to provide and the performance of those services by Mr Bartley and others like him involved the performance of the services which the appellant had contracted to provide to its customer. In these

circumstances the work conducted by Mr Bartley and others like him should, in my view, be regarded as work performed for the business of the appellant, particularly because of the organised and repetitive system under which it was supplied and conducted. To my mind this is more consistent with Mr Bartley, and others like him, working in the business of the appellant than each of those individual men conducting independent businesses of their own, no matter that several of the conventional indicia of employer/employee are missing from their relationship. In a commercial, as well as a legal sense, the source of engagement of the men is arranged through the relationship between the appellant and its customers and, once the men accept an individual engagement and become subject to the guidelines, the right of termination of the relationship at an hour's notice by the appellant is as effective a measure of their control by the appellant as can be imagined.

52 It is true that the contract between the appellant and each contractor goes to considerable lengths to set out, in express terms, that many of the indicia of the employer/employee relationship are excluded and that the relationship between the parties is expressly stated to be that of principal and independent contractor and not employer/employee. However, it is the substance of the relationship and not its form, still less declarations or labels which the parties themselves may attempt to place on their relationship, which is determinative - ***R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd*** (1952) 85 CLR 138 at 150 - 151; ***Cam & Sons Pty Ltd v Sargent*** (1940) 14 ALJ 162 and ***Hollis v Vabu Pty Ltd*** (*supra*) at 45.

53 For these reasons I consider that the Full Bench of the Commission was correct in determining that the relationship between the appellant and the two contractors was that of employer and employee and that the Commission had jurisdiction to hear and determine the applications for relief made under the Act.

54 For these reasons I would dismiss this appeal.

55 **SIMMONDS J**: Personnel Contracting Pty Ltd is a labour hiring business trading as Tricord Personnel (Tricord). It registers individuals whom from time to time it may approach, or who approach it, to do work, under contract with Tricord, for clients of Tricord. The work includes work in construction. Two particular individuals performed construction work under these arrangements. Their circumstances gave rise to the question whether the arrangements under which they worked could result in disputes with Tricord on "industrial matters" for the purposes of the *Industrial Relations Act 1979* (WA) (the Act). This appeal was from a determination of the Full Bench of the Industrial Relations Commission that those arrangements could do so, on the basis they gave rise to a relationship of employer and employee under a contract of service for the purposes of the Act. This determination reversed the decision to the contrary of Commissioner Gregor.

56 This appeal raises two issues, both of importance to the application to arrangements of the kind I have described of the system of regulation of industrial matters under the Act. One is whether the Act reserves the determination that it does apply to such arrangements exclusively to the Commission, so this Court cannot review it, at least in the case of a determination as a preliminary matter of the question of such application, being one made before the relevant industrial matter is dealt with by the Commission. If the Court can indeed review a determination of such a preliminary matter, then the other issue is whether the Full Bench's determination was in error. Both are issues of some difficulty.

Does this Court have jurisdiction? Appeal Ground 1

57 An understanding of this issue requires an appreciation of how this matter came to this Court.

58 Mr Kevin Bartley did work on building projects for a client of Tricord, Hanssen Project Management Pty Ltd, initially as a steel fixer then as a form worker, under the arrangements I have described. He was a member of the Construction Forestry Mining and Energy Union (the CFMEU). The CFMEU on his behalf made a claim before the Industrial Relations Commission that alleged he had been wrongfully dismissed from that work for Hanssen, either by Tricord or by Hanssen. This claim was in application No CR 168 of 2003. In that application the CFMEU sought a declaration that Mr Bartley was an employee of Tricord or alternatively of Hanssen.

59 Mr Craig Fowler also did work on building projects for Hanssen under the arrangements with Tricord. He too was a member of the CFMEU, which informed Tricord that the union intended to negotiate for an industrial agreement under the provisions of the Act. This became the application to the Commission that is No 1036 of 2003.

60 In both No CR 168 of 2003 and No 1036 of 2003 the question arose of whether they raised an "industrial matter" for the purposes of the Act. The parties to them agreed that the question be determined as a preliminary question going to the jurisdiction of the Commission to entertain the applications. The question was answered at first instance by Commissioner Gregor that it did not, on the basis that there was no "employee" and therefore no "employer" involved, which is an element of "industrial matter" for the purposes of the Act. The CFMEU appealed to the Full Bench of the Commission. The Full Bench upheld the appeal, and remitted the matter to the Commissioner to determine the applications according to law in accordance with the reasons for the decision on the appeal. The principal judgment was by Sharkey P, with whom Smith C agreed. Beech SC also agreed, but he delivered additional reasons. The Full Bench's decision only related to Tricord, not to Hanssen.

61 Tricord appealed the Full Bench's decision to this Court. Only Tricord was a respondent to the appeal. The appeal was argued on the basis that the Court's only source of jurisdiction under the Act to hear this appeal was s 90, which in material part is as follows:

> "90. Appeal to Court from Commission
>
> (1) Subject to this section, an appeal lies to the Court in the manner prescribed from any decision of the President, the Full Bench, or the Commission in Court Session -
>
> (a) on the ground that the decision is in excess of jurisdiction in that the matter the subject of the decision is not on an industrial matter;
>
> (b) erroneous in law in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making the decision appealed against; or
>
> …
>
> but upon no other ground."

62 Tricord's original grounds of appeal set out a list of respects in which the Full Bench was said to have erred in determining that the matter the subject of its decision was an "industrial matter", for which the question is whether Tricord was an "employer" for the purposes of the phrase. Those respects were in the original ground 1 related only to "excess of jurisdiction" in

s 91(1)(a). The written submissions for the CFMEU included that here the Full Bench's decision went to a matter, the application to the facts of "employer" under the Act, which did not represent an "excess of jurisdiction" of the particular sort referred to under that paragraph.

63 However, at the hearing, leave was granted to Tricord to amend ground 1 to add that, further or in the alternative, the listed respects showed the decision was "erroneous in law" insofar as the Full Bench erred in finding the appellant was an "employer" for the purposes of the Act. Counsel for Tricord explained to us that the amendment was not to permit it to contend the Full Bench had put forward an erroneous construction of relevant provisions of the Act. Rather he said he was contending that the Full Bench's application of those provisions showed a misunderstanding of what they meant. We granted the leave on the basis that counsel for the CFMEU did not oppose the amendment, and on the basis that the respects in which the Full Bench was said to have erred in law were the same as those in respect of which it was said to have made a decision in excess of jurisdiction. Counsel for the CFMEU took the position before us that the amendment did not avoid the necessity for Tricord if it were relying on the Act s 90(1)(b) to show (on the facts of this case) an error in the construction or interpretation of the Act, here the terms "employer" and "employee". Unlike in ***United Construction Pty Ltd v Birighitti*** [2003] WASCA 24, where the application of the term "employer" for the purposes of the *Long Service Leave Act 1958* (WA) was in issue, here there was no suggestion from Tricord that the Full Bench had erred in its interpretation of the corresponding term in the industrial relations legislation.

64 In the event I have determined that the Court has jurisdiction under s 91(1)(a), which makes it unnecessary for me to determine whether the case under s 91(1)(b) had been made good. I begin by setting out the material parts of the other relevant provisions of the Act, and then considering the arguments for the CFMEU that this appeal cannot be dealt with under s 91(1)(a).

65 Those provisions of the Act are s 24(1), on the jurisdiction of the Commission, and s 7(1) "industrial matter", "employee" and "employer".

66 The Act s 24(1) deals with the jurisdiction of the Commission in matters like this one as follows:

> "24. Jurisdiction to decide whether matter is industrial
>
> (1) The Commission has jurisdiction to determine in any proceedings before it whether any matter to which those proceedings relate is an industrial matter and a finding by the Commission on that question is, subject to sections 49 and 90, final and conclusive with respect to those proceedings.

67 Section 49 of the Act relates to appeals to the Full Bench. I have already set out the relevant provisions of s 90.

68 The definitions of "industrial matter", "employer" and "employee" in the Act s 7(1) are in material part as follows:

> "7. Interpretation
>
> (1) In this Act, unless the contrary intention appears -
>
> ….
>
> '**industrial matter**' means any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter affecting or relating or pertaining to - [a list of items appears as (a) to (m)]
>
> '**employee**' means -
>
> (a) any person employed by an employer to do work for hire or reward including an apprentice or trainee; …
>
> '**employer**' includes -
>
> (a) persons, firms, companies and corporations;
>
> …
>
> employing one or more employees and also includes a labour hire agency or group training organisation that arranges for an employee (being a person who is a party to a contract of service with the agency or organisation) to do work for another person, even though the employee is working for the other person under an arrangement between the agency or organisation and the other person;"

69 I have set out the provisions as they were in force from 8 September 2002. However, I note that, in the version of the Act apparently the one the Full Bench used, the s 7(1) definitions I have set out were all made subject to specified provisions in Pt 1A of the Act. However, that part was repealed by *Labour Relations Reform Act 2002* (WA) (No 20 of 2002) together with the referring language in the definitions. Act No 20 of 2002 came into force in this respect on 8 September 2002. The specified provisions related to an "employer" and an "employee" who were parties to a "workplace agreement". However, the Full Bench makes no reference to what are now the repealed provisions and no other reason to think they figured in its reasons is apparent to me.

70 I also note that s 7(1) says "labour hire agency" means "a person or entity that conducts a business of the kind commonly known as a labour hire agency". It was accepted before us that Tricord was a "labour hire agency" within that definition.

71 For the CFMEU it was contended that the joint effect of s 24 and s 90 was to eliminate the possibility of review by this Court of Commission decisions for jurisdictional error, except where the error was one where "the matter the subject of the decision is not on an industrial matter", in the language of current s 90(1)(a). This sort of excess it seemed to be suggested could only be encountered at least where the Commission had actually made the decision dealing with the industrial matter, as opposed to making a preliminary determination as to its jurisdiction to make such a decision, as in this case. This would seem to mean that at best the current proceedings were premature: they could only be brought after the Commissioner had dealt with the alleged industrial matters before it (those of the unfair dismissal, and the negotiations for an industrial agreement), as called for by the Full Bench's decision.

72 This seems to me to be a somewhat strained reading of the paragraph, and unlikely to have been intended by the legislature. Counsel for the CFMEU laid considerable emphasis on the word "on" in the phrase "on an industrial matter" in s 91(1)(a). That word does not seem to me to be decisive. As a matter of ordinary language, it seems to me that the word in this context could readily be understood as "with respect to": see Macquarie Dictionary (2000) "on", 17 ("subject, reference, or respect: [as

in] views on public matters"). So understood, it avoids what seems otherwise to be the rather odd result that the parties would have to await the outcome of the Commission's deliberations resting on a possibly erroneous view of the scope of "industrial matter" before any error could be addressed by way of an appeal to this Court.

73 Counsel for the CMEU went further, however. The submission appears to have been that an error where the "matter the subject of the decision is not on an industrial matter" went to whether as a matter of application of the Act to the facts before the Commission the dispute was one of those listed in the Act s 7(1), "industrial matter" (a) to (m). These include the following:

> "(a) the wages, salaries, allowances, or other remuneration of employees or the prices to be paid in respect of their employment;
>
> (b) the hours of employment, leave of absence, sex, age, qualification, or status of employees and the mode, terms, and conditions of employment including conditions which are to take effect after the termination of employment; …
>
> (ca) the relationship between employers and employees; …"

74 This, it seems to have been suggested, means that "employer" and "employee" would only arise to the extent the terms were employed in one of the specifics, as they did in the ones I have set out.

75 Counsel for the CFMEU directed us to the change that had been made to the Act s 90(1)(a) by Act No 20 of 2002, which is responsible for the current form of the provision. The previous form was as follows:

> "(1) Subject to this section, an appeal lies to the Court in the manner prescribed from any decision of the President, the Full Bench, or the Commission in Court Session on the ground that the decision is erroneous in law or is in excess of jurisdiction but upon no other ground."

76 It will be seen that that this provision combined what is now s 90(1)(a) (on excess of jurisdiction) and s 90(1)(b) (on errors of law). But more importantly for present purposes, the previous form did not qualify the reference to "excess of jurisdiction" in any way.

77 The argument for the CFMEU rests, of course, on *Interpretation Act 1984* (WA) s 18, which says that "a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object". We were directed, for the purpose or object of the law making the change, Act No 20 of 2002, to the second reading speech of the Minister, which is admissible for this purpose under *Interpretation Act* s 19(1)(a) read with s 19(2)(f). In that speech, the Minister said, materially for our purposes it was submitted:

> "This Bill includes amendments designed to strengthen the power and effectiveness of the Commission. The legislation affirms that proceedings before the Commission cannot be removed from the Commission or challenged in any other Court.
>
> …
>
> Under the new legislation the Industrial Appeal Court's role will be limited to important legal and jurisdictional matters. … These reforms are intended to ensure that the discretionary exercise of power by the Commission is not overturned by the Court unless there is some significant specified error. This will reduce the increasing tendency to legal technicality that detracts from the proper role of the Commission in conciliating and arbitrating industrial matters in a practical everyday manner that is intelligible to ordinary people."

78 It does not seem to me that these passages advance the CFMEU argument. They seem rather to indicate a determination by the legislature that "a the matter the subject of the decision is not on an industrial matter" has been singled out as an "important jurisdictional matter", distinct from other possible jurisdictional issues in the Act.

79 However, the position for the CFMEU also appeared to be that in any event the provision had the effect, provided the conclusion that there was an "industrial matter" was reasonably open on the facts before the Full Bench, that its determination the Commission had jurisdiction would not be reviewable. We were referred to a number of authorities on judicial review, particularly ***Australian Broadcasting Tribunal v Bond*** (1990) 170 CLR 321, per Mason CJ at 355 - 356. Here, as will appear below, it appears to be agreed there is evidence in support of the Full Bench's decision, although it is contended for Tricord that the evidence taken as a whole is insufficient to reach it, and so the opposite conclusion was not in fact reasonably open to the Full Bench.

80 However, the argument I have just described seems to me to be a strain on the language of the relevant provisions, and a qualification of the ordinary law on review for jurisdictional fact which I would expect to find rather more clearly addressed in the statutory language if the legislature intended such qualification. Under that law, it is not sufficient there is some evidence in support of a determination that the facts essential for jurisdiction existed. The facts must be established on the evidence before the Court: see Aronson M *et al*, Judicial Review of Administrative Action, 3rd ed, Law Book Company, Pyrmont NSW, 2004, at 228.

81 I note, of course, that this is an appeal under the Act, not a proceeding by way of judicial review under the prerogative writs. I further note that it is a matter of some difficulty to determine what is a jurisdictional fact for the purposes of the law of judicial review (Aronson *et al*, 231). However, I also note the structure both of the old s 91(1) and the new s 91(1)(a) and (b), distinguishing between errors as to jurisdiction and errors of law, it seems to me. This structure indicates that Parliament intended the decision of the Full Bench that the matter the subject of the decision is on an industrial matter be treated as reviewable on an appeal in the same way as if it were a jurisdictional fact.

82 I conclude then that this Court has jurisdiction to hear this appeal, and to consider whether the Full Bench was in error in determining that the matter the subject of its decision is an "industrial matter" within Act s 7(1).

The Commission's jurisdiction: was Tricord an "employer"?

83 The appeal was argued before us on the basis that the issue as to the jurisdiction of the Commission reduced to whether Tricord was not an "employer" with the Act s 7(1). That definition in its turn required us to determine whether the two individuals, Mr Bartley and Mr Fowler, were "employees" under a "contract of service" with Tricord. This the parties conceded took us to the common law on the distinction between a contract of service, involving employers and employees, and a contract for services, involving principals and independent contractors.

84 For the purpose of that determination, it was accepted on the appeal that Tricord had contracts with Mr Barley and Mr Fowler, and with Hanssen, Tricord's client on the jobs on which those two individuals worked. It appears to have been accepted before

us that the two did not have contracts with Hanssen. Such a view in any event derives considerable support from the analysis by the Full Court of the Federal Court of the same question in respect of a labour hire agency firm in Victoria in ***Building Workers' Industrial Union of Australia v Odco Pty Ltd*** (1991) 29 FCR 104, at 113 - 123, where the contractual arrangements were similar but not by any means identical to the ones before us.

85 The question then becomes one of the identification and characterisation of the contract or contracts between Tricord and the two individuals, in the light of certain further matters arising out of the relations between the parties. I turn first to the issue of the identification of the contracts.

Identification of the contracts with the two individuals

86 In Mr Bartley's case he signed a very simple agreement with Tricord in 2001, one which appears to have been superseded by a rather lengthier document he signed in 2003. He signed the former but it does not appear that he undertook any work under it, at least until 2003, when he responded to an advertisement for work on a building site, and began work there, without realising that Tricord had a contract for the site. About a week into working there, he met with a representative of Tricord and signed the lengthier document. It would appear that the 2001 agreement at least was accompanied by a "Personnel Contracting Guide". In Mr Fowler's case he was invited to work at a site after leaving his name there, and was told at the time of the invitation that he would need to discuss this with a representative of Tricord. At the meeting with that representative he signed the lengthier document. Mr Fowler's document was accompanied by the Guide.

87 Mr Bartley's 2001 document was a single page, headed "Agreement to Contract", which a representative of Tricord also signed. This document contained an acknowledgement and agreement that Mr Bartley had "no relationship of Employer-Employee with Tricord Personnel", he was "self-employed", and "as such" he was "not bound to accept any work through" Tricord. The document further provided for Mr Bartley to work at an agreed price per hour for "actual on-site hours" or the "job price to be agreed", which was the extent of Tricord's "responsibility or liability" to him. All work he agreed to do "through" Tricord he agreed would be done "in a 'workmanlike' manner" and Tricord would be indemnified against "faulty workmanship". He agreed that he had no claims on Tricord for holiday pay, sick pay or similar. And he agreed to supply his own "personal tool kit, safety gear or any necessary ancillary equipment required", with no claim on Tricord for any of this.

88 The 2001 document appears to represent the terms for a contract to be concluded for the work to be done for a client of Tricord. It is not clear under it whether in fact those terms included that Tricord's client was meant to be bound by and able to take advantage of the terms. This is because Tricord was defined in the document as "Tricord Personnel and/or Associated Clients".

89 The 2003 document that both men signed is three pages long, and differs from the 2001 one in both of the respects just described, as well as in providing very much more detailed terms and other provisions, for the most part. The 2003 document is headed "Independent Contractor Agreement" and is between Tricord and each man identified as a "Contractor". There is an express disclaimer of any intention to create the relationship of employer and employee, and a statement of an intention to create one of principal and independent contractor (Pt 9). The Full Bench noted that Mr Fowler had in his evidence before the Commissioner acknowledged he had been told that the Agreement was to make him an independent contractor (per Sharkey P, par 18), while Mr Bartley conceded he may have been told this (per Sharkey P, par 29). There is no definition of Tricord as including anyone else. There are some indications of an intention there be contractual obligations on both sides apart from any arising out of the work to be done for a particular client of Tricord.

90 Thus, the Agreement also refers to an "Engagement" which the Contractor "accepts" (Pt 2) for a term commencing on its date and ending with the termination by either Tricord or the Contractor. This is by either "in their sole discretion … at any time … giving the other party not less than one hour's notice of termination" (Pt 3). The Contractor during the Engagement has certain "Duties" (Pt 4), which are to "consider … such Work as is referred by [Tricord] from time to time", to "comply and act in accordance with the provisions of the Guide" and to "comply with the laws of Western Australia and where relevant of each of the other States and Territories of Australia". For its part, Tricord has during the Engagement "Obligations" (Pt 5) to "use its reasonable endeavours to refer appropriate Work" to the Contractor "as and when [Tricord] sees fit". However, Tricord "does not guarantee" it will be able to "provide Work" to the Contractor. And the Contractor agrees (Pt 9.2) to indemnify Tricord in three situations. Two of these concern actions or similar, costs, expenses or fees for harm, either "caused by or resulting from any wilful or negligent act or omission or misfeasance of the Contractor", or "sustained by the Contractor incurred while attending to performance of the Contractor's duties under, or incidental or preparatory to this Agreement" (with a saving for wilful or negligent acts or omissions of Tricord or its officers, servants or agents). The third is rather less clear, concerning actions or similar, costs, expenses or fees for "challenges brought by the Contractor or by any person, organisation or government authority concerning the efficacy, legitimacy or effect and meaning of the terms and conditions of this Agreement".

91 As I have indicated, it also appears to be contemplated that there will be agreements, on terms including those in the Agreement, for each case of Work referred to and accepted by the Contractor. Thus, where Work is referred the Contractor "may, at its discretion, accept and agree to undertake such Work" (Pt 4(a)). If the Work is accepted, the Contractor must carry it out "in a timely and professional manner using such professional skills as are necessary to complete the work appropriately with a high standard of workmanship" (Pt 4(b)). The fees for the Work will be (Pt 6 (a) and (b)) "based on a flat hourly rate as agreed by the Company and the Contractor on a case by case basis", based on "actual on-site hours". Either the Contractor or Tricord may terminate any Work (Pt 8) "without necessarily terminating the Engagement" in the same way as the Engagement may be terminated (at any time, by giving not less than one hour's notice of termination).

92 It was not put to us, however, that the Agreement gave rise to an enforceable contract apart from the incorporation of the relevant terms into the contract for any Work accepted by the "Contractor". The view that they do not derives support from ***Drake Personnel Ltd v Commissioner of State Revenue*** (2000) 2 VR 635, on arrangements similar in this respect, at [34]. Argument before us was rather directed to the characterisation of the contracts for the Work accepted. The Full Bench appears to have proceeded in a similar way. This exercise of characterisation should recognise, however, that the contract is one that is only partly written, in view of the provision for the flat hourly rate to be agreed, and should also recognise that the characterisation exercise is to proceed by reference to the "totality of the relationship" between the parties, including the "system operated" and the "work practices imposed" by Tricord: see ***Hollis v Vabu Pty Ltd*** (2001) 207 CLR 21, at 33. This in my view would at least involve taking account of the terms of the Engagement, whether or not it is a contract, as I will indicate. Whether or not those terms tip the balance in favour of or against the conclusion the Full Bench reached is a different matter.

93 Ground 2 for the appeal was to the effect that the Full Bench failed to have any or proper regard to Mr Bartley's 2001 agreement, the Guide, the 2003 independent contractor's agreement and the reference in discussions with them at the time to

the individuals becoming independent contractors. In fact the Full Bench appears to have taken account of all of these. Rather, the matter resolves to one of whether or not they were properly borne in mind in making the Bench's final determination. This overlaps with the other grounds of appeal below, and in my view does not add usefully to them.

94 It is now convenient to turn to the question of the appropriate test for a contract of service at common law.

The test for a contract of service

95 The common law test for distinguishing a relationship of employer/employee, on the one hand, and principal/independent contract or, on the other, has recently been reviewed in some detail in the judgment of Hasluck J of this Court in ***Birighitti*** (*supra*), at [57] to [67]. The other members of the Court (Anderson J, who dissented on the jurisdictional issue in the case, and Scott J) did not find it necessary to enter into the question in as much detail because of the case's particular facts.

96 In this case, where it seems to me the matter is rather more evenly balanced than in ***Birighitti***, I consider it is necessary to review the matter again, particularly as it was contended in this case that there had been a shift in the law not entered into in ***Birighitti***. I review the matter again without meaning to depart from the view of Hasluck J there in any way, but to emphasise matters of first principle particularly relevant to this case.

97 The most recent High Court authority in point, for the purposes of vicarious liability for the negligence of a bicycle courier, is ***Hollis v Vabu Pty Ltd*** (*supra*). There was a clear majority on the issue of the application of the test, that of Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ, with McHugh J dissenting, and Callinan J not expressing a concluded view on the matter. As to the test itself, however, I see no clear difference between all of the members of the Court who expressed a concluded view.

98 The test set out in ***Vabu*** by the majority is expressed in terms of the difference between a person (an employee) whose work serves another, and is done **in that other's business**, on the one hand, and a person whose work is likewise for the benefit of another's business, but is done in the course of the carrying on of a **trade or business of the person doing the work**, on the other. The majority referred (***Vabu***, at 39) for this purpose to ***Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd*** (1931) 46 CLR 41, at 48, per Dixon J, and to ***Marshall v Whittaker's Building Supply Co*** (1963) 109 CLR 210, at 217 per Windeyer J, where language of this sort is used. The ***Vabu*** majority also referred to ***Northern Sandblasting Pty Ltd v Harris*** (1997) 188 CLR 313, at 366 per McHugh J, where the distinction is expressed in terms of the independent contractor as a person who does the work not as "the representative of the employer".

99 For the application of the test, and particularly for the relevance of the matter of "control" of the work done, the ***Vabu*** majority refer to the dicta in ***Stevens v Brodribb Sawmilling Co Pty Ltd*** (1986) 160 CLR 16, at 29 per Mason J. There, his Honour acknowledges the historical significance of the "control test" and the difficulties in using it in the historical ways in modern working conditions, where he says

> "The common law has been sufficiently flexible to adapt to changing social conditions by shifting the emphasis in the control test from the actual exercise of control to the right to exercise it, 'so far as there is scope for it', even if it be 'only in incidental or collateral matters': *Zuijs v Wirth Brothers* [(1955) 93 CLR 461, at 571]. Furthermore, control is not now regarded as the only relevant factor. Rather it is the totality of the relationship between the parties which must be considered."

100 What his Honour meant by the reference to the factors, including but not limited to control, subsumed by the "totality of the relationship" is indicated by an earlier passage in his judgment in ***Stevens*** (*supra*), which is not referred to in ***Vabu***, but which is a passage quoted in ***Odco*** as setting out the law on this point ((*supra*) at 754):

> "The approach of this court has been to regard it [control] merely as one of a number of indicia which must be considered in the determination of the question: *Queensland Stations Pty Ltd v FCT* (1945) 70 CLR 539 at 552; *Zuijs*' case [*supra*]; *FCT v Barrett* (1973) 129 CLR at 401; 2 ALR 65; *Marshall* [*supra*] at 218. Other relevant factors include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee."

101 As these dicta tend to indicate, the application of the test is a matter of some difficulty, as this case illustrates. I need to consider that question separately.

The application of the test

102 The difficulty in applying the test for finding an employment relationship is acknowledged in ***Stevens*** (*supra*), in the judgment of Wilson and Dawson JJ, a passage also quoted as setting out in the law on this point in ***Odco*** ((*supra*) at 754):

> "The modern approach is … to have regard to a variety of criteria. This approach is not without its difficulties because not all of the accepted criteria provide a relevant test in all circumstances and none is conclusive. Moreover, the relationship itself remains largely undefined as a legal concept except in terms of the various criteria, the relevance of which may vary according to the circumstances."

103 It was put to us for the CFMEU that ***Vabu*** (*supra*) should be seen as indicating the law has moved on since ***Odco*** in respect of the significance of the "control test", and we were also referred to the judgment of Kirby J in ***Ermogenous v Greek Orthodox Community of SA Inc*** (2002) 209 CLR 95, at [81], where his Honour affirmed by reference to ***Vabu*** "that 'control', the traditional indicium of the employment relationship, is only one relevant factor". In light of the dicta I have referred to as having been quoted in ***Vabu*** I cannot agree that the law has changed as submitted. I also note that so far as I can determine this appears to have been the view of Hasluck J in ***Birighitti*** ((*supra*) at [74] and [75]).

104 There is, however, a further matter in respect of the application of the common law test, and in particular the relevance of the "control test", that was not before the Court in ***Birighitti***, which was not dealing with a labour hire agency. It is whether the common law approach is modified by the specific inclusion of the possibility of such an agency as an "employer" in s 7(1). I return to that below, after I have considered the application of the "control test" and the other factors in this case.

105 In any event, it may be that the application of the common law test for an employee, framed in the way of the one I have described and to be applied as I have indicated, may allow for differences in result influenced by the reason for which the test is relevant (such as vicarious liability), a point which appears to have been of some concern to McHugh J in ***Vabu*** ((*supra*) at 50). However that may be, I do not see any such differences as likely to affect the outcome in this case, as I will explain. In particular, the characterisation of the contract in this case would seem to me to be likely to be the same on the view of the ***Vabu*** majority, or that of the Full Court of the Federal Court in ***Odco***.

106 It follows from the way the test and its application must be approached that I now need to consider the various factors in this case that might be seen to be relevant to the characterisation issue, as the judgments in ***Vabu*** and ***Odco*** did. The grounds of appeal were concerned with how the Full Bench did, and did not, proceed in relation to the relevant factors.

107 For this purpose, I begin with the factors made relevant by the "control test".

The control test

108 Of the 12 grounds of appeal, grounds 4, 5, 6 and 7, as well as 9(ii), related to different aspects of the application of this test and the conclusions to be drawn from such application. That focus was understandable, as the Full Bench appears to have placed heavy reliance on the factors made relevant by the test. In particular, it referred to the control elements it saw emerging from the Personnel Contracting Guide with which it was a term of the Engagement, and therefore of the Work accepted, that the Contractor comply (Agreement, Pt 4). The Full Bench appears to have seen the Guide as of considerable importance to distinguishing the position of the labour hire agency before it, Tricord, from that of the agency before the Court in ***Odco*** (*supra*), where the Court concluded that the agency was not in an employment relationship with those it engaged, and where there was nothing corresponding to the Guide (see Sharkey P, at par 243; and Beech SC, par 269).

109 Particular emphasis was laid by the Full Bench on the way the Guide indicated that there was a **right of ultimate control** in Tricord, which on ground 4 was an error. The Full Bench appears to have drawn this conclusion in part from the "restricted" delegation of (non-exclusive) day-to-day control to the clients with which Tricord contracted (Sharkey P, par 195). Thus, the Guide contained an express provision obliging the Contractor to comply with the "requirements" of the "position" represented by the Work accepted (Guide, 2, referred to by Sharkey P at par 204(a)). The form of contract, or "Personnel Contracting Agreement", between Tricord and its client Hanssen which regulated the Work done by the two Contractors here provided that "Tricord Personnel contractors are at the client's direction" (Personnel Contracting Agreement, cl 4). Grounds 6(i) and 7 were that the use of these provisions by the Full Bench in this way was an error.

110 For Tricord, it appears to have been submitted that these provisions did not go to any more than was entailed in the obligation of the Contractor to Tricord in their Agreement to carry out the work to the standard the Agreement specifies (Pt 4(b), above). This view appears to me to overstate the matter. The provisions in the Guide read with the Personnel Contracting Agreement appear to me to point towards a contract of service, but in light of the provisions referred to by counsel for Tricord not by any means to determine the matter. This appears to me to be the view of these provision which is required by the law on the application of the test of a contract of service that I have referred to. I do not read the judgments of the Full Bench to have proceeded in any other way.

111 There were also a number of elements in the Guide read with the Contractor's Agreement that were referred to by Sharkey P of the Full Bench as going to **actual control** by Tricord of its Contractors. One of these, however, the subject of ground 9(ii), does not seem to me to be control of the sort that points towards a contract of service, but rather on the authorities to point away from it. It is the requirement for the Contractor to supply their own equipment including work wear (Sharkey P, par 204(c) and (d)), and the lack of provision for any equipment to be supplied by Tricord: Guide 4, which echoes the Contractor's Agreement, Pt 4, concluding words. Such supply, while not being inconsistent with a contract of service, appears to me to have been referred to as tending away from such contracts in ***Vabu*** ((*supra*) at 44). There, however, the firm that engaged the bicycle couriers provided radios and uniforms, for which the couriers were responsible. There was also in the case of one of the Contractors evidence that he had been supplied with safety wear on which Tricord's name appeared. However, there was no evidence that this clothing was required, and Sharkey P appears to have placed no weight in his determination on this evidence (par 209).

112 Two of the other requirements Sharkey P points to do not seem to me to point one way or the other. One, the subject of part of ground 6(ii), is for the Contractor to keep and pass on to Tricord records of hours worked for weekly payment by Tricord: Guide 5 read with Contractor's Agreement, Pt 6 (referred to by Sharkey P, par 206), which is consistent with a casual employment relationship, or an independent contractor's arrangement for time billing. The other is for Tricord to withhold income tax at source, which, however, is acknowledged by Sharkey P, at par 204(f), to be "neutral", correctly in my view.

113 There was one matter pointed to by Sharkey P (at par 204(b)) which does not appear to me to be clearly a matter of obligation. This is the provision (Guide 3) for the Contractor to inform Tricord if the Contractor is unable to present for Work accepted. This is described as "essential" as a matter of "courtesy", in the interests both of the Contractor (because Tricord would be able to consider covering them) and of Tricord.

114 This leaves a number of matters, referred to in the Full Bench's decision (per Sharkey P, par 204(c), (g) and (h)) that do seem to me to point to actual control. They were the obligation of Contractors to present themselves for work in a "neat, clean and tidy" way (Guide 4), to take certain actions or refrain from others in the interests of occupational health and safety for the Contractor (Guide "Occupational Health and Safety"), and to report certain other matters to Tricord, being workplace "difficulties or problems experienced on site" (Guide 9), concern that their union representatives are not "acting in their best interests" (Guide 10), and concern that they have been discriminated against or harassed (Guide 13). These matters include, under the "Occupational Health & Safety" head, many prescriptions at levels of considerable detail (such as applying "15+ sun screen cream" on exposed portions of the body while "working outside"), and strict "prohibitions of consuming or being under the influence of alcohol or drugs", and of "practical jokes and horseplay" on the job, as well as compliance with any smoking prohibitions for the workplace, prohibitions which Contractors were told they should "normally expect". These matters were separately emphasised in the judgment (Sharkey P, par 205), and form the subject of ground 5. I return to them again below.

115 For Tricord it was put to us that the provisions here, as to occupational health and safety at least, were in fact neutral, because of the common law and statutory duties that employers owed to employees, and principals to their independent contractors, in respect of their safety. Reference was made to *Occupational Health and Safety Act 1984* (WA), s 19(4), in respect of principals and their independent contractors. This consideration does not in my view detract, however, from the way the detailed prescriptions in the Guide point towards actual control.

116 My conclusion on the factors made relevant by the common law control test is that, while some do indeed point towards an employment relationship, in sum they do not point as strongly in that direction as the Full Bench concluded, and to that extent I would uphold the relevant grounds of appeal 4, 6(ii) and 9(ii).

117 I turn now to the matters on which the Full Bench separately relied in support of its conclusion and which are addressed in the Grounds of appeal. I note that most of these matters appear to form part of the inclusionary list provided by Mason J in the passage (at 24) quoted from ***Stevens*** (*supra*), and I use the headings from that list.

Mode of remuneration

118 This is addressed as part of ground 6(ii), another part of which I have already addressed, and elaborated upon in ground 9(v). The Full Bench referred to the facts that its quantum was calculated by reference to the rate provided to Tricord by its client (Hanssen), and paid weekly into their accounts on the basis of records of hours worked provided by the Contractors and by the client. These were said to be "significant evidence of a modus operandi compatible with and consistent with the existence of a contract of service and not a contract of services" (per Sharkey P, par 190). There seems to be an implicit contrast here with payment by result or otherwise on the completion of the work contracted for.

119 While the contrast may be a reasonable one, it does not seem to me that in a world of time-based billing and piecework too much should be made of that contrast. While I am not convinced that the facts so referred to here are, as was contended for Tricord, "neutral" (appellant's submissions par 7), I am also of the view that more was made of the contrast here than was appropriate, and to that extent I would uphold grounds 6(ii) and 9(v).

Provision and maintenance of equipment

120 I have already referred to this matter in another context in which the Full Bench refers it, that of control, and is the subject of ground 9(ii). The matter is also separately referred to (per Sharkey P, par 180), in terms of the evidence before the Commissioner of provision by the two individuals of some materials needed for their work, but with the balance made available by the client, so far as is apparent from the judgments (per Sharkey P, par 19, for Bartley, and par 23, for Fowler). The provision by the individuals is referred to as "not meaning they were not employees" (Sharkey P, par 180), which is consistent with ***Vabu*** (*supra*) as I explained; however, the effect of this view is in my view detracted from by his later reference to it being evidence of control, a matter I discussed above.

The obligation to work

121 Here the Contractor's Agreement makes it plain, as I have explained, that any such obligation arises only when the Contractor accepts an offer of Work (Pt 4), and is an obligation that is terminable on either side by one hour's notice (Pt 8). While ground 9(vi) puts it to be an error not to weigh this as tending against a finding of an employment relationship, with the Full Bench (Sharkey P, par 191), I do not consider much can be made of it, as it is also consistent with casual employment.

The hours of work and provision for holidays

122 What this factor appears to refer to is (putting aside the hours of work, with which I have already dealt) what the Full Bench called the "usual benefits of an employee", which would include also sick leave and the like (Sharkey P, par 188). Matters such as workers compensation and superannuation, it was conceded before us and by the Full Bench (Sharkey P, par 192), must now, because of the terms of the relevant legislation, be set aside, because that legislation now extends beyond employees. There was no provision in the Contractor's Agreement for the other "usual benefits", while the earlier agreement signed by Mr Bartley, to the extent it is relevant, expressly negatived them. Ground 9(iv) was that the Full Bench had failed to give this matter its proper effect, but I do not agree. As the Full Bench indicated, it is a factor "of some significance" as pointing away from an employment relationship, although it can be overborne by other factors (par 188). The Full Bench found that it was overborne, however, which is a different matter, to which I return.

The deduction of income tax

123 By the Guide, Tricord deducted income tax on a PAYG basis, not a PAYE one. The latter would be usual in the case of employees, the former in the case of independent contractors. However, as the Full Bench pointed out (Sharkey P, par 186), this was a matter specially arranged by Tricord with the Australian Taxation Office, and in those circumstances could not be seen as other than "neutral". It was not addressed by the grounds of appeal.

The delegation of work

124 The ability of the person engaged to delegate their work would on the face of it tend away from the status of an employee. There was no provision for this in the Contractor's Agreement or otherwise emerging from the evidence, the Full Bench noted (Sharkey P, par 185), and the grounds of appeal did not address this point.

Other factors: indicia of a separate business

125 The relevance of the matter of whether there were indications that persons like the Contractors here were engaged in a separate business in whose course the relationship with Tricord was entered into emerges clearly from ***Vabu*** (*supra*). Such indications would of course point away from the status of an employee. Grounds 9(i), (iii) and (vii), and ground 8, went to these factors.

126 In ***Vabu*** reference was made to the bicycle couriers not supplying "skilled labour or labour which required special qualifications", and having no ability to pursue an "independent career" or generate "goodwill" as a bicycle courier (at 42). There were indications that the "engagement by Vabu left the couriers with limited scope for the pursuit of any real business enterprise on their own account" (at 44). These indications were not overborne by the couriers' provision of their own bicycles, although it was indicated that the case "might" be different if "investment in capital equipment were more significant or greater skill and training were required to operate it" (at 41 - 42).

127 Here there was on the face of it more room left under the Contractor's Agreement for the pursuit of separate activities than was the case under ***Vabu***, given the Agreement's provisions for deciding whether to accept the offer of Work, and termination on one hour's notice. There was also the provision in the Guide (11) stating that the Contractor is responsible for their own public liability insurance, a matter referred to by the Full Bench as "probably a neutral factor" (Sharkey P, par 185). Ground 9(iii) addressed this factor, and, standing alone, I would have seen it differently from the Full Bench. However, the same provision in the Guide also indicates that Tricord can carry the Contractor under their "blanket" policy, and by "default" would charge to the Contractor the relevant "minimal" fee by way of deduction from their weekly payments (Pt 11). This provision for joining Tricord's "scheme" is referred to an "indicative of integration in Tricord's organisation" in the judgment of the Full Bench (Sharkey P, par 185), as I think it does. The matter of integration in Tricord's organisation is a matter I return to below.

128 A related point emerges from ground 9(vii), which drew our attention to the provisions in the Contractor's Agreement that required the work to be of a suitable standard (Pt 4, above), and the Contractor to indemnify Tricord against any action or similar arising out of or referable to damage or similar caused by or resulting from any wilful or negligent act or omission or misfeasance of the Contractor (Pt 9.2(a)). The former matter is not discussed in the Full Bench's decision, except as in passing apparently as something tending towards an employment relationship (Sharkey P, par 243), while the latter matter is said to be "neutral" in the same way as that of responsibility for public liability insurance (Sharkey P, par 185). It seems to me, in light of the authority on the liability of an employee to their employer for negligence (***Lister v Romford Ice & Cold Storage Co Ltd*** [1957] AC 555), that the two matters are indeed "neutral", notwithstanding what might be a somewhat higher standard of responsibility under the express provision than that under the liability in tort. However, it was put to us that the inclusion of the contractual provision was of a piece with the other provisions in the Agreement to do with the parties' relationship, in that they all stipulated the consequences of the principal and independent contractor relationship. However, I do not see the provision adding anything of significance to those provisions, which I reach below.

129 There was a non-competition clause in the Contractor's Agreement which "during any Work" prohibited the Contractor "directly or indirectly" providing any "services" to, or being "engaged with, any business or activity involving, 'Clients", where that prohibited conduct was "competitive with any business carried on by [Tricord] with its Clients" (Pt 7). Ground 8 was that the Full Bench was in error in construing the nature of this provision by reference to the client, rather than competitors of Tricord, and in not noting that the clause was consistent with the relationship of principal and independent contractor.

130 In fact, the Full Bench read the clause as prohibiting the Contractor working for a "competitor with the client" while they were working for that client, and so read as "consistent" with an employment relationship (Sharkey P, par 211). However, I do not read the clause as broadly. In view of the definitions of "Work" and "Client" in the Agreement (Pt 1), the clause would appear to cover conduct during Work even when the Contractor had not accepted the Work, but not to prevent the Contractor seeking out work where there was no involvement with Clients, as well as where the Contractor had not been offered Work with one. So read, it is indeed consistent with the relationship of principal and independent contractor as ground 8 puts to us.

131 Beyond these matters, there was no suggestion, either in submissions to us or before the Full Bench (Sharkey P, par 178), that the two individuals were carrying on separate businesses, with an exception I shortly reach. In particular, neither individual had formal trade qualifications, although they did have construction skills at least in formwork (Sharkey P, par 174), a matter which ground 9(i)(a) draws to our attention. Nor was there a suggestion of any capital investment by either beyond the equipment they provided (see Sharkey P, par 177). Neither individual was suggested to be in partnership with any one else, or a principal of any corporate enterprise in the sphere of their work for Tricord (Sharkey P, par 184).

132 However, as ground 9(i)(b) reminded us, Mr Bartley had signed the 2001 agreement which contained an acknowledgement that he was "self-employed". I return below to the provisions of the agreements the two men had signed to a similar effect.

Other factors: integration in the organisation

133 This is a matter pointing away from the possibility of a separate business, of course. Its relevance seems to emerge from the test for employment I have referred to. To repeat that test as I formulated it, it is of the difference between a person (an employee) whose work serves another, and is done **in that other's business**, on the one hand, and a person whose work is likewise for the benefit of another's business, but is done in the course of the carrying on of a **trade or business of the person doing the work**, on the other (***Vabu***, at 39). Ground 10 addressed these matters.

134 The integration test directs attention to the question in whose business the work was being done, although it is open to question whether it simply restates the question, rather than directing attention to factors relevant to answering it. I note in particular the dicta of Mason J in ***Stevens*** (*supra*) on the test doubting its value as other than a way of collecting factors which could just as easily be viewed as relevant to the right to control: at 27 - 28.

135 The Full Bench in this case referred to a "mosaic of integration underpinned by specific and detailed obligations and practices", which was "entirely significant" (Sharkey P, par 218). What constituted the underpinning appear to be factors already mentioned (by Sharkey P, and by me), of no evidence of a separate business, of the non-competition clause, of the obligation to maintain a neat and clean appearance, to perform the Work accepted to the relevant standard at the agreed "remuneration" and with withholding of taxation on a PAYG basis, to document hours worked, and to comply with the occupational health and safety and other reporting obligations to which I earlier referred (Sharkey P, par 214 and par 217). At the same time reference was made in this connection to Tricord's ability to terminate the Work or the Engagement on one hour's notice, as I have indicated. I do not see this way of collecting these factors as adding weight to them in the resolution of the employment question.

136 However, there was also what appears to be a reference in this connection to the power in Tricord's Personnel Contracting Agreement with its client Hanssen to withdraw a Contractor from a client's "unsafe workplace" until Tricord is "satisfied that any risk is removed" (cl 1: see Sharkey P, par 217). This was also a matter specifically mentioned as one that in the case of labour hire agencies was possibly of greater significance to the employment issue than that of day to day control (Beech SC, at par 269). This may go to show a form of identification of the Contractors and Tricord with one another of the sort the test I have referred to contemplates.

137 It is not, however, as strong an identification, it seems to me, as the sort of factor represented by the provision of a uniform identifying those doing work for another with that other. The provision of a uniform has historically been acknowledged as a relevant factor, as is indicated in ***Vabu*** (*supra*), where the Court found that the requirement to wear the uniform provided was to advertise the Vabu business (at 42 - 43). There was no such provision here (putting aside the safety vest to which I have previously referred). Nor were there other factors like those referred to in ***Drake*** (*supra*), where Drake provided awards for performance, organised happy hours and film nights and sent out newsletters and birthday cards, and also emphasised that "in the client's workplace [those doing work under the arrangements with Drake] will be perceived as coming from Drake, and that Drake will be judged by their behaviour and performance" (at 638 per Phillips JA, quoting from the first instance judgment).

138 In summary then, to the extent this factor adds anything to the others, I do not see it adding as much as the Full Bench appears to have concluded it did, and to that extent I would uphold ground 10.

Other factors: the language of the parties' written contract

139 I have treated this as a separate factor because the authorities indicate that, while clauses stating that the relationship of the parties is that of principal and independent contractor, or to a similar effect, are "not determinative", the language of the contract is relevant to determining what rights and obligation the parties created for themselves: ***Vabu*** (*supra*), at 45. Ground 3, and 9(viii) which appears to me largely to restate ground 3, was that the Full Bench failed to give proper effect to the language of this sort in the parties' relationship, while ground 12 took issue with the conclusion that the Full Bench drew in the face of that language that the parties were in a casual employment relationship in respect of accepted Work. Ground 12 was addressed to the Full Bench's conclusion that it could put the language to one side as a "sham". Ground 5, which I have previously referred to in connection with the control test, also addressed certain portions of this language.

140 I begin by noting the repeated indications in the Agreement between the Contractors here and Tricord, beginning with its title ("Independent Contractor's Agreement"), that their relationship was being labelled principal and independent contractor, not employer and employee. There was an express provision to that effect (Agreement, Pt 9.1) which goes further, to indicate at least some of the implications intended to flow from that, as follows:

> "Nothing in this Agreement will be taken as constituting the Contractor an employee or servant of the Client or the Company or any of its subsidiaries. The Contractor will not represent himself as being an employee of the Company at any time, or as being in any way connected with the business of the Company unless he is doing Work for the Company."

141 There were also repeated references in the Guide to the status of the Contractor as an "independent contractor" or similar. These preface statements concerning the Contractor's need for public liability insurance (cl 11), the indicated differences for a "contractor" compared with an "employee" for issues of discrimination and equal opportunity, and the section on "Occupational Health & Safety" with its reference to the Contractor's "responsibilities" for their own safety and health, followed by lengthy and detailed descriptions of conduct in which the Contractor "must" or must not engage in the interests of occupational health and safety. I have previously referred to these requirements and prohibitions; here I emphasise the aspects of the contexts in which they appear which appear to me to be calculated to emphasise the contractor's responsibility for their own position, and to which no reference is made by the Full Bench. Ground 5 emphasised just these aspects of the provisions.

142 In the judgment of the Full Bench the conclusion is expressed that the provision in the contract (Pt 9.1) expressly characterising the individuals signing them as "independent contractors" was a "sham" (per Sharkey P, pars 84 and 233). Ground 12 took issue with this characterisation, which appears to have been important to the Full Bench's conclusion on the parties' relationship.

143 Such a characterisation is certainly one basis for a determination that the provision is not entitled to any weight. It expresses the conclusion that the other terms of the parties' relationship indicate it should not be seen as "a genuine statement of the parties' intentions": ***Australian Mutual Provident Society v Allan*** (1978) 52 ALJR 407, at 409 (PC SA) (source of quotation). However, such a clause may still be regarded as a statement of the parties' genuine intentions, and yet be overborne by those other terms: ***Birighitti*** (*supra*), at par 13 per Anderson J.

144 However, in this case, in my view it is difficult to extract from the materials before the Full Bench, analysed as I have indicated above, that the clause was a "sham". I have indicated in my rather lengthy review of the factors bearing on the nature of the parties' relationship that the matter is not as strongly in favour of an employment relationship as the Full Bench appears to have concluded. As to the matters which appear to me to have been of predominant significance to the Full Bench, the control factors do not point as strongly in that direction as they concluded, while in my view this is also the case for the factors pointing away from a separate business and towards integration of the Contractors in Tricord's business. Of the remaining factors, none points strongly towards the conclusion the Full Bench reached, as the Full Bench itself seemed to recognise, with the exception of the mode of remuneration, where I have indicated my disagreement with the view the Full Bench took. And one factor - the lack of provision for the usual benefits of employment - points away from employment, as the Full Bench indicated.

145 In these circumstances, as ground 12 put to us, I do not believe it is possible to put the clause aside on the basis it is a "sham". Rather, this is, as was put for Tricord, a case where there are indications pointing in both directions, none of which is determinative. In this situation, the correct approach appears to be as the Privy Council put it in ***AMP*** ((*supra*) at 389), quoting with approval from the judgment of Lord Denning MR in ***Massey v Crown Life Insurance Co*** [1978] 2 All ER 576:

> "If their relationship is ambiguous and is capable of being one way or the other [ie, either service or agency], then the parties can remove that ambiguity, by the very agreement itself which they make with one another. The agreement itself then becomes the best material from which to gather the true legal relationship between them".

146 To a similar effect, as is noted in ***Odco*** ((*supra*) at 756), are Wilson and Dawson JJ in ***Stevens*** ((*supra*) at 37):

> "None of this leads to any necessary inference however, and the actual terms and terminology of the contract will always be of considerable importance."

147 This does not mean that the clause in the Contractor's Agreement which labelled the parties' relationship is then simply given effect to, without further analysis. The possibility must also be considered (as I have indicated) that that language is overborne by other language (including most importantly the rights and duties that language gives rise to) in the Agreement. Here, however, there is no such overbearing, on the analysis I have already set out. Rather, there is, to set alongside the features of the parties' relationship that (as I have indicated) might be seen to point the other way, the other features that, throughout the Agreement, and its Guide, might be seen to point towards independent contractor status.

148 I note the emphasis on the presence of language like that in the Agreement labelling the relationship (in Pt 9.1) as a significant factor to be weighed, in ***Odco*** where such a clause was present (at 755), and as a point upon which to distinguish that case in ***Drake***, ((*supra*) at 655), per Phillips JA, where there was no such clause. Counsel for the CFMEU laid considerable emphasis on ***Drake*** in support of his arguments, but I do not consider that case to be, in the light of this aspect of the matter, as helpful to his case as he submitted. I note finally that a clause like that in the Agreement here, Pt 9.1, in the contract with couriers in ***TNT Worldwide Express (NZ) Ltd v Cunningham*** [1993] 3 NZLR 681, was referred to in ***Vabu*** (at 45) as having been held to summarise the relationship between the parties "accurately", by reference to other factors. In ***Vabu*** there does not appear to have been a clause like Pt 9.1.

149 It follows that I consider it was an error of the Full Bench to put aside, or not to have weighed, the language in the Agreement that labelled the relationship that of principal and independent contractor, and that sought to pursue the logic of that label as I have indicated.

150 Further, on the balance of indications to be drawn from the language of the parties' relationship and the rights and obligations to which it gave rise I am of the view that the relationship here is one of principal and independent contractor in each case. I would thus uphold ground 3 and its restatement in ground 9(viii).

The relevance of the status of a "labour hire agency"

151 A further issue arises in respect of the application of the common law test, however, and it went to the specific inclusion of "labour hire agency" in the definition in s 7(1) of "employer" I set out above. This matter was considered by the Full Bench in its decision (Sharkey P at par 46 to par 74, and Beech SC, at par 262 to par 270), where it was concluded the inclusion did not change the necessity to determine that a "contract of service" was involved according to "ordinary common law precepts and concepts" (Sharkey P, par 73; and see Beech SC, par 262 and par 269). Rather, Sharkey P concluded (par 73) that the new language made it "irrelevant" whether or not the "employee" was under the "day to day control" of the client of Tricord for whom the employee performed their work, while Beech SC concluded (par 269) that the new language meant such control might not be "as significant" as the evidence of a "right of ultimate control" in Tricord of the sort that might be argued to emerge from the Guide here.

152 On the appeal to us there was no argument addressed to this point, and in the final analysis nothing in my view turns on it.

153 In my view, the construction advanced appears to be correct, as a matter of the ordinary meaning of the relevant phrase in s 7(1) "employer". It also gives effect to the apparent intention underlying the phrase, which was introduced into the definition by Act No 20 of 2002. This intention was indicated in the Minister's second reading speech to be "to ensure that the Commission has the power it properly requires" by making it "explicit that an employer also includes labour hire and group training organisations" (quoted in the Full Bench's decision, at par 52).

154 However, such an approach appears to me to be within the modern approach to the common law test, as this is referred to by Mason J in ***Stevens*** ((*supra*) at 29). It is the approach I have endeavoured to follow here. It follows that the suggested implication of the form of reference to "labour hire agency" in Act s 7(1) "employer" does not in my view change the common law, or my conclusion.

Conclusion

155 I have concluded then that the Full Bench erred in concluding that Tricord was an "employer" of each of the two individuals in this case for the purposes of Act s 7(1) and therefore for the purposes of the jurisdiction of the Commission in respect of an "industrial matter" within s 7(1) that might otherwise arise between them, and that this Court has jurisdiction to review and set aside that decision.

156 Accordingly, this appeal in my view should be allowed.

2004 WAIRC 13766

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 40 OF 2003

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	PERSONNEL CONTRACTING PTY LTD T/A TRICORD PERSONNEL **APPELLANT** **-v-** THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
CORAM	**STEYTLER J (Presiding Judge)** **HEENAN J** **SIMMONDS J**
DATE OF ORDER	WEDNESDAY, 29 DECEMBER 2004
FILE NO/S	IAC 7 OF 2004
CITATION NO.	2004 WAIRC 13766

Result	Appeal allowed
Representation	
Appellant	Mr P P McCann (of Counsel)
Respondent	Mr H Borenstein (of Counsel) Mr T J Dixon (of Counsel)

Order

Having heard Mr P P McCann (of Counsel) on behalf of the Appellant and Mr H Borenstein (of Counsel) and with him Mr T J Dixon (of Counsel) on behalf of the Respondent, THE COURT HEREBY ORDERS THAT :-

1. The appeal is allowed.
2. The judgement of the Full Bench is set aside.
3. The Order of the Industrial Commission made on 23 October 2003 that both applications be dismissed for want of jurisdiction be restored.

JOHN SPURLING,
Clerk Of The Court.

FULL BENCH—Appeals against decision of Commission—

2004 WAIRC 13733

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TANIA MARIE HEFFERNAN **APPELLANT** **-and-** TYREMARKETERS **RESPONDENT**
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER A R BEECH SENIOR COMMISSIONER J F GREGOR
DELIVERED	TUESDAY, 21 DECEMBER 2004
FILE NO/S	FBA 43 OF 2004
CITATION NO.	2004 WAIRC 13733

Catchwords	Industrial Law (WA) – Appeal against decision of a single Commissioner – Harsh, oppressive and unfair dismissal – Retraction of resignation – Notice of resignation – No dismissal – Appeal dismissed – *Industrial Relations Act* 1979 (as amended), s29(1)(b)(i)
Decision	Appeal dismissed
Appearances	
Appellant	Mr D Clarke, as agent
Respondent	Ms K Reid (of Counsel), by leave

Reasons for Decision

THE PRESIDENT:

INTRODUCTION

1 This is an appeal by the above-named appellant, Tania Marie Heffernan, against the decision, and, indeed, the whole of the decision of the Commission at first instance, constituted by a single Commissioner, given on 24 September 2004 in application No 489 of 2004.

2 The decision appealed against is constituted by an order dismissing an application by the appellant made to the Commission pursuant to s29(1)(b)(i) of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*"). The matter was dismissed for want of jurisdiction.

GROUNDS OF APPEAL

3 It is against that decision that the appellant now appeals on the following grounds (see page 2 of the appeal book (hereinafter referred to as "AB")):-

> "1. That the Learned Commissioner erred in not accepting the Applicant's evidence which was unchallenged. The Respondent through the National Manager Mr Mark Luciani and the Applicant had agreed for the Applicant's resignation to be retracted on the 26th February 2004. The Learned Commissioner omitted this evidence from the decision and further, this evidence clearly indicates that the Applicant's retraction was in place and that the documentation on the 18th March 2004 was a follow up as requested. The Appellant submits that there is a serious issue to be heard by the Full Bench and that it is in the public interest that the matter be heard by the Full Bench in order that the Appellant has the right to be heard on the unfair dismissal and jurisdictional arguments.
>
> 2. The Learned Commissioner erred in not accepting clear evidence by the Applicant, in that termination occurred on the 23rd March 2004, the date of termination.
>
> 3. The Learned Commissioner erred in not applying the facts and the law as presented in relation to the contract of employment and agreement between the parties.
>
> 4. The Learned Commissioner erred in finding that no jurisdiction can be applied to the claim and thus dismissing the claim. The Appellant submits that the Learned Commissioner had the evidence to find that the Applicant was unfairly dismissed and therefore had jurisdiction to hear and determine the claim.
>
> 5. The Appellant seeks the assistance of the Full Bench in quashing the decision of the Learned Commissioner and upholding the appeal and remitting the matter back to the Commissioner for further determination of the unfair dismissal claim, or that the Full Bench determine the jurisdiction and unfair dismissal matter on the evidence presented."

BACKGROUND

4 The appellant claimed that she was harshly, oppressively or unfairly dismissed by her employer, the above-named respondent, by whom she had been employed for over 11 years. At the time of her dismissal, her position was that of area sales manager. She was concerned about certain matters and was aware of the respondent's policies, including the "Standards for Success" policy which provides a number of procedures to enable employees to express concern.

5 The appellant made application to the Commission under s29(1)(b)(i) of *the Act*, the application being filed on 8 April 2004, claiming that she had been harshly, oppressively or unfairly dismissed by her employer, the above-named respondent. Upon the hearing of this application, which was opposed, the only oral evidence adduced was that of the appellant. There was, however, documentary evidence adduced. At the conclusion of the appellant's case, the respondent submitted no case to answer for lack of jurisdiction. That submission was upheld. Of course, no evidence was adduced on behalf of the respondent with such a submission being made. Thus, the Commissioner was required to decide the matter on the case put at best for the appellant.

6 The appellant was at a meeting at work on 18 February 2004 at about 12.30pm. At the meeting, her manager, Mr Walter Kemp, hit her across the ear, on her evidence. She said that she told him that the blow hurt and that he chuckled, when she said that. She told him in no uncertain terms that it really hurt and she said that he then mumbled an apology. She continued to participate in the meeting but about half an hour later left because Mr Kemp directed her to contact some clients. She attended work each day for a further week and continued to work in the business.

7 On Monday, 25 February 2004, seven days later, Mr Kemp returned to the office and the appellant gave him, or left on his desk, a letter in the following terms:-

> "Wednesday, February 25, 2004
>
> Wally Kemp
>
> Tyremarketers
>
> 239 Star Street
>
> Welshpool WA 6106
>
> Dear Wally
>
> This is to formally notify you that I am resigning from Tyremarketers as Area Sales Manager.
>
> Wednesday, March 24, 2004 will be my last day of employment.
>
> Thank you for the opportunity to work for such an outstanding organisation."

In that letter, there was no reason expressed for her resignation and certainly no complaint about Mr Kemp.

8 She forwarded copies of that letter to Mr Mark Luciani, the national manager, and to Mr Brenton Watkins, the state manager of the respondent.

9 The next day the appellant spoke to Mr Luciani on the telephone, and he asked her to retract her resignation. He also told her that he would sort the matter out, even if he had to come over to Perth to do so. She said that she believed that he intended to sort the matter out.

10 She attended at work for a further two days, then said that she could not continue to attend work because she was unwell.

11 On 18 March 2004, the appellant emailed and wrote a hand written letter to Mr Luciani seeking to "retract" her resignation. On the same day, she wrote to him another letter, headed "Without Prejudice", in which she complained about Mr Kemp and other matters. Both the email and the hand written letter of 18 March 2004 read as follows (see pages 84 and 85 (AB)):-

> "Please find attached a Private and Confidential letter regarding my resignation. I will post an original copy which will be signed for your records.
>
> I would also like to withdraw my resignation until further notice pending a thorough investigation of the matter in hand and pending the out-come of my doctors assessment when I will be fit to return to my current employment."

12 The type written letter headed "Without Prejudice" of 18 March 2004, as well as containing complaints about her treatment by her employer and of unacceptable behaviour to her contained two relevant paragraphs, which I reproduce hereunder:-

> "Mark, as you are aware, I have previously reported incidents of unacceptable behaviour, directly to you and Brenton Watkin's (sic) regarding Wally Kemp's behaviour over the past 30 months unfortunately without any satisfactory resolution which has now resulted in me in (sic) tendering my resignation.
>
> I have attached for your information a detailed account of specific incidents that have lead (sic) to my action."

13 There was also this further relevant paragraph at the end of the letter:-

> "Please note that timing is of essence in this matter. Should a suitable resolution not be reached then I will seek further external advise (sic) and review my options accordingly."

A copy of that letter was marked to Mr Brenton Watkins and to Human Resources (see pages 86 – 87 (AB)).

14 On 23 March 2004 the appellant enquired about whether the retraction of her resignation had been accepted. Mr Watkins advised her later that the retraction of her resignation was not accepted. She also spoke to Mr Luciani later that day and he confirmed this. He told her that the withdrawal of her resignation had not been accepted. He also told her that it was the company's decision. She told him that she was disappointed because he, Mr Luciani, had told her to withdraw her resignation. She said in evidence that, until she had that conversation, she believed that she was going back to work.

15 The appellant's employment came to an end on 24 March 2004 which was the date nominated in her letter of resignation of 25 February 2004. She did not work on that day.

16 In cross-examination at first instance, the appellant gave this evidence. She said that she was unable to explain why she had not produced a document in court which showed that she spoke to Mr Mark Luciani on 25 February 2004. She reiterated that, in that conversation, Mr Luciani asked her to "retract" her resignation. She also said that it took her three weeks to "retract" it, "Because I was not well and Brenton was instructed … or he told me that I was to put everything in writing to them" (see pages 57-58 (AB)). Her evidence next was as follows:-

> "(Q) Okay. So rather than do what you were told and retract your resignation on the 25th, you took three weeks to put all these things in writing and then finally you decided to … to retract your resignation?
>
> (A) That's right.
>
> (Q) Which wasn't until March, 18th March?
>
> (A) That's right."

17 On 25 March 2004 she was interviewed by Ms Marnie Wilson in respect of the complaints that she had made.

FINDINGS AT FIRST INSTANCE

18 The Commissioner at first instance asked herself ultimately who really terminated the employment. She determined that the appellant terminated the employment and did so in circumstances where it was not until a week after the incident upon which she relies occurred. The resignation was not in the heat of the moment. Her letter of resignation gave no hint of any difficulties or that she relied on any repudiatory behaviour on behalf of the respondent. The letter was written in terms which suggested that she has no complaint with her employer, the Commissioner found, too.

19 Although the appellant spoke to Mr Luciani later, after having tendered her resignation, and said that she was asked to withdraw the resignation, she did not do so for a further three weeks. She made no formal complaint for three weeks after the resignation and it was not until that point that she sought to retract the resignation.

20 She continued to work with the person she claims assaulted her, Mr Kemp, and made no formal complaint for three weeks. She intended to work out her notice, quite clearly. She said that she believed that Mr Luciani genuinely intended to deal with the matter, and said that she believed that the organisation did not let her down.

21 Therefore, the Commissioner at first instance held that the action of bringing the employment to an end by relying on the alleged assault should have occurred forthwith, not a week later, and not on a month's notice, and it would have been appropriate to have clearly identified the cause in the letter of resignation. It was not done. In the end, the Commissioner held that it was clear that the resignation was not in the heat of the moment and, not only did she make no formal complaint for three weeks after her resignation, but it was not until that point that she sought to retract the resignation.

ISSUES AND CONCLUSIONS

22 The decision appealed against was not a discretionary decision, as that term is defined in *Norbis v Norbis* [1986] 161 CLR 513 and *Coal and Allied Operations Pty Ltd v AIRC and Others* [2000] 203 CLR 194.

23 The Commissioner was required to and decided, as a matter of fact and law, whether there was a dismissal of the appellant by the respondent and, therefore, whether the Commission had jurisdiction to hear and determine the matter before it.

24 As a matter of law, a party to a contract of employment may give unilateral notice of termination, which the appellant did by her letter of 25 February 2004 to the respondent, and in fact to Mr Kemp, with a copy to Mr Luciani and Mr Watkins. There was no suggestion that the notice was invalid because it specified too short a period or for any other reason. Therefore, subject to what I shall say hereinafter, on its face, the notice was valid. Where there is a valid notice of termination of a contract of employment, however, unilateral withdrawal of the notice is, as a general rule, not possible. Withdrawal by mutual consent is, however (see *Riordan v War Office* [1959] 1 WLR 1046 at 1054 (affirmed on appeal [1960] 3 All ER 774 (CA)); *Harris and Russell Ltd v Slingsby* [1973] ICR 454 at 455 and *Birrell v Australian National Airlines Commission* (1984) 5 FCR 447 at 457 per Gray J).

25 A valid notice may be unilaterally withdrawn, however, where the notice is given by a person in a highly emotional state and is retracted upon recovery from that position (see *Martin v Yeoman Aggregates Ltd* [1983] ICR 314). However, the notice must be given in the heat of the moment and withdrawn as soon as the person realises that she or he has acted in anger (see *Birrell v Australian National Airlines Commission* (op cit) at page 459; see also *Gunnedah Shire Council v Grout* (1995) 134 ALR 156 (FCFC)).

26 It would appear that, if the employee's resignation was given in such a state of confusion that it could not be considered a voluntary act, it would not be open to accept the resignation or perhaps even a resignation under pressure (see *Gunnedah Shire Council v Grout* (op cit)).

27 Although there was some early emphasis on the resignation being an element in a constructive dismissal, that was not how the appeal was argued. Further, it was not seriously argued that the notice dated 25 February 2004 was one which was given in such a state of confusion that it could not be considered a voluntary act, particularly since it took seven days after the event to give notice. Further, it was certainly not established to have been retracted upon the recovery of her condition, that is, from being in a highly emotional state, even if the fact that such a highly emotional state existed, which was not proven.

28 In the end, on appeal, the substance of the appeal was that the unilateral notice of termination was withdrawn by mutual consent of the parties and that is how Mr Clarke, for the appellant, put it to the Full Bench.

29 On the evidence, both written and oral, the only oral evidence being that of the appellant, it was clear that:-

(a) The appellant gave notice of resignation from her employment to her employer by written notice dated 25 February 2004, such resignation to take effect on 24 March 2004.

(b) That, on her own evidence, it was agreed between the appellant and Mr Luciani in their telephone conversation of 26 February 2004 that she would, at the request of Mr Luciani, withdraw her notice of resignation. In other words, there was to be a mutual agreement that the notice be withdrawn, and that the withdrawal of the notice unilaterally given was to be accepted by the respondent. However, such withdrawal or retraction was to be in writing as the appellant said she had been told by Mr Brenton Watkins, the state manager, in evidence. Significantly, there is no evidence of any other conditions to be met agreed on that day. Thus, it was clearly the fact that there was to be an unconditional withdrawal which would be accepted or, alternatively, there was no evidence to the contrary, even from the appellant.

(c) That the appellant confirmed that the retraction had not been given in accordance with the telephone communication of 26 February 2004 with Mr Luciani because, when she explained why she had taken three weeks to retract the resignation and finally decided to retract it some weeks after the conversation with Mr Luciani, she had not complied with what they had discussed.

30 That, further, contrary to what Mr Clarke submitted, the agreement for the withdrawal depended on the appellant:-

(a) Giving notice in writing of the retraction.

(b) It being unconditional.

(c) That it occur within a short time after the conversation, according to her own admission.

31 The appellant, if there was an agreement on 26 February 2004, did not adhere to it but purported to unilaterally vary it by conditionally and temporarily, instead of absolutely and unconditionally, withdrawing the notice of resignation. She did this by saying unequivocally (see pages 84 and 85 (AB)) that, when she finally emailed and wrote her purported retraction to her employer, the resignation was only withdrawn until further notice pending a thorough investigation of the matter, and the recovery of her health. There was no evidence that such a condition was discussed or agreed on 26 February 2004 by or between the appellant and Mr Luciani.

32 Further, the letter of 18 March 2004 to Mr Luciani, headed "Without Prejudice", but admitted at first instance, refers to Mr Kemp's behaviour which had not been satisfactorily resolved, according to the appellant, and "which has now resulted in me tendering my resignation". That supports the view that the resignation was temporarily deferred in its operation but was not at all withdrawn. That is further supported by the second last paragraph in the letter in which compensation for stress alleged to have been suffered was also claimed and which I have quoted above.

33 It was therefore open to find on those facts that a unilateral notice of resignation by the appellant, which it was agreed with her employer would be withdrawn ((ie) the employer would accept its withdrawal) was not withdrawn because there was no decision to do so for three weeks, because the retraction was not confirmed in writing soon after the event and because there was a variation of the agreement that the appellant would accept an unconditional retraction, and, further, because there was a failure to give unconditional notice of revocation. Thus, the appellant's employment ended on 24 March 2004 by notice and on the date that her unilateral notice designated.

FINALLY

34 It was therefore open to find that the notice of resignation was not withdrawn or that it was not withdrawn in accordance with the agreement with the respondent of 26 February 2004 to accept its withdrawal. It therefore took effect, as the appellant admitted, on 24 March 2004. There was no dismissal by the employer, but a unilateral termination of a contract by the employee. It was open to so find and the Commissioner should have so found. There was therefore no dismissal and the Commissioner had no jurisdiction to hear and determine the matter. The Commissioner was correct to so find.

35 For those reasons, I would find the appeal not made out and would dismiss it.

CHIEF COMMISSIONER A.R. BEECH:

36 I agree that the appeal must be dismissed. As I understand the argument on appeal on behalf of Ms Heffernan, it was argued that the Commissioner at first instance erred in not finding that Ms Heffernan was dismissed on 23 March 2004 when she was advised that her purported withdrawal of her resignation was not accepted by the respondent.

37 However, that argument cannot stand. It is not supported by Ms Heffernan's own evidence that her employment came to an end on 24 March 2004, not 23 March 2004. Even Ms Heffernan's original Notice of Application stated that her employment ended on 24 March 2004 which is the day her notice of resignation expired. Ms Heffernan was not dismissed and the Commissioner was patently correct to decide that the claim of unfair dismissal must be itself dismissed.

SENIOR COMMISSIONER J F GREGOR:

38 I have had the benefit of reading the reasons for decision of His Honour, the President. I agree with those reasons and have nothing to add.

THE PRESIDENT:

39 For those reasons, the appeal is dismissed.

Order accordingly

2004 WAIRC 13494

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TANIA MARIE HEFFERNAN
	APPELLANT
	-and-
	TYREMARKETERS
	RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER A R BEECH SENIOR COMMISSIONER J F GREGOR
DELIVERED	THURSDAY, 2 DECEMBER 2004
FILE NO/S	FBA 43 OF 2004
CITATION NO.	2004 WAIRC 13494

Decision	Application discontinued by consent

Order

The application for particulars herein, having been filed in the Registry of the Commission on the 24th day of November 2004, and having been listed for hearing before the Full Bench on the 3rd day of December 2004, and the parties herein, on the 2nd day of December 2004 in relation to application FBA 43 of 2004, having filed in the Registry of the Commission a Proposed Minute of Consent Order to discontinue the application and the parties having waived the rights conferred on them by s35 of the *Industrial Relations Act* 1979 (as amended), it is this day, the 2nd day of December 2004 ordered and declared, by consent as follows:-

(1) THAT there be leave granted and leave is hereby granted for application No FBA 43 of 2004 to be discontinued.

(2) THAT the Full Bench refrain from hearing the said application further.

By the Full Bench

(Sgd.) P J SHARKEY,
President.

[L.S.]

2004 WAIRC 13731

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TANIA MARIE HEFFERNAN
	APPELLANT
	-and-
	TYREMARKETERS
	RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER A R BEECH SENIOR COMMISSIONER J F GREGOR
DELIVERED	TUESDAY, 21 DECEMBER 2004
FILE NO/S	FBA 43 OF 2004
CITATION NO.	2004 WAIRC 13731

Decision	Appeal dismissed
Appearances	
Appellant	Mr D Clarke, as agent
Respondent	Ms K Reid (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on the 15th day of December 2004, and having heard Mr D Clarke, as agent, on behalf of the appellant, and Ms K Reid (of Counsel), by leave, on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 21st day of December 2004 wherein it was found that the appeal should be dismissed, it is this day the 21st day of December 2004, ordered that appeal No. FBA 43 of 2004 be and is hereby dismissed.

By the Full Bench

(Sgd.) P J SHARKEY,
President.

[L.S.]

FULL BENCH—Appeals against decision of Industrial Magistrate—

2004 WAIRC 13687

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IAN WILLIAM CORNTHWAITE
	APPELLANT
	-and-
	MINISTER FOR POLICE AND COMMISSIONER OF POLICE, WESTERN AUSTRALIA POLICE SERVICE
	RESPONDENTS
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	SENIOR COMMISSIONER A R BEECH
	COMMISSIONER J F GREGOR
DELIVERED	THURSDAY, 16 DECEMBER 2004
FILE NO	FBA 38 OF 2004
CITATION NO.	2004 WAIRC 13687

Catchwords	Industrial Law (WA) – Appeal against the decision of the Industrial Magistrate – Alleged underpayment and breach of agreement – On call allowance – Reasonable overtime – After hours call outs – Appeal dismissed - *Industrial Relations Act* 1979 (as amended), s84.
Decision	Appeal dismissed
Appearances	
Appellant	Ms L Roche (of Counsel), by leave, and with her Mr R Horton, Industrial Officer
Respondent	Mr R Bathurst (of Counsel), by leave

Reasons for Decision

THE PRESIDENT:

INTRODUCTION

1 This is an appeal brought pursuant to s84 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*") against the decision of an Industrial Magistrate made on 10 September 2004 in the Industrial Magistrate's Court at Perth. The decision appealed against was the dismissal of a number of claims made by the above-named appellant against the above-named respondents, the claims being M6, M7, M8 and M9 of 2004.

2 The appellant appeals against that decision on grounds to which I will refer later in these reasons.

3 The claims at first instance were claims that the respondents had committed breaches of the *Western Australia Police Service Enterprise Agreement for Police Act Employees 1996*, No AG 274 of 1996, clause 16. – On Call Allowance; No AG 129 of 1998, clause 19 – On Call Allowance; and No PSA AG8 of 2001, clause 19 – On Call Allowance. M6 of 2004 covers the period from 9 January 1998 to 18 March 1999 comprising 48 weeks or 24 pay periods and alleges 24 breaches of the relevant agreement leading to an alleged underpayment of $17,839.87. M7 of 2004 covers the period from 19 March 1999 to 3 December 2000 comprising 92 weeks or 46 pay periods and alleges 46 breaches of the relevant agreement leading to an alleged underpayment of $30,102.98. M8 of 2004 covers the period from 4 December 2000 to 18 September 2001 comprising 44 weeks or 22 pay periods and alleges 22 breaches of the relevant agreement leading to an alleged underpayment of $17,000.58. M9 of 2004 covers the period from 19 September 2001 to 1 August 2002 comprising 48 weeks or 24 pay periods and alleges 24 breaches of the relevant agreement leading to an alleged underpayment of $15,327.66. The total amount claimed in alleged underpayments was $80,271.09 for 116 alleged breaches of the industrial agreements (see page 374 of the appeal book (hereinafter referred to as "AB")).

4 The relevant industrial agreements are:-

(a) *Western Australia Police Service Enterprise Agreement for Police Act Employees 1996*, No AG 274 of 1996 ("the 1996 Agreement").

(b) *Western Australia Police Service Enterprise Agreement for Police Act Employees 1998*, No AG 129 of 1998 ("the 1998 Agreement").

(c) *Western Australia Police Service Enterprise Agreement for Police Act Employees 2001*, No PSAAG 8 of 2001 ("the 2001 Agreement").

5 At first instance, the applications were opposed. They were heard and decided.

THE CLAIM AND THE RELEVANT CLAUSES OF THE THREE AGREEMENTS

6 These claims are made pursuant to clause 19. On Call – Close Call – Standby Allowances of the 2001 Agreement and the equivalent clauses in the other agreements. They are not altered in each agreement and the relevant parts of clause 19(1), (2)(a) and (3), read as follows:-

> "(1) For the purpose of this clause:
>
> "On-call" shall mean a situation in which an employee is rostered, or directed by a duly authorised Senior officer, to be available to respond forthwith for duty outside of the employee's ordinary working hours or shift. An employee placed on call shall remain contactable by telephone or paging system for all of such time unless working in response to a call or with the consent of his or her appropriate Senior officer.

"Close-call" shall mean a situation in which an employee is rostered, or directed by a duly authorised Senior officer, that they are or may be required to attend for extra duty sometime before their next normal time of commencing duty and that the employee is to remain at his or her residence and be required to be available for immediate recall to duty.

"Stand-by" shall mean a situation in which an employee is rostered or directed by a duly authorised Senior officer to remain in attendance at his or her place of employment at that time, overnight and/or over a non-working day, and may be required to perform certain tasks periodically or on an ad hoc basis. Such employee shall be provided with appropriate facilities for sleeping if attendance is overnight, and other personal needs, where practicable.

(2) (a) An employee who is authorised by the Employer or a duly authorised Senior officer to hold themselves available under any of the conditions contained in subclause (1) of this clause, shall be paid the appropriate allowance in accordance with the following scale:

…

(3) Payment in accordance with subclause (2) of this clause, shall not be made in respect to any period for which payment is otherwise made in accordance with the provisions of Clause 18. - Overtime when the employee is recalled to work."

7 It is trite to say that it was for the applicant at first instance to establish all of the elements of his claim on the balance of probabilities, including that the duties which he performed and for which he claimed an on call allowance were directed to be performed in accordance with the relevant provision of the agreement.

BACKGROUND

8 The appellant, Senior Constable Ian William Cornthwaite, is and was, at all material times, a scenes of crime officer or forensics officer employed in the Western Australian Police Service. His evidence was that his occupation was correctly described as forensic technician.

9 Senior Constable Cornthwaite, whose correct designation was forensic technician, trained for five years to become one. The work of a forensic technician or scene of crimes officer is to detect and gather evidence and scenes of crimes, preserve the same, and ensure that after analysis the evidence is produced in court.

10 The difference between being on call and being available to work and working overtime is and was that an on call officer must return to duty forthwith when called, otherwise that officer may be disciplined, whereas if a police officer is recalled for overtime she/he is expected to attend unless there is good reason not to. It was generally the evidence that a person was not subject to discipline if she/he declined to work overtime. However, former Superintendent Raymond Charles Pottinger's evidence was that such a person could be disciplined for declining to do overtime, but, as I understood his evidence, one used one's commonsense in these matters in deciding how such a refusal was dealt with. It was, however, quite clear that if an officer was on call and refused to attend he/she was subject to disciplinary action for refusing to attend. (There was referred to the 1998 and 2001 Agreements, as well as the evidence of Senior Constable Cornthwaite (see pages 150-151 (AB)) and the evidence of Mr David Eacott (see page 187 (AB))). Thus, if an officer does not return to duty when she/he is on call, she/he may be the subject of disciplinary action which is not the case in relation to overtime. That was the evidence for both sides. I wish to observe that by clause 18(1) an employee may be required to work reasonable overtime and such employee shall work overtime in accordance with such requirement. Thus, an employee who does not work reasonable overtime in accordance with the requirements to do so may commit a breach of clause 18(1) of the 2001 Agreement. Further, breach of a direction to do so might well be a failure to comply with a reasonable and lawful order and be contrary to the contract.

11 On 12 January 1998 Senior Constable Cornthwaite commenced duty as the sole forensic technician for the Pilbara district of Western Australia. He was described by Superintendent William Matson, the then district officer for the Pilbara district, as a "resource" for the whole region. He is and was, at all material times, a police officer. He was assigned to and worked from the South Hedland Police Station. His period of duty there ended on 1 August 2002, after which he was posted to Kalgoorlie.

12 As the learned Industrial Magistrate found, and as was not disputed, the district in which he was required to work is 550,000 square kilometres in area, and about half the size of Egypt. It contained 16 towns at first but later 14 towns. The busiest town was South Hedland, which is why he was stationed there.

13 Scenes of crime officers or forensic technicians are trained to and their purpose is to visit scenes of crime, both major and minor, and collect evidence from a scene. They then reproduce that evidence in court and their training takes five to seven years.

14 The most relevant clauses of the 2001 Agreement are clauses 18 and 19 (16 and 17 of the 1996 Agreement), which remained the same in all of the agreements.

15 Overtime (see pages 693-696 (AB)) which prescribes entitlements for working overtime and which, in its most relevant part, clause 18(1), reads as follows:-

"(1) An employee may be required to work reasonable overtime and such employee shall work overtime in accordance with such requirement."

16 This clause, and its equivalent in other agreements, was discussed in some detail in *Hill v Minister for Police and Another* (2004) 84 WAIG 3189 at 3199 (FB). As was observed in *Hill v Minister for Police and Another* (FB) (op cit), overtime entitlements are different from on call entitlements and exist because of a different clause to the on call clause in the agreements, in the 2001 Agreement, clause 18.

17 A police officer is "on call" within the meaning of the on call clause if "rostered, or directed by a duly authorised Senior officer, to be available to respond for duty outside the employee's ordinary working hours or shift".

18 It was common ground that Senior Constable Cornthwaite was paid a substantial amount, characterised as overtime, for hours which he worked out of ordinary hours.

19 The issue in this matter was whether Senior Constable Cornthwaite had been rostered or directed by a duly authorised senior officer to be available to respond forthwith for duty outside the employee's ordinary working hours or shift. If that were so, then Senior Constable Cornthwaite was placed on call and then remained contactable by telephone or paging system for all of that time unless working in response to a call or with the consent of his or her appropriate senior officer. The duly authorised officers (see exhibit 2) and the only duly authorised officers for the purpose of clause 19 were the relevant regional officer or branch head (see clause 19).

20 Although Detective Sergeant Ronald Francis Clarke, who was stationed at South Hedland, directed Senior Constable Cornthwaite to be available 24 hours a day, seven days a week, it would seem that that Senior Constable Cornthwaite did a lot of work for the detectives. Detective Sergeant Clarke was not an officer who had authority to roster or direct him to do on call work pursuant to clause 19 of the 2001 Agreement. It was common ground that Senior Constable Cornthwaite did a great deal of after hours work and was called out to do so.

21 The evidence for the appellant in this matter was that of Senior Constable Ian William Cornthwaite himself and retired Superintendent Winston Thomas Neville. There was also the evidence of Detective Sergeant Ronald Francis Clarke. This was the evidence on behalf of the appellant. On behalf of the respondents, Mr David Eacott, the then acting manager of the workplace relations branch in the police service, Superintendent William Matson who was the Pilbara district officer, and Senior Constable Cornthwaite's district officer from 12 June 1998 to January 1999. The district officer is the officer in charge of a police district. The district officer for the Pilbara district from January 1999 to February 2002, former Superintendent Raymond Charles Pottinger, also gave evidence. He was also Senior Constable Cornthwaite's district officer. Superintendent Catherine Mary Bullen gave evidence for the respondents too. She was an inspector and assistant district officer in the Pilbara district, from 4 December 2000 to January 2001 whilst Senior Constable Cornthwaite was at South Hedland.

22 It was not in dispute that Senior Constable Cornthwaite was the only forensic technician in the Pilbara district and that he was sometimes used in the Kimberley. There is no doubt that the demands upon him were great and those demands extended out of hours. It was not in dispute that he was called out after hours a great deal and that he responded to such calls. In respect to those calls he claimed and was paid overtime. He did not claim nor was he paid on call allowance. He was not rostered on call.

23 There is no doubt that frequent attendances out of hours caused inconvenience and disruption to him and his family. It was his evidence which was entirely credible that, because of this disruption, he decided to move from the Pilbara to Kalgoorlie where he was stationed at the time of the hearing at first instance.

24 At all material times, he was stationed at South Hedland where, as I understand the evidence, much of the work in the Pilbara existed. The station was commanded by a senior sergeant, first of all Senior Sergeant Kennington and then Senior Sergeant Salfinger. At South Hedland, whilst he was the forensic technician there, the officer in charge of detectives, three junior detectives, was Detective Sergeant Clarke. Needless to say Senior Constable Cornthwaite was required to work a great deal with detectives. It was not in dispute, and, indeed, it was clear, that the only officer who had the power to place an officer and,, indeed, Senior Constable Cornthwaite on call was the district officer and no one else, and not Detective Sergeant Clarke. That is the district officer was the only officer to whom was delegated the authority of the Commissioner to put officers on call. Not only that, but the evidence was also that Senior Constable Cornthwaite's superior was the senior officer in charge of the station at South Hedland, or that his superior officer in the sense of line manager was himself.

25 The question in this matter was a narrow one. The question was whether in accordance with clause 19(1) Senior Constable Cornthwaite was directed by a duly authorised senior officer to be available to respond forthwith for duty outside the employee's working hours or shift. The clause also provides, as I have observed, that an employee so directed must remain contactable by telephone or paging system for all of such time unless working in response to a call or with the consent of his or her appropriate senior officer.

26 It was clear that Senior Constable Cornthwaite was made available and made himself available many times out of hours to answer calls and did answer those calls. It is clear that he was provided with a mobile telephone to enable him to be contacted and that he was so contacted. That evidence flies in the face of the clear evidence that Senior Constable Cornthwaite's telephone number was made available and placed on the notice board in all police stations in the region for use by others. It was also not in dispute that any officer was able to and permitted to enlist his help.

27 I have already observed that the calls on his time were very frequent out of hours and that he was the sole forensic technician in the district, a huge district with huge distances to cover. He was also early, on in his period at South Hedland, provided with a police service motor car which he could use to commute in, so that if he were called out he had a vehicle ready to attend scenes of crime and to carry his equipment in. Superintendent Matson said in evidence that he approved the commuter use of the vehicle because Senior Constable Cornthwaite otherwise had to beg, borrow or steal another vehicle, and he needed a vehicle to transport his equipment. Senior Constable Cornthwaite did indeed use the vehicle. He travelled long distances at times, driving for eight hours at a stretch.

28 He was required to seek renewal of the approval being three months for the commuter use of the vehicle. It was approved by Inspector Mel Scott on one occasion on the basis that Senior Constable Cornthwaite required the vehicle because he was on 24 hour call out. Mr Pottinger did not sign approval on such a basis on another occasion. He could not remember why, but attributed it to his not agreeing with the wording.

29 The evidence of Detective Sergeant Clarke, and, to some extent, that of Senior Constable Cornthwaite on the one hand, and that of Mr Pottinger, Superintendent Matson and Superintendent Bullen on the other hand, was in conflict about the question whether the duly authorised officers had directed a call out.

30 Mr Neville's evidence was limited to the period before early 1995 and could not be of much assistance.

31 There is no doubt, on all of the evidence of Detective Sergeant Clarke, Mr Pottinger, Superintendent Matson and Superintendent Bullen that the question of the payment of an on call allowance was raised on a number of occasions with all district officers and Superintendent Bullen, then an inspector, by Detective Sergeant Clarke. It was not raised with them by Senior Constable Cornthwaite. In fact, it was not raised by Senior Constable Cornthwaite with Inspector Bullen, as she then was, with whom he had not infrequent discussions. Insofar as it was relevant, the evidence was that Senior Constable Cornthwaite was either subject to the supervision of the senior sergeant at South Hedland or to no one, and that Detective Sergeant Clarke was not his line manager, in any event. Detective Sergeant Clarke did sign some of his overtime claims, but it was denied by the witness that he had any right to. It was clear that on behalf of the detectives and Senior Constable Cornthwaite, Detective Sergeant Clarke asked that they be placed on call. No one else had the power to place them on call than the district officers. Detective Sergeant Clarke certainly did not.

32 It was the clear and unequivocal evidence that at no time was there a direction by any authorised officer ((ie) Superintendent Matson and then Superintendent Pottinger) that Senior Constable Cornthwaite be on call in those terms or at all. It is obvious that both gentlemen did not want increased costs for on call allowances in their budget. Further, both Mr Pottinger and the then Inspector Bullen were not keen to cause health and safety risks by having an officer called out out of hours to drive long distances.

33 However, the evidence of Detective Sergeant Clarke was more to the effect that he was told that all of the detectives were to be available to go on duty if required. The words "to be available" were used.

34 It was asserted by Detective Sergeant Clarke, but denied by Mr Pottinger, that Detective Sergeant Clarke was threatened by Mr Pottinger with an immediate transfer if he did not make himself available for after hours call outs. This state of affairs was known by Senior Constable Cornthwaite, according to that officer's evidence.

35 It was the clear evidence of the three witnesses for the respondents that Senior Constable Cornthwaite was expected to answer a call after hours if he were available. However, it was also their evidence that if he were not available he did not have to answer the call. He would certainly not have to answer the call if he had had liquor to drink. The evidence also was that on occasions he played bowls in other towns in the Pilbara, which might limit his availability, and was not available on a couple of occasions after having drunk liquor at send offs for other officers. There was no evidence that he was not contactable at any time. Indeed, he was contactable and made himself available in circumstances which were difficult socially or for family reasons. However, there was no evidence that he was required to be available after hours unless he had his superior's permission not to be.

36 The evidence for the respondents was that other officers were used or the scene was protected to await Senior Constable Cornthwaite's attention if he were unavailable.

37 The fact, of course, that an employee placed on call does not remain contactable does not mean that she/he is not on call, although the failure to remain on call may constitute a breach of the agreement by the employee concerned. The failure to remain on call may constitute a breach of the agreement.

38 The substance of Detective Sergeant Clarke's evidence was that it was made clear to him that he was in reality on call, as was Senior Constable Cornthwaite and the junior detectives, but the detectives and Senior Constable Cornthwaite were not to be paid for it.

39 It was also the case for the appellant that this was a situation from which it could be inferred that there was a direction by the two authorised officers to the detectives and Senior Constable Cornthwaite to place themselves on call and remain on call.

40 Senior Constable Cornthwaite claimed and was paid overtime and explained that he had not claimed an on call allowance because he knew that he would not get it.

41 The learned Magistrate found that no senior officer orally directed Detective Sergeant Clarke to direct Senior Constable Cornthwaite to be on call, and, on his own evidence, he was given no direction personally to be on call.

42 For the purposes of clause 19(1), there could be no valid direction by Detective Sergeant Clarke.

43 Notwithstanding that it was important that Senior Constable Cornthwaite was a highly trained officer whose availability was important to the proper investigation and prosecution of criminal matters, there were other officers in the district from Broome and the metropolitan area, as well as the district itself, who were used when he was unavailable on the uncontroverted evidence of Mr Pottinger and Superintendent Matson. This occurred when Senior Constable Cornthwaite was unavailable on holidays, although he was also called out when he was on holidays. Even though his telephone number was available in all police stations, and he was provided with a work vehicle and a mobile telephone, that was not conclusive proof that he was directed to be on call.

44 The document signed by him and the district superintendent which spans the period 27 October 1999 to 27 January 2000 which stated that the reason for the approval of the vehicle was "due to being available 24 hours a day to attend major and minor crime scenes throughout the Pilbara district, and to have necessary forensic equipment stored in vehicle" was important. However, on its own, and in the face of the other evidence, including the claims for payment of overtime and the direct denials which were accepted by the learned Magistrate, that evidence was not and could not be conclusive.

45 When Acting Inspector Walsh came to South Hedland in 1998 or 1999 to discuss the high expenditure of overtime and travelling allowances in the forensic office and in an attempt to reduce the budget, Senior Constable Cornthwaite responded with an application that he be placed on call allowance (see exhibit F), and this request was denied by Acting Inspector Walsh. It was not, on that evidence, reasonable for Senior Constable Cornthwaite to assume that he was required to be on call and attend call outs, given that he claimed and was paid overtime and for the other reasons which I have expressed. That is clear evidence that at least at that time he knew that he had not been directed to be on call and might well have recognised that he was not likely to be directed to be placed on call.

46 It is necessary to consider whether inferentially and having regard to all of the evidence Senior Constable Cornthwaite had been directed to be on call, notwithstanding the direct evidence of his superiors to the contrary.

47 First, there was no credible evidence of disciplinary action being threatened or taken if he did not respond to calls. It was open to find, on a fair reading of the evidence, that the denial of any threat having been made to Detective Sergeant Clarke of a transfer if the detectives and Senior Constable Cornthwaite were not available for calls should not be accepted. That means that the evidence that Senior Constable Cornthwaite was to be called out only if he were available was credible evidence, particularly since his own evidence was that he, at times, was not available. Further, there was no evidence that any action was taken when he was not available, for example when he was playing bowls in nearby Pilbara towns.

48 Second, whilst he did answer many calls after hours he claimed and was paid overtime for those calls, or at least for most of them.

49 Third, there was evidence that sometimes Senior Constable Cornthwaite was unavailable to attend, and I would also add that even if he were called out on holidays that in itself was not conclusive evidence that he was on call.

50 Fourth, the provision of the car and the telephone was consistent with his being called to duty after hours, which he was on many occasions and could be by any officer who had his number at the police stations in the Pilbara. However, it was still open to find that he was only required to answer if he were available.

51 Fifth, on a fair reading, there was nothing in Detective Sergeant Clarke's evidence which should have led to it being preferred to that of his senior officers when they in evidence said that they had denied his requests that he and other officers, including the detectives and Senior Constable Cornthwaite, be placed on call.

52 Sixth, no district officer, it was open to find, directed that he make himself available on call 24 hours a day seven days a week, and it is clear on the evidence that in fact, notwithstanding the huge demands on his time, that he did not do so. (It is not, of course, clear that being on call constituted being available 24 hours a day seven days a week. The determination of that question can await another day). There was also the evidence of Acting Inspector Walsh's specific rejection of Senior Constable Cornthwaite's own claim to be placed on call and there was no evidence that he subsequently requested that until much later.

53 Seventh, the regularity and quantity of late night calls was consistent with his being subject to meeting reasonable requests to work overtime for which he was paid. However, requests to work overtime, if they are frequent and unreasonable, may constitute evidence that an officer has been directed to work on call. In this case, the best evidence was that he was to make

himself available. I would also add that the evidence of his superiors that they would not have placed him on call because of the danger to his health and safety caused by the necessity to travel late at night and work or drive long hours on any regular basis was entirely credible given the size of the Pilbara region. It might have been different if the necessity for him to make himself available related only to the Port Hedland/South Hedland locality.

54 Eighth, there was unshaken evidence that the calling out of Senior Constable Cornthwaite could be delayed and that other persons from time to time did his work if he were unavailable. It is not incredible, notwithstanding that he was the only forensic officer available to cover such a huge area because it is patently the fact that he could not cover such a huge area at all times when he might have been expected otherwise to have done so.

55 There was no evidence sufficient as alleged from which an inference might be drawn on the balance of probabilities that he was directed to place himself on call.

56 For all of those reasons, ground 1 is not made out.

57 As to ground 2, there is no evidence that Senior Constable Cornthwaite's employers knew that he was on call, let alone that they acquiesced in his being on call.

58 Further, it is not evidence of a direction that Superintendent Matson or Mr Pottinger did not tell Senior Constable Cornthwaite that Detective Sergeant Clarke was not his line manager when they did not know that it was suggested to him otherwise. Whilst I agree that one may infer from the facts that a direction was given and that one might correctly hold that a person might direct another to convey to another officer that she/he was to be on call, then that is obviously a direction to the person concerned and nothing in the agreement or otherwise forbids it. For example, such a course might be taken by an officer who did not, for whatever reason, she/he thought of want to personally record the direction whilst still directing a person to do something.

59 In my opinion, too, it can be properly inferred from other facts and circumstances of what has occurred that a person is on call and has been directed to be on call, but on a consideration of all of the evidence, as I have said in relation to ground 1, it was not an error not to so infer in this case.

60 There is another obstacle which might exist in this case to the claim at first instance. I make no finding about it, however, because it was not raised. However, it is clear that clause 19(3) provides that no payment in accordance with subclause (2) of clause 19, shall be made ((ie) no payment by way of an on call payment) in respect to any period for which payment is otherwise made in accordance with the provisions of clause 18 when the employee is recalled to work. Thus, it would seem that if one is paid overtime for being recalled to work, one cannot claim or be paid on call payments under clause 16.

61 I agree in relation to ground 2(c) that the fact that a superintendent or other superior officer in the police service gives a direction that subordinate officers should be on call and has it conveyed through a junior officer whose job it is to ensure that that occurs is not necessarily delegating his power to direct. It is more likely that it is the passing of an order down the chain of command in a disciplined and hierarchical service. However, that will depend on the facts. In this case, it was denied by both Superintendent Matson and Mr Pottinger that any such direction was given. It is also fair to say that such a direction would be more likely to have been given on the evidence by it being conveyed by the officer in charge at South Hedland, namely the senior sergeant. Therefore, it was open to find, and correct to find, that no direction was given. In particular, on a fair reading of all of the evidence, such a finding was open, having regard to the evidence of Superintendent Matson and Superintendent Bullen, as well as that of Mr Pottinger. There was no reason, having regard to the principles in *Fox v Percy* (2003) 197 ALR 201 (HC) and *Devries v Australian National Railways Commission* [1993] 177 CLR 472 to find error in the Magistrate's findings based on his view of the credibility of the witnesses.

62 It is also necessary to say that the law relating to interest is as expressed by this Full Bench in *Foy v The Directors of Terraqua Pty Ltd* (2003) 83 WAIG 3319 (FB) and is not diluted by what was said in *Hill v Minister for Police and Another* (FB) (op cit).

FINALLY

63 For all of those reasons, the appeal is not made out. For all of those reasons, I would dismiss the appeal.

SENIOR COMMISSIONER A R BEECH:

64 I too would dismiss the appeal. The essential issue in the appeal is not whether Senior Constable Cornthwaite worked as though he was on-call. The issue before the Industrial Magistrate, and effectively before the Full Bench, is whether the on-call provisions of the EBA have been breached. That will require Senior Constable Cornthwaite to show that he worked in the manner that he did because he had been "directed by a duly authorised senior officer to be available to respond forthwith for duty outside of his ordinary working hours or shift".

65 Senior Constable Cornthwaite argued that he was directed to be on-call by Detective Sergeant Clarke. However, the evidence before the Industrial Magistrate, including from Detective Sergeant Clarke himself, is that he did not have the authority to direct Senior Constable Cornthwaite to be on-call even though Detective Sergeant Clarke was senior to him. On the evidence before the Industrial Magistrate, Senior Constable Cornthwaite was clearly correct. This is because the EBA requires the direction to be given by a "duly authorised senior officer". The position of Detective Sergeant is neither duly authorised to direct officers to be on call nor is it a senior officer position. Accordingly, Detective Sergeant Clarke's direction to Senior Constable Cornthwaite could not activate the direction required under the EBA.

66 Senior Constable Cornthwaite argued, therefore, that the direction given by Detective Sergeant Clarke was not Clarke's direction; rather that Detective Sergeant Clarke was passing on the direction which had been given to him by the two District Superintendents Superintendent Matson and Mr Pottinger to pass on to Senior Constable Cornthwaite. However, in their evidence before the Industrial Magistrate's Court Superintendent Matson and Mr Pottinger both deny that they required Senior Constable Cornthwaite to be on-call. There was thus a direct conflict in the evidence which was resolved by the Industrial Magistrate preferring the evidence of Superintendent Matson and Mr Pottinger over the evidence of Detective Sergeant Clarke.

67 It was entirely appropriate that the Industrial Magistrate reached that conclusion. For one thing, Detective Sergeant Clarke, had an interest in Senior Constable Cornthwaite being found to have been on-call. Also, there is other evidence including that Senior Constable Cornthwaite sought to be paid and was paid, at overtime rates on each occasion, which suggests that he did not consider he was on-call.

68 Furthermore, and significantly, when Senior Constable Cornthwaite was asked why he did not claim on-call allowance, he answered that it was because he knew that he would not get paid. This appears to be in direct contradiction to Senior Constable Cornthwaite's evidence that he had been directed by Detective Sergeant Clarke to be on-call. If Senior Constable Cornthwaite's evidence was to be accepted, the evidence would be that he had claimed on-call allowance because he had been directed to be on-call by Detective Sergeant Clarke, or alternatively and indirectly, Superintendent Matson or Mr Pottinger. Therefore, Senior Constable Cornthwaite's evidence that he did not believe he would be paid on-call allowance if he claimed it is rather suggestive of his understanding that he had not been directed by a duly authorised senior officer to be available to respond forthwith for duty outside of the employee's working hours or shift. This damages significantly Senior Constable Cornthwaite's case.

69 That damage is not remedied by the evidence of the provision of a motor vehicle or mobile telephone both of which would assist Senior Constable Cornthwaite being able to be contacted and able to return to work quickly if he was in fact available to work the overtime he was asked to work. There is, too, the evidence of at least one occasion when Senior Constable Cornthwaite was not available for immediate recall to work because he was at home minding the children and his wife had to return home before he could go to work.

70 The evidence shows that Senior Constable Cornthwaite is a most conscientious and skilled police officer of whom the WA Police Force and the wider community can be proud. His commitment to his work and his preparedness to be recalled to work sets a standard which others might find difficult to match. However, that cannot lead to the conclusion that Senior Constable Cornthwaite had been directed by a duly authorised senior officer to be available to respond forthwith for duty outside of his ordinary working hours when the balance of the evidence does not support such a conclusion. Indeed, the balance of the evidence supports the contrary conclusion. This is significant given that one extension of the evidence in this matter is that, on a future occasion, an employee in the position of Senior Constable Cornthwaite is able to refuse to work overtime if it is not reasonable overtime as that is defined in the EBA.

COMMISSIONER J F GREGOR:

71 I have had the opportunity of reading the reasons for decisions of his Honour the President and the Chief Commissioner in draft. I agree with them that this appeal must be dismissed. Whether Senior Constable Cornthwaite was entitled to be paid an on-call allowance as he claimed depends upon whether he was directed by a duly authorised senior officer to be available to respond forthwith for any duty outside his ordinary working hours or shift.

72 Senior Constable Cornthwaite argued that he had been so directed by Detective Sergeant Clarke. The finding of the Industrial Magistrate was that Detective Sergeant Clarke did not have the authority to direct Senior Constable Cornthwaite to be on call.

73 It is clear that the evidence of the Superintendents Matson and Bullen was that they had never given that authority. They gave evidence which His Worship found to be compelling, evidence which he favoured over that given by Detective Sergeant Clarke.

74 There is no indication of any error in the conclusion reached by the Industrial Magistrate. The key to whether there was the right to on call allowance, as claimed, is whether there was a direction by a duly authorised senior officer. The Industrial Magistrate found that essential ingredient was absent and therefore he dismissed the claim.

75 The argument that has been raised on appeal does not demonstrate that the learned Industrial Magistrate was wrong and therefore this Full Bench should dismiss the Appeal.

THE PRESIDENT:

76 For those reasons, the appeal is dismissed.

Order accordingly

2004 WAIRC 13686

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IAN WILLIAM CORNTHWAITE **APPELLANT** **-and-** MINISTER FOR POLICE AND COMMISSIONER OF POLICE, WESTERN AUSTRALIA POLICE SERVICE **RESPONDENTS**
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY SENIOR COMMISSIONER A R BEECH COMMISSIONER J F GREGOR
DELIVERED	THURSDAY, 16 DECEMBER 2004
FILE NO	FBA 38 OF 2004
CITATION NO.	2004 WAIRC 13686

Decision	Appeal dismissed
Appearances	
Appellant	Ms L Roche (of Counsel), by leave, and with her Mr R Horton, Industrial Officer
Respondent	Mr R Bathurst (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on the 11th day of November 2004, and having heard Ms L Roche (of Counsel), by leave, and with her Mr R Horton, Industrial Officer, on behalf of the appellant, and Mr R Bathurst (of Counsel), by leave, on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 16th day of December 2004 wherein it was found that the appeal should be dismissed, it is this day the 16th day of December 2004, ordered that appeal No. FBA 38 of 2004 be and is hereby dismissed.

By the Full Bench

(Sgd.) P J SHARKEY,
President.

[L.S.]

FULL BENCH—Unions—Application for Registration—

2004 WAIRC 13556

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IN THE MATTER OF AN APPLICATION BY THE RESTAURANT AND CATERING INDUSTRY ASSOCIATION OF EMPLOYERS OF WESTERN AUSTRALIA INC
	APPLICANT
	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH AND THE WESTERN AUSTRALIAN HOTELS AND HOSPITALITY ASSOCIATION INCORPORATED (UNION OF EMPLOYERS)
	OBJECTORS
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY SENIOR COMMISSIONER A R BEECH COMMISSIONER J H SMITH
DELIVERED	WEDNESDAY, 8 DECEMBER 2004
FILE NO/S	FBM 9 OF 2004
CITATION NO.	2004 WAIRC 13556

Catchwords	Industrial Law (WA) – Application to register an organisation of employers – Sufficient interest for objectors to be heard – Constitutional coverage – Unregistered organisation, overlap in eligibility for membership – Application granted – *Liquor Licensing Act* 1988 (as amended) - *Industrial Relations Act* 1979 (as amended) s6(a), (ab) and (e), s26(1)(a) and (c), s53(1), s54, s54(1), s54(2), s55(2), s55(3), s55(4), s55(4)(b)(iii), s55(4)(c) and (d), s55(5), s56(1), s58(3), s59(1), s59(2) - *Industrial Relations Commission Regulations* 1985 (as amended) – *Associations Incorporated Act* 1987, s18(6) – *Interpretation Act* 1984 (as amended), s56.
Decision	Application granted.
Appearances	
Applicant	Mr O Moon, as agent, and with him Mr T Bright
Objectors	Ms S Howard, on behalf of the WAHHA Mr A Gill, (of Counsel), by leave, on behalf of the LHMU

Reasons for Decision

THE PRESIDENT:

INTRODUCTION

1 This is an application by the above-named applicant unregistered organisation of employers. The applicant seeks registration pursuant to s54 of the *Industrial Relations Act* 1979 (as amended) (hereinafter called "*the Act*"), of itself as an organisation of employers. The applicant is an incorporated body, having been originally incorporated under s18(6) of the *Associations Incorporation Act* 1987 on 13 February 1984 and having changed its name on 2 September 2003 from the Restaurant and Catering Industry Association of Western Australia Inc. to Restaurant and Catering Industry Association of Employers of Western Australia Inc.

2 The objectors, the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch (hereinafter called "the LHMU"), and The Western Australian Hotels and Hospitality Association Incorporated (Union of Employers) (hereinafter called "the WAHHA"), are respectively an organisation of employees and an organisation of employers as organisation is defined in *the Act*. The Full Bench was satisfied that they had sufficient interest to be heard as objectors as organisations representing employees employed both by the LHMU and who would be employed by employers who were members of the above-named applicant if this application were successful, and by the WAHHA which has constitutional coverage of a number of categories of at least one employer of which the applicant seeks coverage. Further, the LHMU is a party to awards which purport to cover employers whom the applicant seeks to cover in its eligibility rule. There was no objection to the objectors being heard.

3 The eligibility rule of the applicant, which is rule 7.1, in its relevant parts, the first two lines, reads as follows:-

> "Members of the Association shall consist of Sole Traders, Business Partnerships and Corporations who are employers of labour in the "industry" as defined subject to the following …".

4 "Industry" is defined in rule 2.2 of the applicant's rules as follows:-

> ""Industry" means Licensed and Unlicensed Restaurants, Lunch Bars and Coffee Lounges, Fast Food Outlets and Take Away, and Licensed and Unlicensed Caterers throughout the State of Western Australia, engaged in the preparation for consumption, serving, selling or supply of meals or foodstuffs and or services whether in conjunction with the sale and the serving or selling of liquor to the general public or any segment thereof as described under the Australian and New Zealand Industrial Classification Standard."

THE APPLICATION - STATUTORY COMPLIANCE

5 There were two statutory declarations with annexures declared by Mr Terry John Bright, secretary and chief executive officer of the applicant, on 2 and 28 September 2004 respectively. There was also a quantity of documentary evidence. There was also evidence from the bar table not objected to, and sworn evidence from Mr Bright.

6 The application was duly sealed in accordance with the rules of the applicant.

7 All of the relevant regulations contained in the *Industrial Relations Commission Regulations* 1985 (as amended) were complied with.

8 It is quite clear, and I am satisfied and find, that the applicant is an unregistered organisation, because it is certainly not registered, consisting of two or more employers, and, in fact, about 435 employers (see s54(1) of *the Act* and Mr Bright's evidence).

9 Next, I am satisfied that according to its rules, rule 4.1, the applicant is an unregistered organisation associated for the purpose of protecting or furthering the interests of those employers (see s54(1)(b) of *the Act*).

10 I am also satisfied and find on the evidence, pursuant to s54(1)(a), that the employer members of the applicant unregistered organisation have in the aggregate throughout the six months immediately preceding the date of application for registration employed on an average, taken per month, not less than 200 employees (see Mr Bright's evidence at page 36 of the transcript, and, in fact, 15,000, which is an estimate, but was not challenged and was the evidence of someone with knowledge of the affairs of the members.

11 I am satisfied and find that the applicant has complied with s55(1) of *the Act*. I am satisfied and find that the organisation has complied with the requirements of s55(1) in that the relevant notice required by s55(2) was published in the Western Australian Industrial Gazette on 22 September 2004 ((2004) 84 WAIG 3059-3060).

12 Further, since the notice was published more than 30 days before the hearing of this application on 25 October 2004, then I am satisfied that and find that s55(3) has been complied with.

13 S55(4) requires that notwithstanding that an organisation complies with s53(1) or s54(1) of *the Act* or that the Full Bench is satisfied for the purposes of s53(2) or s54(2), the Full Bench is required to refuse an application by the organisation under the section unless it is satisfied as to a number of prescribed facts, things and requirements. The requirement is mandatory (see s56 of the *Interpretation Act* 1984 (as amended)).

14 I am satisfied and find, on the statutory declaration of Mr Bright of 2 September 2004 (exhibit 7), and the annexures thereto that:-

(a) Reasonable steps have been taken to adequately inform the members:-

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

(ii) Of the proposed rules of the organisation.

(b) The members or any of them may object to the making of the application or to those rules or any of them by forwarding a written objection to the Registrar.

(c) Having regard to the structure of the organisation, and any other relevant circumstances, the members have been afforded a reasonable opportunity to make such an objection (see s55(4)(b)(iii) of *the Act*).

(d) In relation to the members of the organisation there has been no ballot of the type conducted under s55(4)(c) and since no objection has been taken by any member less than 5% of the membership has objected to the making of the application or to the rules or any of them (see s55(4)(c)).

(e) In relation to the alteration of the rules of the organisation, those rules provide for reasonable notice of any proposed alteration and reasons therefor to be given to the members of the organisation and for a reasonable opportunity for the members to object to any such proposal (see s55(4)(d) and rule 34.1).

15 I am also satisfied and find, having regard to the rules, that the rules of the organisation relating to elections for office provide that the election shall be by secret ballot and conform with the requirements of s56(1) of *the Act* and are such as will ensure, as far as practicable, that no irregularity can occur in connection with the election.

16 I am also satisfied that s56(1) has been complied with in every relevant respect, and that s56(1)(a) also has been complied with.

17 I am therefore satisfied and find that all relevant statutory provisions and regulations have been complied with by the applicant. I should add that the objection of the LHMU on that basis was not pressed by Mr Gill.

18 I now turn to s55(5) of *the Act*. That provides:-

> "Notwithstanding that an organisation complies with section 53(1) or 54(1), the Full Bench shall refuse an application by the organisation under this section if a registered organisation whose rules relating to membership enable it to enrol as a member some or all of the persons eligible, pursuant to the rules of the first-mentioned organisation, to be members of the first-mentioned organisation unless the Full Bench is satisfied that there is good reason, consistent with the objects prescribed in section 6, to permit registration."

19 It should also be read with s26(1)(a) of *the Act* which requires the Commission, inter alia, to act according to equity, good conscience, and the substantial merits of the case, s26(1)(c) which requires the Commission to have regard for the interests of the persons immediately concerned whether directly affected or not and, where appropriate, for the interests of the community as a whole, and s6(a), (ab) and (e) of *the Act* which reads as follows:-

"The principal objects of this Act are —

(a) to promote goodwill in industry and in enterprises within industry;

…

(ab) to promote the principles of freedom of association and the right to organise;

…

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

BACKGROUND

20 The applicant has been a registered incorporated body since 1984 when it was incorporated as an association. Its coverage is in the hospitality industry and currently it has 330 licensed restaurant employer members out of a total of 435 actual members. It is not clear how many licensed caterer members it has or what sort of premises the other employers who are members are engaged in. It is clear, however, that some are unlicensed premises and some are licensed and unlicensed caterers.

21 The applicant has and does provide industrial and other advice to its members. It also provides other assistance to its members and generally represents them. Its members include caterers who have special facility licences under the *Liquor Licensing Act* 1988 (as amended) (hereinafter referred to as "*the Liquor Act*"). Caterers may not hold licences at all but they seek a permit for particular functions also. The membership also includes proprietors of unlicensed premises and unlicensed caterers.

22 For some years until 1994, the applicant occupied part of the objector, the WAHHA's premises and paid rent. Its members also received industrial representation services as part of what was called a secretarial service for a fixed fee which was paid annually by the applicant to the WAHHA. Since a year or so after 1994, the applicant has occupied its own premises and provided its own services to its members.

23 The WAHHA has been registered in this Commission as an organisation of employers since 1984. There are and have been differences between the applicant and the WAHHA in relation to one or two matters, one being the ability to sell liquor without serving a meal to the customer at the same time, and also the question of whether smoking should be permitted in premises. The licensed restauranteurs, through the applicant, are against that being permitted. There is some element of trade competition between them. However, there is also a great deal of agreement on matters of mutual interest, as I will mention hereinafter referring to the evidence of Mr Bright.

24 Notwithstanding its representation of and advice to its members, the applicant is not and cannot be a party to relevant awards or industrial agreements and cannot and does not represent its members in the Commission because it is not registered as an organisation under *the Act*.

25 The WAHHA, pursuant to its rules, rule 5 in particular, has coverage of what are called "licensee members" ((ie) persons or corporations who are the holders of a hotel licence, tavern licence, limited hotel licence, restaurant licence, or "such other licence as may be accepted by State Council and as granted by the Licensing Court of W.A. or its successor ….") (see rule 5(a)).

26 The coverage really extends to all persons or corporations who hold licences granted by the Liquor Licensing Court, provided the licence is "accepted" by the WAHHA's State Council.

27 There is no eligibility for membership of the WAHHA for any employer who conducts premises which are not licensed under *the Liquor Act*, under the WAHHA rules.

28 On the undisputed evidence, the WAHHA had, at the material times, 516 members, of whom 40 are licensed restauranteurs, of whom about 13 - 20 are members who subscribe for service only. There are 50 caterer members with special facility licences and others who are licensed restauranteurs registered among the general membership.

29 There is provision in the WAHHA rules for a special division of licensed restauranteurs, but there is no evidence that that has any operational existence.

30 The LHMU is an organisation of employees which has coverage, inter alios, of persons employed in hotels, motels, tourist complexes and/or resorts, clubs, cabarets, convention centres, taverns, winehouses, restaurants, cafes, eating houses, tearooms and coffee lounges, but not establishments which primarily provide a takeaway service where not alcohol is sold or served, with one or two exceptions. Further, the LHMU covers persons employed by caterers (see, generally, rule 3(7) (a), (c) and (d)). Relevantly, therefore, this is the organisation of employees which would represent the employees employed by members of the applicant, except, I would think, for clerical and trades employees, for example, were this application granted. It already represents those persons employed by members of the WAHHA. It is to be noted that the WAHHA is a named respondent to the *Motel, Hostel Service Flats and Boarding House Workers' Award* 1976 (No 29 of 1974), a named respondent and a party to the *Hotel and Tavern Workers' Award* 1978 (No R31 of 1977), and a named respondent to the *Restaurant, Tearoom and Catering Workers' Award* 1979 (No R48 of 1978) (hereinafter referred to as "*the Restaurant Award*").

31 The LHMU is a party to all of those awards and is the sole union party. Insofar as the WAHHA has been named as a respondent to these awards, it has no authority under its rules to cover employers who conduct premises which are not licensed. Indeed, there was no evidence that any organisation seeks to represent those employers.

32 Clause 4 – Scope of the *Hotel and Tavern Workers' Award* 1978 (No R31 of 1977) would not afford that coverage.

33 Clause 4 – Scope of *the Restaurant Award* reads as follows:-

"This Award shall apply to all workers employed in the callings described in Clause 21 of this award, in Restaurants and/or Tearooms and/or Catering Establishments and/or by Catering Contractors, as defined in Clause 6 of this Award."

34 That clause refers to both licensed and unlicensed premises. The WAHHA has no right to enrol as a member an employer not conducting a licensed premises. That is clear because of its restriction to licensees who are the proprietors, by definition, of licensed premises.

35 Clause 6 of *the Restaurant Award* contains a definition of restaurants, tearooms and catering establishments and contractors.

36 The proposed eligibility rule of the applicant, rule 7, I have already referred to above. On a fair reading, and it was part of its case, the applicant seeks to cover employers whether they are sole traders, business partnerships or corporations. However, all must be employers.

37 The employers, to be eligible, must be employers of labour in the industry as defined ((ie) licensed and unlicensed restaurants and other unlicensed premises described as lunch bars and coffee lounges, fast food outlets and takeaway premises). Employers would also be eligible who employ, as licensed and unlicensed caterers throughout the State of Western Australia, persons "engaged in the preparation for consumption serving and selling or supply of meals or foodstuffs whether in conjunction with the sale and the serving or selling of liquor to the general public or any segment thereof …".

38 It was clear that the parties, where the term "licensed" was used, meant licensed under *the Liquor Act*. There was no evidence that any other organisation, as defined, represents or purports to represent employers who conduct any of the above-named unlicensed premises. It was not contended, nor could it be, that the WAHHA can cover any employer who conducts unlicensed premises.

39 It seems to have been accepted on behalf of the objectors and the applicant that the only area of overlap in eligibility for membership would occur, if this application were to be granted, because both the WAHHA and the applicant would be empowered by their rules to enrol and represent licensed restauranteurs and licensed caterers ((ie) caterers holding any sort of liquor licence including a special facility licence and restauranteurs holding any sort of liquor licence). That was the only real point of objection by both objectors.

40 The membership numbers of the applicant and the WAHHA are of some relevance. The applicant at the time of the hearing had about 435 members of whom 340 members were employers and the proprietors of licensed restaurants. At the material times, the WAHHA had 516 members of whom 40 are licensed restaurant members and 50 hold special facility licences as caterers. In the category of employer as a licensed restauranteur, 13 to 20 members are subscription members ((ie) they are not full paying members and pay only for a service and are not entitled to vote). It was made clear by Mr Moon on behalf of the applicant that the applicant is interested only on behalf of its members in one award, *the Restaurant Award*. Indeed, under its rules, the applicant would not have any right to cover persons within the scope of the other two awards to which we were taken on the hearing of this application.

41 It is fair to observe that the WAHHA has represented persons industrially since 1984 in this Commission and in other respects since it was founded in 1897. As I understand the case for the applicant, it was that the applicant had a membership of and was representative of the interests of licensed restauranteurs and also licensed caterers for many years and that the only industrial involvement of licensed restauranteurs was small, the applicant's members being represented by the WAHHA only in return for a fee paid by the applicant. There was one incident where the applicant's members voted in an election for the president of the WAHHA but that was an isolated act and one of very doubtful legitimacy. It was not suggested otherwise. The WAHHA was only contracted to conduct its secretariat ((ie) the applicant's secretariat). What that meant, as I understood it, was that the applicant, having been represented in industrial matters by the WAHHA for a fee for some years, ceased after about 1994-1996 to do that and the applicant which has carried the responsibility for the industrial advice to and representation of its members which for some time it arranged through the WAHHA for a fee, now seeks to be registered to represent its members fully industrially in this Commission. I would emphasise that the only organisation authorised by its rules to represent them industrially and cover licensed restaurants since 1984 is the WAHHA. The award which deals with licensed restaurants as well as unlicensed restaurants is an award to which the WAHHA is a respondent.

42 It was the clear evidence given from the bar table, and not denied, both on behalf of the LMWU and the WAHHA, that they had been engaged in industrial matters in the hospitality industry by way of negotiation and the seeking and updating of awards for some years. It was also the case for the applicant, consistent with s6(a),(ab) and (c) of *the Act* – objects, that the authority for registration applied for would promote goodwill in industry and promote principles of freedom of association and the right to organise. It was also the case for the applicant that, notwithstanding the overlapping, which all admitted would exist were this application granted, it would not, given the industry's concern, be such as to be practicable to discourage the overlapping.

43 The WAHHA should have no part in industrial representation of or negotiation of any award on behalf of unlicensed caterers, restauranteurs, etc. because it has no constitutional coverage.

44 The other awards, which refer only to licensed premises and which we were told by Mr Moon were not the concern of the applicant, refer only to licensed premises and are clearly matters within the WAHHA's power and right of representation conferred on it by its eligibility rule.

45 There was a question of the effect of the registration of the applicant on the industry and on the LHMU and the WAHHA. It was not at all disputed that the WAHHA has developed and implemented "policies and procedures" leading to agreements appropriate to the needs of the industry and has provided members with advice, research and advocacy in matters affecting the hospitality industry employees. However, the fact was that that was permissible only in relation to those whom it might legitimately represent in accordance with its eligibility rule, which is the licensed sector of the industry.

46 It was not in dispute that there is a history over a number of years of industrial agreement making and negotiation between the WAHHA and the LHMU. I would, however, observe that the overlap which will undoubtedly arise were this application successful, could arise only in relation to licensed restaurants and caterers, not unlicensed restaurants or other similar premises or unlicensed caterers.

47 Significantly, the evidence was, and it was not disputed, that the applicant is already providing advice, research and advocacy services to its members in that section of the hospitality industry (see Mr Bright's evidence (page 42 of the transcript)). If the application is granted, the overlap will interfere with the right of the WAHHA to represent its members, mainly licensed caterers and restauranteurs, but only in the event that they became members of the applicant which would have limited coverage extending to any employers conducting licensed premises. However, it was strongly asserted by the LHMU that there would be a limit on the ability to reach agreements because there would be another party and a third party and that always makes things more difficult. There would, it was contended, be less certainty.

48 It was asserted, too, that, if granted, the application would create confusion in matters relating to rights and duties of employers. Such an assertion on behalf of the objectors, it was said, was unfounded and subjective. It was, of course, clear on the evidence that there are and were some differences between the applicant and the WAHHA about trading which might relate to competition between the two. In particular, questions of smoking and the ability for restauranteurs to serve liquor apart

from meals they disagree on. However, as Mr Bright said, and it was not contradicted "… I suppose 95% of our issues would be fought on a joint basis. We are a member of a number of business associations and fight the same fight." As against this, there was evidence from the bar table that there may be disputation amongst bodies themselves about what is contained in the award and it is easier to deal with matters when there is a "peak body" such as the WAHHA.

49 Ms Howard, who appeared for the objector, WAHHA, made it clear to the Full Bench that if there was no application to cover licensed restaurants and caterers, there would be no objection to the application. Indeed, on behalf of her principal, she proposed an exclusion of all employers whose coverage was claimed by the applicant, but who were eligible to be members of the objector, WAHHA. There are caterer members of the applicant, but it was not said in evidence how many ((ie) licensed caterers).

OVERLAP

50 I wish now to turn to the question of overlap, a matter which affects the question of whether the application should be permitted.

51 The question arises whether there is good reason, consistent with the objects of *the Act*, prescribed in s6, to permit registration.

52 That question also arises because s55(5) of *the Act* mandatorily directs the Full Bench, even if s54(1) is complied with, to refuse an application under s55 ((ie) a s54 application), inter alia, "if a registered organisation whose rules relating to membership enable it to enrol as a member some or all of the persons eligible, pursuant to the rules of the first mentioned organisation, to be members of the first mentioned organisation unless the Full Bench is satisfied that there is good reason, consistent with the objects prescribed in s6 to permit registration". Full Benches of this Commission have often considered s55(5) (see for example *Re an application by the Health Services Union of Western Australia (Union of Workers)* (2004) 84 WAIG 3203 (FB)).

53 Ipp J in *Ex parte Burswood Resort (Management) Ltd v FLAIEU* (Nos 2267 and 2329 of 1993) (unreported) delivered 20 January 1994 (Supreme Ct of WA) considered this matter. I apply what His Honour said as strongly persuasive authority. On His Honour's dicta, my view of the operation of s55 of *the Act* is as follows.

54 There is nothing which limits the circumstances to which the Full Bench may have regard under s55(5) of *the Act* in determining whether "good reason" exists, save and except that the good reason must be consistent with the objects of *the Act* prescribed in s6.

55 "Consistent with" does not mean "advance" and the Full Bench may have regard to matters which do not advance the objects set out in s6 of *the Act*, as long as those matters are consistent with those objects.

56 Once it is apparent an application to register an organisation or to alter its eligibility rule will result in an overlapping of eligibility for membership, the Full Bench must determine that there is "good reason" within the meaning of s55(5) of *the Act* to permit registration, it must determine that it is not practicable within the meaning of s6(e) to discourage overlapping.

57 Upon the Full Bench deciding that it is not practicable in the circumstances to discourage overlapping, it can determine that there is good reason consistent with the objects prescribed in s6(e) of *the Act* to permit registration. If, however, it is practicable to discourage overlapping, then there could not be good reason, consistent with s6(e), to permit registration.

58 It is abundantly and admittedly clear that there will be overlapping if this application is granted because both the WAHHA and the applicant will have constitutional coverage of licensed restaurant employers and licensed caterer employers.

59 Therefore, it has to be decided whether it is practicable to discourage overlapping within the meaning of s6(e) of *the Act*. I am not able to find a judicial definition of "practicable" which is relevant. The word "practicable", however, means in its most apposite definition (see "*The Macquarie Dictionary*" 3rd Edition):-

> "capable of being put into practice, done or effected, especially with the available means or with reason or prudence; feasible"

60 The question is whether it is practicable or not to discourage overlapping ((ie) in part whether the circumstances mean that the Full Bench can determine whether it is within reason or prudent and feasible to determine that it cannot discourage overlapping).

61 The most relevant facts are these, as I find them.

62 Both the WAHHA and the applicant have, in modern times, agreed or arranged or countenanced the applicant representing licensed restauranteurs, with the exception of a few. The WAHHA has had coverage of these persons since 1984 by virtue of its rules which were then registered in this Commission. However, as an unincorporated association and as a registered organisation, each respectively has purported to cover the membership. The WAHHA, in its industrial representation of licensed restaurant employers, has negotiated and is itself a named respondent to *the Restaurant Award*. During this time, the applicant has not been a registered organisation and cannot represent licensed restauranteurs and licensed caterers in the Commission. However, the facts of this matter point to an entirely different practical situation which is the result of the will of the members of the applicant organisation, most of whom are licensed restauranteur employers.

63 For quite some years, up until 1994-1996, both entities co-existed as different entities. It was the case that there was a de facto ceding of representation during this time of coverage of licensed restauranteurs to the applicant by the arrangements between them. The same might be said of some licensed caterers. The WAHHA, although it had constitutional coverage of licensed restauranteurs and licensed caterers actually provided services to the applicant on behalf of its licensed restaurant members representing them for a fixed annual fee, paid not by them as its members but by the applicant organisation on behalf of its own members who were licensed restauranteurs and some of whom were licensed caterers. In other words, the WAHHA provided a service to an association of restaurant employers and caterers being licensed restauranteurs and licensed caterers who were eligible for membership of the WAHHA as if they were not members of the WAHHA, and as members of the applicant association. I so find. I also find that its members were not considered to be members of the WAHHA and were not members of the WAHHA, except for one president's election to which I have referred to above.

64 By implication, I find that the same applied to some licensed catering members of the applicant. Unlicensed members, of course, would not at all be the subject of any overlapping and were never eligible for membership of the WAHHA.

65 Since 1994-1996, not only has the applicant occupied different premises from the WAHHA, but it has no longer availed itself of the WAHHA's service providing its own industrial advice to its members and generally representing them as their industry body. As at the time of hearing the application, the nature of the applicant's actual membership was that, out of 435 members it had about 340 licensed restaurant employers, a very large percentage, giving a very strong flavour of an association, the majority of whose members were licensed restaurant proprietors and employers. There is undoubtedly licensed restaurant membership of the WAHHA, about 40 (see page 69 of the transcript), but except for about eight and some who are general members, 13 - 20 are not full members. Thus, the fact that WAHHA rules 12 and 14 provide for a separate division for these sort of members and the WAHHA is of no assistance to it. That compares with the 340 licensed restauranteurs who are members of the applicant. Whilst it is said that the registration of another organisation will make it more difficult to negotiate matters, I cannot see that that is so, having regard to the fact that the applicant is the organisation which represents the majority of licensed restaurant employers who have joined the applicant and the WAHHA. It is quite clear from that that licensed restaurant proprietors in substantial numbers do not wish to be members of the WAHHA and wish to have their own "industry" body which has existed since 1984 registered as an organisation under *the Act*. I so find.

66 The Full Bench was not told, however, how many members of the applicant had caterers' licences, although the indisputed evidence was that some members had.

67 As to licensed caterer employers, there are about 50 with special facility licences who are members of the WAHHA and some of those would be licensed caterers. There is no evidence that there are more or less who are members of the applicant. It is difficult to say, therefore, that there are so many of those persons in the applicant organisation that they will be properly represented by it compared to the WAHHA.

68 I am not, however, persuaded that the granting of the application would have an adverse effect on the WAHHA's ability to represent members. I say that because there is no persuasive evidence of that and, in fact, it has not represented licensed restauranteurs industrially in any numbers except at the instance of the WAHHA for some years, certainly not since 1994-1996, and for the reasons which I have expressed above. It has also purported to represent unlicensed restauranteurs and caterers without authority. Further, the overlap would relate only to employers bound by one award, *the Restaurant Award*, and not to all employers bound by that award, were the applicant to become a party to that award or to successfully apply for a new award. Nor would such an overlap apply to more than one award. Therefore, it is difficult to see how this would create difficulties in the representation, hinder negotiations, or increase disputation. Indeed, there is no evidence from which I could infer that it would at all increase disputation. Indeed, there is no evidence of existing disputation.

69 I acknowledge, however, that generally it is easier to negotiate if there are less parties. I make the same finding in relation to the assertion of the WAHHA's ability to efficiently reach agreements suitable to the hotel and hospitality industry would be affected.

70 I would observe, significantly, that the hotel industry is a different one and this application seeks no coverage of persons engaged in it. Indeed, the application seeks coverage only of persons in licensed and unlicensed restaurants and similar premises, as well as licensed and unlicensed caterers. I am not satisfied that the application may cause confusion about matters relating to the rights and duties in the hotel industry. If there is a hotel industry, as seems to be acknowledged by the WAHHA objection, then the registration of the applicant can have no effect on the industrial instruments which relate to it because it will have no coverage of hotel proprietor employers, as I have said. As to the hospitality industry, which was not defined except under the rules of the applicant, there is no coverage of any employer in it except for licensed and unlicensed restaurants, coffee lounges, fast food outlets, takeaways and licensed and unlicensed caterers sought by the applicant.

71 The scope for the new organisation to come into conflict with the WAHHA would be limited for that reason and limited to the narrow scope of its eligibility clause.

72 In any event, even though there are differences about matters such as smoking in restaurants and licensed premises, the right to sell liquor in restaurants without a meal and the latter as a matter of competition, there is undisputed evidence which I accept that there was a great deal on which there was agreement between the applicant and the WAHHA. There was no evidence that there could not be some agreement reached or negotiations taking place between the applicant and the LMWU, or that there would be disputation caused by this application being granted.

73 Therefore, for the following reasons, namely that:-

(a) The overlapping of membership relates to an area of membership in the area of licensed catering and licensed restaurants which for years have been effectively the preserve of the applicant and not the WAHHA.

(b) In every respect, except representation in the Commission, the applicant has been the representative body for those it seeks to cover for many years.

(c) This application seeks to complete what is in fact a fait accompli accepted by the WAHHA and the applicant.

(d) There is no persuasive evidence that disputation will occur, given the past industrial role of the applicant.

(e) This will not affect the LMWU adversely because already the applicant has made some attempt to contact it and there was no evidence that there will be major difficulties.

(f) In any event, there is no objection to registration of the applicant in relation to unlicensed premises and caterers.

(g) There is evidence that the applicant's members have had industrial representation except in the Commission and they will be able to have it in the Commission if the application is granted.

(h) That such is more likely to be advantageous to the unions and to the number of members of the applicant who have voted with their feet not to have industrial representation by the WAHHA.

(i) The fact of the matter, persuasive but not determinative, is that the members or the bulk of them, licensed restaurant employers, have elected for years not to be represented by the WAHHA which has few members in that category. In part, they are competitors, too, of the WAHHA and I instance the difference about conditions pertaining to the sale of liquor in restaurants, but they are not daggers drawn and seem to be able to act in agreement a lot of the time, on the evidence.

(j) The WAHHA does not, in reality, represent licensed restaurant employers because of the small numbers to which they were able to point as members.

(k) I am not persuaded that it is the case with licensed caterers that the same has occurred.

(l) Currently, unlicensed premises and caterers have no industrial representation by any organisation, there is no evidence that they do, and there are members of the applicant who will benefit from that.

74 For all of those reasons, it is not practicable, as I find, to discourage overlapping insofar as it relates to all categories of employer sought to be covered by the applicant, save and except licensed caterers. There is not sufficient evidence to make a finding to that effect in relation to licensed caterers.

75 The next question is whether there is good reason consistent with the objects of *the Act* contained in s6 to permit registration.

76 In my opinion, it is consistent with s6(a) of *the Act* in that, to make the order would promote goodwill in industry and, in particular, in enterprises within industry because the licensed and unlicensed food purveyors and caterers would be represented by an organisation which they prefer and have supported for years in relation to their interests generally, not merely their industrial interests.

77 There is also good reason, consistent with s6(ab) of *the Act*, to make the orders sought because the right to organise as an organisation of employers is being recognised in the case of an unregistered organisation which already represents a substantial number of employers in an industry which might well be identified as a separate part of the hospitality industry.

78 Next, for the same reason, the formation of a representative organisation of employers (s6(e) of *the Act*) is consistent with the objects of *the Act* so as to justify making the order sought. Further, since at the same time, it is not practicable to discourage overlapping of eligibility for membership of the WAHHA and the applicant, it is consistent with that object, s6(e), to make the order sought.

79 In particular, the organisation will be able to represent employers who are not currently represented by their own organisation as a matter of fact. Accordingly, I am satisfied that, though there will be an overlap, there is good reason consistent with the objects prescribed in s6 of *the Act* to permit registration and I am not therefore required under s55(5) to refuse it.

THE MERITS OF THE APPLICATION

80 It is quite clear, for all of the reasons which I have expressed above, that the equity, good conscience and substantial merits of the case lie with the applicant and that its interests, those of its members and those who are eligible to be its members, are served without detriment to the WAHHA and will be by the order which it is sought that the Full Bench make. The exception to that is licensed caterers about whose interests and numbers there is a paucity of evidence.

NAME OF THE APPLICANT

81 I now turn to the name of the applicant to which the objection was taken.

82 First, I am satisfied and find that, by the use of the word "employers" in its name, the registered name clearly indicates that the organisation is an organisation of employers.

83 Next, s59(2) of *the Act* is therefore complied with as I find. S59(1) prohibits the Full Bench from authorising the registration of an organisation under a name identical with that by which any other organisation has been registered. There is no suggestion and/or no evidence that that was the case. The name is not prohibitable on that ground.

84 Next, by s59(2) of *the Act*, the Full Bench is prohibited from authorising the registration of an organisation under a name which, by reason of its resemblance to another organisation or body or for any other reason is, in the opinion of the Full Bench, likely to deceive or mislead any person. In my opinion, the applicant is unlikely to mislead anyone by its name that it is anything but an association of restaurant and catering industry employers. It does not purport to mention anything else in its name. However, that is subject to what I say hereinafter.

FINALLY

85 I would, for those reasons, make an order authorising the registration of the applicant as an organisation of employers, the rules of the organisation being those rules. However, I would require the rules to be amended to exclude from the eligibility rule employers of licensed catering businesses, since there is insufficient evidence that the applicant represents them, particularly in terms of numbers, nor am I satisfied that s55(5) of *the Act* requires me to do anything because of the paucity of evidence but to refuse the application. This requires consideration by the applicant of whether it wishes to make an application under s58(3) to exclude that class of person from the eligibility rule and the definition of "industry" in its rules. Otherwise the applicant would not be authorised to be registered with the rules in their current form. However, if the latter step was taken, the effect of s58(3) would require that to be considered. I would adjourn the matter to a date to be fixed whilst the parties consider these matters.

CHIEF COMMISSIONER A R BEECH and COMMISSIONER J H SMITH:

86 The facts and legal principles that should be applied in determining whether this application should be granted are set out by His Honour in his reasons for decision. Except in relation to His Honour's findings and conclusions in respect of caterers we agree with his findings and conclusions. We also add the following comments in relation to licensed restaurants.

87 The principal issue for consideration arises from the overlap in the proposed constitutional coverage of the applicant and the WAHHA: the Full Bench shall refuse an application if the rules allow it to enrol as a member some or all of the persons eligible to be members of another registered organisation unless the Full Bench is satisfied that there is good reason, consistent with the objects of the Act, to commit registration. The extent of the overlap is in the area of licensed restaurants and possibly some catering organisations which may be holders of special facility licenses.

88 As to licensed restaurants, on the evidence of the WAHHA given from the bar table it has 40 members who are licensed restaurant owners out of a total of 516 members.

89 On the evidence of Mr Bright the applicant has 435 members. Three hundred and thirty of those members are licensed restaurant owners which is approximately half of the licensed restaurants in the State. Further, Mr Moon, appearing on behalf of the applicant, made a valid submission that some of the WAHHA members in this category may be in licensed hotel premises.

90 Therefore, a significant proportion of licensed restaurant holders are members of the applicant and not the WAHHA. Notwithstanding the long prior registration of the WAHHA and the fact that it has on occasions represented licensed

restaurateurs in matters before the Commission, the evidence is that the significant majority of such establishments do not belong to the WAHHA but to the applicant. The existing registration of the WAHHA does not mean that it represents the vast majority of licensed restaurants; the evidence is to the contrary. One of the principal objects of the Act is to encourage the formation of representative organisations of employers and employees and their registration under this Act and to discourage, so far as practicable, overlapping of eligibility for membership in such organisations. On this evidence we find that it would be consistent with the first part of that object for the applicant to be registered.

91 The second part of the object is able to be met by granting exclusion in the applicant's rules excluding from membership any person eligible to belong to the WAHHA. However, this suggestion by the WAHHA was resisted by the applicant and understandably so; it would have the effect of providing that the vast majority of the applicant's members would not be eligible to be members of the applicant as registered when the evidence shows that those members have a strong desire to be members of it. For that reason, it is not practicable within the terms of that principal object to exclude from the applicant's membership members of, or persons eligible to be members of, the WAHHA.

92 As to licensed catering businesses we accept the evidence of Mr Bright that the applicant has 62 caterers as members. It was not stated what proportion of these are licensed. The association has specifically recognised caterers in its name since February 1984. The area of overlap pressed by the WAHHA in its objection included special facilities licences that some catering businesses may have. We were informed by Ms Howard that the WAHHA has "over 50" members in a special facilities license grouping. How many of this group of 50 are licensed caterers was not stated. The WAHHA's registered rules do not denote licensed catering businesses as a category of membership as such although its objects include reference to "the liquor, hospitality, catering and entertainment industries". It is thus not clear what is covered within the term "special facilities license grouping". Further, pursuant to s.46 of the Liquor Act special facility licences can be granted for a prescribed purpose. Regulation 9A of the Liquor Licensing Regulations 1989 prescribes 14 purposes for which a special facility licence may be granted. These include catering but also include purposes such as theatre or cinema, reception or function centre, foodhall and room service restaurant. Consequently at law it is not open to assume that because a member of the WAHHA holds a special facility license they are a licensed caterer.

93 We consider that the evidence of the applicant's catering membership discharges the onus upon it and that the evidence overall does not reveal a significant area of overlap in licensed catering members which counter-balances the evidence of the catering membership of the applicant.

94 On that basis, we find that the balance of the evidence favours the registration of the applicant notwithstanding the professional manner in which the WAHHA has conducted its industrial relations advisory and representation roles. Had the licensed restaurant and catering membership of the WAHHA been of a more significant level, this conclusion would not have been as readily open given the terms of the Act.

THE PRESIDENT:

95 For those reasons, the application is granted.

Order accordingly

2004 WAIRC 13612

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IN THE MATTER OF AN APPLICATION BY THE RESTAURANT AND CATERING INDUSTRY ASSOCIATION OF EMPLOYERS OF WESTERN AUSTRALIA INC
	APPLICANT
	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH AND THE WESTERN AUSTRALIAN HOTELS AND HOSPITALITY ASSOCIATION INCORPORATED (UNION OF EMPLOYERS)
	OBJECTORS
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	SENIOR COMMISSIONER A R BEECH
	COMMISSIONER J H SMITH
DELIVERED	WEDNESDAY, 8 DECEMBER 2004
FILE NO/S	FBM 9 OF 2004
CITATION NO.	2004 WAIRC 13612

Decision	Application granted.
Appearances	
Applicant	Mr O Moon, as agent, and with him Mr T Bright
Objectors	Ms S Howard, on behalf of the WAHHA
	Mr A Gill, (of Counsel), by leave, on behalf of the LHMU

Order

This matter having come on for hearing before the Full Bench on the 25th day of October 2004, and having heard Mr O Moon, as agent, and with him Mr T Bright, on behalf of the applicant and Ms S Howard, on behalf of the WAHHA, and Mr A Gill (of Counsel), by leave, on behalf of the LHMU, as objectors, and the Full Bench having reserved its decision on the matter, and the reasons for decision being delivered on the 8th day of December 2004, it is this day, the 8th day of December 2004 ordered and declared as follows:-

(1) THAT the Registrar be and is hereby authorised to register a new organisation to be known as the "Restaurant and Catering Industry Association of Employers of Western Australia Inc".

(2) THAT the rules of the said organisation filed herein are declared to be the rules of the said organisation "Restaurant and Catering Industry Association of Employers of Western Australia Inc".

By the Full Bench

(Sgd.) P J SHARKEY,
President.

[L.S.]

FULL BENCH—Procedural Directions and Orders—

2004 WAIRC 13688

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LINDA JANE AUBURN
	APPELLANT
	-and-
	THE CALINGIRI SPORTS CLUB INC
	RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY COMMISSIONER S J KENNER COMMISSIONER S WOOD
DELIVERED	FRIDAY, 17 DECEMBER 2004
FILE NO/S	FBA 41 OF 2003
CITATION NO.	2004 WAIRC 13688

Decision	Appeal dismissed
Appearances	
Appellant	No appearance
Respondent	Mr D F Johnston, as agent

Order

This matter having come on for hearing before the Full Bench on the 17th day of December 2004, and there being no appearance by or on behalf of the appellant, and having heard Mr D F Johnston, as agent, on behalf of the respondent, and the Full Bench being satisfied and having found that, pursuant to s.27(1)(d) of the *Industrial Relations Act* 1979 (as amended), both parties having been duly served with notice of the proceedings and that the Full Bench could and should proceed to determine the matter in the absence of the parties;

AND WHEREAS since no step had been taken in the proceedings by or on behalf of the appellant since the 21st day of November 2003 to prosecute the appeal;

AND WHEREAS no explanation was advanced why that was so, and there was no evidence that any further step would be taken, the Full Bench found that the appeal herein should be dismissed for want of prosecution;

AND the Full Bench having determined that the appeal should be dismissed for want of prosecution it is this day, the 17th day of December 2004, ordered that appeal No. FBA 41 of 2003 be and is hereby dismissed.

By the Full Bench

(Sgd.) P J SHARKEY,
President.

[L.S.]

2004 WAIRC 13696

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WA BRANCH
	APPELLANT
	-and-
	WEST AUSTRALIAN NEWSPAPERS LTD
	RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER A R BEECH COMMISSIONER S J KENNER
DELIVERED	MONDAY, 20 DECEMBER 2004
FILE NO/S	FBA 46 OF 2004
CITATION NO.	2004 WAIRC 13696

Decision	Appeal discontinued by consent.

Order

The Notice of Appeal herein, having been filed in the Registry of the Commission on the 3rd day of November 2004, and having been listed for hearing before the Full Bench on the 20th day of December 2004, and the parties herein, on the 17th day of December 2004, having filed in the Registry of the Commission a Proposed Minute of Consent Order to discontinue the appeal, and the parties having waived their rights conferred on them by s35 of the *Industrial Relations Act* 1979 (as amended), it is this day, the 20th day of December 2004, ordered and declared, by consent, as follows:-

(1) THAT there be leave granted and leave is hereby granted for appeal No FBA 46 of 2004 to be discontinued.

(2) THAT the Full Bench refrain from hearing the said appeal further.

By the Full Bench

(Sgd.) P J SHARKEY,
President.

[L.S.]

COMMISSION IN COURT SESSION—Matters dealt with—

2004 WAIRC 13455

HOSPITAL SALARIED OFFICERS' AWARD 1968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF WORKERS)
	APPLICANT
	-v-
	ROYAL PERTH HOSPITAL AND OTHERS
	RESPONDENTS
CORAM	COMMISSION IN COURT SESSION CHIEF COMMISSIONER W S COLEMAN SENIOR COMMISSIONER A R BEECH COMMISSIONER P E SCOTT
DATE	MONDAY, 29 NOVEMBER 2004
FILE NO	P 39 OF 1997(B)
CITATION NO.	2004 WAIRC 13455

Result	Application discontinued

Order

WHEREAS on the 18th day of March 2004, the Commission in Court Session issued an Order which in order 3 said that subclause 5(e) of Schedule 1 of the Order shall be reviewed by the Commission in Court Session following six months' operation; and

WHEREAS at a conference convened on the 26th day of November 2004, the parties agreed:

(i) That the classification and grading structure for Clinical Psychologists above Grade 2 as determined by the Commission in Court Session shall continue to be dealt with by way of Operational Circular pending the finalisation of the implementation of such structure.

(ii) That following such finalisation the parties shall discuss further the matter of the classification and grading structure being reflected in an Operational Circular and the terms of the circular.

(iii) That where no agreement is reached on the continuation of the Operational Circular either party may apply to the Commission to amend the Hospital Salaried Officers' Award 1968 to include the classification and grading structure for Clinical Psychologists;

NOW THEREFORE the Commission in Court Session, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders:

1. THAT subject to the terms of this Order the classification and grading structure for Clinical Psychologists above Grade 2 shall continue to be published by the Employer in an Operational Circular in accordance with subclause 5(e) of Schedule A of the Hospital Salaried Officers' Award 1968.

2. THAT following the conclusion of the implementation of the classification and grading structure for Clinical Psychologists the parties shall have discussions as to the continuation of or amendment to the Operational Circular.

3. THAT should the parties not agree to the continuation of the classification and grading structure being published by way of the Operational Circular either party may make application to the Commission to amend the Hospital Salaried Officers' Award 1968.

4. THAT this application otherwise be and is hereby discontinued.

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

PRESIDENT—Matters dealt with

2004 WAIRC 13492

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-and-
	WEST AUSTRALIAN NEWSPAPERS LTD
	RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	THURSDAY, 2 DECEMBER 2004
FILE NO/S	PRES 6 OF 2004
CITATION NO.	2004 WAIRC 13492

Catchwords	Industrial Law (WA) – Application seeking stay of operation of a decision of the Commission – Extrinsic material to qualify a meaning – Serious issues to be tried – Balance of convenience – Application dismissed - *Industrial Relations Act* 1979 (as amended), s26(1)(c), s44, s49(11)
Decision	Application dismissed
Appearances	
Applicant	Mr L Edmonds, as agent
Respondent	Mr D J Cronin (of Counsel), by leave

Reasons for Decision

THE PRESIDENT:

INTRODUCTION

1 This is an application by the above-named applicant organisation of employees (hereinafter referred to as "the AFMEPKIU") made pursuant to s49(11) of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*").

2 I will refer to the abovenamed respondent employer, West Australian Newspapers Ltd, hereinafter as "WA Newspapers".

3 By the application, the AFMEPKIU seeks an order for the stay of operation of part of the decision of the Commission made by a single Commissioner in application No CR 116 of 2004 on 19 October 2004, pending the hearing and determination of an appeal by the AFMEPKIU against that decision.

4 The appeal, No FBA 46 of 2004, was instituted by notice of appeal filed in the Commission on 3 November 2004, and, according to the declaration of service filed herein, was duly served on 5 November 2004.

5 The particulars of the application are lengthy and I do not reproduce them here.

6 The application was opposed by WA Newspapers which filed a notice of answer on 25 November 2004.

7 I am satisfied and find that the appeal was duly instituted and instituted within time and that the AFMEPKIU, as respondent in the proceedings at first instance, is and was, at all material times, a person entitled to appeal against the decision and has sufficient interest within the meaning of s49(11) of *the Act* to make this application.

DECISION APPEALED AGAINST

8 The decision appealed against is in the form of a declaration and order that, formal parts omitted:-

> "(1) DECLARES that the Applicant has the lawful right to employ part time employees in classifications covered by The Printing (Newspaper) Award 1979;
>
> (2) ORDERS that the Applicant can immediately appoint six part time publishing hands."

GROUNDS OF APPEAL

9 The grounds of appeal are as follows:-

> "1. The Commision (sic) made an eror (sic) when it determined that the clauses 9, 11 and 17 of the West Australian Newspapers Production Employees (Enterprise Bargaining) Agreement 2003 No AG 216 of 2003 were clear and unambiguous at paragraph 35 of the decision.
>
> 2. The Commission made an error when it failed to consider the conduct of the parties during the course of negotiations when determining the meaning and effect of the terms of the West Australian Newspapers Production Employees (Enterprise Bargaining) Agreement 2003 No AG 216 2003 at paragraph 35 of the decision.
>
> 3. The Commission made an error when it failed to characterise the claim by the employer to engage part-time employees as an "extra claim" within the meaning of clause 23 of the West Australian Newspapers Production Employees (Enterprise Bargaining) Agreement 2003 No AG 216 of 2003 at paragraph 33 of the decision.
>
> 4. The Commision (sic) made an eror (sic) when it determined that the terms of the West Australian Newspapers Production Employees (Enterprise Bargaining) Agreement 2003 No AG 216 of 2003 allowed the employer to engage part-time employees in classifications covered by The Printing (Newspaper) Award 1979."

BACKGROUND

10 A number of matters were referred for hearing and determination pursuant to s44 of *the Act* by the Commissioner at first instance on 24 June 2004. The matters referred for hearing and determination were as follows:-

(a) WA Newspapers and the AFMEPKIU are in dispute over WA Newspapers' intention to employ six part-time publishing hands.

(b) WA Newspapers claims that it should be permitted to appoint part-time publishing hands without delay.

(c) WA Newspapers seeks:-

(i) A declaration that WA Newspapers has that lawful right to employ part-time employees in classifications covered by the *Printing (Newspaper) Award* 1979;

(ii) An order stipulating that WA Newspapers can immediately appoint six part-time publishing hands.

11 The AFMEPKIU opposed the appointment of part-time publishing hands.

12 The Commissioner had to consider whether the proposal to engage six part-time employees went beyond the scope of the changes in work contemplated by the express terms of *The West Australian Newspapers Production Employees (Enterprise Bargaining) Agreement* 2003 (No AG 216 of 2003) (hereinafter referred to as "the 2003 Agreement"), in particular clause 23 of that agreement.

13 The applicant at first instance was WA Newspapers which said that the appointment of six part-time publishing hands:-

(a) Was the most efficient way of getting the work done;

(b) Was a flexible employment option that was lawful and fair;

(c) Would assist women and people with family responsibilities to gain permanent employment in the newspaper publishing industry;

(d) Would provide opportunities for part-time work for WA Newspapers' ageing workforce.

It claimed to be authorised to do so by clauses 9 and 11 of the 2003 Agreement.

14 The Commissioner at first instance decided that the introduction of six part-time publishing hands was a change in the way work was performed to facilitate productivity and efficiency within the meaning of clause 9 of the 2003 Agreement. She also found that the additional hands would improve productivity and result in the efficient use of labour. She did not accept that the AFMEPKIU's proposal would improve productivity and efficiency as the three additional full-time publishing hands would have to be rostered on to work at times when there would be insufficient work for them to carry out. Further, the three additional employees would not be able to be rostered to cover all of the work during the peak periods, she found. She also found that the evidence established that WA Newspapers' proposal was a measure to address excessive overtime.

15 The Commissioner therefore construed that the claim for part-time employment as not being an extra claim within the meaning of clause 23 of the 2003 Agreement.

16 In the end, the Commissioner found that the words of clauses 9, 11 and 17 of the 2003 Agreement are clear and unambiguous. Consequently, the conduct of the parties cannot be used to qualify the meaning of these clauses. In any event, at the time the negotiations took place, the 2000 Agreement was in place which contained the same provisions as clauses 9 and 11 of the 2003 Agreement and also provided for pay increases to be paid during the life of the agreement in consideration of further increases in productivity and efficiency in the same manner as clause 17 of the 2003 Agreement.

PRINCIPLES

17 The principles which apply to applications for a stay are long settled and were referred to by the Commission, constituted by the President, in *Director General, Department of Justice v CSA* (2002) 83 WAIG 47 at 49 and *DVG Morley City Hyundai v Fabbri* (2002) 82 WAIG 2440 at 2441 in the following terms:-

> "19 The principles which apply to applications for a stay were most recently expressed by the Commission, constituted by the President, in *Bamboo Holdings Pty Ltd v Halligan* 82 WAIG 966 at 967-968, and are as follows:-
>
> ""The principles which apply to applications for a stay were most recently expressed by the Commission, constituted by the President, in *Stanley and Others t/a Communique Communications v Bryant* 82 WAIG 785 at 787 and are as follows:-

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

The principles by which applications pursuant to s.49(11) of the Act are determined are well settled in this Commission. Amongst others, the reasons for decision in *AWU v BHP Iron Ore Ltd* 81 WAIG 406 properly expresses them at pages 407-408:-

I reproduce hereunder the relevant extract from *CSA v Director General, Department of Transport* 80 WAIG 2855 at 2856:-

These principles have been laid down in a number of cases, including *Gawooleng Dawang Inc v Lupton and Others* 72 WAIG 1310, *Director General of the Ministry for Culture and the Arts v CSA and Others* 79 WAIG 670 and *City of Geraldton v Cooling* 80 WAIG 1751.

It is for the applicant to establish that the stay should be granted. It is, of course, an underlying principle that the successful party is entitled to the fruits of her/his/its order, award or declaration.

For the applicant to succeed, it must be established that there is a serious issue to be tried, that the balance of convenience favours the applicant and that other factors consistent with the application of s.26(1)(a), s.26(1)(b) and/or s.26(1)(c) of the Act, if they exist, require that the application be granted.

If these ingredients exist, then exceptional circumstances exist which warrant the granting of the application as a matter of equity, good conscience and the substantial merits of the case. (I say that to further explain the principles.)

The need to prevent there being any more uncertainty than is necessary, in industrial matters, is important, too (see *Re Moore; Ex parte Pillar* [1991] 65 ALJR 683 at 685 (HC)).

I would add the following further observations.

Before weighing other factors the court needs to be satisfied that there is an arguable case on appeal, (in this jurisdiction a serious issue to be tried also described as a strong case), to ensure that the appeal has not been lodged simply to delay execution (see *Croney v Nand* [1999] 2 Qd R 342 at 348-9 (CA)).

If an appeal may be nugatory a stay will be granted. An appeal will be nugatory when because of the respondent's financial state there is no reasonable prospect of recovering monies paid to him pursuant to the judgment.

An appeal will be nugatory too, if the appellant can show that without a stay of execution he/she will be ruined (see *Lino Type Hell Finance Ltd v Baker* (Practice Note) [1992] 4 All ER 887 at 888).

Inconvenience and the possibility of risk to the appellant's property do not constitute special circumstances (see *Cox v Simeon* (SC (WA) Full Court Lib No 5063 7 September 1983, unreported)).

The onus is on the applicant, of course, to demonstrate a proper basis for a stay, as I have observed above, which will be fair to all the parties and the court will weigh the balance of convenience and the rights of the parties as I have observed above (see *Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685 at 694).

The mere preservation of the status quo, nor by themselves, the merits of the appeal are not sufficient. Further, it is not sufficient to constitute special circumstances that the appeal is arguable, is being pursued in good faith and with expedition and that the stay will not prejudice anybody (see *Hamersley Iron Pty Ltd v Lovell* (No 2) (1998) 20 WAR 79 and 80, 88 (FC)).

Appropriate circumstances may exist within the context of the balance of convenience if serious injury will result to the applicant unless a stay is granted (see *McBride v Sandland* (No 2) (1918) 25 CLR 369 and 375) and, as I have observed, an appeal will be nugatory when, because of the respondent's financial state, there is no reasonable prospect of recovering monies paid to him/her pursuant to the judgment, but appropriate circumstances are not limited to that situation and will exist whenever there is a real risk that it would not be possible for a successful appellant to be restored substantially to his/her former position (see *Federal Commission of Taxation of Commonwealth of Australia v The Myer Emporium Ltd* (No 1) [1986] 160 CLR 221 at 223).""

20 To amplify these principles I would also quote the following paragraph from the judgement of Anderson J in *Hamersley Iron Pty Ltd v Lovell*(No.2) (1998) 20 WAR 79 at pages 89-90 (FC) where His Honour said:-

"As I understand the cases, however, unless a stay is necessary to preserve the subject matter or integrity of the litigation in the broader sense described above the circumstances will not be regarded as sufficiently exceptional to enliven the discretionary jurisdiction to provide a stay. Only if the applicant can show that a stay is necessary to that end will the high Court go on to consider matters such as whether the application for special leave has a prospect of success, whether a stay will occasion hardship to the respondent, where the balance of convenience lies, and so on. I think such matters are always treated as secondary to the question whether a stay is necessary to preserve the subject matter or integrity of the litigation. They come into play only if it appears that the refusal of a stay will substantially deprive the applicant of the benefit to be derived from the appeal. Thus, an applicant may fail to obtain a stay even if the applicant can show that unless there is a stay the appeal will be futile."

21 Further, at page 91 His Honour said:-

"So far as I can see, those cases in which the court has given consideration to such matters such as hardship, the balance of convenience, the prospect that special leave to appeal may be granted and so on are all cases in which the first hurdle has been cleared by the applicant. They are cases in which, speaking broadly, an appeal would be futile unless a stay was granted. I would include in this category of cases *Moulleux Pty Ltd v Girvan NSW Pty Ltd* (1991) 13 Leg Rep 24; *De L v Director–General, Department of Community Services* (NSW) (1997) 136 ALR 201; *Bryant v Commonwealth Bank of Australia* (1996) 70 ALJR 306.""

SERIOUS ISSUES TO BE TRIED

18 The substance of the grounds of appeal on the merits is that clauses 9, 11 and 17 of the 2003 Agreement were not correctly construed by the Commissioner at first instance. It is not, of course, clear from the grounds of appeal how it might be said that those clauses ought to be construed. The Commissioner reproduced the clauses in their relevant parts in the Commissioner's decision at first instance. The Commissioner determined that these clauses were clear and unambiguous.

19 The AFMEPKIU submits that there is a serious issue to be tried because the Commissioner erred in law when she determined that it was not permissible to look at extrinsic material to qualify the meaning of the clauses. In interpreting an award, if the terms are clear and unambiguous, it is not permissible to look to extrinsic material to qualify that meaning (see *Norwest Beef Industries Ltd and Derby Meat Processing Co Ltd v AMIEU* (1984) 64 WAIG 2124 at 2127 (IAC) per Brinsden J).

20 For the AFMEPKIU it is submitted that the clauses are capable of more than one interpretation, and therefore are not clear and unambiguous.

21 First, on a fair reading, the clauses would not seem to be either unclear and/or unambiguous. Indeed, it was not submitted to me in what respects or why it might be said that the clauses were unclear and/or unambiguous. Indeed, at first blush only, and I do not look beyond that because I am not required to, the clauses commit the parties to changes pursuant to an introduction to change procedure, an increase in wages which recognises the potential for further increase in productivity and efficiency, and a general commitment to make changes during the duration of the agreement organisationally and in work practices. The pay increases contemplate changes and the achievement of productivity. I paraphrase the clauses. In addition, clause 22 contains an acknowledgement by both parties of their concern about excessive overtime and their agreement to having discussions about these concerns. Those clauses, on a fair reading, do not readily raise a bar to the declaration made.

22 The question before the Commissioner was whether the proposal to engage six part-time employees to do work, otherwise done on overtime by full-time employees, went beyond the scope of the changes in work contemplated by the agreement in those clauses. I must say again, at first blush, that I see nothing in those clauses and on the arguments put to me which would not contemplate what is proposed, but that is not a matter for me to decide, and I make that observation only in the context of what I am required to decide on this application.

23 Accordingly, there was no ambiguity or lack of clarity which permitted the Commissioner to consider the industry, the custom and practice in the workplace or the conduct of the parties in the workplace in order to determine the meaning of the clauses, or, indeed, the intent of the parties expressed in negotiations or otherwise.

24 This is because both parties in the agreement committed themselves by the agreement to making changes during the duration of the agreement, as I have said above. Both parties committed themselves to the achievement of efficiency and productivity. The pay increases committed to contemplated those changes and both of the parties expressed their concern about excessive overtime, and undertook to discuss this problem further in meetings.

25 In any event, there was no answer in the submissions of the AFMEPKIU to the finding that at the time when the negotiations took the 2000 agreement was in place. That agreement, the Commissioner also found, contained the same provisions as clauses 9 and 11. That agreement also provided for pay increases to be paid during the life of the agreement in consideration of further increases in productivity and efficiency in the same manner as clause 17 of the agreement.

26 It was therefore impermissible that the Commissioner, as she correctly found, resort to extrinsic evidence of any kind.

27 There was no submission further how and in what particular manner any such extrinsic evidence might assist an interpretation of the clauses.

28 For those reasons, I find that there was not established to be any serious issue to be tried or any strong case raised by grounds 1 and 2 of the appeal.

29 As to ground 3, no real submission was made concerning the merit of that ground. In addition, there was no answer or no cogent answer to the submission of WA Newspapers that the no extra claims clause in the agreement is limited to claims outside the express terms of the agreement, and, in this case, the provisions construed clearly form part of the agreement and have full effect in no way limitable by the no extra claims clause. Thus, it was not established that any serious issue or strong case on appeal was raised by that ground.

30 As to ground 4, nothing was said to establish that that ground raised a serious issue to be tried and in part, at least, what that ground alleges is covered by what I have said about grounds 1 and 2.

BALANCE OF CONVENIENCE

31 The AFMEPKIU's case was that the balance of convenience operated in favour of the AFMEPKIU on this application because the implementation of the decision would result in a reduction of regular overtime being worked by their members, which it was not denied was the stated objective of WA Newspapers.

32 Next, it was submitted that, as a result, the AFMEPKIU's members would suffer a loss in income and would suffer accordingly if overtime were reduced. Further, the AFMEPKIU submitted that detriment would be suffered by any employees engaged as part-time employees who might subsequently be terminated if the appeal were successful. It was also submitted that the introduction of part-time employees to the workplace had potential to create industrial unrest.

33 Next, it was submitted that WA Newspapers has not employed part-time employees for the last 171 years, and further delay of six to eight weeks whilst the appeal is heard and determined is not a substantial delay.

34 As against that, it was submitted that no serious injury will result to the AFMEPKIU or its members if a stay were not granted.

35 It was submitted, too, that because concerns about safety measures had been expressed by the AFMEPKIU and its members because of the high level of overtime worked, the employment of part-timers would reduce excessive overtime and the concomitant risk to health and safety. Clause 22 of the 2003 Agreement bears out that the parties had concerns and agreed to have meetings to discuss them.

36 The AFMEPKIU also asserted that the lead up to Christmas would be the busiest period for WA Newspapers, and it would be prejudiced by excessive overtime costs if it could not act on the decision at first instance. There is no evidence of the amount of such overtime costs and I do not accept that as significant.

37 It was also submitted that WA Newspapers has advertised for part-time employees and has a number of suitable candidates to fill those positions. It was also submitted that part-time employees will not be prejudiced because they will be informed of the appeal and their positions can be offered conditional upon the outcome of the appeal.

38 This ought to be seen against the background that the case upon appeal is not, at least on the submissions put to me in these proceedings, a strong one. Further, and in any event, whilst the AFMEPKIU's members will suffer some decrease in income, it is not likely to be a great decrease over what will be a relatively short period between, and, further, it is not clear, on the evidence, what that decrease will be over that period.

39 There is no evidence that the period between the date of the order and the issuing of the Full Bench's decision will result in any substantial loss of income to the AFMEPKIU's members or, on the other hand, the loss of any excessive amount in overtime payments to WA Newspapers.

40 The implementation of the decision will result in a reduction of overtime and of income, as I have observed, but the losses are not established to be so great or serious as to militate in favour of the AFMEPKIU.

41 In addition, as to the question of part-time employees and any detriment to them if a stay was not granted, they can, I accept, easily be employed, and should be employed, if they are to be employed, on the basis that they will have a very short-term employment or not, subject to the outcome of the appeal.

42 As to the submission that, if the order is not stayed, the introduction of part-time employees has the potential to create unrest in the workplace, that submission is irrelevant. It is irrelevant because the Commission has made an order and declaration and that is an end of the matter. In any event, there is no evidence of any likely unrest.

43 Of course, the appeal would self-evidently not be futile merely because a stay is not granted, subject to the rights of the appellant on appeal.

44 Further, the appeal would patently not be rendered futile if I do not make an order staying the operation of the decision at first instance.

45 In my opinion, it has not been established that the balance of convenience rests with the AFMEPKIU in these proceedings. It has not been established that WA Newspapers should be deprived of the fruits of its judgment.

FINALLY

46 The equity, good conscience and substantial merits of the case have not been established to lie with the AFMEPKIU. There are no exceptional circumstances which would justify a stay. It has not been established that its interests should be advanced over the interests of WA Newspapers (see s26(1)(c) of *the Act*).

47 I therefore, for those reasons, dismissed the application.

2004 WAIRC 13444

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-and-
	WEST AUSTRALIAN NEWSPAPERS LTD
	RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	MONDAY, 29 NOVEMBER 2004
FILE NO/S	PRES 6 OF 2004
CITATION NO.	2004 WAIRC 13444

Decision	Application dismissed
Appearances	
Applicant	Mr L Edmonds, as agent
Respondent	Mr D J Cronin (of Counsel), by leave

Order

This matter having come on for hearing before me on the 29th day of November 2004, and having heard Mr L Edmonds, as agent on behalf of the applicant and Mr D J Cronin (of Counsel), by leave, on behalf of the respondent and having determined that the application herein should be dismissed, and having determined that reasons for decision will issue at a future date, it is this day, the 29th November 2004, ordered that application No PRES 6 of 2004 be and is hereby dismissed.

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

2004 WAIRC 13732

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE DIRECTOR GENERAL, DEPARTMENT OF JUSTICE
	APPLICANT
	-and-
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	TUESDAY, 21 DECEMBER 2004
FILE NO	PRES 8 OF 2004
CITATION NO.	2004 WAIRC 13732

Catchwords	Industrial Law (WA) – Application for a stay of the order pending appeal – General principles relating to stays – Breach of *Public Sector Standards* – Intervention in selection process – Application dismissed – *Industrial Relations Act* 1979 (as amended), s26(1)(c), s49(11), s80E(1), (5) and (7) – *Public Sector Management Act* 1994, s8, s9, s97(1)(a) – *Public Sector Standards - Western Australian Public Sector Code of Ethics*
Decision	Application dismissed
Appearances	
Applicant	Mr R J Andretich (of Counsel), by leave
Respondent	Mr B Cusack, as agent

Reasons for Decision

THE PRESIDENT:

INTRODUCTION

1 This is an application by the above-named applicant employer, the Director General, Department of Justice (hereinafter referred to as "the Director General"), made pursuant to s49(11) of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*").

2 I will refer to the above-named respondent, The Civil Service Association of Western Australia Incorporated, which is an organisation of employees, as that term is defined in *the Act*, as "the CSA".

3 By the application, the Director General seeks an order for the stay of operation of whole of the decision, constituted by an order of the Commission, constituted by the Public Service Arbitrator, given on 6 December 2004 in application PSACR 51 of 2002. I do not produce the particulars of the application pursuant to s49(11) here.

4 The order made at first instance, formal parts omitted, reads as follows:-

> "That Neville Jones be appointed to the status of a Level 7 employee within the respondent's operations with an effective date of 25 December 2002 within seven (7) days of the date of this order."

5 The application at first instance was opposed by the Director General and this application is opposed the CSA, which was the applicant in the proceedings before the Commission at first instance.

6 I am satisfied and find that the appeal is duly instituted and instituted within time and that the applicant, as the respondent in the proceedings at first instance, is and was, at all material times, a person entitled to appeal against the decision and has sufficient interest within the meaning of s49(11) of *the Act* to make this application.

BACKGROUND

7 Mr Neville Jones, whom I take to be a member of the respondent organisation of employees, applied in the Department of Justice (hereinafter referred to as "the Department") for an advertised position of Level 7, Principal Policy Officer. He was interviewed for the position by a selection panel on 10 September 2002. Afterwards, the panel recommended that he be appointed to the position. The Executive Director of the Department approved the panel's recommendation on 7 October 2002. On 11 October 2002, a letter was sent to Mr Jones by a recruitment officer from the Department advising him that he was the successful applicant and would be appointed, subject to any appeal pursuant to the *Public Sector Standards*.

8 No appeals were lodged.

9 On 24 October 2002, Mr Jones was advised by the chairperson of the selection panel, Mr Bill Cullen, that the Director General had forwarded a memorandum to him expressing concerns about Mr Jones' work performance and requesting "that referee reports be obtained from named persons chosen by the respondent himself".

10 Mr Jones received a letter from Ms Stephanie Withers, the Director of Human Resources in the Department, dated 5 December 2002, in which she advised him that he would not be appointed to the advertised position. That letter further advised him that the vacancy would not be filled and that the Department was seriously considering abolishing the position, which in due course they did.

11 Indeed, in the letter (paragraph 9 of the reasons for decision at first instance), he was advised that referee reports provided by Mr Thompson and Dr Kay indicated that there were "issues around his appointment to the position".

12 Only after he received this letter, was Mr Jones given access to the referee reports. He gave evidence, at first instance, that the allegations contained in them were without substance. He had worked in the Department for 23 years. He, as at the time of the hearing, was a Level 6 Senior Policy Officer Court Services Division, but he had acted in Level 7 and 8 positions.

GROUNDS OF APPEAL

13 The appeal which was instituted by the Director General against the decision is appeal No FBA 51 of 2004. It was filed in the Commission on 6 December 2004. For convenience, I reproduce the grounds of appeal as follows:-

> "1. The Commissioner in her capacity as the Public Service Arbitrator erred in law in finding she had jurisdiction to consider the Application and to order the appointment of Mr Jones to the status of a Level 7 employee.
>
> PARTICULARS
>
> (a) Section 80E(7) of the Industrial Relations Act provides an Arbitrator does not have jurisdiction to inquire into or deal with any matter in respect of which a procedure referred to in section 97(l)(a) of the Public Sector Management Act is or may be prescribed under that Act, such a procedure having been prescribed in the Public Sector Management (Examination and Review Procedures) Regulations in connection with Recruitment, Selection and Appointment to the Public Sector.
>
> 2. The Commissioner erred in law in finding in her capacity as the Public Service Arbitrator she had jurisdiction to judicially review the Respondent's decision not to appoint Mr Jones.

PARTICULARS

(a) The Public Service Arbitrator is not vested with jurisdiction either generally or specifically by section 80E(5) of the Industrial Relations Act to inquire into and deal with an industrial matter solely by way of judicial review.

(b) The Public Service Arbitrator misapplied the decision of the Full Bench in Civil Service Association of Western Australia Incorporated v. Director General Department of Justice [2004] WAIG 869 in finding the Public Service Arbitrator had such jurisdiction, when the ratio of the decision was that the Arbitrator could inquire into whether the statutory conditions for the exercise of a power had been complied with when the exercise of the power was itself an industrial matter.

(c) Appointment decisions made under Section 64 of the Public Sector Management Act are not amenable to judicial review.

3. The Commissioner in her capacity as Public Service Arbitrator erred in law in finding the actions of the Respondent and Mr R Harvey were unlawful.

PARTICULARS

(a) There is no legal obligation upon an employing authority to accord a person who applies for a public service position under the Public Sector Management Act procedural fairness or a hearing in connection with the determination of the application.

(b) The Respondent as employing authority was free to bring to the attention of the Selection Panel and his delegate Mr Harvey matters that concerned him in respect of Mr Jones' suitability for appointment.

4. If the Commissioner in her capacity as the Public Service Arbitrator had jurisdiction to judicially review the decision of the Respondent not to appoint Mr R Jones the only order she could make was to declare the decision void.

PARTICULARS

(a) In judicially reviewing a discretionary decision a Tribunal is unable to substitute its decision for that of the primary decision maker.

(b) In making an order to appoint Mr R Jones she exceeded her jurisdiction because section 80E(7) of the Industrial Relations Act provides an Arbitrator does not have jurisdiction to inquire into or deal with any matter in respect of which a procedure referred to in section 97(1)(a) of the Public Sector Management Act is or may be prescribed under that Act, such a procedure having been prescribed in the Public Sector Management (Examination and Review Procedures) Regulations, in connection with Recruitment, Selection and Appointment in the Public Sector."

PRINCIPLES

14 The principles which apply to applications for a stay are long settled and were referred to by the Commission, constituted by the President, in *Director General, Department of Justice v CSA* (2002) 83 WAIG 47 at 49 and *DVG Morley City Hyundai v Fabbri* (2002) 82 WAIG 2440 at 2441 in the following terms:-

> "19 The principles which apply to applications for a stay were most recently expressed by the Commission, constituted by the President, in *Bamboo Holdings Pty Ltd v Halligan* 82 WAIG 966 at 967-968, and are as follows:-
>
> > ""The principles which apply to applications for a stay were most recently expressed by the Commission, constituted by the President, in *Stanley and Others t/a Communique Communications v Bryant* 82 WAIG 785 at 787 and are as follows:-
> >
> > "The principles by which applications pursuant to s.49(11) of the Act are determined are well settled in this Commission (see *Commissioner of Police v CSA* 81 WAIG 2553 at 2554):-
> >
> > The principles by which applications pursuant to s.49(11) of the Act are determined are well settled in this Commission. Amongst others, the reasons for decision in *AWU v BHP Iron Ore Ltd* 81 WAIG 406 properly expresses them at pages 407-408:-
> >
> > I reproduce hereunder the relevant extract from *CSA v Director General, Department of Transport* 80 WAIG 2855 at 2856:-
> >
> > These principles have been laid down in a number of cases, including *Gawooleng Dawang Inc v Lupton and Others* 72 WAIG 1310, *Director General of the Ministry for Culture and the Arts v CSA and Others* 79 WAIG 670 and *City of Geraldton v Cooling* 80 WAIG 1751.
> >
> > It is for the applicant to establish that the stay should be granted. It is, of course, an underlying principle that the successful party is entitled to the fruits of her/his/its order, award or declaration.
> >
> > For the applicant to succeed, it must be established that there is a serious issue to be tried, that the balance of convenience favours the applicant and that other factors consistent with the application of s.26(1)(a), s.26(1)(b) and/or s.26(1)(c) of the Act, if they exist, require that the application be granted.
> >
> > If these ingredients exist, then exceptional circumstances exist which warrant the granting of the application as a matter of equity, good conscience and the substantial merits of the case. (I say that to further explain the principles.)
> >
> > The need to prevent there being any more uncertainty than is necessary, in industrial matters, is important, too (see *Re Moore; Ex parte Pillar* [1991] 65 ALJR 683 at 685 (HC)).
>
> I would add the following further observations.

Before weighing other factors the court needs to be satisfied that there is an arguable case on appeal, (in this jurisdiction a serious issue to be tried also described as a strong case), to ensure that the appeal has not been lodged simply to delay execution (see *Croney v Nand* [1999] 2 Qd R 342 at 348-9 (CA)).

If an appeal may be nugatory a stay will be granted. An appeal will be nugatory when because of the respondent's financial state there is no reasonable prospect of recovering monies paid to him pursuant to the judgment.

An appeal will be nugatory too, if the appellant can show that without a stay of execution he/she will be ruined (see *Lino Type Hell Finance Ltd v Baker* (Practice Note) [1992] 4 All ER 887 at 888).

Inconvenience and the possibility of risk to the appellant's property do not constitute special circumstances (see *Cox v Simeon* (SC (WA) Full Court Lib No 5063 7 September 1983, unreported)).

The onus is on the applicant, of course, to demonstrate a proper basis for a stay, as I have observed above, which will be fair to all the parties and the court will weigh the balance of convenience and the rights of the parties as I have observed above (see *Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685 at 694).

The mere preservation of the status quo, nor by themselves, the merits of the appeal are not sufficient. Further, it is not sufficient to constitute special circumstances that the appeal is arguable, is being pursued in good faith and with expedition and that the stay will not prejudice anybody (see *Hamersley Iron Pty Ltd v Lovell* (No 2) (1998) 20 WAR 79 and 80, 88 (FC)).

Appropriate circumstances may exist within the context of the balance of convenience if serious injury will result to the applicant unless a stay is granted (see *McBride v Sandland* (No 2) (1918) 25 CLR 369 and 375) and, as I have observed, an appeal will be nugatory when, because of the respondent's financial state, there is no reasonable prospect of recovering monies paid to him/her pursuant to the judgment, but appropriate circumstances are not limited to that situation and will exist whenever there is a real risk that it would not be possible for a successful appellant to be restored substantially to his/her former position (see *Federal Commission of Taxation of Commonwealth of Australia v The Myer Emporium Ltd* (No 1) [1986] 160 CLR 221 at 223).""

20 To amplify these principles I would also quote the following paragraph from the judgement of Anderson J in *Hamersley Iron Pty Ltd v Lovell*(No.2) (1998) 20 WAR 79 at pages 89-90 (FC) where His Honour said:-

"As I understand the cases, however, unless a stay is necessary to preserve the subject matter or integrity of the litigation in the broader sense described above the circumstances will not be regarded as sufficiently exceptional to enliven the discretionary jurisdiction to provide a stay. Only if the applicant can show that a stay is necessary to that end will the high Court go on to consider matters such as whether the application for special leave has a prospect of success, whether a stay will occasion hardship to the respondent, where the balance of convenience lies, and so on. I think such matters are always treated as secondary to the question whether a stay is necessary to preserve the subject matter or integrity of the litigation. They come into play only if it appears that the refusal of a stay will substantially deprive the applicant of the benefit to be derived from the appeal. Thus, an applicant may fail to obtain a stay even if the applicant can show that unless there is a stay the appeal will be futile."

22 Further, at page 91 His Honour said:-

"So far as I can see, those cases in which the court has given consideration to such matters such as hardship, the balance of convenience, the prospect that special leave to appeal may be granted and so on are all cases in which the first hurdle has been cleared by the applicant. They are cases in which, speaking broadly, an appeal would be futile unless a stay was granted. I would include in this category of cases *Moulleux Pty Ltd v Girvan NSW Pty Ltd* (1991) 13 Leg Rep 24; *De L v Director–General, Department of Community Services* (NSW) (1997) 136 ALR 201; *Bryant v Commonwealth Bank of Australia* (1996) 70 ALJR 306.""

ISSUES AND CONCLUSIONS

15 When the application was made, jurisdiction was in issue and the Arbitrator found that she had jurisdiction to hear and determine the matter. The issues which arose out of the grounds of appeal were the subject of submissions by Mr Andretich (of Counsel) for the applicant herein and by Mr Cusack on behalf of the respondent.

16 The first question was whether the Commission had jurisdiction to hear and determine the matter before the Arbitrator, which, as expressed in the orders sought, was to complete his promotion by placing him in the position of Principal Policy Officer Level 7, No PO 1035, which Mr Jones applied for.

17 For the applicant it was submitted that there was no jurisdiction in judicial review conferred on the Arbitrator and that therefore the order made at first instance was incompetent as being made without jurisdiction.

18 The respondent relied on the dicta of the Full Bench of this Commission in *Civil Service Association of WA Incorporated v Director General, Department of Justice* (2002) 82 WAIG 2858 at 2862 (FB) ("Bowles' Case"). On the authority of that case and the construction adopted therein of s80E(1) and (5) of *the Act*, it could not be strongly argued at first blush that the matter before the Commission was outside its jurisdiction.

19 That power included the power to nullify what was done at first instance and declare it void. It also included the power to modify and vary a decision at first instance. The power is a wide and express statutory power, as the dicta in Bowles' Case (op cit) characterises it.

20 Next, the issue was whether the Arbitrator exceeded her jurisdiction in that a failure to meet the standards required to be observed for the recruitment, selection and appointment of people, if not met, cannot be the subject for a claim for review under Regulation 5 of the *Public Sector Management (Examination and Review Procedures) Regulations* 2001 (see *Managing Director of the South Metropolitan College of TAFE v CSA* (1999) 80 WAIG 7 at 32). However, as the respondent submitted and as was held in Bowles' Case (op cit), the prohibition upon the Arbitrator under s80E(7) of *the Act* enquiring into or dealing with or referring to the Commission in Court Session or the Full Bench any matter in which a procedure referred to in s97(1)(a) of the *Public Sector Management Act* 1994 (hereinafter referred to as the "*PSM Act*") is or may be prescribed under *the Act* does not operate in certain circumstances.

21 Bowles' Case (op cit) is authority for the proposition that there is jurisdiction in the Arbitrator to consider a void exercise of power by a public sector employer, provided that that exercise relates to a matter referred to in s80E(1) and (5) of *the Act*, even though a breach of *Public Sector Standards* is alleged to have occurred. Obviously, if the power itself was invalidly or unlawfully exercised, then the question of *Public Sector Standards* and their compliance falls by the wayside. They can only apply to a valid and lawful exercise of power. This was a case where the Arbitrator found that, because of the Director General's intervention in the selection process, he acted outside his powers and therefore his intervention in the process should be declared void. His intervention consisted of the overruling of the decision to select Mr Jones.

22 The Arbitrator also found that, because Mr Harvey determined that Mr Jones was unsuitable for the Level 7 position after the four referee reports were obtained at Mr Piper's request, he acted contrary to the *PSM Act* and the *Western Australian Public Sector Code of Ethics*. Further, because of the process, he was denied procedural fairness. As a result, the Arbitrator found that Mr Harvey's actions were invalid and should be nullified. Insofar as s8 and s9 of the *PSM Act* are concerned, there is a strong argument that, if not complied with since they are mandatory, an act done contrary to s8 and s9 of the *PSM Act* may lack statutory validity. Certainly, failure to comply with the *Western Australian Public Sector Code of Ethics* can render an act statutorily invalid. How wide that might be or how narrow is not a matter for me to consider here. As to whether the failure to comply with s8 and s9 of the *PSM Act* and the code constitutes a failure to provide procedural fairness, I would say this. It is strongly arguable that a code placed on the statute has sufficient force to support a finding that failure to comply with it might render the action failing to comply with it void.

23 Suffice it to say, for those reasons, I do not consider that there is a serious issue to be tried. In particular, I am not satisfied that there is a strong argument against the proposition that jurisdiction existed and that what the Public Service Arbitrator correctly did was to modify or vary the decision against Mr Jones.

24 In the light of the width of the power conferred by s80E(7) of *the Act*, there is not a strong argument available that the Arbitrator could not declare acts void and then remedy them. I am not persuaded that there is a serious issue to be tried, for those reasons.

BALANCE OF CONVENIENCE

25 It was submitted that the balance of convenience favoured the Director General because the appointment is not to any position, as such, but simply to a Level 7 position which is the level of position which Mr Jones applied for and for which he was selected. It was submitted that Mr Jones remained employed and therefore would not suffer any undue hardship should the order be stayed. However, so the submission went, should the order be made, then a substantial retrospective payment of $9,000.00 approximately would be made in respect of work that he has not performed in a Level 7 job. Thus, it was submitted, the balance of convenience lay with the Director General.

26 On the other hand, Mr Jones was acting at Level 7 from prior to 25 December 2002 until 31 December 2003, so no payment would be made to him for that period. The amount payable is about $9,000.00 in back pay. This, it was submitted, is a relatively small sum, payment of which would not inconvenience the Director General. There was no evidence that Mr Jones would not be able to repay the monies if the appeal were successful. Indeed, the evidence was, unobjected to from the bar table, that he would be able to repay it.

27 It is true, too, that Mr Jones has been deprived of the monies for twelve months. It was also submitted that the order to place him in a Level 7 position which was not a specified position is exceptionable. However, as I understand the Arbitrator's finding, the position which Mr Jones applied for was abolished after the intervention of the Director General. Thus, the actual Level 7 position does not exist by the Director General's own actions. That is not a factor, therefore, which tips the balance of convenience in favour of the Director General.

28 Mr Andretich's submission that the balance of convenience favoured the applicant because the question(s) of law to be decided had not, to his knowledge, been decided before was not a cogent submission due to my views of the lack of strength of the issues to be determined on appeal. For those reasons, I was not satisfied that the balance of convenience lay with the applicant.

FINALLY

29 The equity, good conscience and substantial merits of the case have therefore not been established by the Director General to lie with him. He has not established, within the meaning of s26(1)(c) of *the Act*, that his interests should be served by granting the application in preference to the interests of the CSA and its member, whose interests also must be considered pursuant to s26(1)(c). There have been no exceptional circumstances established either, justifying the making of the order sought.

30 For those reasons, I dismissed the application.

2004 WAIRC 13689

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE DIRECTOR GENERAL, DEPARTMENT OF JUSTICE **APPLICANT** **-and-** THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED **RESPONDENT**
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	FRIDAY, 17 DECEMBER 2004
FILE NO/S	PRES 8 OF 2004
CITATION NO.	2004 WAIRC 13689

Decision	Application dismissed
Appearances	
Applicant	Mr R J Andretich (of Counsel), by leave
Respondent	Mr B Cusack, as agent

Order

This matter having come on for hearing before me on the 16th day of December 2004, and having heard Mr R J Andretich (of Counsel), by leave, on behalf of the applicant and Mr B Cusack, as agent, on behalf of the respondent, and having determined that the application herein should be dismissed, and having determined that reasons for decision will issue at a future date, it is this day, the 17th day of December 2004, ordered that application No PRES 8 of 2004 be and is hereby dismissed.

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

2005 WAIRC 00010

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	G & M PARTACINI T/AS BAYSWATER POWDER COATERS
	APPLICANT
	-and-
	THE SHOP DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WA
	RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	WEDNESDAY, 5 JANUARY 2005
FILE NO	PRES 9 OF 2004
CITATION NO.	2005 WAIRC 00010

Catchwords	Industrial Law (WA) – Application for a stay of the order pending appeal – General principles relating to stays – Functus Officio – Application dismissed – *Industrial Relations Act* 1979 (as amended), s26(1)(a), (b), (c), s27(1)(m), s44, s49(11)
Decision	Application dismissed.
Appearances	
Applicant	Mr C S Fayle, as agent
Respondent	Mr T Pope, as agent

Reasons for Decision

THE PRESIDENT:

INTRODUCTION

1 This is an application by the above-named applicant employer (hereinafter referred to as "Bayswater Powder Coaters").

2 By this application, G & M Particini, who are not named by their full names, but are said to be trading as Bayswater Powder Coaters, seek an order for the stay of operation of the whole of the decision made by a single Commissioner in matter No CR 142 of 2003 on 2 December 2004.

3 The particulars of the application are as follows:-

> "1. The Order is the subject of an Appeal number FBA 52 of 2004 in which it is to be submitted that the Commission was *functus officio* at the time of the making of said order. Such an Appeal seeks a determination from the Full Bench of an important point of law, and as it effects (sic) or may effect (sic) or more accurately define the powers and/or jurisdiction of the Commission it is clearly in the public interest to be heard.
>
> 2. The Order alters an original Order that had been made against another legal entity which had been involved in the matter before the Commission. Two days prior to the making of the Order in question the Union commenced proceedings to enforce the original Order against the Appellant by way of completing and signing a Complaint in the Industrial Magistrates Court. The Order in question was subsequently made by the Commission and the Magistrates matter was lodged for enforcement. This is therefore a matter of some urgency.
>
> 3. The Order if enforced will result in payment of moneys to a third party not a party to the proceedings of the Commission, and if successful would result in a situation whereby the Appellant, if successful, would be unable to recover said moneys without long expensive and protected proceedings in another place. This would effectively negate the Appeal and deny the Appellant the fruits of its litigation. The balance of convenience therefore favours the granting of the stay."

4 The appeal herein is appeal No FBA 52 of 2004 which was filed in the Commission on 16 December 2004 and which was served, according to the Declaration of Service of Christopher Stanley Fayle, on the above-named respondent on 16 December 2004. The application herein itself was filed on 17 December 2004 and served on 20 December 2004.

5 I am satisfied and find that the appeal was duly instituted and instituted within time and that the applicant, as respondent to the proceedings at first instance, is and was at all material times a person entitled to appeal against the decision, and has sufficient interest, within the meaning of s49(11) of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*") to make this application.

BACKGROUND

6 The above-named respondent organisation (hereinafter referred to as "the SDEA"), representing a person whom one assumes was a member, namely Mr Benedetto Guiseppe Coccaro, made application to the Commission at first instance, constituted by a

single Commissioner, pursuant to s44 of *the Act*, claiming the reimbursement to Mr Coccaro of the sum of $3,156.00, being the amount paid by him for damage to a vehicle, which damage occurred as a result of a collision with it by a vehicle being driven by him on his way home from his employer's premises.

7 The Commissioner, in proceedings where the respondent, according to the heading of the documents, was called "Bayswater Powder Coaters Pty Ltd", having heard and determined the matter, ordered on 27 May 2004 as follows:-

> "The respondent to pay Benedetto Coccaro the sum of $2,367.00 within 14 days of the date of this order."

8 The respondent was, as named, "Bayswater Powder Coaters Pty Ltd".

9 There was an appeal against that decision to a Full Bench of this Commission. The appeal was heard and determined, the appeal being brought by a body calling itself "G & M Particini trading as Bayswater Powder Coaters", and having been heard and determined in appeal No FBA 22 of 2004, and the reasons for decision being delivered on 21 October 2004, by order dated Thursday, 21 October 2004, the Full Bench dismissed the appeal, so that the order at first instance remained as it was.

10 It would seem that, subsequent to that, upon application of the SDEA, the Commissioner corrected, by order dated 2 December 2004, the order to which I have referred above, made on 27 May 2004 in CR 142 of 2003.

11 The Commissioner ordered as follows:-

> "That the order which issue (sic) on 27 May 2004 should be corrected to read:
>
> G & M PARTICINI TRADING AS BAYSWATER POWDER COATERS"

12 Thus, persons trading under a trade name were substituted as parties for the company named in the application and in the order of 27 May 2004.

PRINCIPLES

13 The principles which apply to applications for a stay are long settled and were referred to by the Commission, constituted by the President, in *Director General, Department of Justice v CSA* (2002) 83 WAIG 47 at 49 and *DVG Morley City Hyundai v Fabbri* (2002) 82 WAIG 2440 at 2441 in the following terms:-

> "19 The principles which apply to applications for a stay were most recently expressed by the Commission, constituted by the President, in *Bamboo Holdings Pty Ltd v Halligan* 82 WAIG 966 at 967-968, and are as follows:-
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> ""The principles which apply to applications for a stay were most recently expressed by the Commission, constituted by the President, in *Stanley and Others t/a Communique Communications v Bryant* 82 WAIG 785 at 787 and are as follows:-
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> "The principles by which applications pursuant to s.49(11) of the Act are determined are well settled in this Commission (see *Commissioner of Police v CSA* 81 WAIG 2553 at 2554):-
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> The principles by which applications pursuant to s.49(11) of the Act are determined are well settled in this Commission. Amongst others, the reasons for decision in *AWU v BHP Iron Ore Ltd* 81 WAIG 406 properly expresses them at pages 407-408:-
>
> I reproduce hereunder the relevant extract from *CSA v Director General, Department of Transport* 80 WAIG 2855 at 2856:-
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> These principles have been laid down in a number of cases, including *Gawooleng Dawang Inc v Lupton and Others* 72 WAIG 1310, *Director General of the Ministry for Culture and the Arts v CSA and Others* 79 WAIG 670 and *City of Geraldton v Cooling* 80 WAIG 1751.
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> It is for the applicant to establish that the stay should be granted. It is, of course, an underlying principle that the successful party is entitled to the fruits of her/his/its order, award or declaration.
>
> For the applicant to succeed, it must be established that there is a serious issue to be tried, that the balance of convenience favours the applicant and that other factors consistent with the application of s.26(1)(a), s.26(1)(b) and/or s.26(1)(c) of the Act, if they exist, require that the application be granted.
>
> If these ingredients exist, then exceptional circumstances exist which warrant the granting of the application as a matter of equity, good conscience and the substantial merits of the case. (I say that to further explain the principles.)
>
> The need to prevent there being any more uncertainty than is necessary, in industrial matters, is important, too (see *Re Moore; Ex parte Pillar* [1991] 65 ALJR 683 at 685 (HC)).
>
> I would add the following further observations.
>
> Before weighing other factors the court needs to be satisfied that there is an arguable case on appeal, (in this jurisdiction a serious issue to be tried also described as a strong case), to ensure that the appeal has not been lodged simply to delay execution (see *Croney v Nand* [1999] 2 Qd R 342 at 348-9 (CA)).
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> If an appeal may be nugatory a stay will be granted. An appeal will be nugatory when because of the respondent's financial state there is no reasonable prospect of recovering monies paid to him pursuant to the judgment.
>
> An appeal will be nugatory too, if the appellant can show that without a stay of execution he/she will be ruined (see *Lino Type Hell Finance Ltd v Baker* (Practice Note) [1992] 4 All ER 887 at 888).
>
> Inconvenience and the possibility of risk to the appellant's property do not constitute special circumstances (see *Cox v Simeon* (SC (WA) Full Court Lib No 5063 7 September 1983, unreported)).
>
> The onus is on the applicant, of course, to demonstrate a proper basis for a stay, as I have observed above, which will be fair to all the parties and the court will weigh the balance of convenience and the rights of the parties as I have observed above (see *Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685 at 694).

> The mere preservation of the status quo, nor by themselves, the merits of the appeal are not sufficient. Further, it is not sufficient to constitute special circumstances that the appeal is arguable, is being pursued in good faith and with expedition and that the stay will not prejudice anybody (see *Hamersley Iron Pty Ltd v Lovell* (No 2) (1998) 20 WAR 79 and 80, 88 (FC)).
>
> Appropriate circumstances may exist within the context of the balance of convenience if serious injury will result to the applicant unless a stay is granted (see *McBride v Sandland* (No 2) (1918) 25 CLR 369 and 375) and, as I have observed, an appeal will be nugatory when, because of the respondent's financial state, there is no reasonable prospect of recovering monies paid to him/her pursuant to the judgment, but appropriate circumstances are not limited to that situation and will exist whenever there is a real risk that it would not be possible for a successful appellant to be restored substantially to his/her former position (see *Federal Commission of Taxation of Commonwealth of Australia v The Myer Emporium Ltd* (No 1) [1986] 160 CLR 221 at 223).""

20 To amplify these principles I would also quote the following paragraph from the judgement of Anderson J in *Hamersley Iron Pty Ltd v Lovell*(No.2) (1998) 20 WAR 79 at pages 89-90 (FC) where His Honour said:-

> "As I understand the cases, however, unless a stay is necessary to preserve the subject matter or integrity of the litigation in the broader sense described above the circumstances will not be regarded as sufficiently exceptional to enliven the discretionary jurisdiction to provide a stay. Only if the applicant can show that a stay is necessary to that end will the high Court go on to consider matters such as whether the application for special leave has a prospect of success, whether a stay will occasion hardship to the respondent, where the balance of convenience lies, and so on. I think such matters are always treated as secondary to the question whether a stay is necessary to preserve the subject matter or integrity of the litigation. They come into play only if it appears that the refusal of a stay will substantially deprive the applicant of the benefit to be derived from the appeal. Thus, an applicant may fail to obtain a stay even if the applicant can show that unless there is a stay the appeal will be futile."

23 Further, at page 91 His Honour said:-

> "So far as I can see, those cases in which the court has given consideration to such matters such as hardship, the balance of convenience, the prospect that special leave to appeal may be granted and so on are all cases in which the first hurdle has been cleared by the applicant. They are cases in which, speaking broadly, an appeal would be futile unless a stay was granted. I would include in this category of cases *Moulleux Pty Ltd v Girvan NSW Pty Ltd* (1991) 13 Leg Rep 24; *De L v Director–General, Department of Community Services* (NSW) (1997) 136 ALR 201; *Bryant v Commonwealth Bank of Australia* (1996) 70 ALJR 306.""

SERIOUS ISSUE TO BE TRIED

14 The substance of the ground of the application is that the Commission was functus officio at the time it made the correcting order and that the order alters an original order that had been made against another legal entity which had been involved in the matter before the Commission. Two days before the making of the order in question the SDEA commenced proceedings to enforce the original order against the applicant by way of completing and signing a Complaint in the Industrial Magistrates Court and the order was subsequently made by the Commission and the Magistrate's matter was lodged for enforcement.

15 It is said that the order, if enforced, will result in the payment of monies to a third party not a party to the proceedings and, if successful, would result in a situation whereby the appellant, if successful, would be unable to recover the monies without long, expensive and protracted proceedings in another place which would effectively negate the appeal and deny the appellant the fruits of its litigation.

16 What is significant is that, at the hearing at first instance (exhibit 1 (see pages 2 and 3 of the transcript at first instance) on 22 March 2004, Mr Fayle, who appeared as agent on this application and at first instance, unequivocally informed the Commission that there was no Bayswater Powder Coaters Pty Ltd and that Bayswater Powder Coaters was, in actual fact, a business name operated by Mr and Mrs Particini. He submitted that the matter should have been raised.

17 The Commissioner asked and he replied:-

"Mr Fayle:	Firstly, there is no Bayswater Powder Coaters Pty Ltd and I believe that it's incumbent on the respondent to –
Harrison C:	What do you mean by that, Mr Fayle?
Mr Fayle:	Well, Bayswater Powder Coaters is in actual fact a business name operated by Mr and Mrs Partacini. I have Mr Partacini with me.
Harrison C:	Well, Mr Fayle, this matter – this issue has not been raised previously by the respondent.
Mr Fayle:	I know that, ma'am, but under the Dogrin Pty Ltd case the matter should have been raised. It's a situation whereby at any time the parties can be amended.
Harrison C:	All right. Who do you say is the correct employer of Mr Caccaro?
Mr Fayle:	Well, Mr and Mrs G Partacini trading as --
Harrison C:	Bayswater Powder Coaters?
Mr Fayle:	-- Bayswater Powder Coaters.
Harrison C:	All right. Is there any issue for the respondent if I was to change the name of the respondent to -- to that entity?
Mr Fayle:	Well, ma'am, there would be an issue if you weren't to change it, and that is, if you were to issue an order against a non-existent proprietary limited company it would be unable to be enforced in the --
Harrison C:	That's right.
Mr Fayle:	-- Industrial Magistrates Court.
Harrison C:	So I'm asking you if the respondent agrees with the name of the respondent being changed to the correct entity?
Mr Fayle:	Indeed, ma'am.

Harrison C: Oh, well, thanks very much for that, Mr Fayle.

Mr Fayle: That's quite okay."

18 Mr Fayle, on behalf of the respondents at first instance, namely the applicants in these proceedings, unequivocally identified the correct name of the respondents as G & M Partacini (Giorgio and Maria Partacini) trading as "Bayswater Powder Coaters".

19 The oral order was made by consent deleting the name and replacing it with G & M Partacini. The Commissioner did not indicate that she would issue a written order or an order as part of the written order, although in her reasons for decision (paragraph 5), the Commissioner said that she proposed to issue an order "that Bayswater Powder Coaters Pty Ltd be deleted as the named respondents in this application and be substituted with G & M Partacini trading as Bayswater Powder Coaters". Of course, no such order issued, no doubt by oversight. Nonetheless, the parties conducted themselves as if it had because the appeal to the Full Bench was made by the parties substituted by the oral order of the Commissioner, namely G & M Particini trading as Bayswater Powder Coaters. In particular, the appellants gave every indication that they were parties complaining about the order made at first instance, although it did not contain an order as in fact orally and in writing announced by the Commissioner.

20 The order reflecting the oral order announced by the Commissioner was not made until 2 December 2004 when the order at first instance was corrected, so that the order was one compelling G & M Partacini trading as Bayswater Powder Coaters to pay the monies ordered to be paid, in lieu of Bayswater Powder Coaters Pty Ltd which was no longer, by consent, a party to the application, and had not been since 22 March 2004.

21 Within the principles outlined in *Aussie Online Ltd v Lane* (2001) 81 WAIG 2511 at 2514 (FB), there was a clear correction of a slip, the slip being a failure to include in the order issued an order substituting parties, an order which was consented to (see paragraphs 6 and 7 (page 918)). The slip was correctable under s27(1)(m) of *the Act* and was so corrected. The Commissioner, for that purpose, was not functus officio. In any event, the correcting order was not objected to and the applicants conducted themselves as if the consent order had been made.

22 Indeed, the applicants have conducted themselves in such a way that it might properly be found that they are estopped from denying that it was a party (see *Commonwealth of Australia v Verwayen* [1990] 170 CLR 394).

23 For those reasons, it was not established that there was a serious issue to be tried.

BALANCE OF CONVENIENCE

24 The balance of convenience has not been established to lie with the applicant because the respondents are seeking, with no legal merit, to thwart an order made against them but containing an error in the naming of a party which did not recognise what they consented to.

25 The balance of convenience does not lie with the applicants attempting to thwart the enforcement of an order against them which was made in proceedings in which their advocate had asked that they be substituted for the party named as the correct parties, as respondents, to the application. No exceptional circumstances have been established which would warrant the granting of a stay and the appeal would certainly not be rendered nugatory by an order under s49(11) of *the Act* not being made.

FINALLY

26 For those reasons, the applicants have not established that the equity, good conscience and substantial merits of the case lie with them. They have, in particular, not established, within the meaning of s26(1)(c) of *the Act*, that their interests should be served by granting the application in preference to the interests of Mr Coccaro that it should not. For those reasons, therefore, I dismissed the application.

2004 WAIRC 13735

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	G & M PARTACINI TRADING AS BAYSWATER POWDER COATERS
	APPLICANT
	-and-
	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES ASSOCIATION OF WA
	RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	WEDNESDAY, 22 DECEMBER 2004
FILE NO/S	PRES 9 OF 2004
CITATION NO.	2004 WAIRC 13735

Decision	Application dismissed
Appearances	
Applicant	Mr C S Fayle, as agent
Respondent	Mr T Pope, as agent

Order

This matter having come on for hearing before me on the 22nd day of December 2004, and having heard Mr C S Fayle, as agent, on behalf of the applicant and Mr T Pope, as agent, on behalf of the respondent, and having determined that the application herein should be dismissed, and having determined that reasons for decision will issue at a future date, it is this day, the 22nd day of December 2004, ordered that application No PRES 9 of 2004 be and is hereby dismissed.

(Sgd.) P J SHARKEY,
President.

[L.S.]

CANCELLATION OF—Awards/Agreements/Respondents—

2004 WAIRC 13521

CSR LIMITED - COTTESLOE REFINERY (ENTERPRISE BARGAINING) AGREEMENT 1994

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	(COMMISSION'S OWN MOTION)
	APPLICANT
	-v-
	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION WESTERN AUSTRALIAN BRANCH, CSR LIMITED - SUGAR DIVISION, THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH AND COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH
	RESPONDENTS
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	MONDAY, 6 DECEMBER 2004
FILE NO/S	APPL 1580 OF 2004
CITATION NO.	2004 WAIRC 13521

Result	Agreement cancelled
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS the Commission, being of the opinion that there was no employee to whom the following industrial agreement applied, did give notice on the 27th day of October 2004 of an intention to make an order cancelling such agreement;

AND WHEREAS at the 6th day of December 2004 there were no objections to the making of such an order;

NOW THEREFORE, I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, pursuant to the powers conferred by the said Act, do hereby order that the following industrial agreement be cancelled:

CSR Limited - Cottesloe Refinery (Enterprise Bargaining) Agreement 1994

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2004 WAIRC 13523

CSR SUGAR COTTESLOE REFINERY ENTERPRISE AGREEMENT 1996

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	(COMMISSION'S OWN MOTION)
	APPLICANT
	-v-
	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH, THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH AND THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	RESPONDENTS
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	MONDAY, 6 DECEMBER 2004
FILE NO/S	APPL 1581 OF 2004
CITATION NO.	2004 WAIRC 13523

Result	Agreement cancelled
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS the Commission, being of the opinion that there was no employee to whom the following industrial agreement applied, did give notice on the 27th day of October 2004 of an intention to make an order cancelling such agreement;

AND WHEREAS at the 6th day of December 2004 there were no objections to the making of such an order;

NOW THEREFORE, I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, pursuant to the powers conferred by the said Act, do hereby order that the following industrial agreement be cancelled:

CSR Sugar Cottesloe Refinery Enterprise Agreement 1996

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2004 WAIRC 13522

THE SUGAR REFINING AWARD NO. A41 OF 1982

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION (COMMISSION'S OWN MOTION)
	APPLICANT
	-v-
	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, CSR LIMITED, COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH AND THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH
	RESPONDENTS
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	MONDAY, 6 DECEMBER 2004
FILE NO/S	APPL 1576 OF 2004
CITATION NO.	2004 WAIRC 13522

Result	Award cancelled
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applied, did give notice on the 27th day of October 2004 of an intention to make an order cancelling such award;

AND WHEREAS at the 6th day of December 2004 there were no objections to the making of such an order;

NOW THEREFORE, I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, pursuant to the powers conferred by the said Act, do hereby order that the following award be cancelled:

The Sugar Refining Award No. A41 of 1982

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

NOTICES—Award/Agreement matters—

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 2 of 2005

APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "AUSTRALIAN WORKERS' UNION (WESTERN AUSTRALIAN PUBLIC SECTOR) WATERS AND RIVERS COMMISSION INDUSTRIAL AGREEMENT 2004"

NOTICE is given that an application has been made by the Chief Executive Officer of the Waters and Rivers Commission under the Industrial Relations Act 1979 for registration of the above Agreement.

As far as relevant, those parts of the Agreement that relate to area of operation or scope are published hereunder.

3. DEFINITIONS

3.1

For the purposes of the Industrial Agreement the following definitions shall apply.

a) "Award" means the federal AWU (Western Australian Public Sector) Award 2002.

b) …

c) "Certified Agreement" means the Australian Workers' Union (Western Australian Public Sector) Waters and Rivers Commission Certified Agreement 2004.

d) – i) …

5. APPLICATION AND PARTIES BOUND

5.1 The parties bound by the Industrial Agreement are:

a) the Australian Workers' Union, Western Australian Branch; and

b) the Waters and Rivers Commission.

5.2 The Industrial Agreement applies to all employees who are members of or eligible to be members of the Union and covered by the Award and certified Agreement.

5.3 At the date of registration the approximate number of employees bound by the Industrial Agreement is 5.

5.4 The Industrial Agreement shall be read in conjunction with the federal AWU (Western Australian Public Sector) Award 2002 and the Australian Workers' Union (Western Australian Public Sector) Waters and Rivers Commission Certified Agreement 2004.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J. SPURLING,
Registrar.

12 January 2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICATION NO. APPL 15 OF 2005

APPLICATION FOR VARIATION OF AWARD

ENTITLED

"CULTURAL CENTRE AWARD 1987 NO. A28 OF 1988"

NOTICE is given that an application has been made to the Commission by Liquor, Hospitality and Miscellaneous Union, Western Australian Branch under the Industrial Relations Act 1979 for a variation of the above Award.

As far as relevant, those parts of the proposed variation that relate to area of operation or scope are published hereunder: -

1. Schedule B - Respondents – Vary this schedule by inserting the following respondent –

SCHEDULE B - RESPONDENTS

Department of Housing and Works
99 Plain Street
EAST PERTH WA 6004

A copy of the proposed variation may be inspected at my office at 111 St George's Terrace, Perth.

(Sgd) J. SPURLING,
Registrar.

11 January 2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICATION NO. APPL 1313 OF 2004

APPLICATION FOR VARIATION OF AWARD ENTITLED

"FIRE BRIGADE EMPLOYEE'S AWARD 1990 No A28 of 1989"

TAKE NOTICE that the Commission, on its own motion pursuant to s.40B of the *Industrial Relations Act 1979* intends to vary the above award.

As far as relevant, those parts of the proposed variation that relate to area of operation or scope are published hereunder:

1.3 - Area and Scope

This award shall apply to those employees employed in the classifications in Clause 4.2 Wages of this award and who are employed by the Fire and Emergency Services Authority of Western Australia.

4.2 - Wages

Classification
Trainee Firefighter
3rd Class Firefighter
2nd Class Firefighter
1st Class Firefighter - Level 1 - 3
Senior Firefighter
Station Officer - Level 1 - 2
District Officer
Superintendent
Communication Systems Officer – level 1 - 4
Fire Safety Assistants
Fire Safety Assistant (O'Connor Workshop)

(Sgd) J.A. SPURLING,
Registrar.

6 January 2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICATION NO. A1 OF 2005

APPLICATION FOR REGISTRATION OF AN AWARD

ENTITLED "FREMANTLE PRISON TOUR GUIDES INTERIM AWARD 2005"

NOTICE is given that an application has been made to the Commission by Liquor, Hospitality and Miscellaneous Union, Western Australian Branch under the Industrial Relations Act 1979 for the above award.

The purpose of the application is stated to be:

To provide Award coverage to Tour Guides, Ticket Sellers and Tour Supervisors at the Fremantle Prison.

As far as relevant, those parts of the Award which relate to area of operation or scope are published hereunder:

3 – AREA AND SCOPE

This Interim Award shall have effect in the State of Western Australia and shall apply to employers listed in Schedule B and to their employees eligible to be members of the Liquor, Hospitality and Miscellaneous Union and employed in classifications in clause 6 wages.

6 – WAGES

Classifications:

Attendant;
Receptionist Attendant;
Tour guides;
Attendant Supervisor; and
Tour Guide Supervisors

SCHEDULE B - RESPONDENTS

Department of Housing and Works 99 Plain Street EAST PERTH

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

(Sgd.) J. SPURLING,
Registrar.

13 January 2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICATION NO. APPL 1244 OF 2004

APPLICATION FOR VARIATION OF AWARD ENTITLED

"GRAIN HANDLING MAINTENANCE WORKERS' AWARD NO C477 of 1979"

TAKE NOTICE that the Commission, on its own motion pursuant to s.40B of the *Industrial Relations Act 1979* intends to vary the above award.

As far as relevant, those parts of the proposed variation that relate to area of operation or scope are published hereunder:

2. Clause 3. – Area and Scope – Delete this clause and insert in lieu:

3. – AREA AND SCOPE

This Award related to all work done by maintenance employees employed by Co-operative Bulk Handling Limited or BulkWest Engineering Pty Ltd in the State of Western Australia in any calling mentioned in Clause 27 – Wages of this Award.

27 – WAGES

Tradesperson Level 1 - 4

Maintenance Employee Level 1 - 4

Driver Articulated Vehicle exceeding 20 tonne capacity

Driver Motor Vehicle exceeding 7 tonne capacity

(Sgd) J.A. SPURLING,
Registrar.

6 January 2005

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 5 of 2005

APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "METROPOLITAN CEMETERIES BOARD INDUSTRIAL AGREEMENT 2004"

NOTICE is given that an application has been made by the Chief Executive Officer of the Metropolitan Cemeteries Board under the Industrial Relations Act 1979 for registration of the above Agreement.

As far as relevant, those parts of the Agreement that relate to area of operation or scope are published hereunder.

3. DEFINITIONS

3.1

For the purposes of the Industrial Agreement the following definitions shall apply.

a) …

b) "Award" means the Cemetery Boards - Western Australia Award 2000.

c) "Certified Agreement" means the Metropolitan Cemeteries Board – Western Australia Certified Agreement 2004.

d) – i) …

5. APPLICATION AND PARTIES BOUND

5.1 The parties bound by the Industrial Agreement are:

a) the Western Australian Shire Councils, Municipal Road Boards, Health Boards, Parks, Cemeteries and Race Courses, Public Authorities Water Boards Union; and

b) the Metropolitan Cemeteries Board.

5.2 The Industrial agreement applies to all employees who are members of or eligible to be members of the Union and covered by the Award and certified Agreement.

5.3 At the date of registration the approximate number of employees bound by the Industrial Agreement is 41.

5.4 The Industrial Agreement shall be read in conjunction with the federal Cemetery Boards - Western Australia Award 2000 and the Metropolitan Cemeteries Board – Western Australia Certified Agreement 2004.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J. SPURLING,
Registrar.

12 January 2005

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 1 of 2005

APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "WESTERN AUSTRALIAN GREYHOUND RACING ASSOCIATION (OUTSIDE WORKERS) GENERAL AGREEMENT 2004"

NOTICE is given that an application has been made by the Chief Executive Officer of the Western Australian Greyhound Racing Association under the Industrial Relations Act 1979 for registration of the above Agreement.

As far as relevant, those parts of the Agreement that relate to area of operation or scope are published hereunder.

3. DEFINITIONS

3.1

For the purposes of the General Agreement the following definitions shall apply.

a) …

b) "Award" means the Municipal Employees Western Australian Sporting Grounds Award 2000.

c) "Certified Agreement" means the Western Australian Greyhound Racing Association (Outside Workers) Certified Agreement 2004.

d) – i) …

5. APPLICATION AND PARTIES BOUND

5.1 The parties bound by the General Agreement are:

a) the Western Australian Municipal Road Boards, Parks and Racecourses Employees Union of Workers.

b) the Western Australian Greyhound Racing Association.

5.2 The General Agreement applies to all employees who are members of or eligible to be members of the Union and covered by the Award and Certified Agreement.

5.3 At the date of registration the approximate number of employees bound by the General Agreement is 10.

5.4 The General Agreement shall be read in conjunction with the Western Australian Greyhound Racing Association (Outside Workers) Certified Agreement 2004.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J. SPURLING,
Registrar.

12 January 2005

PUBLIC SERVICE ARBITRATOR—Matters dealt with—

2004 WAIRC 13300

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE (FORMERLY KNOWN AS MINISTRY OF JUSTICE)
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	MONDAY, 15 NOVEMBER 2004
FILE NO/S	PSACR 51 OF 2002
CITATION NO.	2004 WAIRC 13300

Catchwords	Public Service Arbitrator – Application to complete implementation of promotion – Actions of Director General and Executive Director unlawful – – Principles of natural justice and procedural fairness – Whether denied and whether statutory provisions complied with – Actions unfair, unlawful and inappropriate – Order to implement promotion – *Industrial Relations Act 1979* (WA) s 80E(1) s 80E(5) s 80E(7); *Public Sector Management Act 1994* (WA) s 7 s 9
Result	Application granted
Representation	
Applicant	Mr J Dasey
Respondent	Mr R Andretich (of counsel)

Reasons for Decision

1 The Civil Service Association of Western Australia Incorporated ("the applicant") applied to the Public Service Arbitrator ("the Arbitrator") on 17 December 2002 for an urgent conference pursuant to s44 and s80(e) of the *Industrial Relations Act 1979* ("the Act"). The applicant was seeking an interim order pursuant to s44(6)(ba) that the Director General Department of Justice ("the respondent") not abolish the Level 7 Principal Policy Officer position (P001035) ("the Level 7 position") or appoint a person other than Mr Neville Jones to that position prior to the final determination of this application. The particulars of this application as set out in Schedule A to the application are:

> "Mr Neville Jones, a member of the Association, is employed by the Respondent.
>
> Mr Jones applied for an advertised position of Level 7, Principal Policy Officer, and was interviewed by the selection panel on 10 September 2002.
>
> On 7 October 2002 the Executive Director approved the panel's recommendation to appoint Mr Jones to the advertised position.
>
> On 11 October 2002 a letter was sent to Mr Jones by a Recruitment Officer from the Respondent's Department advising him that he was the successful applicant and that subject to any appeal pursuant to the Public Sector Standards, he would be appointed to be (sic) position.
>
> The deadline for the lodgement of appeals pursuant to the Public Sector Standards was 24 October 2002. No appeals were lodged.
>
> On 24 October 2002 Mr Jones was advised by the Chairperson of the selection panel, Mr Bill Cullen, that the Respondent himself had forwarded a memorandum to Mr Cullen expressing concerns about Mr Jones' work performance and "requesting" that referee reports be obtained from specific persons chosen by the Respondent himself.
>
> Mr Jones received a letter dated 5 December 2002 from Ms Stephanie Withers, Director Human Resources, in which he is advised that he would not be appointed to the advertised position. The letter further advises that the vacancy will not be filled, and the Respondent is "seriously considering abolishing this position".

2 At the outset the respondent maintained that the Arbitrator did not have jurisdiction to deal with this application. After reviewing submissions from the parties on this issue I issued a decision that the Arbitrator had jurisdiction to deal with this application as the subject matter of this application did not relate to a breach of a Public Sector Standard.

3 A number of interlocutory matters and related applications surrounding the appointment of Mr Jones to the Level 7 position delayed the hearing of this matter until June 2004. In the interim the respondent abolished the Level 7 position in January 2003.

4 As conciliation proceedings did not resolve the issues in dispute, the matter was referred for hearing and determination. The schedule of memorandum of matters referred for hearing and determination is as follows:

> "1. The applicant contends that the following actions were unlawful and should be declared void:
>
> a) The actions of the Director General relating to the construction and forwarding of his memorandum dated 23 October 2002, concerning Mr Neville Jones, and the instructions to officers contained therein; and
>
> b) The actions of the Executive Director, selection panel members, human resources officers and any other officer, in direct response to the Director General's memorandum dated 23 October 2002, relating to Mr Jones.
>
> 2. The applicant seeks the following orders:
>
> a) Within seven (7) calendar days of the date of the issuing of this Order, the respondent is to complete the implementation of Mr Jones' promotion to the position of Principal Policy Officer Level 7 (position number P001035) so that Mr Jones is substantively confirmed in the position with effect from the date on which the position was advertised. Mr Jones is to be permitted to perform all of the position's duties and is to receive all

benefits, entitlements, privileges, powers, authority, responsibility, amenities and status which should reasonably accompany the position.

b) Within seven (7) calendar days of the date of this Order the Director General is to e-mail a copy of these Orders and accompanying Reasons for Decision to all staff with email facilities within the respondent's employ. No derogatory comments about Mr Jones are to be contained in the email or in any other written communications to staff. A copy of the email is to be given to staff without email facilities.

Background

1. The Applicant's member Mr Neville Jones is a permanent Level 6 Public Service Officer employed by the Respondent.
2. Mr Jones applied for a Level 7 vacancy in position 001035 Principal Policy Officer ("the position").
3. The selection panel interviewed Mr Jones on 10 September 2002 and subsequently assessed Mr Jones as the recommended applicant. On 26 September 2002 such a recommendation was forwarded to the Executive Director, who had delegated authority to appoint an officer to fill the subject vacancy.
4. On 11 October Mr Jones was advised through a letter from a Recruitment Officer that he had been recommended for appointment.
5. The Director General by memo dated 23 October 2002 requested that the Chairperson of the selection committee, Mr Cullen, consider the referee reports and consult with the Manager Human Resources, before advising Mr Piper of Mr Cullen's recommendation regarding Mr Jones' suitability for the position.
6. The appointment of Mr Jones did not proceed.
7. On 5 December Mr Jones received a letter from the Director Human Resources stating that notwithstanding the letter of 11 October the position would not be filled and that as a result of referee reports which had been received the Executive Director felt that Mr Jones was unable to meet the requirements of the vital aspects of the essential criteria."

Applicant's Evidence

5 Mr Jones has worked with the respondent for 23 years and his current position with the respondent is a Level 6 Senior Policy Officer, Court Services Division. Mr Jones gave evidence that he has acted in Level 7 positions with the respondent over the past ten years and he once acted as a Level 8 employee for seven weeks.

6 After Mr Jones applied for the Level 7 position in August 2002 he received the following letter from the respondent, dated 11 October 2002 (formal parts omitted):

"**P001035, PRINCIPAL POLICY OFFICER, LEVEL 7, POLICY, PLANNING & RESEARCH, CJJ DIVISION**

I am pleased to advise that you have been recommended for appointment to the above position.

Applicants not recommended may lodge a formal application for a review if they are of the opinion that there has been a breach of (sic) standard relating to the recruitment, selection and appointment process. The period allowed to lodge a formal application for review closes 5.00pm 24 October 2002.

In view of the requirement to offer unsuccessful applicants the opportunity for review you will appreciate your appointment is not yet assured. I will advise you further in due course."

(Exhibit R1)

7 Mr Jones understood from this letter that he would be appointed to the Level 7 position subject to no complaints being lodged prior to 24 October 2002 alleging a breach of a Public Sector Standard. On or about 23 October 2002 Mr Bill Cullen contacted Mr Jones informing him that the Director General, Mr Alan Piper, had some concerns regarding Mr Jones' performance and as a result he asked Mr Cullen to obtain referee reports concerning Mr Jones' suitability for the Level 7 position. As Mr Jones was concerned about Mr Piper's actions he raised the matter with the applicant and the respondent's Director of Human Resources Ms Stephanie Withers. Mr Jones asked Ms Withers for a copy of the Director General's letter to Mr Cullen requesting that referee reports be obtained and he was told by Ms Withers that he would be given the opportunity to review the referee reports prior to any decision being made about filling the Level 7 position. Ms Withers also told him that if the referee reports were 'fine' he would be appointed to the Level 7 position. Mr Jones confirmed that in early November 2002 his representative sent correspondence to the respondent complaining about the requirement that referee reports be obtained and requested that Mr Jones' appointment proceed, but no response was received.

8 Following is the Director General's memorandum dated 23 October 2002 which was sent to Mr Cullen (formal parts omitted):

"**Re: Principal Policy Officer (Position No 001035) – Recruitment, Selection and Appointment Process**

Routinely I am advised of senior appointments within the Division. As such I have recently been advised of the recommended appointment of Mr Neville Jones to the position of Principal Policy Officer within the Community and Juvenile Justice Division.

It has previously come to my attention that there are some concerns in regards to Mr Jones' skills and abilities as per the following:

- Deficiency in his ability to engage and consult with stakeholders when developing policies/strategies.
- Deficiency in his ability to develop policies/strategies that meet the needs of the business area.
- Deficiency in his ability to complete projects satisfactorily.
- Deficiency in his ability to play a leadership role within the Department.
- Lacks the confidence of his colleagues to represent the Department at senior decision-making forums.

I have been informed that referee reports were not sought by the panel to clarify Mr Jones' suitability for the position. Although, I recognise that this is not a mandatory requirement, given the concerns I have outlined above, I request that the panel seek written referee reports from the following personnel.

- Mr Gary Thompson, Executive Director, Courts
- Mr Stephen Kay, Director Court Development
- Mr Alan Thompson, (Referee nominated by Mr Jones)
- Dr Bob Fitzgerald (Referee nominated by Mr Jones)

I have sought advice from the Human Resources Directorate, which has prepared the attached referee report to be completed by the referees. Based on the outcome of these referee reports and in consultation with Mr Terry Bransby,

Manager HR (CJJ), I wish to be advised of your recommendation regarding Mr Jones' suitability for the position before any such appointment is confirmed."

(Exhibit A1.3)

9 On or about 11 December 2002 Mr Jones received the following letter, dated 5 December 2002, from Ms Withers (formal parts omitted):

"**P001035, PRINCIPAL POLICY OFFICER, LEVEL 7, POLICY & PLANNING, CJJ DIVISION**

Notwithstanding the letter of recommendation to the position of Principal Policy Officer P001035, dated 11 October 2002, we regret to advise a decision had been made not to proceed in filling this vacancy.

In conjunction with your application and interview, your nominated referees, plus two Departmental referees were contacted. Referee reports provided by Mr Thompson and Dr Kay indicate that there are issues around your appointment to this position. Drawing from this information Mr Harvey feels that you are unable to meet the requirements of the vital aspects of the essential criteria.

Also, Mr Harvey is currently looking at the organisational structure within Policy & Planning and is seriously considering abolishing this position, as he believes the structure is 'top heavy' and more resources need to be directed to lower level policy positions.

Appointments in the public sector are subject to the provisions of the Public Sector Management (Examinations and Review Procedures) Regulations 2001. Accordingly, as an applicant, it is open to you to make application for a review of this process, if you are of the opinion that the Recruitment, Selection and Appointment Standard (see reverse of page 2) has been breached.

In lodging your claim, specify which part of the Standard you believe has been breached and why, along with a brief explanation as to how the outcome of the selection process has adversely affected you.

Your claim must be received in this office by 5.00pm, 19 December 2002. Claims cannot be accepted after this date. Your claim should be forwarded either by email to humanres@justice.wa.gov.au, fax to (08) 9264 1273, post to The Recruitment Officer, GPO Box F317, Perth WA 6841, or hand delivered to the Human Resources Directorate, 11th Floor, 141 St Georges Terrace, Perth."

(Exhibit A1.13)

10 Mr Jones stated that it was only after he received this letter that he was given access to the referee reports (except for Dr Fitzgerald's report which had previously been emailed to him).

11 Mr Jones stated that the respondent had previously not made him aware of the performance issues raised in the Director General's letter to Mr Cullen (Exhibit A1.3). Mr Jones confirmed that his last performance appraisal was conducted by the respondent in 1996. It was Mr Jones' view that the Director General's allegations outlined in the memo dated 23 October 2002 were without substance.

12 Mr Jones gave the following information about the four referees who were asked to prepare reports on Mr Jones subsequent to him being selected for the Level 7 position. Mr Jones stated that he had worked with Dr Fitzgerald between 1993 and 2001 and that Dr Fitzgerald had a good working knowledge of Mr Jones' abilities and the work he had undertaken. Mr Jones stated that he worked with Mr Alan Thompson between 1994 and 2002, he was Mr Jones' direct manager for a number of years and he worked closely with him. Mr Jones stated that he had little contact with Dr Kay. Mr Jones gave evidence that even though he formally reported to Dr Kay he did not deal with him on a day to day basis as most of his dealings were with Ms Lesley McComish as acknowledged by Dr Kay in his report. Mr Jones stated that Dr Kay would have some knowledge of Mr Jones' ability but Ms McComish was the person in the best position to assess his work. Mr Jones confirmed that even though he had worked adjacent to Mr Gary Thompson for approximately eighteen months he had little to do with Mr Jones' areas of work even though Mr G Thompson signed off on much of his work.

13 Mr Jones stated that as a result of not being appointed to the Level 7 position he has suffered substantial economic loss. He also stated that the Director General's opinions about him have become well known within the respondent's operations and this has had a negative impact on his future career prospects with the respondent and Mr Jones believes that he has become ineligible to take up a permanent Level 7 position within the respondent's operations as a result of the Director General's actions. Mr Jones stated that this dispute has had a negative impact on his health and he was shattered by what has transpired after working for so many years with the respondent. Mr Jones stated that throughout 2003 he acted in a Level 7 position dealing with policy development and legislation and he was paid at the top level of the Level 7 salary range. Whilst in this position he stated that there has been no criticism about his work, only positive responses.

14 Mr Jones stated that subsequent to these events Dr Kay discussed with him the possibility of acting in Ms McComish's Level 7/8 position supervising a number of Level 7 employees, if her position became available. Mr Jones stated that in the event this vacancy did not arise.

15 Under cross-examination Mr Jones agreed that the letter he received dated 11 October 2002 (Exhibit R1) refers to him being recommended for appointment to the Level 7 position and was not a formal offer of appointment to the position. Mr Jones then went on to state that based on his knowledge of how the respondent operates he understood the Level 7 appointment would automatically proceed unless an application was lodged alleging a breach of a Public Sector Standard. Mr Jones understood that this letter formed part of the respondent's process of making a formal offer to an employee.

16 Mr Jones stated that he had not worked with the respondent's substantive Executive Director, Mr Robert Harvey, up to the time he was selected for the Level 7 position. Mr Jones understood that if he was appointed to the Level 7 position this would entail working with Mr Harvey and that he would report to him through Mr Cullen.

17 Mr Robert Carter was the respondent's Acting Executive Director, Community and Juvenile Justice ("CJJ") in October and November 2002. Mr Carter confirmed that he signed off on the selection panel's recommendation that Mr Jones be appointed to the Level 7 position and certified that the selection panel had followed proper processes. Mr Carter stated that under the respondent's selection process a selection report is generated once a selection panel finalises its decision, the appointment process is then reviewed by the respondent's human resources section and the recommendation is then given to the Executive Director for endorsement. Mr Carter stated that he had no concerns about the selection process used to fill the Level 7 position and he stated that he had no concerns about endorsing the recommendation that Mr Jones be appointed to the Level 7 position.

18 Mr Cullen was the selection panel's chairperson for the Level 7 position and he stated that he was allocated this role as the Level 7 position would report to him. Mr Cullen stated that he believed that the selection panel was competent to make the selection for the Level 7 position. He stated that there were fourteen applicants for the Level 7 position, that there was a reasonably strong field of candidates and seven applicants were selected to be interviewed. Mr Cullen stated that Mr Jones was the most competitive applicant and that the selection panel's decision to recommend him for the Level 7 position was

unanimous. He stated that no referee reports were sought as the selection panel concluded it was not necessary. Mr Cullen stated that he expected Mr Jones to be appointed to the Level 7 position and he was aware that Mr Carter had endorsed the selection panel's decision. Mr Cullen confirmed that after the selection panel had recommended Mr Jones for appointment to the Level 7 position he was later asked to obtain referee reports about Mr Jones. Mr Cullen stated that Mr G Thompson initially refused to provide a referee report for Mr Jones as he claimed he did not have a strong knowledge of Mr Jones' work but he did fill out parts of the referee report. Mr Cullen stated that he was not asked to have Mr Jones comment on the referee reports and the selection panel did not reconvene to consider the reports as the selection panel relied on its previous decision to select Mr Jones on the basis of the information it had at the time and because the selection panel believed it had already made a correct decision to recommend Mr Jones for the Level 7 position. After obtaining the referee reports as requested Mr Cullen submitted them to Mr Harvey, who had by this time returned to the Executive Director, CJJ, position in November 2002, for his attention.

19 Ms McComish confirmed that she was on the selection panel for the Level 7 position. She stated that Mr Jones was the most able applicant for the Level 7 position. Ms McComish stated that she had worked closely with Mr Jones and had been familiar with his work since early 2002.

Respondent's Evidence

20 Ms Withers gave evidence in chief by way of a witness statement (Exhibit R2). Ms Withers is currently the respondent's Acting Director, Business Management, Prisons Division and she has held this position since 23 February 2004. She was previously the respondent's Director Human Resources and was in this position when applications were called to fill the Level 7 position. Ms Withers confirmed that Mr Cullen was the selection panel's chairperson and that the panel recommended Mr Jones to be promoted to the Level 7 position. Ms Withers stated that the selection panel followed the recommended selection process which is based on the following:

> "(a) Department of Justice Recruitment and Selection Policy, 1996;
>
> (b) Public Sector Standards in Human Resource Management 2001;
>
> (c) Public Sector Management Act, 1994;
>
> (d) Public Sector Management (Examination & Review Procedures) Regulations, 2001; and
>
> (e) Equal Opportunity Act of Western Australia, 1984."

(Exhibit R2)

21 Ms Withers understood that the selection panel chose not to obtain referee reports as the recommended applicant was well known to panel members and she stated that even though panels are advised to seek referee reports it is not an essential step in the selection process.

22 Ms Withers gave evidence that the letter sent to Mr Jones on 11 October 2002 (Exhibit R1) was not a binding offer by the respondent to Mr Jones for him to be appointed to the Level 7 position and that recommendations for promotion can be withdrawn at any stage for a number of reasons prior to the written confirmation of an appointment. These reasons include organisational restructures, a redeployee referral or if a breach of process occurred. Ms Withers stated that a promotion is not considered final until the recommended applicant is provided with a written "offer of promotion" outlining the relevant employment conditions and the recommended applicant accepts, signs and returns the offer to the respondent's Human Resources Directorate.

23 Ms Withers understood that on 23 October 2002 the Director General, Mr Piper, raised the issue of Mr Jones' suitability for the Level 7 position with Mr Cullen on the basis that he had previously been made aware of concerns about Mr Jones' skills and abilities. Ms Withers confirmed that Mr Piper documented these deficiencies and requested that four referee reports be obtained from four persons nominated by him (two of whom Mr Jones had nominated as referees). After the requested referee reports were obtained Ms Withers stated that the respondent's substantive Executive Director, CJJ, Mr Harvey, dealt with Mr Piper's request. Ms Withers gave evidence that in his position of Executive Director Mr Harvey had been delegated by the Director General with the authority to select and appoint persons for positions in his division.

24 In a memorandum sent to Ms Withers dated 3 December 2002, Mr Harvey stated that some of the referee reports raised issues about Mr Jones' appointment to the position and these concerns accorded with his views about Mr Jones. Mr Harvey also referred to the 'preponderance' of Level 7 positions and he stated that consideration was being given to the respondent decreasing its number of Level 7 positions. Following is a copy of the memorandum sent by Mr Harvey to Ms Withers (formal parts omitted):

> "**Re: Appointment Process – Principal Policy Officer P001035**
>
> I refer to the matter relating to the appointment of Mr Jones to the position of Principal Policy Officer within Community and Juvenile Justice.
>
> It is clear from the referee reports provided by Mr Gary Thompson and Dr Steven Kay that there are some issues around Mr Jones' appointment to the position of Principal Policy Officer.
>
> My personal belief is that Mr Jones' approach does not display a contemporary view of policy development. This view is that current technology provides policy officers access to vast amounts of knowledge and they are becoming more influencers and managers of stakeholders. The selection criteria "Relationship Building and Networking" pertaining to this position states that the successful applicant is to have the 'ability to communicate effectively with diverse audiences, using a variety of strategies, establishing relationships with stakeholders and represent and promote the agency". The above-mentioned referee reports question Neville's ability to do this.
>
> It is also apparent, within the current organisational structure of the Community & Juvenile Justice Division, that there is a preponderance of Level 7 positions and given this circumstance, serious consideration is being given to creating more operational levels with the Division and decreasing the number of Level 7 positions. The Principal Policy Officer position may as a consequence be abolished.
>
> All things considered I have decided not to proceed with filling the vacancy for Principal Policy Officer, P001035."

(Exhibit A1.10)

25 Ms Withers stated that once Mr Harvey decided not to proceed with filling the Level 7 position she wrote to Mr Jones on 5 December 2002 informing him that the referee reports provided to Mr Harvey indicated that there were issues about his appointment and that the Level 7 position was not being filled as Mr Harvey was reviewing the respondent's organisational structure. Ms Withers confirmed that even though Mr Jones had the opportunity to lodge an appeal if he believed the standard on recruitment, selection and appointment had been breached Mr Jones did not apply to have Mr Harvey's decision reviewed. Ms Withers confirmed that the Level 7 position was abolished on 16 January 2003.

26 Under cross-examination Ms Withers stated that she believed the referee reports requested by Mr Piper acknowledged Mr Jones' strengths and weaknesses. Ms Withers gave evidence that it was unusual for a delegated officer to re-visit a selection panel's decision after the selection panel's recommendation had previously been endorsed. Ms Withers stated that as the person delegated with the power to appoint a person to the Level 7 position, Mr Harvey had the right to reject the selection panel's decision as long as he did not do so arbitrarily or capriciously. Ms Withers stated the following:

> "…They have to raise issues with me, and - - it does happen, occasionally, that a delegate will say "No. We believe the panel has erred", and I say "It is your decision. You're the one who signs it", so - - but I say to them "You must be clear about what is wrong", and in the case - - with this one, where it was the view that the panel had not addressed this issue, really, of positioning and capacity to influence the agenda within the department, I - - I said to Robert "Well, really, we need to get referees, and they'll either confirm the issues you've raised, or disappear them", but it is always the right of a delegate - - because they actually make the decision - -"

(Transcript page 45)

27 When asked why Mr Jones was unsuccessful in gaining the Level 7 position Ms Withers confirmed that she told Mr Jones that he was unable to meet the requirements of vital aspects of the essential criteria. When Ms Withers was asked which criteria in particular she was relying on she referred to the reasons outlined in the memorandum from Mr Harvey which stated that:

> "The selection criteria "Relationship Building and Networking" pertaining to this position states that the successful applicant is to have the 'ability to communicate effectively with diverse audiences using a variety of strategies, establishing relationships with stakeholders and represent and promote the agency'. The above mentioned referee reports question Neville's ability to do this."

(Exhibit A1.10)

Ms Withers conceded that three of the four referee reports did not comment negatively about Mr Jones in relation to this selection criteria.

28 Ms Withers was aware that Mr G Thompson was initially reluctant to write a referee report about Mr Jones.

29 Ms Withers stated that she was unaware if any negative assessments about Mr Jones' ability had ever been put to him. Ms Withers confirmed that she advised Mr Jones that he would have the opportunity to review the four referee reports prior to a final decision being made about the Level 7 position and she was unaware that Mr Jones had not been given this opportunity prior to the final decision being made not to fill the Level 7 position. Ms Withers stated that she did not instruct Mr Bransby not to give the referee reports to Mr Jones until after he had received the letter dated 5 December 2002 advising that the Level 7 position would not be filled.

30 Under re-examination Ms Withers confirmed that the letter she sent to Mr Jones on 5 December 2003 conveyed the views of Mr Harvey and were not her personal views. Ms Withers stated that Mr Jones should have been given copies of the four referee reports and be given the right of reply before any decision was made about the Level 7 position. Ms Withers confirmed that redeployees may be considered for a position prior to a position being advertised and that on rare occasions if a redeployee becomes available after a position has been advertised then this person may be redeployed into the advertised position in preference to the recommended applicant.

31 Mr Harvey gave evidence in chief by way of a witness statement (Exhibit R4). Mr Harvey is currently employed by Edith Cowan University as its Executive Dean. When Mr Jones applied for the Level 7 position Mr Harvey was the respondent's substantive Executive Director, CJJ. Mr Harvey stated that the Level 7 position was located in the Policy Planning and Research Branch and indirectly reported to him through the Manager of Policy Planning and Research, Mr Cullen.

32 Mr Harvey confirmed that when Mr Carter was acting in Mr Harvey's absence he endorsed the recommendation made by the selection committee that Mr Jones fill the Level 7 position. Mr Harvey stated that he became aware of the Director General's concerns about Mr Jones' appointment after receiving a copy of the memo Mr Piper sent to Mr Cullen in his capacity as chairperson of the selection panel. Mr Harvey stated that he noted the Director General's concerns and also that the Director General had requested that the selection panel seek written referee reports from Mr G Thompson, Dr Kay, Mr A Thompson and Dr Fitzgerald, the last two of whom were referees nominated by Mr Jones.

33 Mr Harvey understood that after the referee reports were received they were forwarded to him for consideration as he had delegated authority to make the appointment to the Level 7 position. Mr Harvey stated that he reviewed the referee reports and noted that the reports provided by Mr G Thompson and Dr Kay raised issues concerning Mr Jones' appointment to the Level 7 position. Mr Harvey quoted the following from the Level 7 position's job description which he understood reflected the role of the Level 7 position:

> "Principal Policy Officer develops, advocates, promotes and implements community and juvenile justice policy pertinent to statewide (sic) prison services, community justice services and juvenile justice services. The Principal Policy Officer provides leadership and innovation in community and juvenile justice policy and some legislation and establishes collaborative and cooperative internal and external stakeholder relationships. The position performs within an environment of competing stakeholders (sic) needs and issues and extensively consult with a wide range of key stakeholders, including external special interest groups."

(Exhibit R4)

Mr Harvey stated that when taking this description into account he believed that Mr Jones could not bring to the Level 7 position the required leadership and communications skills and it was his view that even though the selection panel may have decided that Mr Jones was the best applicant for the position this did not necessarily justify his appointment to the Level 7 position. On this basis Mr Harvey determined that Mr Jones did not meet the requirements of the Level 7 position. Mr Harvey stated that he had acted independently in deciding whether to appoint Mr Jones to the Level 7 position even though he was aware of the Director General's views about Mr Jones. Mr Harvey stated that his conclusions about Mr Jones' suitability for the position were set out in the memorandum he prepared and addressed to Ms Withers dated 3 December 2002 (Exhibit A1.10). During this period Mr Harvey was also reviewing the organisational structure of the respondent's Community and Juvenile Justice area and as a result of this review Mr Harvey concluded that the respondent had a preponderance of Level 7 positions which required reducing and substituting with more operational level positions. Mr Harvey stated that on this basis he determined that the Level 7 position was to be abolished, which he understood occurred in January 2003.

34 Mr Harvey stated that he had some dealings with Mr Jones even though he was employed in a separate directorate.

35 Mr Harvey confirmed that when he decided not to appoint Mr Jones to the Level 7 position he based his decision on the information he knew about Mr Jones as well as the four referee reports. When asked why he believed Mr Jones was not suitable for the Level 7 position Mr Harvey stated that Mr Jones had a number of strengths including being hard working and conscientious as well as a good knowledge of relevant legislation. However, the Level 7 position required a person who was able to engage with stakeholders, who was able to produce consensus outcomes in an intelligent fashion, and the position

required a person to be an energetic communicator who had an awareness of the political nuances of the issues being dealt with. It was Mr Harvey's view that Mr Jones did not have these engagement skills which were necessary for the position. Even though Mr Harvey was aware that there was a capable field of applicants for the Level 7 position the issue for him was whether the person chosen was capable of meeting the requirements of the Level 7 position. Mr Harvey stated that he was surprised that Mr Carter signed off on recommending Mr Jones for the Level 7 position.

36 Under cross-examination Mr Harvey stated that the Director General did not ask him to review Mr Jones' appointment. He stated that the review of the Level 7 position's appointment arose from the Director General's request to Mr Cullen that the selection panel review its decision. After Mr Cullen wrote to Mr Harvey advising that he did not wish to have anything further to do with the Level 7 position as the selection panel had already made its recommendation Mr Harvey then became involved in the process.

37 Mr Harvey gave evidence that the information contained in his memo to Ms Withers dated 3 December 2002 about Mr Jones not fulfilling the necessary requirements for the Level 7 position was based on Mr G Thompson and Dr Kay's referee reports. Mr Harvey stated that he took additional information into account as well as his own judgements about the position's requirements when deciding whether Mr Jones should be appointed to the Level 7 position. Mr Harvey conceded that both Dr Kay and Mr G Thompson had limited knowledge of Mr Jones' work. Mr Harvey stated that he was unaware if Mr G Thompson and Dr Kay supervised Mr Jones and he stated that he did not obtain a report from Mr Jones' supervisor Ms McComish about Mr Jones as it was the Director General's decision who was to provide the referee reports. When Mr Harvey reviewed the comments regarding the selection criteria relating to relationship building and networking in the four referee reports he acknowledged that three of the referee reports were positive about Mr Jones fulfilling the Relationship Building and Networking selection criteria and one report was silent on this criteria (transcript page 110). Mr Harvey also conceded that the selection panel concluded that Mr Jones met the requirements of this criteria.

38 Mr Harvey stated that he disagreed with the selection panel's decision to recommend Mr Jones as the position required additional communication and representation skills than those detailed in the Level 7 position's selection criteria and Mr Harvey stated that he considered more than what was detailed in the Level 7 position selection criteria relating to relationship building and networking when making his decision not to appoint Mr Jones.

39 Mr Harvey confirmed that he was not aware that Mr G Thompson initially stated that he was not in a position to provide a referee report on Mr Jones. When asked about Mr Harvey's familiarity with Mr Jones' work, Mr Harvey could not recall specific work with which he had been involved but he stated that he was aware that Mr Jones had completed some policy reviews. Mr Harvey was unaware that Mr Jones did not see the referee reports prior to him making a decision about the Level 7 position and he stated that Mr Jones should have been given the opportunity to review the reports but he conceded that he did not do anything to ensure that this eventuated. Mr Harvey stated that he did not instruct the referee reports to be withheld from Mr Jones. When asked if he was aware that Mr Jones had previously acted in Level 7 positions Mr Harvey stated that it would not surprise him nor would this have influenced him in arriving at the decision he made.

40 In re-examination Mr Harvey stated that relationship building was not the only criteria which he took into account when deciding not to appoint Mr Jones to the Level 7 position. He stated that other relevant skills that Mr Jones lacked included the ability to engage. Mr Harvey stated that Mr Jones had a traditional style and lacked innovation which was inconsistent with the dynamic nature of the Level 7 position. He also took into account that the Level 7 position came within his area of responsibility, he had certified the job description for this position, it was a job he had created and he had specific views about how he saw this position being undertaken.

Submissions

Applicant

41 The applicant argues that once the selection panel's decision was endorsed by the respondent's acting Executive Director, Mr Carter, then the recommendation to appoint Mr Jones to the Level 7 position had been accepted by the respondent subject to a breach of a standard arising. The applicant argues that the subsequent interference in that decision by Mr Piper and Mr Harvey was unlawful and the Arbitrator therefore has the power to void Mr Harvey's decision not to fill the Level 7 Position. The applicant maintains that in the circumstances it is appropriate to appoint Mr Jones to the Level 7 position and if the position is no longer available then the respondent should regard Mr Jones as a substantive Level 7 employee and deal with him accordingly.

42 The applicant relies on the following submissions in support of its claim that Mr Jones was treated unlawfully by the respondent.

43 The applicant argues that the Commission has the power to review administrative decisions made within the public sector and maintains that the respondent's actions towards Mr Jones breached the principles of administrative law. As a public authority the respondent is bound by the principles of administrative law when making decisions about its employees and the Arbitrator must have regard to these principles when assessing this application (*Civil Service Association of WA Incorporated v Director General, Ministry of Justice* [2002] 82 WAIG 2858; *Civil Service Association of Western Australia Incorporated v Director General, Education Department of WA* [2002] 82 WAIG 2982).

44 The applicant argues that once the respondent's Executive Director was delegated with the power to make an appointment to the Level 7 position this decision rested with the Executive Director and therefore there was no legal authority for the Director General to intervene in this decision as once a statutory power is delegated by a delegator to a delegatee the delegator is divested of that power. This power only then resides with the delegatee and the delegator has no lawful right to exercise or to interfere with the exercise of that power given to the delegatee (*Blackpool Corporation v Locker* [1947] 1 KB 349). Further, the applicant argues that once Mr Carter endorsed the selection panel's recommendation Mr Harvey had no power to revisit the decision.

45 The applicant maintains that the communication of a lawful decision to a person prevents a public authority from altering or withdrawing that decision. Furthermore, good conscience prevents a public authority from resiling from a lawful decision communicated to the affected party. In this instance Mr Jones assumed he was the successful applicant for the Level 7 position when he received the letter from the respondent dated 11 October 2002 and the only impediment to him being appointed was whether or not there had been a breach of a Public Sector Standard. Mr Jones therefore had a reasonable expectation that he would be appointed to the Level 7 position (*R v North and East Devon Health Authority, ex parte Coughlan (Secretary of State for Health and another intervening)* [2000] 3 All ER 850). Mr Jones was entitled to rely on the normal processes being utilised by the respondent without the intervention of the Director General or Mr Harvey (*Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346). Further, Mr Jones had no opportunity to review the additional referee reports even though he was told he would be able to do so prior to any final decision being made about the filling of the Level 7 position. When a reasonable expectation is held, a person should not have their expectations dashed without being given the opportunity to comment otherwise natural justice is denied (*FAI Insurances Limited and The Honourable Sir Henry Arthur Winneke and Others* [1981-1982] 151 CLR 342).

46 The applicant argues that estoppel and legitimate expectations are matters that sit outside the Recruitment, Selection and Appointment Standard (which deals with the selection process) and does not deal with questions of administrative law and subsequent decision making.

47 The applicant argues that the assessment process for the Level 7 position was concluded when the selection panel's decision was communicated to Mr Jones. The applicant argues that after the letter was sent to Mr Jones communicating the decision that he was the recommended applicant the only qualification to his appointment was whether or not a breach of standard was lodged. The applicant argues that the decision could only be changed if it proceeded on a factually incorrect basis or misleading information was given and in this instance these issues did not arise. The applicant argues that the selection process was not able to be reopened at the Director General's direction or recommendation nor by Mr Harvey once the selection panel's decision had already been lawfully made and communicated to the successful candidate. Even if in this instance Mr Harvey had the power to reopen the process it could only have been a decision made by Mr Harvey and no one else (including the Director General) as Mr Harvey was the person delegated with the power to complete the exercise of filling the Level 7 position. The applicant argues that the letter from the Director General to Mr Cullen was specifically designed to pressure Mr Harvey into changing the decision to appoint Mr Jones to the Level 7 position. Mr Harvey's decision is therefore unlawful and should be declared void (*Kevin Charles O'Neill and Commonwealth of Australia* [1984] No. V84/59 Compensation).

48 The applicant argues that if the Director General had an issue with Mr Jones' performance it should have been formally dealt with under the relevant provisions of the *Public Sector Management Act 1994* ("the PSM Act"). Further, the applicant claims that when the decision was made to review Mr Jones' appointment to the Level 7 position this exercise of power was invalid as it was used for a purpose apart from the purpose that had been delegated to Mr Harvey. As statutory powers are to be used for the purpose for which they were intended they cannot be used for improper purposes, or beyond the sound range of discretion (*The Queen v Toohey; Ex parte Northern Land Council* [1980-1981] 151 CLR 170). The applicant argues that the power to promote officers, cannot lawfully or properly be used to performance manage an officer, or penalise an officer for perceived substandard performance, when no issues of substandard performance have previously been put to the officer, and no substandard performance processes have been applied to the officer.

49 The applicant argues that an administrative decision is flawed if irrelevant factors are taken into account. The applicant maintains that Mr Harvey took an irrelevant consideration into account when he allowed the Director General's comments about Mr Jones' alleged performance deficiencies to interfere with the implementation of Mr Jones' promotion, and/or to revise the selection panel's decision. In this instance general knowledge about Mr Jones should not have been taken into account as this knowledge was irrelevant and did not demonstrate that Mr Jones did not fulfil the essential selection criteria for the Level 7 position (*Minister for Aboriginal Affairs and Another v Peko-Wallsend Limited and Others* [1985-1986] 162 CLR 24).

50 The applicant maintains that the respondent caused serious harm to Mr Jones, both personally and professionally, by the Director General putting views about his perceptions of Mr Jones' alleged substandard performance in writing to the selection panel, which ultimately led to Mr Jones' promotion not going ahead. The respondent did not therefore act from a fully informed, reasonable, proper and lawful basis. Mr Jones' reputation, professional standing, career prospects and self esteem have been seriously damaged by the respondent's actions and Mr Jones has suffered substantial harm due to the Director General's actions and his long term prospects within the respondent's operations have been stymied given the Director General's views on Mr Jones. Additionally Mr Jones has incurred a significant financial detriment by not having his promotion to a substantive Level 7 position implemented, and taking into account superannuation consequences, this will result in an ultimate loss to Mr Jones in the long term in the vicinity of $100,000.

51 The applicant argues that Mr Jones was denied natural justice and procedural fairness given the actions of the Director General and the Executive Director in relation to Mr Jones' non-appointment to the Level 7 position. Further, the applicant maintains that the respondent breached ss7-9, s70 and s79 of the PSM Act in its treatment of Mr Jones.

52 The applicant maintains that it is not open to the respondent to review a decision after an initial decision has already been made unless errors or omissions were made. The applicant maintains that as there was no error or omission in this instance then the power to overturn or review an administrative decision was not open to the respondent (*Venture Management Limited v Commissioner of State Taxation* [unreported] delivered 5 June 1991; *Waltons Stores (Interstate) Ltd v Maher* [1988] 164 CLR 387).

Respondent

53 The respondent maintains that the letter sent to Mr Jones on 11 October 2002 (Exhibit R1) was not an offer of appointment or an appointment in itself. It merely advised Mr Jones of the outcome of the selection process and that he had been recommended for appointment to the Level 7 position. Even though it was reasonable for Mr Jones to be optimistic that his appointment would follow there was no automatic right that this appointment would proceed nor was the respondent precluded from not implementing the selection panel's recommendation. Ms Withers gave evidence that the letter sent to Mr Jones dated 11 October 2002 did not constitute a binding offer of promotion and whilst rare, recommendations by selection committee are not always implemented. A promotion is not considered final until an applicant was provided with a formal offer that had been accepted, signed and returned to the Human Resources Directorate and such an offer was not made to Mr Jones. As Mr Harvey determined that Mr Jones' appointment should not proceed, Mr Jones was then advised that he was not to be appointed.

54 The respondent concedes that as part of the review of the selection committee's decision Mr Jones was not provided with the opportunity to comment on the referee reports obtained at the request of the Director General. However, the respondent maintains that the PSM Act does not expressly or by implication require an applicant for appointment or promotion to be accorded a hearing before the employing authority, if the employing authority decides to refuse his or her appointment on material which is adverse to that applicant unless he or she has a legitimate expectation of such a hearing and even though Mr Jones may have had an expectation of being able to respond to the referee reports obtained before the decision was made this hearing would not have changed the outcome (*Stead v State Government Insurance Commission* (1986) CLR 141).

55 The respondent submits that there is no prohibition on the respondent bringing to the attention of its delegatee (in this case Mr Harvey) matters which the Director General felt may be relevant to Mr Jones' appointment. It was then open to Mr Harvey to determine what influence if any those matters may have on his decision provided he exercised an independent mind in making this decision.

56 The respondent maintains that Mr Harvey was entitled when making his decision whether to appoint Mr Jones to the Level 7 position to take into consideration any relevant material coming into his possession (*Minister for Aboriginal Affairs v Peko-Wallsend Limited & Ors* [op cit]). Furthermore, s59(1)(a) of the *Interpretation Act 1984* provides that where a written law confers power on a person to delegate the exercise of any power or the performance of any duties conferred or imposed upon him or her under a written law, such delegation shall not preclude a person so delegating from exercising or performing at any time a power or duty so delegated.

57 Even though a delegation was made in this case, under s33 of the PSM Act, the Director General is still able to exercise the power of appointment at any time. In this case the Director General did not exercise his power of appointment but, if the applicant's submissions are accepted then the Director General was able to exercise this power himself or through Mr Harvey given s59(1)(a) of the *Interpretations Act 1984*.

58 The respondent rejects the applicant's submissions that the Commission should review the decision not to appoint Mr Jones on the basis of illegality in the administrative sense. The respondent maintains that judicial review of an administrative act is the province of the superior courts and the power to undertake judicial review is within the exclusive province of the Supreme Court as part of its inherent jurisdiction and no state courts or tribunals have been conferred with this power. The respondent concedes that as part of its arbitral functions the Commission can review the exercise of statutory powers in connection with an employees' employment but this is not the same as arguing that the Commission can engage in judicial review and declare the exercise of power as being unlawful and therefore invalid.

59 The respondent concedes that it is within the Commission's jurisdiction to determine whether the conditions imposed by statute have been satisfied before a power provided to an employer in connection with an employee's employment can be exercised (*Civil Service Association of WA Incorporated and Director General, Ministry of Justice* [op cit]). The respondent argues that this case however is not authority for the proposition that the Commission has jurisdiction to generally engage in the judicial review of decisions made by public authorities in connection with employment. It is simply authority for the proposition that where the statutory prescribed conditions in connection with an employment power are not met the Commission may declare a decision made ultra vires and therefore void, as opposed to finding it unfair.

60 The respondent submits that the Commission should not order that the respondent re-establish the Level 7 position and order that Mr Jones be appointed to this position based on Mr Jones having a legitimate expectation that he would be appointed to this position. The respondent maintains that a judicial review can only focus on the process and if the process is flawed then the only order that can issue is that the decision was invalid and that the decision needs to be made in accordance with the law – there can be no examination of the merits.

61 The respondent rejects the applicant's claim that there was any evidence that the refusal to appoint Mr Jones was to punish him for alleged deficiencies in his performance.

62 The respondent maintains that if the Commission finds that it can review the decision not to appoint Mr Jones then there is no power to require the respondent to appoint Mr Jones to the Level 7 position as the Commission then becomes involved in determining the merit and fairness of the decision not the lawfulness of the decision. As these matters are covered by the Recruitment, Selection and Appointment Standard, under s80E(7) of the Act, the Arbitrator's jurisdiction is therefore excluded from dealing with the matter and if Mr Harvey's decision is to be set aside on the basis of judicial review any further decision cannot be made under the Arbitrator's jurisdiction given the existence of this Standard. Further, the respondent submits that any order that the Commission issues that the respondent appoint Mr Jones to the re-established position would be beyond the Arbitrator's jurisdiction because of the operation of s80E(7) of the Act. The respondent argues in any event that no order should be made because of the substantial time delay in hearing this matter.

63 As the position that Mr Jones applied for has been abolished there are doubts about the Arbitrator's power to require the position to be re-established and at the very least such an order should not be made in the public interest as it is generally the province of an employer to determine the structure of its business, the qualifications of the people they will employ and who they will employ and the Commission should not lightly interfere with this right (*Western Australian Prison Officers' Union of Workers v Hon Minister for Corrective Services* [1989] 69 WAIG 2217; *Re Cram and Others Ex parte NSW Colliery Proprietors' Association Limited and Others* [1987] 163 CLR 117 at 136-137; *Amalgamated Metal Workers and Shipwrights Union of Western Australia and Others v Robe River Iron Associates* [1986] 67 WAIG 2).

Findings and Conclusions

Credibility

64 I listened carefully to the evidence and carefully observed each witness whilst they gave their evidence. In my view each witness gave their evidence honestly and to the best of their recollection. However, I qualify this by saying that in my view Mr Harvey was tentative and unconvincing when giving evidence about the basis on which he determined that Mr Jones was unsuitable to be appointed to the Level 7 position.

65 Even though the Level 7 position was abolished in January 2003 the applicant is seeking an order that Mr Jones' selection for the Level 7 Position be finalised by Mr Jones being appointed to this position with effect from the date on which the position was advertised and that Mr Jones be permitted to perform the duties and receive all of the benefits, entitlements and privileges which accompany the Level 7 position. The respondent opposes the order sought and claims that it had every right not to appoint Mr Jones to the Level 7 position even though he was recommended by the selection panel for appointment to this position.

66 I have already found that in this instance the Arbitrator has jurisdiction to deal with this application as the applicant's claim does not relate to a breach of a public sector standard, specifically the standard applying to recruitment, selection and appointment (*Civil Service Association of Western Australia Incorporated v Director General Department of Justice* [2004] 84 WAIG 869). In arriving at this decision I accepted that the applicant's complaint relates to whether or not the Director General and Mr Harvey acted in a lawful manner when they became involved in the appointment process for the Level 7 position after the selection panel decided to recommend Mr Jones for appointment to this position and after this decision was endorsed by Mr Carter who, as the respondent's acting Executive Director CJJ, was delegated with the responsibility of filling the Level 7 position.

67 I reject the argument raised by the respondent at the hearing that the Arbitrator does not have the power to review the actions of both Mr Piper and Mr Harvey in relation to this matter as such a review would constitute the judicial review of an administrative act which is the province of superior courts. The Full Bench decision in *Civil Service Association of Western Australia Incorporated v Director General Ministry of Justice* (op cit) is authority confirming that the Arbitrator has express power when dealing with an industrial matter relating to a government officer to review, nullify, modify or vary any act of a Chief Executive Officer as an employer which is invalid and to give any relevant orders or directions, which can review, modify, vary or nullify such an act when statutory provisions in connection with an employee's employment are not met. At p2862 of this decision his Honour, the President stated:

> "There was also a submission that there was no jurisdiction in the Commission to declare the transfer invalid because what was being sought was the judicial review of an administrative act. That, it was submitted, on behalf of the respondent, was outside the jurisdiction of the Commission constituted by the Arbitrator, which, so constituted is not a superior court. Jurisdiction in this matter was said to be conferred, as I have said, by s.80E of *the Act*.
>
> S.80E(1) of *the Act* reads as follows:-

"(1) Subject to Division 3 of Part II and subsections (6) and (7), an Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a Government officer, a group of Government officers or Government officers generally."

S.80E(5) of *the Act* prescribes what the Arbitrator may do in the exercise of his jurisdiction. S.80E(5) reads as follows:-

"80E. Jurisdiction of Arbitrator:

(5) Nothing in subsection (1) or (2) shall affect or interfere with the exercise by an employer in relation to any Government officer, or office under his administration, of any power in relation to any matter within the jurisdiction of an Arbitrator, but any act, matter or thing done by an employer in relation to any such matter is liable to be reviewed, nullified, modified or varied by an Arbitrator in the course of the exercise by him of his jurisdiction in respect of that matter under this Division."

The section seems to prevent the Arbitrator interfering with any employer's exercise of its/his/her duties under the section in relation to any government officer or office under the administration of the employer in relation to any matter within the jurisdiction of an Arbitrator.

However, it is clearly and unambiguously prescribed in s.80E(5) as follows, namely that:-

"any act, matter or thing done by an employer in relation to any such matter ((ie) within the jurisdiction of an Arbitrator), is liable to be reviewed, nullified, modified or varied by an Arbitrator in the course of the exercise by him or his jurisdiction in respect of that matter under this Division."

It is quite clear, therefore, that the decision to transfer and the request or direction for transfer of Ms Bowles was within the jurisdicition (sic) of the Arbitrator. I say that for the reason which I express hereinafter.

The purported transfer of Ms Bowles was the act, matter or thing was liable to be reviewed, nullified, modified or varied by the Arbitrator in this case. That is so because it was an act, matter or thing purported to be done or done by an employer as prescribed in the *PSM Act*, s.80(E)(5), in relation to a matter within the jurisdiction of the Arbitrator. The purported transfer was clearly a matter within the definition of "industrial matter" in s.7 of *the Act* because it affected or related to or pertained to the work privileges, rights or duties of both the employer and the employee in an "industry" as defined in s.7.

Accordingly, it was open to the Commission to find that it was unlawful, or ultra vires by way of the review, or to enable the Arbitrator to modify or vary the act of the respondent.

Most cogent in this case is the power which exists under s.80E(5) of *the Act* to nullify. To "nullify" means, in its most relevant definition "To render or declare legally void or inoperative: to nullify a contract" (see "*The Macquarie Dictionary" (3rd Edition*)).

There is also, therefore, expressly conferred on the Arbitrator the power to nullify ((ie) to render or declare void the decision and other acts matters or things done to effect or to attempt to effect) the transfer to Hakea Prison of Ms Bowles. Equally as cogent is the express power to review contained in s.80.E(5).

Since the express power and jurisdiction exists to nullify any act of the Chief Executive Officer, as an employer, it follows that the Arbitrator is not prevented from doing acts or giving orders or directions which are usually confined to the process of judicial review in a court in order to review, modify, vary or nullify such an act. If there was a restriction on that power, Parliament would have expressly said so. It did not. Further, the act sought to be reviewed clearly fits within the definition of an "industrial matter" as it appears in s.7 of *the Act* (see also s.80E(1)). I would therefore find that the power to nullify, modify or otherwise deal with the decision to transfer in accordance with *the Act* was within jurisdiction. I say that because the decision to transfer Ms Bowles and the purported transfer of Ms Bowles was an act which affected and directly related to the rights, duties and obligations of both an employer and an employee in an industry as defined. The act sought to be nullified, modified, reviewed or varied was and is an act, matter or thing done by an employer in relation to a matter within the jurisdiction of the Arbitrator namely an industrial matter relating to a government officer (see s.80E(1)). It is therefore within jurisdiction whether the act complained of is or was an administrative act or not.

There was, therefore, clearly, express jurisdiction to vary modify or indeed to render void by declaration all or any of the acts, matters or things done effected or attempted to be done or effected by the respondent.

In that this related to what was done or sought to be done pursuant to statutory power under the *PSM Act* there was clear jurisdiction to nullify, vary or modify what was done.

The *Ishmael Case* (op cit) is authority for a number of propositions. These include S80E(7) of *the Act* which deprives the Arbitrator of jurisdiction to enquire into or deal with or refer to the Commission in Court Session or the Full Bench any matter in which a procedure referred to in s.97(1)(a) of the *PSM Act* is or may be prescribed under that Act.

However, the question for the Arbitrator was not and could never be whether there was a breach of the prescribed standards, because the prescribed standards could only be applicable to an act of transfer or purported act of transfer which was lawful and/or within power, not one which was void. S.97(1)(a) of the *PSM Act* does not operate in its terms, it is trite to observe, to deprive the Arbitrator of jurisdiction to determine whether there is a valid exercise of power under s.65 of the *PSM Act*. Indeed, it confers it."

68 It is not disputed in this case and I find that Mr Jones is a government officer and that this issue concerns an industrial matter as defined in the Act as it relates to Mr Jones' rights as an employee. In this instance the question to be determined is whether Mr Piper and Mr Harvey engaged in a valid exercise of power when Mr Piper became directly involved in the selection process for the Level 7 position. It is therefore my view that the Arbitrator has the jurisdiction to deal with this application.

69 The respondent and its employees are required to adhere to the requirements of the PSM Act and the Western Australian Public Sector Code of Ethics ("the Code") (see s30 of the PSM Act) at all times when fulfilling their roles and functions. It is also the case that public sector departments and agencies are subject to the general principles of administrative law when applying statutory rules, regulations and acts of Parliament (*Civil Service Association of Western Australia Incorporated v Director General, Education Department of WA* [op cit]).

70 It was not in dispute and I find that after Mr Piper and Mr Harvey became involved in the Level 7 position's selection process this resulted in the selection panel's recommendation that Mr Jones be appointed to the Level 7 position and Mr Carter's endorsement of the selection panel's decision effectively being overturned and even though Mr Jones was unanimously chosen by the selection panel as its preferred candidate for the Level 7 position and the selection panel's decision had been ratified by the person delegated by the Director General to fill this position Mr Jones was not appointed to the Level 7 position. The relevant sequence of events is as follows:

1. After Mr Jones applied for the Level 7 position he was interviewed on 10 September 2002 along with a number of other competitive applicants. Mr Jones was subsequently assessed by the selection panel to be the recommended applicant for appointment to the Level 7 position and the respondent's then Acting Executive Director CJJ, Mr Carter, who had been delegated by the Director General, Mr Piper, with the authority to fill the Level 7 position endorsed the selection panel's recommendation on 7 October 2002. This confirmation was then forwarded to the respondent's Human Resources Department for further action. As part of the respondent's customary processes I find that Mr Jones was formally notified by letter on or about 11 October 2002 that he had been recommended for appointment to the Level 7 position and that his appointment was not yet assured due to 'the requirement to offer unsuccessful applicants the opportunity for review' (Exhibit R1). Even though it is clear that this letter did not constitute a formal offer of employment to Mr Jones for the Level 7 position, I find that when Mr Jones was sent this letter confirming him to be the selected candidate Mr Jones was advised that he would be appointed to the Level 7 position subject to whether or not a complaint was lodged in a specified time frame by one of the unsuccessful applicants claiming a breach of the standard relating to the recruitment, selection and appointment process. In the event, no complaint was lodged within the required timeframe by any applicant for the Level 7 position alleging any breach of this standard. I accept that when considering applicants for the Level 7 position the selection panel carried out its functions in an appropriate and transparent manner even though the selection panel chose not to obtain referee reports for Mr Jones as Ms Withers confirmed that obtaining referee reports is not an essential step in the selection process for a selection panel. I also accept Ms Withers' evidence that the selection panel followed the respondent's recommended selection process taking into account the guidelines outlined in the Department of Justice Recruitment and Selection Policy, 1996, the Public Sector Standards in Human Resource Management 2001, the PSM Act, the Public Sector Management (Examination & Review Procedures) Regulations, 2001 and the Equal Opportunity Act of Western Australia, 1984. A review of the selection panel's report confirms that Mr Jones was assessed as meeting all of the essential selection criteria for the Level 7 position, he was considered to have outstanding skills and experience in a number of relevant areas and he was considered to be the most competitive candidate for the Level 7 position (Exhibit A1.1).
2. On 23 October 2002 Mr Piper wrote to the selection panel's Chairperson, Mr Cullen, detailing a range of general performance concerns about Mr Jones and requesting that the selection panel seek written referee reports about him from four persons, two of whom were referees nominated by Mr Jones and two of whom were nominated by Mr Piper. Attached to this memorandum was a pre-prepared referee report which had been prepared after Mr Piper sought advice from the respondent's Human Resources Directorate. Mr Piper's memorandum to Mr Cullen concluded with the statement "Based on the outcome of these referee reports and in consultation with Mr Terry Bransby, Manager HR (CJJ), I wish to be advised of your recommendation regarding Mr Jones' suitability for the position before any such appointment is confirmed.".
3. After the referee reports were obtained the selection panel decided not to review its original decision to recommend Mr Jones for appointment to the Level 7 position as it believed it had already fulfilled its functions and had no further role to play in the process.
4. By this point Mr Harvey had returned as Executive Director CJJ and instead of the selection panel's decision not to review its decision to recommend Mr Jones for appointment to the Level 7 position being referred back to Mr Piper as instructed Mr Harvey became involved in the filling of the Level 7 position. After Mr Harvey reviewed the referee reports he sent a memo to Ms Withers on 3 December 2002 advising her that as there were issues about Mr Jones' capacity to fulfil the Level 7 position and as he was considering a restructure of the Policy and Planning area and the possibility that the Level 7 position may be abolished, he advised her that the Level 7 position would not be filled (Exhibit A1.10).
5. On 5 December 2002 Mr Jones was notified by Ms Withers that notwithstanding the letter sent to him on 11 October 2002 advising him that he was the recommended applicant for the Level 7 position, he would not be appointed to the Level 7 position on the basis of the referee reports received from Mr G Thompson and Dr Kay and Mr Harvey's personal belief that Mr Jones' approach did not meet the requirements of 'vital aspects of the essential' selection criteria.
6. In the interim Mr Jones' representatives had written to the respondent complaining about the selection process being reopened and seeking that Mr Jones be appointed to the Level 7 position however, the respondent did not reply to this correspondence.

71 It was not in dispute and I find that the Director General delegated the power to fill the Level 7 position to the Executive Director CJJ and that the Director General has the power to make this delegation under s33 of the PSM Act. Even though the Director General divested himself of the power of appointment for the Level 7 position I accept that the Director General was not precluded from exercising or performing at any time this power or duty which was so delegated (see s59(1)(a) of the *Interpretation Act 1984*). It is my view however that there is not an unfettered right on the part of the delegator to interfere in the selection process or to seek to take over the selection process unless the delegator him or herself exercises this power in accordance with proper procedures and processes applying in the public sector as well as the relevant statutes.

72 I find that Mr Piper acted inappropriately and contrary to the statutory requirements on him by writing the memo to Mr Cullen on 23 October 2002 and initiating a review of the selection process for the Level 7 position as it is my view that Mr Piper did not have the power to interfere in the selection process in the way he did. I find that in doing so Mr Piper's actions were contrary to a number of the provisions of the PSM Act and the Code and the requirement on him to adhere to the necessity to afford an employee the right to procedural fairness. Even though I accept that there was no prohibition on the Director General bringing to the attention of his delegate (Mr Harvey) matters which he believed may have been relevant to Mr Jones' appointment, in this instance this is not what took place.

73 I have based my conclusions on the following. Sections 7 and 9 of the PSM Act read as follows:

> "**7. General principles of public administration and management**
>
> The principles of public administration and management to be observed in and in relation to the Public Sector are that —
>
> (a) the Public Sector is to be administered in a manner which emphasises the importance of service to the community;
>
> (b) the Public Sector is to be so structured and organised as to achieve and maintain operational responsiveness and flexibility, thus enabling it to adapt quickly and effectively to changes in government policies and priorities;
>
> (c) public sector bodies are to be so structured and administered as to enable decisions to be made, and action taken, without excessive formality and with a minimum of delay;

(d) administrative responsibilities are to be clearly defined and authority is to be delegated sufficiently to ensure that those to whom responsibilities are assigned have adequate authority to deal expeditiously with questions that arise in the course of discharging those responsibilities;

(e) public sector bodies should have as their goal a continued improvement in the efficiency and effectiveness of their performance and should be administered with that goal always in view;

(f) resources are to be deployed so as to ensure their most efficient and effective use;

(g) proper standards of financial management and accounting are to be maintained at all times; and

(h) proper standards are to be maintained at all times in the creation, management, maintenance and retention of records."

9. General principles of official conduct

The principles of conduct that are to be observed by all public sector bodies and employees are that they —

(a) are to comply with the provisions of —

(i) this Act and any other Act governing their conduct;

(ii) public sector standards and codes of ethics; and

(iii) any code of conduct applicable to the public sector body or employee concerned;

(b) are to act with integrity in the performance of official duties and are to be scrupulous in the use of official information, equipment and facilities; and

(c) are to exercise proper courtesy, consideration and sensitivity in their dealings with members of the public and employees."

74 The Code provides that all Public Sector employees are to act in an open and accountable manner, they must protect people's rights to due process and they must treat employees courteously and with due consideration. Further, employees are to be informed about decisions and actions affecting them.

75 I have already stated that I accept that Mr Piper had the right to bring to the attention of the delegate and the selection panel relevant information that may not have been considered in filling the level 7 position. However, in doing so Mr Piper was required to act in a fair and transparent manner. In this case I find that when Mr Piper re-opened the selection process for the Level 7 position his actions were contrary to the requirements on him under s7(d) and s9(a)(iii) and s9(c) of the PSM Act and those sections of the Code concerning the necessity to act in an open manner and at the same time protect a person's right to due process and afford employees the opportunity to be informed about any decision affecting them.

76 I find that by nominating two of the four referees who were required to write reports about Mr Jones, Mr Piper did not act in an open and transparent manner towards Mr Jones as an inference could be drawn that the two referees selected by Mr Piper were deliberately chosen to achieve a pre-determined outcome as Dr Kay and Mr G Thompson had a limited knowledge of Mr Jones' skills and abilities and Mr G Thompson initially refused to fill out this report due to his limited knowledge about Mr Jones. I find that Mr Jones was denied procedural fairness when he was not given the opportunity to review the pro forma referee report for the Level 7 position prior to it being sent to the referees nominated by Mr Piper as the report asked referees to comment on Mr Jones' specific abilities as well as his ability to fulfil the essential criteria for the Level 7 position. In unilaterally deciding on the structure of the referee report it is my view that Mr Piper did not ensure Mr Jones' right to due process as provided for in the Code. I find that Mr Jones was denied due consideration and courtesy as provided for in the Code and s9(c) of the PSM Act when the Level 7 position's selection process was re-opened on the basis of Mr Piper's personal views about Mr Jones' performance without any explanation given to Mr Jones for Mr Piper's actions. In doing so I find that Mr Piper did not act in an open and accountable manner towards Mr Jones as required under the Code nor was Mr Jones afforded procedural fairness as Mr Jones was unable to respond to Mr Piper's personal views about his abilities. It is a fundamental principle of administrative law that a decision maker must afford an opportunity to be heard to a person whose interest will or may be adversely affected by a decision and this did not happen in this instance. I find that Mr Jones was treated unfairly and was again denied procedural fairness when Mr Piper did not ensure that Mr Jones was able to respond to the referees' views about his suitability or otherwise for the Level 7 position prior to a decision being made about filling the Level 7 position. I also find that Mr Piper did not ensure that the respondent's administrative responsibilities were clearly defined as required under s7(d) of the PSM Act when he sought a review of Mr Jones' selection and then required Mr Cullen to advise him of Mr Cullen's recommendation regarding Mr Jones' suitability for the Level 7 position before any such appointment was confirmed.

77 I conclude that Mr Piper's action in becoming involved in the selection process for the Level 7 position was not a valid exercise of his powers and as a result it is my view that Mr Piper's intervention in the Level 7 position's selection process should be nullified and declared void. It follows and I find that the subsequent review of Mr Jones' appointment to the Level 7 position by Mr Harvey should not have taken place as Mr Harvey only became involved in a review of the Level 7 selection process as a result of Mr Piper's intervention.

78 As I have decided that Mr Piper's actions in becoming involved in the Level 7 position's selection process should be declared void, it follows that Mr Harvey would therefore not have become involved in the selection process for the Level 7 position. In any event I find that even if Mr Harvey had the ability to review the selection panel's decision to recommend Mr Jones for appointment to the Level 7 position it is my view that the way in which he intervened was contrary to the requirements of the PSM Act and the Code. I find that when Mr Harvey concluded that Mr Jones was unsuitable for the Level 7 position after the four referee reports were obtained at Mr Piper's request he acted contrary to the requirements on him of parts of s9(a) of the PSM Act and parts of the Code. Further, I find that as a result of the process adopted by Mr Harvey, Mr Jones was denied procedural fairness.

79 It is not in dispute that when the selection panel decided not to review its original decision to recommend Mr Jones as it believed it had fulfilled its function and had no further role, Mr Harvey considered the referee reports which were generated after Mr Piper's intervention in the selection process. After taking into account his own personal views about Mr Jones' capacity and suitability for the requirements of the Level 7 position, in particular his views about Mr Jones' inability to fulfil the selection criteria relating to relationship building and networking, Mr Harvey then decided that Mr Jones should not be appointed to the Level 7 position. I have already found that Mr Harvey was not convincing when he attempted to explain his reasons for reaching the view that Mr Jones was unable to meet the requirements of the vital aspects of the essential criteria for the Level 7 position. It is clear that the referee reports reviewed by Mr Harvey did not contain any adverse comments about Mr Jones' ability to satisfy the selection criteria relating to relationship building and networking. Mr Harvey therefore had no basis for making the claim he did in his memorandum to Ms Withers, dated 3 December 2002, that according to two of the referee reports Mr Jones did not satisfy the requirements of the selection criteria relating to "Relationship Building and

Networking" (Exhibit A1.10) and when giving evidence in these proceedings Mr Harvey conceded that all of the referee reports contained no negative feedback about Mr Jones being unable to meet the specific requirements of this criterion which the respondent complained Mr Jones did not meet (see Exhibit A1.4, A1.5, A1.7 and A1.8). In endeavouring to explain his decision that Mr Jones was unsuitable to fulfil the requirements of the Level 7 position Mr Harvey gave evidence that he also took into account his own views about Mr Jones' strengths and weaknesses and other comments in two of the referee reports none of which was ever put to Mr Jones for his response. I find that as Mr Jones was not given the opportunity to respond to Mr Harvey's views about his abilities Mr Jones was denied procedural fairness. I find that the process adopted by Mr Harvey was contrary to the Code as he was not being open and transparent nor did he afford Mr Jones due consideration and courtesy when making his decision not to appoint Mr Jones to the Level 7 position. In my view Mr Harvey did not ensure that Mr Jones was afforded procedural fairness as Mr Jones was not given the opportunity to respond to the referee reports prior to Mr Harvey making a decision about the Level 7 position. I also find that Mr Jones was denied due consideration and courtesy as required under s9(c) of the PSM Act and the Code when Mr Jones' representative complained to Mr Harvey about the process being re-opened and requesting that he be confirmed in the Level 7 position, no response was provided by Mr Harvey to his concerns. In the circumstances, as Mr Harvey did not comply with the statutory requirements on him when he intervened in the selection process for the Level 7 position it is therefore my view that Mr Harvey's actions are invalid and therefore should be nullified.

80 I now must decide on a remedy in relation to this application. It is not in contest that the Level 7 position for which Mr Jones was the successful candidate was abolished some months after Mr Jones would have been confirmed into the Level 7 position (January 2003). Having considered the arguments of both parties it is my view it would be inappropriate to require the respondent to re-establish the Level 7 position. I accept that the Level 7 position has been abolished for over 18 months and it would be inappropriate in the circumstances to require the respondent to re-instate this position. However, I conclude that Mr Jones should be appointed to a substantive Level 7 position within the respondent's operations on the basis that Mr Jones would have been appointed to the Level 7 position prior to it being abolished if Mr Piper and Mr Harvey had not intervened in the process. Furthermore, it is clear that Mr Harvey did not decide to review the recommendation that Mr Jones be appointed to the Level 7 position of his own volition and only did so as a result of Mr Piper's intervention, nor did Mr Harvey's review of the filling of the Level 7 position arise as a result of any proposed restructure.

81 In reaching this view I also take into account that Mr Jones has had a successful and lengthy employment history with the respondent (23 years) and that no concerns about his performance were raised with Mr Jones until the Director General issued his memorandum on 23 October 2002 (Exhibit A1.3). I accept that Mr Jones is currently classified as a Level 6 employee and has acted in a number of positions at Level 7 with the respondent for extended periods, and that in 2003 Mr Jones spent most of the year acting in a Level 7 position. I take into account that Mr Jones was selected for the Level 7 position on merit after a transparent and competitive process was undertaken in accord with the respondent's standard processes, the selection panel decided that Mr Jones met all of the selection criteria for the Level 7 position, the selection panel's decision was signed off by the person delegated with the responsibility to fill the position and the selection panel decided to stand by its original decision after the four referee reports were obtained. I find that both Mr Cullen and Ms McComish, who were on the selection panel, were well placed to determine that Mr Jones had the skills and ability to fulfil all of the requirements of the Level 7 position, particularly given that the Level 7 position would report to Mr Cullen, and Ms McComish had worked with Mr Jones on a regular basis for a some time. Further, I accept that Mr Jones had not been advised of any concerns that the respondent had about his performance, the respondent had sufficient confidence in his ability to act in Level 7 positions on numerous occasions and no other applicant for the Level 7 position lodged a complaint claiming a breach of the Recruitment, Selection and Appointment Standard.

82 It is therefore my view that Mr Jones be appointed to the status of a Level 7 employee within the respondent's operations effective from the date that the Level 7 position would normally have been filled by Mr Jones. The parties are to confer within seven days of the date of this decision as to what that date is and advise the Commission accordingly.

2004 WAIRC 13514

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED **APPLICANT** **-v-** DIRECTOR GENERAL, DEPARTMENT OF JUSTICE (FORMERLY KNOWN AS MINISTRY OF JUSTICE) **RESPONDENT**
CORAM	COMMISSIONER J L HARRISON PUBLIC SERVICE ARBITRATOR
DATE	FRIDAY, 3 DECEMBER 2004
FILE NO/S	PSACR 51 OF 2002
CITATION NO.	2004 WAIRC 13514

Result Application granted

Order

HAVING HEARD Mr J Dasey on behalf of the applicant and Mr R Andretich 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 Neville Jones be appointed to the status of a Level 7 employee within the respondent's operations with an effective date of 25 December 2002, within seven (7) days of the date of this order.

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

INDUSTRIAL MAGISTRATE—Complaints Before—

2005 WAIRC 00011

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES' COURT

PARTIES	PAUL DANIEL GREEN
	CLAIMANT
	-v-
	SPOTLESS SERVICES AUSTRALIA LIMITED
	RESPONDENT
CORAM	MAGISTRATE G CICCHINI IM
DATE	WEDNESDAY, 24 NOVEMBER 2004
CLAIM NO	M 64 OF 2003
CITATION NO.	2005 WAIRC 00011

Representation	
Claimant	Mr PG Laskaris (of Counsel) instructed by *Slater & Gordon Lawyers* appeared for the Claimant.
Respondent	Ms L Gibbs (of Counsel) of *CCI Legal, Barristers & Solicitors* appeared for the Respondent**.**

Reasons for Decision

(Delivered extemporaneously at the conclusion of the hearing, extracted from the transcript and edited by His Worship)

1 I am dealing with an interlocutory application filed by the Claimant on 23 November 2004 in which he seeks to vacate the hearing date which was set for today and tomorrow. There has not been compliance with the regulations concerning the filing and service of the application however the Respondent does not take issue with that. Accordingly I am called upon to consider the application for the adjournment on the basis that the Claimant is currently unavailable because he is overseas.

2 The Claimant departed Australia yesterday bound for Iraq. He works in Iraq. He has known that he would not be available for the hearing for some considerable period time and at least from 6 November 2004. He had however hoped to rearrange his travel plans so that he would be able to remain for the trial. His attempts to do so proved fruitless because of the difficulty in accessing secure flights within Iraq operated by the armed forces of the USA. In his affidavit sworn yesterday in support of his application he said that he made several attempts to alter his travel plans so that he would be in a position to remain to give evidence at the hearing. He was hopeful up until just prior to making this application of being able to postpone his departure but in the end was not able to do so. His failure to depart would have inevitably resulted in him losing his job. The extent to which he went in attempting to alter his travel plans has not been disclosed. There is no detail in that regard. There has simply been a bland statement on his part that he has made attempts to do so. I can only take that at face value. In the end he has testified under oath that he has attempted to change his travel plans so that he could be here today and tomorrow for the trail of the matter. Unfortunately the Claimant failed to disclose his situation to all those concerned including the Respondent and the Court. His application to adjourn the trial was made very late, in fact the day before the commencement of the trial.

3 There can be no doubt that the Respondent has been very much caught by surprise. By the time the application was made the Respondent had already caused a witness to be flown from Melbourne to testify at the hearing. Another witness also had to make special arrangements to attend the hearing. The Respondent accordingly appears today with its witnesses and is ready for the hearing. Any adjournment of the hearing will inevitably result in expense and inconvenience to the Respondent. Accordingly it is the case that the Claimant's conduct in not putting all those concerned on notice about his situation and in making this application very late is a matter of grave concern. He has been dilatory. If he had acted earlier the expense incurred by the Respondent may have been avoided.

4 It is with that background in mind that the merits of the application ought be considered. One of the factors necessarily considered is the nature of the claim. A consideration of the papers on file (I avoid using the word "pleadings" because this is not a Court of pleadings) reveals that there is a legitimate contest between the parties in relation to the construction of the applicable industrial agreement. The Respondent says that the claim is without merit and the Claimant should not be permitted to have this matter adjourned given that he has little chance of success. However it seems to me that the claim is arguable and it cannot be said on the face of it that the claim is without merit. The matter needs to be argued in the usual way. It follows therefore that the Claimant would necessarily need to give evidence to establish his case. Any failure to give evidence on material issues would inevitably result in the Claimant not being able to prove his claim. Accordingly a refusal of the adjournment application would inevitably result in the claim being dismissed. The Claimant argues that if that were to occur injustice would result to him. He maintains that if the hearing were to be adjourned the Respondent would not suffer injustice. In support of his contention he cites ***Myers v Myers [1969] WAR 19*** in which His Honour Jackson J, as he then was, said at page 21:

> "To grant or refuse an adjournment is a matter for the discretion of the court to whom the application is made. But where the refusal of an adjournment would result in serious injustice to one party, an adjournment should be granted unless in turn this would mean serious injustice to the other party. An appellate court will not interfere with a discretionary order of this sort unless there is a strong reason for believing that an injustice has resulted."

5 His Honour also said at that page:

> "'To hear the other side' is a basic principle of justice, and this means not only that a party may appear by counsel on the hearing but should be allowed to give evidence for himself when his evidence is material."

6 The Claimant maintains that he is in exactly the same situation as the appellant in ***Myers*** (supra) given that he needs to give evidence in the hearing in this matter. The refusal of an adjournment leading to an inability to give evidence would result in injustice to him. There is force in his contention.

7 The Respondent opposes the application. Counsel for the Respondent, in submissions, reviewed the conduct of the Claimant throughout the course of these proceedings in an attempt to exemplify the dilatory nature of the Claimant. The Respondent is also concerned about the lateness of the application. The Respondent contends that if the Claimant were to be successful in

his application then it would suffer a consequent waste of time and money. It is argued that the Claimant may well have avoided the situation by making his application at an earlier time. His failure to make the application earlier demonstrates vexatiousness. In essence the Respondent says that the Claimant has acted in the way that he has in order to punish the Respondent. Accordingly the application for an adjournment should be refused. If not refused the Court should order costs against the Claimant given that the Claimant's conduct demonstrates vexatiousness on his part. In that regard the Respondent says that this Court has power to order costs pursuant to section 347 of the ***Workplace Relations Act 1996***. It is argued that the authority to award costs in interlocutory proceedings has been established in ***Commonwealth of Australia v Construction, Forestry, Mining and Energy Union [2003] FCAFC 115***. The Respondent submits that any failure to award costs to it would, of itself, amount to a serious injustice to it given the wasted time and expense arising.

8 Whilst acknowledging that the Respondent has been severely inconvenienced and has suffered expense at the hands of the Claimant the question nevertheless remains whether such expense and/or inconvenience amounts to injustice. Further there is an argument as to whether section 347 of the ***Workplace Relations Act 1996*** would enable me to make an order as against the Claimant in any event despite what was said in ***Commonwealth of Australia v Construction, Forestry, Mining and Energy Union*** (supra). The Claimant appears to concede that in respect of this interlocutory application it would be permissible for this Court to make an order for costs if it were to find that the Claimant has been vexatious.

9 Although there can be no doubt that the Claimant has acted in a dilatory way with respect to this application, it does not necessarily follow that his actions have been vexatious. There is nothing before the Court of an evidentiary nature that would enable this Court to conclude that the Claimant's conduct in bringing the interlocutory application late has been vexatious. That is particularly so given his sworn evidence that he attempted to make other arrangements so that he could be at the hearing. It follows that the basis for concluding that the Claimant has been vexatious, enabling a costs order against him, does not exist. A costs order cannot be made. Given that costs are not recoverable that, of itself, may amount to injustice to the Respondent. I say that because costs do not follow the event in this jurisdiction. The usual situation in most other jurisdictions is that costs do follow the event. Accordingly in such jurisdictions a party is able to recover costs thrown away where an adjournment is granted resulting from the conduct of the opposing party. The award of cost is taken to be an ameliorating factor considered in a decision as to whether or not an adjournment should be granted. In ***Tremeer v City of Stirling & Anor [2002] WASCA 281*** the Full Court of the Supreme Court of Western Australia constituted by Wallwork, Steytler and Mc Lure JJ, said at paragraph 35:

> "It was urged upon us that to allow an adjournment in a case such as this would result in case management principles being set at nought. That is a contention which does not bear analysis. There is a range of remedies (some of them drastic) available to any party faced with dilatoriness on the part of an opposing party. Good case management ensures that those remedies, including the making of appropriate costs orders, are utilised in order to deal with conduct of that kind."

10 It will be obvious that the availability of costs was an important consideration in that matter. However the difficulty arising here is that costs will not be recoverable. It follows therefore that the fact that the Respondent has incurred costs, which are not recoverable, must carry much greater weight than it ordinarily would in my consideration of whether or not the hearing should be adjourned. Having said that, the decision in ***Tremeer v City of Stirling & Anor*** (supra), and others, makes it clear that the Courts will be reluctant to stop a party from presenting his, her or their case in a matter. Ordinarily the Court will strive where possible to ensure that the matter is dealt with on its merits. However on some occasions the Courts will, in weighing up the competing factors, have regard to case management principles that may override all other considerations. There is a concern that valuable court resources not be wasted. In the decision of the High Court of Australia in ***Sali v SPC Ltd & Anor [1993] 67 ALJR 841*** their Honours Toohey and Gaudron JJ said at page 849:

> "The view that the conduct of litigation is not merely a matter for the parties but is also one for the court and the need to avoid disruptions in the court's lists with consequent inconvenience to the court and prejudice to the interests of other litigants waiting to be heard are pressing concerns to which the court may have regard."

11 I may have regard to such consideration, and do. The Magistrates' Courts generally are very busy places. I sit both in this Court and in the Court of Petty Sessions in Perth. The Court of Petty Sessions in Perth is currently listed to December of 2005. If you want a multiple day hearing you will get one in December 2005. It is accordingly very important that the Courts utilise resources appropriately and that wastage of time is avoided. The two days potentially lost in this matter could not be usefully utilized resulting in wasted resources. I recognise however that case management is not an end in itself. The decision of the High Court in ***Queensland v JL Holdings Pty Ltd (1997) 189 CLR 146*** per Dawson, Gaudron and McHugh JJ establishes that to be so. Their Honours said at 154:

> "Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management should be allowed to supplant that aim."

12 Their Honours went on to say at page 155:

> "Justice is the paramount consideration in determining an application such as the one in question. Save in so far as costs may be awarded against the party seeking the amendment, such an application is not the occasion for the punishment of a party for its mistake or for its delay in making the application. Case management, involving as it does the efficiency of the procedures of the court, was in this case a relevant consideration. But it should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence, thus precluding the determination of an issue between the parties. In taking an opposite view, the primary judge was, in our view, in error in the exercise of her discretion."

13 Their Honours Wallwork, Steytler and McLure JJ applied the aforementioned decision in ***Tremeer v City of Stirling & Anor*** (supra).

14 It will be obvious from the consideration of the authorities that Courts will strive where possible to ensure that matters are dealt with on their merits. Dilatoriness on one occasion, of itself, would not necessarily result in the Court shutting out the offending party. If I were to refuse the adjournment in this matter the Claimant would be shut out. In my view, the authorities make it clear that the Claimant should not be shut out of these proceedings. The Respondent, in not being able to recover costs thrown away is severely disadvantaged. The disadvantage cannot be ameliorated. The ***Workplace Relations Act 1996*** precludes the making of a cost order in this instance. That flows from the legislature's policy decision as reflected in the ***Workplace Relations Act 1996***. The inability of the Respondent to ameliorate its disadvantage is indeed unfortunate. It stems directly from the intent of the legislature.

15 The application for the adjournment will be granted for the reasons previously stated. Additionally there is nothing to indicate that the Respondent will be materially affected other than by virtue of further delay and the expense that it has already

incurred. It is not suggested that witnesses will not be available on a future date. The injustice done to the Respondent by it incurring costs, which are not recoverable, does not outweigh the injustice that would be done to the Claimant by a failure to grant the adjournment, and accordingly the adjournment must be granted.

16 I intend to take an active role in ensuring that the matter is appropriately relisted. The matter must not be relisted by the clerk or by a consent order made by the parties. Rather the Court will relist the matter upon the application of either party supported by affidavit. The Court intends to take a supervisory role in ensuring that the matter proceeds to hearing on the next occasion. For that reason and also given that the Claimant has indicated that he will be reducing the amount of his claim it will be necessary to make further orders.

G Cicchini
Industrial Magistrate

2004 WAIRC 13651

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES' COURT

PARTIES	JEREMY JAMES INGHAM
	CLAIMANT
	-v-
	EXPO GROUP AUSTRALIA PTY LTD
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE G. CICCHINI
DATE	WEDNESDAY, 22 SEPTEMBER 2004
CLAIM NO.	M 219 OF 2002
CITATION NO.	2004 WAIRC 13651

Representation	
Claimant	Ms K Wroughton (of Counsel) instructed by *Workclaims Australia* appeared for the Claimant.
Respondent	Mr A Cameron of *Australian Mines and Metals Association In*c appeared as agent for the Respondent.

Reasons for Decision

Introduction

1 The Claimant was employed with the Respondent from 25 October 1999 until 12 April 2002. On 12 April 2002 the Claimant was informed that due to operational reasons his casual contract of employment would not be renewed. The Claimant's conditions of service were at all material times determined by an ***Australian Workplace Agreement*** (the AWA) entered into between the parties on or about 25 October 1999 and duly signed by both parties. The Office of the Employment Advocate duly registered the AWA on 22 December 1999. The AWA still governed the casual employment relationship between the parties as at the date of termination.

The Claim

2 The Claimant alleges he worked for the Respondent on a full-time basis throughout the term of his employment. He says that he was not in reality a casual employee and that consequently the provisions of a state law namely the ***Minimum Conditions of Employment Act 1993*** (the MCE Act) were implied into his contract of employment. He contends that the MCE Act in part governed the operation of the same. He says that in accordance with the provisions of the MCE Act that he should have, upon termination on 12 April 2002, been paid $8,653.80 in lieu of ten week's annual leave accrued during the currency of his employment and which had not been taken or previously paid. He also claims an amount of $2,769.28 representing what is alleged to be due to him for the sixteen public holidays worked during the material time for which he has not been paid. The Claimant therefore seeks to recover the sum of those two amounts totalling $11,423.08 plus interest thereon. He also seeks the imposition of penalties for the breaches of the MCE Act and costs.

Response

3 The Respondent opposes the granting of the orders sought by the Claimant. It says that the Claimant's conditions of service were determined by the AWA, which was duly registered. In that regard clause 6 of the *Terms and Conditions of Casual Employment* incorporated into the AWA provided inter alia that:

> . . ."*the salary contains a component in recognition of public holidays, intervals of leave . . .*"

4 The Respondent argues that the clause creates no additional entitlement to annual leave or pay for work performed on public holidays. It contends that the MCE Act, under which the claim is brought, has no application. In the alternative the Respondent says that given that the Claimant was a casual employee that he is not entitled to that which he seeks pursuant to the MCE Act in any event.

Preliminary Issue

5 On 21 January 2004 the parties came before this Court and agreed that the issue of the jurisdiction of this Court to hear and determine this claim should be determined as a preliminary issue. Although the parties were in agreement in that regard there is now some dispute as to what the resolution of the preliminary issue should entail. In that regard the Respondent suggests that all preliminary issues touching upon the Court's ability to hear and determine the matter should be considered and determined. In particular the Respondent contends that the question of whether or not the Claimant was a casual employee for the purposes of the MCE Act should be finally determined at this stage as a preliminary issue. The Claimant is against that and says that the only matter requiring determination is whether the AWA excludes the MCE Act.

6 I must say that it appears that the only appropriate approach is that suggested by the Claimant. Indeed to attempt to determine the issue of whether the Claimant was an employee within the meaning of section 3 of the MCE Act for the purpose of section 5 thereof without the benefit of evidence other than that which has been agreed would be detrimental to the Claimant's ability

to properly argue his case and would be manifestly unfair. Accordingly I do not propose to truncate the proceedings on that issue. Whether or not that issue remains live will, in any event, be necessarily dependant upon the outcome of my determination of whether or not the AWA excludes the MCE Act.

Determination

7 The Respondent asserts that by virtue of the AWA there can be no additional entitlement to annual leave or pay for work on public holidays because clause 6 of the *Terms and Conditions of Casual Employment* incorporated into the AWA provides:

> "*This specified salary is all inclusive and takes into account all responsibilities, disabilities and other factors associated with the work, location and environmental factors, and includes payment for all hours necessary to undertake your assigned duties.*
>
> *Further, the salary contains a component in recognition of public holidays, intervals of leave, time spent travelling to and from the facilities, and the cost of transport to and from your place of residence to your assembly point and return.*"

8 The Respondent says that the AWA comprehensively addresses the terms and conditions of employment leaving no room for the importation of extraneous considerations. The document speaks for itself. In that regard there is a clear inconsistency between the AWA and the MCE Act to which section 170VR of the ***Workplace Relations Act 1996*** (the WR Act) applies. Put another way, the issue is one of whether or not the AWA is capable of importing the provisions of the MCE Act and not one of whether the AWA excludes the operation of the MCE Act on constitutional grounds.

9 The Claimant on the other hand says that the AWA does not purport to be the exclusive and only record of the employment conditions between the parties. He says that the AWA incorporates the minimum conditions provided for by the MCE Act and there is nothing in the AWA that negates the minimum conditions provided for in the MCE Act being implied into the employment contract. Accordingly it will be necessary to determine whether there is any inconsistency between the AWA and the MCE Act as contemplated by section 109 of the ***Constitution of Australia***. The Claimant says that in determining the issue of inconsistency it will be necessary to discover the field, if any, which the Commonwealth Parliament intended to cover by its enactment of the WR Act

10 In that regard, the Respondent says that the Claimant's approach is both misguided and misconceived because it is readily apparent from the WR Act itself that it is meant to co-exist with state laws on industrial matters. Indeed section 170VR of the WR Act itself reflects that to be so. That section provides:

> ***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.*

11 Indeed the permissible co-existence of State and Commonwealth industrial laws is reflected in the recent decision of French J of the Federal Court of Australia in ***BGC Contracting Pty Ltd v The Construction Forestry Mining & Energy Union of Workers [2004] FCA 981 (29 July 2004)***. The Respondent accepts the MCE Act and WR Act co-exist and says that a consideration of this matter based on constitutional considerations is wholly unnecessary given section 170VR of the WR Act. The Respondent suggests that the only issue requiring determination in this matter is the question of fact of whether there is any inconsistency between the AWA and the MCE Act. If such inconsistency is found then the AWA prevails by virtue of the operation of section 170VR.

12 In determining this preliminary issue I find myself in complete agreement with the approach suggested by the Respondent. The parties agree that the Claimant's conditions of service were at all material times determined by the AWA. The AWA does not expressly or impliedly import the minimum conditions contained in the MCE Act. The agreement speaks for itself. The AWA is an entire agreement that governs the totality of the terms and conditions of the employment relationship. I say that because clauses 1, 4 and 8 of the AWA together with various provisions of the annexure thereto entitled *Terms and Conditions of Casual Employment* forming part of the AWA expressly declare that the AWA forms the basis of the Claimant's casual employment. In those circumstances it is not permissible to look at extrinsic sources to explain or to give effect to aspects of the AWA. The AWA is a comprehensive document that outlines the totality of the Claimant's terms and conditions of employment including his entitlement to annual leave and public holidays as set out in clause 6 of the AWA. There is simply no avenue by which the provisions of the MCE Act can be implied into the AWA given its express provisions. Once the AWA passed the no-disadvantage test and was approved (see section 170VPB of the WR Act) it became the sole instrument which regulated the terms and conditions of the Claimant's employment. The Claimant is, in my view, now estopped from treating the AWA as not being an entire agreement. If there is some disagreement between the parties concerning the interpretation of the terms of the agreement, recourse should be had to the dispute settlement procedure contained in clause 7 of the AWA.

13 I am in general agreement with the first limb of Mr Cameron's submissions. I find that the AWA and the relevant provisions of the MCE Act are inconsistent and that section 170VR of the WR Act operates to exclude the MCE Act. It follows therefore that this claim made pursuant to the MCE Act and section 83 of the ***Industrial Relations Act 1979*** cannot be heard and determined because this Court lacks the jurisdiction to do so by virtue of section 170VR of the WR Act.

14 I will now hear from the parties concerning the orders to be made.

G Cicchini
Industrial Magistrate

2005 WAIRC 00012

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES' COURT

PARTIES	JOHN WILLIAM SWEET
	CLAIMANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF AGRICULTURE
	RESPONDENT
CORAM	MAGISTRATE G CICCHINI IM
DATE	THURSDAY, 18 NOVEMBER 2004
CLAIM NO	M 159 OF 2004
CITATION NO.	2005 WAIRC 00012

Representation	
Claimant	Ms SJ Thomas of the *Civil Service Association of Western Australia Incorporated* appeared as agent for the Claimant.
Respondent	Ms R Hartley (of Counsel) instructed by the *State Solicitors Office* appeared for the Respondent

Reasons for Decision

Introduction

1 The Claimant employed the Respondent as a Quarantine Inspector from 10 January 1983 until 19 November 2003. The provisions of the ***Public Service Award 1992*** and the ***Public Service General Agreement 2002*** (the Agreement) governed his employment.

2 In April 2003 (the material time) the Claimant worked as a shift worker rostered on duty an average of seventy-five hours per fortnight including regular work on weekends and public service holidays. The roster for April 2003 dictated that the Claimant was to work on Good Friday (April 18) and Anzac Day (25 April) both of which were public service holidays. However on 4 March 2003 the Claimant submitted an application for annual leave to cover the period 4 April 2003 to 4 May 2003 inclusive. The application for leave was granted. Accordingly the days that the Claimant was absent on approved annual leave were those days, which the Claimant would have worked, but for the taking of annual leave including 18 April 2003 and 25 April 2003. It follows that the Claimant did not work the Good Friday public holiday and the Anzac Day public holiday because he was on annual leave. If he had not been on annual leave he would have been required to work those days. Subsequently and as a result of that the Respondent debited the Claimant's annual leave entitlement for 18 and 25 April 2003.

3 The Claimant asserts that he should not have had annual leave deducted for those two days and that they should have been treated as public holidays or that he should have received two public holidays in lieu because he is entitled to public holidays in addition to annual leave. The Claimant seeks to recover two days pay at the applicable rate, being that prevailing at the time the annual leave was taken.

Pivotal Issue

4 The pivotal issue requiring determination is whether it can be established on the balance of probabilities that the Respondent has breached clause 24(1)(a) of the ***Public Service Award 1992*** (the Award) by not allowing the Claimant as a holiday with pay, Good Friday and Anzac Day 2003. It is not disputed that the Award binds the parties and that the Agreement does not have relevance to the issue requiring determination.

Submissions

5 The Respondent submits that, given that the Claimant was a shift worker rostered to work regularly on Sundays and public service holidays, he is entitled pursuant to clause 21(2)(d) of the Award to one week's leave in addition to his entitlement to annual leave. Also, pursuant to clause 23(11) of the Award, the Claimant, being a shift worker was, when proceeding on annual leave, paid the greater of the shift and weekend penalties he would have received had he not proceeded on annual leave or a loading equivalent to twenty percent of normal salary for five weeks of leave. Accordingly the Respondent argues that the Claimant's annual leave entitlement, in respect of the public holidays not worked whilst on annual leave, should be reduced by two days. If that were not so, a shift worker rostered for work on a public holiday could simply take annual leave on that day and receive payment without his annual leave entitlement being affected. In other words, the shift worker would get a "*free*" day off. It is submitted that there is no unfairness in this instance with what the Respondent has done because the Claimant was given an extra week of annual leave and was paid a twenty percent loading when on annual leave on account of the fact that because he was a shift worker he might be required to work public holidays as part of his ordinary hours of duty.

6 The Claimant on the other hand submits that clause 24(1)(a) of the Award, which provides:

> *(1) The following days shall be allowed as holidays with pay:*
>
> *(a) New Year's Day, Australia Day, Good Friday, Easter Monday, Christmas Day, Boxing Day, Anzac Day, Sovereign's Birthday, Foundation Day, Labour Day, provided that the employer may approve another day to be taken as a holiday in lieu of any of the above mentioned days.*

does not operate to exclude shift workers from receiving an entitlement of ten paid public holidays per year. It is argued that if it was the intention of the parties to the Award to exclude public holiday entitlements for shift workers then the same would have been clearly stated as has occurred with respect to long service leave. Relevantly in that regard clause 25(7) of the Award provides:

> *(7) Any Public Holiday or days in lieu of the repealed public service holidays occurring during an officers absence on long service leave shall be deemed to be a portion of the long service leave and extra days in lieu thereof shall not be granted.*

7 The "*annual leave*" provision (clause 23 of the Award) does not contain a similar provision. Accordingly the Claimant asserts that public holidays falling during a period of annual leave are additional to that leave.

8 Relevantly clause 21(2)(d) of the Award relating to shift work allowance provides:

> *(d) An officer engaged on shift work who is rostered to work regularly on Sundays and/or public holidays shall be entitled to one week's leave in addition to the officer's normal entitlement to annual leave of absence for recreation.*

9 The Claimant asserts that clause 21(2) provides for an extra week of recreational leave as compensation for the requirement for shift workers to work regularly on Sundays and/or public holidays but such entitlement is not in lieu of the public holiday entitlement. The Claimant argues that his contention is supported by clause 21(2)(b) which provides:

> *(b) Work performed during ordinary rostered hours on Saturdays or Sundays shall be paid for at the rate of time and one-half and on public holidays at double time and one-half. These rates shall be paid in lieu of the allowance prescribed in paragraph (2)(a) of this clause.*
>
> *Provided that in lieu of the foregoing provisions of this subclause and subject to agreement between the employer and the officer, work performed during ordinary rostered hours on a public holiday shall be paid for at the rate of time and one-half and the officer may, in addition, be allowed a day's leave with pay to be added to annual leave or to be taken at some other time within a period of one year.*

10 The Claimant says that clause 21(2)(b) recognises the entitlement to public holidays by the payment of double time and one-half for working on public holidays and that such is in addition to the extra week of recreational leave provided by clause 21(2)(d) of the Award.

11 Further it is argued that clause 21(2)(c) of the Award recognises the entitlement to public holidays by granting a day in lieu should the public holiday fall on a day that the employee is rostered off. Again that is in addition to the extra week of recreational leave provided by clause 21(2)(d) of the Award. Clause 21(2)(c) provides:

> *(c) An officer rostered off duty on a public holiday shall be paid at ordinary rates for such day or, subject to agreement between the employer and the officer, be allowed a day's leave with pay in lieu of the holiday to be added to the officer's next annual leave entitlement or taken at a mutually convenient time within a period of one year.*

12 The Claimant contends that he is entitled to the ten paid public holidays provided for under clause 24(1) in addition to the five week's recreational leave provided for under clauses 21(2)(d) and 23 of the Award. The Award contains no provision for the forfeiture of public holidays nor does it provide that any possible forfeiture is to be compensated by the provision of one week's extra recreational leave.

Determination

13 The relevant facts set out in the introduction are not in dispute. Nor is it in dispute that the Award binds the parties. Accordingly it follows that the only issue requiring determination is one of law being; whether the Respondent has breached clause 24(1)(a) of the Award by failing to pay the Claimant the 2003 Good Friday and Anzac Day public holidays which occurred whilst he was on annual leave.

14 In determining this matter it is important to start by recognising that there are certain minimum conditions of employment that apply. Indeed section 5 of the ***Minimum Conditions of Employment Act 1993*** (the MCE Act) provides:

Minimum conditions implied in awards etc.

> *5. (1) The minimum conditions of employment extend to and bind all employees and employers and are taken to be implied —*
>
> *[(a) deleted]*
>
> *(aa) in any employer-employee agreement;*
>
> *(b) in any award; or*
>
> *(c) if a contract of employment is not governed by an employer-employee agreement or an award, in that contract.*
>
> *(2) A provision in, or condition of, an employer-employee agreement, an award or a contract of employment that is less favourable to the employee than a minimum condition of employment has no effect.*
>
> *(3) A provision in, or condition of, an agreement or arrangement that purports to exclude the operation of this Act has no effect, but without prejudice to other provisions or conditions of the agreement or arrangement.*
>
> *(4) A purported waiver of a right under this Act has no effect.*
>
> *(5) This section has effect subject to sections 8 and 9(1).*

15 Section 8 and 9 of the MCE Act provide for limited contracting out of annual leave and minimum wage entitlements. No similar such provision is to be found within the MCE Act appertaining to public holidays. The minimum conditions provisions with respect to public holidays are found in Part 4 of the Act entitled "*Minimum leave conditions*". Within that Part, Division 5 headed "*Public holidays*" provides in section 30:

> **Public holidays, entitlement to pay for**
>
> *30. 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.*

16 "*Public holiday*" is defined in section 29 of the MCE Act for the purposes of section 30 by reference to Schedule 1 of the MCE Act to include both the Good Friday and Anzac Day public holidays; being consistent with the designated public holidays set out in the Second Schedule to the ***Public and Bank Holidays Act 1972***.

17 The entitlement to paid public holidays as provided for in the MCE Act must have been foremost in the mind of my brother Mr WG Tarr IM when he said in ***Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch v Quality Bakers Australia Limited (2003) 83 WAIG 3673*** that the entitlement to paid public holidays is a "*fundamental right*". At page 3675 of that decision he said:

> *"It is my view that if it was the intention of either party to an agreement that employees are to forfeit such a fundamental right as public holidays, the agreement must clearly provide for such a forfeiture and if it was intended by a party, as is claimed in this case, that the forfeiture is to be compensated by five days extra annual leave, the agreement should reflect that."*

18 There he was referring to the effect that the relevant enterprise agreement, registered pursuant to section 41 of the ***Industrial Relations Act 1979***, had upon the applicable award provisions. Notwithstanding that, my brother's view has equal application to the construction of the Award in this instance. I say that because in that matter he was being asked to do the same as I am being asked to do here, that is to construct the provisions that confer entitlements upon employees. It matters not whether the provisions conferring entitlements are found within one instrument or more than one instrument. Accordingly I reject the Respondent's contention that the aforementioned decision ought to be distinguished because it related to the construction of an award in the light of an agreement. Indeed the ordinary rules of construction apply whether there be one or more instruments governing the conditions of employment.

19 In this matter the Award makes no provision for the forfeiture by shift workers of the entitlement to be paid for public holidays not worked. Nor does it specifically state that one-week's extra recreational leave and the extra leave loading are granted in compensation for forfeited annual leave. Indeed it is silent on the issue. If it were the intention of the parties that the entitlement to paid public holidays be forfeited and compensated for by other award provisions, then the same would have clearly been expressed within the Award itself. An illustration of such is found in clause 25(7) of the Award, which clearly expresses the forfeiting of paid public service leave during periods of long service leave. The failure to expressly provide for forfeiture supports the Claimant's contention, which is consistent with what was said in ***Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch v Quality Bakers Australia Limited*** (supra). As Commissioner Beech (as he then was) said in ***The Media, Entertainment and Arts Alliance of Western Australia (Union of Employees) v Western Australian Sports Centre Trust (2000) 80 WAIG 1674*** *at 1675*:

> *". . . I am not persuaded that where an industrial agreement is silent regarding a particular issue, the absence of a provision is taken as being ambiguous."*

20 There is no ambiguity falling from the Award which would require this Court to construe the Award in the manner suggested in ***Norwest Beef Industries Ltd and Another v WA Branch, Australian Meat Industry Employees Union (1984) 64 WAIG 2124***.

21 There is nothing before the Court which would indicate that the Claimant is not entitled to the ten public holidays provided for under clause 24(1) in addition to the five week's recreational leave provided for in clause 21(2)(d) and leave loading as provided for in clause 23(11) of the Award. Such is consistent with the view expressed by Commissioner Mansfield in his determination of the application made pursuant to section 170LW of the Workplace Relations Act 1996 in the matter of ***Australian Municipal, Administrative, Clerical and Services Union – Western Australian Branch v Western Power Corporation delivered on 16 March 2004 (Print No 944613)*** in which he said at paragraph 21:

> *"The basis for the awarding of extra annual leave for continuous shift workers was, in a large measure, to provide an opportunity for greater leisure time with their families to compensate for those days when they were absent from home because of being required to work on Sundays and public holidays."*

22 In any event clause 21(2)(d) does not make the entitlement to one week's annual leave in addition to the normal entitlement contingent upon working on public holidays. The provision itself is expressed in the alternative and could well apply to a shift worker who only regularly works Sundays. In other words, the entitlement to an extra week's leave is not contingent upon the worker working on public holidays. Indeed the entitlement may arise exclusively of any public holiday consideration. It is foreseeable therefore that if an officer was rostered to work every Sunday but not public holidays then his entitlement to an extra week's leave would remain. It seems to me therefore that clause 21(2)(d) of the Award cannot be read to limit the benefits conferred by clause 24(1) of the Award as the Respondent seems to have done. It is clear that clause 21(2)(d) can operate quite independently and without any correlation to clause 24(1) of the Award. I agree therefore with the Claimant's contention that the entitlement to an extra week of annual leave should not be taken to be in lieu of the public holiday entitlement and, or for that matter, in lieu of the additional leave loading payable pursuant to clause 23(11) of the Award. That approach is consistent with what Commissioner Mansfield said in ***Australian Municipal, Administrative, Clerical and Services Union – Western Australian Branch v Western Power Corporation*** (supra).

23 Furthermore clause 21(2)(b) of the Award recognises the entitlement to public holidays by the payment of double time and one-half and that such payment is in addition to the extra week of recreational leave and extra leave loading. In the alternative and only by agreement between the officer and his or her employer, the officer may be paid at the rate of time and one-half plus be allowed a day's leave with pay to be added to annual leave or to be taken at some other time in lieu of being paid at double time and one-half. There is therefore within that provision the express recognition of the entitlement to paid public holidays irrespective of any other entitlement payable to a shift worker.

24 Clause 21(2)(c) of the Award also recognises the entitlement to public holidays by granting a day in lieu should the public holiday fall on a day that the employee is rostered off. Accordingly the public holiday entitlement is not lost but rather it is preserved. It begs the question: Why should it be lost when an employee proceeds on annual leave?

25 It seems to me that the Claimant's situation was at the material time no different to a shift worker who was rostered off duty. Indeed it could be argued that the Claimant had in fact been rostered off duty as a consequence of his leave application being approved. In those circumstances clause 21(2)(c) of the Award has application. With all due respect to the Respondent, it appears to me that the position taken in rejecting the claim is somewhat fallacious. I say that because the Respondent's position is that if the Claimant were not on annual leave he would have worked Good Friday and Anzac Day in 2003. However the intervening event of the approval of annual leave meant that he was never going to work those days. In effect the roster was changed and the Claimant was no longer rostered on duty. He was off duty. It cannot be said in those circumstances that if he had not been on annual leave he would have been required to work. The fact is that he was not required to work those days. Given that he was not required to work those days, the Claimant's position was no different to

any other person who was off duty. He was entitled to be paid at ordinary rates, but was not. The Respondent's failure in that regard constitutes a breach of the Award.

26 The claim is proved.

G Cicchini
Industrial Magistrate

POLICE ACT 1892—APPEAL—Matters Pertaining To—

2004 WAIRC 13748

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JENNIFER LORRAINE MCKAY
	APPELLANT
	-v-
	THE COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER J H SMITH
	COMMISSIONER J L HARRISON
DATE	THURSDAY, 23 DECEMBER 2004
FILE NO/S	APPL 452 OF 2004
CITATION NO.	2004 WAIRC 13748

Result	Order issued
Representation	
Applicant	Mr D Moen of counsel
Respondent	Mr R Andretich of counsel

Order

WHEREAS an application was made during the hearing of this appeal that the name of the serving police officer the subject of allegations made by the appellant not be made public in any report of these proceedings;

AND WHEREAS the Commission is of the view that an order should issue;

NOW THEREFORE, pursuant to the powers conferred on it under s.27 of the *Industrial Relations Act 1979* and s.33S of the *Police Act 1892*, the Western Australian Industrial Relations Commission hereby orders -

THAT the name of the serving police officer the subject of allegations made by the appellant not be used in any report of these proceedings.

(Sgd.) A R BEECH,
Chief Commissioner
On Behalf Of The
[L.S.] Western Australian Industrial Relations Commission

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2004 WAIRC 13700

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN RAYMOND BATES-SMITH
	APPLICANT
	-v-
	KARRATHA CITY REAL ESTATE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	MONDAY, 20 DECEMBER 2004
FILE NO.	APPL 743 OF 2004
CITATION NO.	2004 WAIRC 13700

Result	Application dismissed for want of prosecution
Catchwords	Contractual benefits claim — Entitlements under contract of employment – Applicant advised he would not attend the hearing – Application to adjourn hearing indefinitely – Test for grant or refusal of adjournment – Adjournment refused – Application dismissed – *Industrial Relations Act 1979* (WA) s.27(1)(a); s.29(1)(b)(ii); Application dismissed for want of prosecution
Representation	
Applicant	Mr J. Bates-Smith (by way of written submissions)
Respondent	Mr J. Brenton (by way of written submissions)

Reasons for Decision

1 This application is a claim for denied contractual benefits which was referred to the Commission by Mr Bates-Smith on 2 June 2004. Mr Bates-Smith had been an employee of Karratha City Real Estate (the respondent) as a sales representative in Karratha. His application to the Commission stated that he was owed commissions on the sale of houses or units to the value of $10,000.

2 The respondent has emphatically denied that any commissions are due to Mr Bates-Smith because he did not follow the sales through to their completion, the "associated problems he left are still ongoing to this date" and "if you leave a company and your deals are still conditional then naturally you lose your agreed entitlement". Mr Brenton has stated that even if Mr Bates-Smith was entitled to an amount of $2,753.60 less tax (which is denied) that sum is far less than the sums owed to either the respondent or its proprietor Mr Brenton personally.

3 The Commission has endeavoured to resolve the claim by conciliation. Mr Bates-Smith no longer resides in Karratha and is now resident in Sydney, New South Wales. On one occasion a conciliation conference was convened in Perth when Mr Bates-Smith returned to Perth and Mr Brenton was joined to the conference by way of conference telephone. On another occasion, the Commission convened a conference with both parties participating by way of a conference telephone.

4 Both Mr Bates-Smith and Mr Brenton agreed to a process whereby Mr Bates-Smith particularised his claim, Mr Brenton responded and in turn Mr Bates-Smith replied to the response. This had the effect of narrowing the claim to only three properties and clearly identifying the issues between the parties in relation to those properties. However there was no prospect of an agreement between the parties. The Commission discussed with each party the most appropriate manner for hearing the claim given that there would be significant contradictions in the evidence to be given by both parties and the Commission would need to decide issues of credibility. Although Mr Bates-Smith was not prepared to travel to Karratha for the hearing, he was prepared to travel to Perth and to bring to Perth a witness resident in Mandurah. For the respondent's part, Mr Brenton was not intending to come to Perth for any reason and, further, the witnesses he wished to call were resident in Karratha.

5 Accordingly, and with the express knowledge and understanding of the parties, on 8 November 2004 the Commission sent a Notice of Hearing to the parties setting the hearing down in Karratha for 16 December 2004 with Mr Bates-Smith travelling to Perth on that day to present his case using the Commission's video-link facilities in Perth.

6 On 6 December 2004 the Commission received a facsimile from Mr Bates-Smith. It stated relevantly:

> "I have weighed up the expenses involved with my claim and have decided that the costs of bringing a witness and myself from Sydney plus costs of bringing two other witnesses to Perth outweighs the likely financial outcome, even if it was in my favour, to warrant going ahead with this claim at this stage.
>
> I reserve the right to pursue this matter further at a later stage when all the parties are available in Perth, either through your department or through the civil courts.
>
> Thank you for your assistance in this matter to date."

7 The Commission replied to Mr Bates-Smith stating that his application had been set down for hearing and that his intention not to attend that hearing is a ground to have his claim struck out for want of prosecution. However, in order for the Commission not to travel to Karratha unnecessarily, and as a courtesy to the respondent who would still need to prepare for the hearing, the Commission cancelled the hearing for 16 December 2004.

8 The Commission also informed Mr Bates-Smith that he had no "right" to pursue his claim at a later stage. Rather, the Commission regarded Mr Bates-Smith's facsimile as a request that the hearing be adjourned indefinitely. The Commission informed Mr Bates-Smith that the Commission would give the respondent an opportunity to reply to that request and may decide to grant the request or alternatively to refuse it. In the event that the request is refused, Mr Bates-Smith's application would be dismissed because of his intention not to attend the hearing.

9 On 15 December 2004 the respondent wrote to the Commission totally rejecting Mr Bates-Smith's application to have the hearing adjourned indefinitely. Mr Brenton wrote:

> "I do not agree to any request from Mr Bates-Smith as we are now entering our third year of this supposed claim of his, and as usual he has substantiated nothing. Please contact me if you have any enquiries."

10 I now turn to examine Mr Bates-Smith's application to have the hearing of his claim adjourned indefinitely. The Commission has been asked to adjourn hearings on a number of occasions in the past. It has been held that in deciding whether or not to grant an adjournment the Commission should adopt the same test as is applied in courts generally: where the refusal of an adjournment would result in a serious injustice to one party, an adjournment should be granted unless in turn this would mean serious injustice to the other party (*Myers v. Myers* [1969] WAR 19).

11 In this case, to refuse Mr Bates-Smith's request would cause a serious injustice to him in that his claim would then be dismissed. However, I also note that Mr Bates-Smith is not, for example, asking for an adjournment for a week, or perhaps a month, in order to accommodate a particular contingency which had come up since the matter was listed for hearing. In fact, Mr Bates-Smith seeks to have his application adjourned indefinitely. That is quite another matter. Mr Bates-Smith does not suggest any timeframe for the length of the adjournment. Rather, the hearing is to be at some future time when "all the parties are available in Perth".

12 The discussions between the parties which occurred at the two conferences before the Commission lead me readily to conclude that there is unlikely to be such a time in the near future, perhaps even the far future: there has been no suggestion from Mr Brenton that he regularly comes to Perth and there has been no indication from Mr Bates-Smith that he will return to Perth on an occasion which may coincide with Mr Brenton being in Perth. It raises the very real prospect, from my point of view, that it is quite likely that this hearing may not be re-listed for some very considerable time into the future, if at all. In

any event, both Mr Bates-Smith and Mr Brenton have witnesses who are not resident in Perth and the presence of both principals in Perth does not mean that all witnesses will also be in Perth. Therefore Mr Bates-Smith's request appears unrealistic; the serious injustice he suffers if his request is not granted is of his own making.

13 Matters which come before this Commission, which deals with claims between employers and employees as an alternative to resort to the civil courts, are to be dealt with promptly. That is certainly the case in relation to claims of unfair dismissal and no less so where there are disputed claims of denied contractual benefits which will need to be resolved with the assistance of witness evidence. If the Commission is to resolve matters in dispute between the parties on the basis of evidence from witnesses, the evidence is best taken as close as possible to the events to which the evidence relates. People's memories fade over time and the Commission is faced with a far more difficult task of resolving conflict in the evidence where the events to the evidence relates occurred years ago. That appears already to be the case here: Mr Brenton's letter states that the parties are entering into their third year of this claim. For that reason there is an onus on an applicant to actively press his or her claim and not to have it adjourned indefinitely.

14 Further, I take into account Mr Brenton's submission that the respondent totally rejects the application to adjourn the hearing indefinitely. In my view, an ex-employer who is named as the respondent in an application such as this has just as vested interest in the outcome of the application as does the applicant. That interest includes having the application disposed of in a proper and timely manner. It is a prejudice to an employer to have a claim hanging over the employer's head at all and certainly for any length of time. I conclude that granting the adjournment that Mr Bates-Smith requests would in turn create the serious injustice to the respondent of having a claim it hotly contests hanging over its head indefinitely.

15 The hearing date and the obligation of Mr Bates-Smith to present his case and evidence at that time was discussed in advance and was well known to him at the time it was set. The value of his claim, which is significantly less that his original claim, has been known to him for a considerable time. Mr Brenton has consistently maintained that there is no substance whatever to Mr Bates-Smith's claim and hence his reference in his letter of 15 December 2004 to Mr Bates-Smith's claim as being "a supposed claim". The breakdown in the relationship between the parties is such that I consider it adds to the serious injustice to the respondent to adjourn the hearing indefinitely.

16 Therefore, I conclude that to grant the adjournment would mean serious injustice to the respondent. Granting an adjournment for a short period of time, measured in weeks, might not warrant that conclusion; granting an indefinite adjournment does warrant that conclusion. I therefore refuse the adjournment.

17 As a consequence Mr Bates-Smith's application will now be dismissed for want of prosecution. An order to that effect now issues.

2004 WAIRC 13701

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN RAYMOND BATES-SMITH
	APPLICANT
	-v-
	KARRATHA CITY REAL ESTATE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	MONDAY, 20 DECEMBER 2004
FILE NO/S	APPL 743 OF 2004
CITATION NO.	2004 WAIRC 13701

Result	Application dismissed for want of prosecution
Representation	
Applicant	Mr J. Bates-Smith (by way of written submissions)
Respondent	Mr J. Brenton (by way of written submissions)

Order

HAVING HEARD Mr J. Bates-Smith (by way of written submissions) on his own behalf as the applicant and Mr J. Brenton (by way of written submissions) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby order –

THAT the application be dismissed for want of prosecution.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

2004 WAIRC 13547

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DARELL IAN GREEN
	APPLICANT
	-v-
	TRACEY AND EDWARD PANNIZZA TRADING AS ROCKINGHAM APPLIANCES
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 8 DECEMBER 2004
FILE NO.	APPL 1091 OF 2004
CITATION NO.	2004 WAIRC 13547

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal – Extension of time for application to be referred to Commission – Application referred outside of 28 day time limit – Failure to appear by the Applicant – Application dismissed for want of prosecution – *Industrial Relations Act 1979 (WA)* s 29(1)(b)(i), (2) & (3)
Result	Application alleging unfair dismissal dismissed for want of prosecution
Representation	
Applicant	No Appearance
Respondent	Mr D Moss (as agent)

Reasons for Decision

1 This application was filed on 20 August 2004 pursuant to s29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act"). Darell Ian Green ("the applicant") claims that he was unfairly dismissed on 9 July 2004 by Tracey and Eddie Pannizza ("the respondent") and a response was filed by the respondent on 29 October 2004 objecting to the application.

2 As this application was filed outside of the 28 day timeframe for lodging this claim the matter was listed for hearing to allow the parties to put submissions and give evidence as to whether or not, under s29(3) of the Act, it would be unfair not to accept this application.

3 The applicant was advised of the hearing by notice dated 11 October 2004 and an amended notice of hearing dated 21 October 2004, which were both forwarded to the address specified in the application and have not been returned to the Commission. The Commission attempted to confirm the date of hearing by telephone with the applicant however the number provided on the application was no longer valid.

4 During the proceedings on 3 November 2004 it became clear that the respondent had been incorrectly named. Given the Commission's powers under s27(1)(m) of the Act, and having formed the view that it was appropriate in the circumstances to amend the respondent's name I propose to issue an order that Tracey and Eddie Pannizza be deleted as the named respondent in this application and be substituted with Tracey and Edward Pannizza trading as Rockingham Appliances.

5 The applicant did not attend the hearing listed for 3 November 2004. The respondent submitted at the hearing that the matter should be dismissed as the applicant had sufficient notice of the hearing, the respondent had suffered considerable inconvenience responding to this application and argued that it would continue to be inconvenienced if this application was set down for another hearing.

6 On 16 November 2004 the applicant was mailed a copy of the transcript of the proceedings of 3 November 2004 and the applicant was advised that he had until 30 November 2004 to advise the Commission as to why the matter should not be dismissed. No response was received by the Commission to this letter.

7 I am satisfied that the applicant has had ample opportunity to prosecute his claim against the respondent and no reason has been given by the applicant for his non-attendance at the hearing. In the circumstances I do not believe it is desirable in the public interest for the matter to be continued and it is my view that it is not appropriate for the Commission and the respondent to expend further resources dealing with this matter and it is also my view that the respondent is entitled to have this claim dealt with in a timely manner.

8 For the above reasons an order pursuant to s27(1)(a) of the Act will now issue dismissing the application for want of prosecution.

2004 WAIRC 13546

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DARELL IAN GREEN
	APPLICANT
	-v-
	TRACEY AND EDWARD PANNIZZA TRADING AS ROCKINGHAM APPLIANCES
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 8 DECEMBER 2004
FILE NO/S	APPL 1091 OF 2004
CITATION NO.	2004 WAIRC 13546

Result Application alleging unfair dismissal dismissed for want of prosecution

Order

THERE BEING no appearance on behalf of the applicant and having heard Mr D Moss as agent 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 name of the respondent be deleted and that Tracey and Edward Pannizza trading as Rockingham Appliances be substituted in lieu thereof.

2) THAT the application be and is hereby otherwise dismissed for want of prosecution.

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

2004 WAIRC 13484

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MOIRA MACLACHLAN HEDDLE
	APPLICANT
	-v-
	MHS GROUP PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	WEDNESDAY, 1 DECEMBER 2004
FILE NO.	APPL 1045 OF 2004
CITATION NO.	2004 WAIRC 13484

CatchWords	Termination of employment – harsh, oppressive and unfair dismissal – Acceptance of referral out of time – Application referred outside of 28 day time limit – Application granted – *Industrial Relations Act 1979* (WA) s 29(1)(b)(i), (2) and (3)
Result	Order made to extend time to file an application
Representation	
Applicant	In person
Respondent	Mr M Underwood

Reasons for Decision

1 This is an application under s 29(3) of the *Industrial Relations Act 1979* ("the Act"), for an extension of time for filing an application under s 29(1)(b)(i) of the Act by Ms Moira MacLachlan Heddle ("the Applicant"), to claim that she has been harshly, oppressively or unfairly dismissed by MHS Group Pty Ltd ("the Respondent") on 14 June 2004. The application was filed by the Applicant on 12 August 2004. The application was filed 31 days out of time.

2 The Applicant qualified as an enrolled nurse in mid 2003. The Applicant came to live in Australia, as an international student. It is common ground that the Applicant could not remain in Australia after she completed her studies, unless she obtained a business visa, which required her to obtain a sponsor. On 6 April 2004, the Applicant was employed by the Respondent, which is a recruitment and consulting business. At the same time the Respondent became the Applicant's sponsor. The Applicant was engaged by the Respondent as a labour hire employee. The Applicant was engaged because the Respondent had intended to place the Applicant in a long placement to care for a brain injured client who required 24-hour care by enrolled and registered nurses. However, after the Applicant's employment commenced that contract did not proceed. The Applicant carried out a few hours of agency work for the Respondent but otherwise, until her employment was terminated, she worked in the Respondent's office answering telephone calls and carrying out other office duties.

3 The Applicant's employment came to an end when she met the Respondent's State Manager, Mr Michael Underwood and Ms Jocelyn Ramage, on 7 May 2004. At that meeting the Applicant was informed that her employment was to be terminated as they were unable to find her suitable duties. The Applicant was provided with the following letter of termination:

> "Dear Moira
>
> Thank you for meeting with Mike Underwood and Jocelyn Ramage on 7 May 2004.
>
> As discussed at the meeting MHS have raised their concerns and listened to your concerns regarding your employment as an Enrolled Nurse.
>
> As you are aware you were initially employed by MHS to assist in the care of a brain injured client who required 24 hour care by Enrolled and Registered nurses. Unfortunately as you are aware the client is no longer with MHS.
>
> MHS personnel have made several attempts to find you suitable duties, including but not limited to, care in the Aged care industry. We understand that you are not willing to work indefinitely in the aged care sector and do not want to participate in the care of a client who requires 24 hour care in her home. Given the current situation in the acute care market we are unable to provide you with work in the acute hospital arena.
>
> It is therefore with regret that we need to terminate your employment with MHS to take effect from the 14 June 2004. We will continue to work towards a suitable agreeable solution to MHS and yourself in the interim. All monies owing to you will be deposited in your nominated bank account as previously agreed up until Friday the 14 June 2004. We require a signed acknowledgement of your receipt of this letter below.

I wish you well with your career.

Yours sincerely

Mike Underwood

State Manager – WA" (*Exhibit 1*)

4 The Applicant says that the termination of employment was unfair in that she disputes the statement in the letter that she was not willing to work in the aged care sector. She says she was happy to work in the aged care sector and that she was also happy to participate in the care of a client who required 24-hour homecare. She said the only issue that she raised in relation to the placements was the rate of pay. The Applicant says her business visa required her to earn over $37,852 per annum as a base rate and the rates offered for each placement was less, which meant that if she accepted either of these positions her visa would be revoked.

5 From 7 May 2004 to 14 June 2004, the Applicant was not required to attend work. During that period of time the Applicant took steps to secure a new sponsor, as the terms of her visa were that if she did not have a sponsor, she would have to leave the country within thirty days. Finding a sponsor was her first priority during that period of time.

6 The Applicant contacted immigration agents and spoke to lawyers to obtain advice about her situation. She saw a legal aid lawyer at the beginning of June 2004, and contacted Wageline. As a result of those enquiries, she contacted the Australian Nursing Federation ("the Union") and spoke to an industrial officer. The Applicant is a member of the Union. The Applicant spoke to the Union's secretary, Mr Mark Olson, who asked her to send him her documents. She did so and he telephoned her on about Sunday, 20 June 2004. She says that Mr Olson told her that he had looked at the papers, that she had grounds for a claim of unfair dismissal and that he would submit a claim to the Commission. At this point in time, the 28 days time period for submitting a claim to this Commission had not expired.

7 The Applicant did not immediately hear from the Union so she made numerous attempts to contact Mr Olson over the next ten days. At the end of ten days, she received a telephone call from Mr Olson who informed her that he had decided against submitting a claim for unfair dismissal and that the time for bringing an application had expired. The Applicant then sought legal advice from the Community Legal and Advocacy Centre ("the Centre") about her claim for unfair dismissal. The first appointment she could obtain with the Centre was on 26 July 2004. She saw a solicitor, who did not have much employment law experience. She later spoke to the Centre's principal solicitor on 3 August 2004, who informed the Applicant that she could submit her own claim for unfair dismissal and that she could make an application to the Commission to waive the filing fee. The Commission file records the Applicant filed the application for unfair dismissal on 12 August 2004, together with an application for waiver of the fee, which was granted by a Deputy Registrar on that day.

8 Mr Michael Underwood, the Respondent's State Manager, testified that the Respondent is a recruitment and consulting business and part of the Respondent's function in Western Australia is to provide labour hire in medical areas. They also provide permanent placement services to clients. He says that after the contract for the brain injured client did not proceed, the Respondent tried to find the Applicant appropriate employment. However, they were unable to do so. Accordingly, a decision was made to terminate the Applicant's employment on 7 May 2004. Mr Underwood maintains that the Respondent was unable to find the Applicant any work which was suitable to her, so they gave her five weeks' notice, which in his opinion was sufficient time for her to lodge an application for unfair dismissal, if she wished to do so.

9 The Respondent contends that the application for an extension of time should not be granted as the Respondent had, by the late filing of the claim, been denied the opportunity to challenge or rectify the situation. Mr Underwood did not offer any evidence as to what could have been or should have been addressed by the Respondent in that period of time.

10 Having heard the evidence in this matter, I concluded at the end of the hearing that I would make an Order granting the Applicant an extension of time to file her application, as I was satisfied that she had provided an acceptable explanation for the delay, which makes it equitable to extend.

Conclusion

11 Having considered all the evidence, I reached the view that I should exercise my discretion to grant the application to extend time to file an application for unfair dismissal. Applying the principles set out by the Industrial Appeal Court in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683, I am satisfied that the Applicant has provided an acceptable explanation of the delay in making her claim, which makes it equitable to extend the time for filing the application. I am satisfied that the Applicant took steps to contest the termination within the 28 day period. In particular, she took steps to instruct the Union to bring an application on her behalf. The Respondent has not raised any real issue of prejudice if the claim is to proceed. There is a dispute as to whether the Applicant's termination is unfair or not. In light of the matters raised, I am satisfied that it cannot be said that the Applicant's claim has no merit whatsoever. In the circumstances I determined that I would grant the application and accordingly, I will make an Order to extend time.

2004 WAIRC 13555

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MOIRA MACLACHLAN HEDDLE
	APPLICANT
	-v-
	MHS GROUP PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	WEDNESDAY, 8 DECEMBER 2004
FILE NO.	APPL 1045 OF 2004
CITATION NO.	2004 WAIRC 13555

Result	Application to extend time under s 29(3) of the *Industrial Relations Act 1979,* granted.
Representation	
Applicant	In person
Respondent	Mr M Underwood

Order

HAVING heard the Applicant and Mr M Underwood, on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* ("the Act") hereby:

ORDERS that the time for filing of application 1045 of 2004 be extended to 12 August 2004.

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

2004 WAIRC 13764

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KRISTY NICOLE HUTCHINGS
	APPLICANT
	-v-
	VORARIN ANUVONGPARKDEECHART
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	FRIDAY, 24 DECEMBER 2004
FILE NO.	APPL 683 OF 2004
CITATION NO.	2004 WAIRC 13764

CatchWords	**Termination of employment – Unfair dismissal – Principles applied** – ***Industrial Relations Act 1979 s23A, s29..***
Result	Unfairly dismissed. Compensation awarded
Representation	
Applicant	Ms K.N. Hutchings appeared on her own behalf
Respondent	Ms V. Anuvongparkdeechart appeared on her own behalf

Decision
(Ex-tempore as edited by the Senior Commissioner)

1 On the 14th May 2004, Kristy Nicole Hutchings (the Applicant) applied to the Commission for orders pursuant to s.23A of the *Industrial Relations Act 1979* (the Act), on the grounds that her dismissal from the employment of Vorarin Anuvongparkdeechart (the Respondent) had been harsh, oppressive and unfair. She also claimed other contractual benefits, including, annual leave, notice and holiday pay.

2 I note concerning the contractual benefits, that it is clear from the evidence her employment was subject to the Shop and Warehouse Wholesale and Retail Award. The award establishes employment conditions for shop assistants in the retail industry of which Ms Hutchings was one. The Commission has no jurisdiction to deal with award enforcement, that jurisdiction is ousted by s.83 of the Act which provides enforcement is the sole jurisdiction of the Industrial Magistrate.

3 That said, there is left, the claim for unfair dismissal.

4 The Applicant says is that she commenced work with the Respondent in 2002. Initially, she was employed as a casual. After 4 weeks, she received what she called "permanent employment". Exhibit K1 shows that permanent employment provided for hours of work which varied between 24 to 43 hours a week. The average is about 30 hours per week.

5 The Applicant says when she first commenced, there were no wage records kept. . These only commenced in August 2003, which is the date she shows as having started work in her particulars of her claim.

6 The Applicant claims she managed the business of the Respondent. At the time her duties included opening and closing the shop, counting the tills, pricing, dressing mannequins and serving customers. The Respondent would only visit the shop from time to time. For all intents and purposes, the Applicant was in charge of the shop during the rest of the time.

7 She does not claim that during her absence, the Respondent did not attend. As I understand her evidence, she says "*I essentially worked alone in the shop, with the Respondent visiting me, from time to time, at least once a week*".

8 There was never any complaint raised with her concerning the standard of her work. She acknowledged that there was an issue about tuning a radio. Apart from that, the Respondent never complained about her performance but gave her the normal directions one would give an employee.

9 Prior to 23rd April 2004 the Applicant became concerned about the failure of the Respondent to pay her some entitlements for an allowance for meals. She made a note of it in the communications book. The mere fact that such a book exits is indicative that the Respondent was not at the premises as much as she claims. I will deal with the Respondent's claims later in these Reasons for Decision.

10 The first time that the Respondent saw that notation, she said to the Applicant "*It appears that you are unhappy here, and you should go. You can go now, if you like, or work out the shift*". The Applicant said she was upset, and crying, but she did leave. Strangely, some 6 weeks later, she did work some additional shifts after the Respondent had made a series of approaches to her to do so. There were only two shifts worked, but I do not see that they affect the viability of this claim, as it concerns unfair dismissal on 23rd April 2004. The Applicant says that she searched for a job after she was dismissed, and was able to obtain work some 6 weeks later.

11 The Commission has heard evidence from Vorarin Anuvongparkdeechart, who is the proprietor of the Respondent. She did not deny the events of 23rd April 2004. She did dismiss the Applicant, but she said the reasons were related to the financial performance of the business, and what she termed "personal reasons". Those personal reasons, as much as can be ascertained from her evidence, were a complaint from a customer made some time ago and not raised with the Applicant, and the Applicant's habit of changing the station on the radio in the shop. There were many opportunities presented to the Respondent to add to those reasons, but there none forthcoming. The Respondent claimed that her reason for termination were those, set out above. She said that she had warned the Applicant on numerous times about her conduct but she gave no instances of when that occurred.

12 Both the parties were unrepresented, and the Commission did the best it could to assist them within the proper boundaries to present their cases. When the Commission deals with a matter like this, it has to make a finding about credibility of witnesses, because it is upon credibility that findings of fact are based, particularly when there is no documentary evidence to support the witness evidence.

13 I heard the Applicant give her evidence. There is nothing which would indicate to me that she is not a witness of credit and there is no reason to de-weight any of the evidence that she has given. The Respondents evidence was different She was evasive, or at least was unable to tell the Commission the reasons upon which she based her decision to terminate, even though she was given opportunity to do so. On a comparative basis, her evidence is not as strong or as believable as that of the Applicant, and I so find.

14 When the Commission is dealing with unfair dismissals it is to apply the principles established in the *Undercliffe Nursing Home v Federated Miscellaneous Workers Union (1985)* 65 WAIG 385. In brief they are that an employer has the right to hire and fire, and the fairness of a tribunal will not interfere with the right, unless that right is abused. In considering a termination, the Commission is not to stand in the shoes of the manager, it is to assess whether the termination was fair, given a normal commercial setting and relationship between the parties.

15 Where there has been summary dismissal, the onus of proof to establish the evidentiary fact of the dismissal lies upon the Respondent. The onus to establish unfairness rests with the Applicant. I need to deal with both obligation and onus.

16 It appears to me that the Respondent has not established the evidentiary facts to underpin the dismissal.

17 On the contrary, on the evidence it is open to find for some reason, the Respondent decided that she would terminate the services of the Applicant. Although she says there were for financial and personal reasons no evidence of the financial state of the business was provided.

18 When the Commission asked, she confirmed that the business was still running. There are no financial reasons upon which dismissal is justified. The presence of genuine financial hardship could provide justification for termination of a contract of employment, but not in the way that this contract has been terminated. There are ways an employer can handle financial stress of the business, and that includes structuring, revising the amount of hours worked by its employees and so on.

19 The personal reasons are said to be a customer made a complaint and that the radio station had been changed. The last one is not a reason to dismiss anybody. There is no evidence that the Applicant was playing heavy metal music which did not fit in with the ambience of the business. Secondly, the customer complaint had been made a very long time ago and had never been raised with the Applicant.

20 If it was a serious complaint it would have been dealt with at the time. Because it appears not to have been, it is not an issue upon which the Respondent can now rely. It is open to find that there were no evidentiary reasons upon which this dismissal, summary as it was, could have been made by the Respondent. In that case, the command in the *Undercliffe Nursing Home* (ibid) is that there be a fair go all round and there has not been in this case. The dismissal must be regarded as an unfair dismissal, and the Commission will find, accordingly.

21 Next. What should happen? The Act requires in s.23A that reinstatement is the primary remedy. However, even though the Applicant went back and worked with the Respondent for a couple of shifts, they have not been able to re-establish an ongoing relationship. She now has other work. To put her back to work for the Respondent, if it is under financial stress, as it is claimed would not be a viable option. I therefore do not intend to order reinstatement.

22 The Act then requires that I examine the question of compensation. The rules for the assessment of compensation are set out in *Boganovich v Bayside Western Australia Pty Ltd (1999)* 79 WAIG 8. Essentially, the Act requires that the person who has been unfairly dismissed be placed in a position by award of compensation, as if they had not suffered a loss.

23 In this case, the Applicant identifies her loss as being 6 weeks. She says that she has tried to mitigate that loss by seeking other employment, and I accept her evidence in that respect. There is no reason to conclude that, absent the termination, she would not have continued to be employed in the Respondent's business for that period of 6 weeks. The Commission will award her for loss 6 weeks' pay based upon an average working week of 30 hours. Calculated on the loss of $459.00 for a 30 hour week this is an amount of $2754.00.

24 The Applicant has led no evidence that she has been injured by this dismissal. There is no evidence of psychological disturbance or any other monetary loss, other than the loss of wages that she may have suffered. That being the case, I do not intend to make any award for injury.

25 The Commission will issue a minute of proposed order which will provide that the Applicant in this case was unfairly dismissed, that reinstatement would not be an option, and that she should be awarded compensation of $2,754.00 payable within 14 days of the date of issue of the order.

2004 WAIRC 13767

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KRISTY NICOLE HUTCHINGS
	APPLICANT
	-v-
	VORARIN ANUVONGPARKDEECHART
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	FRIDAY, 31 DECEMBER 2004
FILE NO/S	APPL 683 OF 2004
CITATION NO.	2004 WAIRC 13767

Result Compensation Awarded

Order

HAVING heard Ms K. N. Hutchings, the Applicant and Ms V. Anuvongparkdeechart for the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the Respondent pay Ms K. N. Hutchings $2754.00 as compensation within 14 days of the date hereof.

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

2004 WAIRC 13739

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TONY KURSAR
	APPLICANT
	-v-
	CARLTON UNITED BREWERIES LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	THURSDAY, 23 DECEMBER 2004
FILE NO.	APPL 621 OF 2004
CITATION NO.	2004 WAIRC 13739

CatchWords	**Termination of employment – Unfair dismissal – Damage to Respondents property – *Industrial Relations Act 1979 s23A, s29.*.**
Result	Dismissed
Representation	
Applicant	Mr Tony Edward Kursar appeared on his own behalf
Respondent	Ms J. Auerbach (of Counsel) appeared on behalf of the Respondent

Reasons for Decision

(Ex Tempore as edited by Senior Commissioner Gregor)

1 This application was filed on 5th May 2004, by Tony Kursar (the Applicant) under s.23A of the *Industrial Relations Act, 1979* (the Act). The supporting particulars of claim provide the Commission with some information about the Applicant and his claim. The Applicant seeks orders against Carlton United Breweries Ltd (the Respondent) who had employed him between 5th May 1994 and 13th April 2004 when the relationship was brought to an end by a notice of termination (Exhibit A15).

2 It appears from the evidence that in the first instance, the Applicant was employed in a non-staff position. That lasted until 1999 when he became a salaried employee. He occupied various staff positions and was a planning systems co-ordinator at the time of termination. The Applicant questions whether the termination of his employment should have been executed on the basis of serious misconduct on the grounds of excessive use of mobile phones and improper and inappropriate use of a laptop which had been issued to him.

3 He also was concerned whether the procedure which led to his termination was valid given that he did not have the assistance of Ms Margaret Currie, who did not give evidence, at the various interviews which were conducted which led to his termination. He also told the Commission that he believed that it was inappropriate for the Respondent to rely upon previous counselling on issues when in respect of one of them which occurred in February 2003 he did not indicate acceptance in writing of the warning which was then given to him. (Exhibit A17).

4 He finally suggested that the termination was unfair because he had not been treated in the same manner as other employees and therefore the conduct of the Respondent was unreasonable.

5 What the Respondent says is that there has been a history by the Applicant of non-conformance with its policies concerning mobile phones. This came to light in 2001 and when his usage of the mobile phone appeared to be running at higher rates than that of other employees. (Exhibit A2).

6 Thereafter and for 3 years, there was a continuing exchange between the parties about the use of mobile phones and later, about inappropriate use of a laptop, (Exhibits A3, A7, A9 supplemented by Exhibit A10 all relate to those issues). The matter came to a head at the end of 2003 and this resulted in some investigations into the use of mobile phones again. The Applicant was told that his usage levels had been higher than his peers. For the month of January 2004 his usage was $1428.00 as opposed to a national operations average of $78.00. He was told that this usage rate, given his previous record, was a very serious breach of company policy and it was a policy about which he had been counselled before in 2002.

7 In 2002 the Applicant was issued with a formal written warning (Exhibit A11). That warning included a reference to other matters including the purchase of non-standard electronic equipment in contravention of the Respondent's policy, the purchase of a telephone and information technology equipment through a non-approved supplier, and installing unauthorised and unlicensed software onto his computer. He was formally warned that if there were any further instances of this behaviour it would be viewed as serious misconduct and may lead to an instant termination of employment.

8 The Respondent then provided the Applicant with a detailed plan by which he could work to prove that he was able to effectively perform his duties. He was told that Damien Finn, the General Manager of Operations, was available to assist him and he could access the Employee Assistance Programme for professional psychological support. The Applicant signed that letter. Issues of the same genre took place in the year 2003. These were detailed in a long communication to him (Exhibit A17). Specific performance and behavioural data were presented to the Applicant for the purpose of assisting him to make improvements to his job performance. Again assistance was offered to him. Ultimately matters did not improve to the satisfaction of the Respondent and the investigations to which I have referred before and which were detailed in Exhibit A14 occurred.

9 As well as use of the mobile phone, there was emphasis on the lack of a cogent explanation from the Applicant about how access for several hours to an internet service provider appeared in his phone account. There were also many numbers on the telephone account where the Applicant could not identify the custodians. There was excessive use of SMS facilities over the weekend. The Applicant was told that the mobile phone usage and cost was at an unacceptable and unjustifiable level and that the evidence did not support the explanations he had provided.

10 There were also details of the findings by the Respondent's Information Technology Section (IT) about the physical condition of the laptop on issue to the Applicant regarding a broken screen and other damage. There was also the re-formatting of the hard disk which was contrary to policy, the presence of games which had the appearance of being pirated and the potential use of laptop in combination with a mobile phone to access the internet. These were all issues which were raised by IT. IT reported the repairs which were necessary to the machine, these included replacement of a broken front cover, the key mat, the power key and rear housing. It is coincidental that at the same time the Applicant had use of a reserve mobile telephone because the phone handset that had been issued to him was being repaired because it had suffered a similar damage.

11 For all those reasons, the Respondent decided it would terminate the service of the Applicant. It said that there had not been an improvement that had been sought over a 3 year period, that the specific instances which it had investigated amounted to serious misconduct and therefore the notice of termination was given.

12 When the Commission deals with matters like this, it is to listen to the evidence and make a decision based on its finding of the credibility of the witnesses concerned. The Applicant was examined in-chief by the Commission and then allowed a substantial amount of time to adumbrate in any way he sought fit upon that evidence in-chief. He was subject to cross-examination by Ms Auerbach, of Counsel, for the Respondent. The findings of credibility that need to be made as a result of hearing witness evidence are a key to the determination of a matter such as this. The Applicant is a person who clearly has had a number of difficulties over the last 3 or 4 years which necessitated him using the Employee Assistance Programme and ultimately seeking help from a psychologist to deal with stress-related issues. I take into account that he would find that these proceedings difficult if that be the situation.

13 Notwithstanding, his evidence is characterised by obfuscation and dissembling. It was confused and confusing. He contradicted himself on many occasions. He displayed an attitude to employment which is quite startling. Some indications of this is in some of his communications to his superiors. For instance, when writing to the General Manager, WA Operations, when he was directed by Jo Christie of Human Resources Management to attend a workshop on managing diversity and respectful behaviour he wrote:

> *"I've spoken to everyone I need to and I think you need to know that like a lot of other people on the floor, most people will not go because of the message being conveyed by this" (Exhibit A8).*
>
> *"I also hold the view that many of these people - - the childish, ridiculous behaviour of a few people is making the whole place look idiotic. We need to talk about this, because I really don't want to waste 2 hours of my time when I know it's not necessary. I do hold strong views on this",*

14 and later,

> *"I'm deadly serious that the next dimwit who tries anything will cross me big time, because I've had enough of turning my cheek to these people who may very well need a psychiatrist more than I need to attend a workshop",*

15 and again, in another communication he says in the context of being asked to refund some money for personal calls:

> *"I have - - I know that I've misused company property, but the revenue of CUB will survive the financial massacre from it, so I cannot see anything will be achieved from my repayment but the building up of my resentment (Exhibit A6),*

16 and then he goes on later to say,

> *"I will draft a letter of resignation if this is not sufficient, because the highlighting of my bad points on a continual basis has led me to believe that that is what is really wanted".*

17 These are just a few examples of an indication of an attitude by an employee which demonstrates he is a problematic person. In the context of how his evidence should be regarded, I have drawn the conclusion that because of the confusing way he has given his evidence and because of the attitude that he expresses, that he is always right, that he is a person upon whom not a lot of credibility should rest in determining the truth or otherwise of his story.

18 I do not find that the Applicant has come here to tell deliberate lies, otherwise I would make it a more serious finding, but he has come here with a mindset which has led him to the position that in the way he has communicated his story that the Commission has no option but to regard his evidence with a great deal of suspicion.

19 The evidence that has been received from the Respondent is in the main part through documentation. There are 18 exhibits that have been presented by the Respondent. Most of those exhibits are photocopies of E-mails between the parties and there can be no question as to their truthfulness or veracity. In addition, I have heard from Ms Christie who was subject to cross-examination by the Applicant. There is no reason for me to conclude she has not told the Commission the truth. Putting the documentary evidence together with the verbal evidence of Ms Christie which has not been diminished in cross-examination

where the evidence of the Respondent varies from the evidence of the Applicant, I am bound to find that the evidence of the Respondent is to be favoured.

20 The Commission is to apply the law which is set out in the *Undercliffe Nursing Home v Federated Miscellaneous Workers Union (1985)* 65 WAIG 385. It is not to interfere with a dismissal or the employer's right to dismiss unless that right is exercised in a harsh or unfair way nor is it to put itself in the shoes of the employer as if it were a surrogate manager and substitute its decision about the original termination for that of the employer. What it has to do determine whether there has been a fair go all round.

21 I find this was a problematic relationship that has run its course. The Respondent shows through the evidence that it made every effort to modify the behaviour of the Applicant to improve his performance and fit in with the way the Respondent did its work and that is the key. It is the Respondent who operates the business, not the Applicant. It is he who must comply with the Respondent's policies, strategies and guidelines, not it with his. It is for him to comply as long as the orders given by the Respondent are fair and reasonable and do not expose him to any harm or prejudice in his employment. There was no sign of either of those two indicia in any of the evidence.

22 On the contrary, he was given a formal warning back in September 2002 (Exhibit A11). There can be no doubt that the warning is detailed, couched in simple language and provides all that a classical warning should provide, that is, it identifies the complaint, it identifies the investigation, it identifies the issues upon which the Respondent is upset and details those and then it provides a remedy for the conduct. The Applicant signed it and even though in his evidence he sought to repudiate his own signature, he is nevertheless bound to that warning. He seeks to set aside the writing in the letter of the 26th of March 2003, because he has not signed it, but in his evidence, he did not deny that he received it. He did not deny that the issues in the letter were raised with him. As with the warning in 2002, this letter identifies the complaint, it identifies the investigation; it identifies the remedy that is required. There could be no doubt that the Applicant knew that the Respondent was upset about how much he used his telephone.

23 It is not a sufficient answer for him to say, "*Someone else did it*". He is responsible, because the company's equipment was in his power and possession. If he let other people use the phone and they used it in an abnormal and unusual way he is responsible because he should have stopped them from doing so. There are many ways he could have, but they are not issues I need to go into here.

24 As for the laptop, it is clear, because the Commission has seen the laptop that no care was taken of this property. Again, the Applicant seeks to blame someone else. Someone else may have been responsible for the damage to the laptop, but again, the laptop, which was valued at around $3000.00, was placed in his care and possession. He had a duty and obligation to ensure that it was kept in a proper operating condition and was returned to his employer in the same condition. For him to say that he had asked for an upgrade and that meant the IT people knew that the equipment was damaged is not an answer upon which I place a great deal of weight. It is mainly a convenience for him. He failed to explain to the Respondent prior to the dismissal why the damage to the machine occurred and he has failed to explain to this Commission when he had the opportunity to do so.

25 His explanations as to the software and re-formatting are in the same category. Again, he blames some unknown person. The fact of the matter is whether or not the damage was done by him is now immaterial, because he was responsible at all times for the proper operation of the equipment. To keep it away from work for 12 months in a non-operational manner as he did is quite astounding. So is his criticism of the Respondent for wanting to investigate and find what had happened to the equipment.

26 In a matter such as this, the onus rests upon the Respondent to prove the evidentiary fact of the dismissal and I find it has discharged that onus. The onus rests on the Applicant to prove, once that evidentiary onus has been discharged, to establish on the balance of probabilities that there has been unfairness in the dismissal. The Applicant has been unable to do so on the balance of probabilities and for that reason his application will have to be dismissed.

27 For all those reasons, an order will issue from the Commission dismissing this application. I should say finally that there will also be an order that no contractual benefit in respect of long service leave has been established.

2004 WAIRC 13754

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TONY KURSAR
	APPLICANT
	-v-
	CARLTON UNITED BREWERIES LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	THURSDAY, 23 DECEMBER 2004
FILE NO/S	APPL 621 OF 2004
CITATION NO.	2004 WAIRC 13754

CATCHWORDS	Termination of employment – Unfair dismissal – Damage to Respondents property – *Industrial Relations Act 1979, s23A, s29*
Result	Dismissed
Representation	
Applicant	MR TONY EDWARD KURSAR
Respondent	MS. J. AUERBACH (of Counsel)

Order

HAVING heard Mr T.E. Kursar who appeared as the Applicant and Ms J. Auerbach, (of Counsel), who appeared on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

1. THAT the application be dismissed: and
2. THAT no contractual benefit in respect of long service leave has been established.

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

2004 WAIRC 13620

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LORNA LUEN LLOYD
	APPLICANT
	-v-
	HADEN FM PTY LTD T/AS RESOLVE FM
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 13 DECEMBER 2004
FILE NO.	APPL 1924 OF 2003
CITATION NO.	2004 WAIRC 13620

Catchwords	Industrial Law (WA) - Termination of employment – Harsh, oppressive and unfair dismissal – Whether applicant terminated due to redundancy – Termination due to genuine redundancy – Failure to meet all requirements of s 41 of the *Minimum Conditions of Employment Act 1993* – Applicant unfairly dismissed – Reinstatement or Re-employment impracticable – Determination of quantum of compensation – No loss demonstrated – Industrial Relations Act 1979 (WA) ss 26 and 29(1)(b)(i) Minimum Conditions of Employment Act 1993 (WA) ss 41 and 43 Contractual benefits claim – Entitlements claimed under contract of employment — Principles – Application dismissed – Industrial Relations Act 1979 WA s 29(1)(b)(ii)
Result	Application alleging unfair dismissal upheld no compensation ordered. Application for contractual benefits dismissed
Representation	
Applicant	Mr P Sorensen (of counsel)
Respondent	Mr J F I Curlewis (of counsel)

Reasons for Decision

1 Lorna Luen Lloyd ("the applicant") lodged an application pursuant to s29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979* ("the Act") against Haden FM Pty Ltd trading as Resolve FM ("the respondent") claiming that she was unfairly terminated on 19 December 2003 and that she is due benefits under her contract of employment with the respondent. The respondent denies that the applicant was unfairly terminated and claims that her position was made redundant. The respondent also denies that the applicant is owed benefits under her contract of employment.

Background

2 The applicant was employed by the respondent on 9 September 2002 as a Contracts Administration Officer ("CAO") at the respondent's Wickham office and the applicant ceased employment with the respondent on 19 December 2003. The applicant's duties included reception duties, dealing with accounts payable and receivable, organising employee training, handling petty cash, operating a two way radio, invoicing, report writing, preparing contracts and any other general administrative duties required by the respondent to fulfil its contract with Robe River Iron Associates ("RRIA"). The applicant was employed pursuant to a written contract of employment (Exhibit A4). When the applicant commenced employment in Wickham she was relocated from Perth at the respondent's expense and the applicant's accommodation in Wickham was provided by the respondent free of charge, including the cost of utilities.

Applicant's Evidence

3 The applicant is a member of the Chartered Institute of Secretaries and has a Diploma in Corporate Management. The applicant stated that throughout her employment with the respondent she did not have a written job description and she undertook all administrative duties required of her. The applicant stated that she worked an excessive amount of hours, that she regularly started work at 6.30am and worked through to 10.00pm seven days a week (except for when she went shopping) and after returning home the applicant continued to undertake work related duties on a computer set up at her home by the respondent. The applicant claimed that in total she had four days off whilst employed by the respondent and the applicant maintained that she worked every public holiday throughout her employment with the respondent.

4 The applicant stated that even though she had no express entitlement to be paid for overtime hours worked by her, she had a verbal agreement with the respondent to take time off in lieu for overtime worked. The applicant stated that she worked additional hours of her own accord as there was a substantial amount of work to be completed. The applicant stated that she did not complain about working excessive hours even though she was aware that she required assistance and that it created a safety risk for her. The applicant stated that at times she had casual employees assisting her.

5 The applicant stated that in October 2003 she was advised not to work any more overtime unless it was authorised in writing by the respondent and as a result she then emailed her manager to gain permission to work overtime. The applicant maintained that no reason was given to her for this policy change.

6 The applicant stated that she became frustrated with duplication in the respondent's administrative procedures and as a result she made a number of suggestions to change procedures however nothing was done. The applicant stated that in September 2003 she wrote to the respondent's Regional General Manager Mr Trevor Ford outlining a number of recommendations to effect changes (Exhibit A5) and Mr Ford responded to her on 6 October 2003 (Exhibit A6).

7 The applicant stated that in August 2003 she sought two days off in lieu for working additional hours but this request was rejected by the respondent (Exhibit A1).

8 The applicant claimed that she was required to use her own vehicle to pick up mail or to pick up the respondent's staff from Karratha airport. The applicant stated that even though she was given the option of using one of the respondent's vehicles they were often unavailable. The applicant stated that other employees were paid an allowance of $25.00 per week to use their vehicles and she was once reimbursed the cost of fuel for using her own vehicle.

9 The applicant maintained that she was distressed in July 2003 when she was advised that she had to either accept a lower level position with the respondent working on a casual basis or accept being terminated. The applicant then gave evidence that after returning from sick leave due to stress as a result of work related issues she was advised that she was to be made redundant.

10 The applicant claimed that the job advertisement placed by the respondent in "The West Australian" in mid November 2003 (Exhibit A2) was a similar position to her CAO job except for the salary package offered. When the respondent advertised this position the applicant emailed Mr Alan Barnes a copy of her Curriculum Vitae ("CV") on 10 December 2003 as the respondent told her that she could apply for the new position.

11 The applicant stated that when she was terminated the respondent asked her to stay on and work for a number of additional weeks past her notice period because of the heavy workload.

12 Subsequent to her termination the applicant relocated to Perth and took on alternative employment on 9 February 2004.

13 Under cross-examination the applicant was asked the basis on which she was claiming a payment of overtime given that her written contract of employment does not expressly allow for any payment of this nature. The applicant agreed there was no term of her contract that she would be paid for overtime worked however she stated that she understood that she would be able to take time off in lieu for additional hours worked. The applicant also conceded that there was no provision in her contract to be paid an allowance for the use of her vehicle.

14 The applicant claimed that she raised the issue of being able to take time off for extra hours worked in October 2002 with her then manager Mr Gary Brown and that he told her that he did not mind her taking time off. The applicant maintained that on two other occasions she was advised that the respondent had no difficulty with her taking time off in lieu for additional hours worked. The applicant stated that notwithstanding this arrangement she received no response when she had applied for time off in lieu when her family visited the Northwest. The applicant stated that she requested two days off in October 2003 however this request was declined. The applicant agreed that in May 2003 she was given a day off as time in lieu to attend a book launch in Perth and that on 31 July 2003 the respondent gave her leave to attend a conference. The applicant stated that she could not recall if this was time off in lieu or annual leave however, when shown her leave request form (Exhibit R1) the applicant conceded that two days time off in lieu was granted for this leave. The applicant stated that up to July 2003 she had made only two requests to take time off in lieu as her work load was heavy. The applicant stated that she would have asked to take more leave if she was not working so hard and that she intended to take a substantial amount of time off in 2004.

15 The applicant agreed that the amount of overtime hours she was claiming was not based on set hours owing to the applicant and she conceded that no time sheets were kept of the hours she worked because she was on a salary. When questioned about the actual hours worked the applicant stated that she only left the office each day to pick up the mail and that she was in the office at all times apart from having half an hour off for lunch. The applicant stated that the only time she went out was to go shopping once a fortnight or to go to church on Sundays. It was put to the applicant that her car was parked at the office on numerous occasions but she was not working in the office on these occasions. The applicant stated that this was untrue. The applicant was asked if she had applied to be reimbursed for petrol she had used in her own vehicle. The applicant stated that she did so once and was paid $40.00. The applicant confirmed that she made no other applications for reimbursement of expenses for using her own vehicle. The applicant conceded that there was no provision in her contract of employment for a travel allowance to be paid to her for the work related use of her private vehicle (Exhibit A4). The applicant stated that as other supervisors were given a car allowance and a vehicle she believed that she was being discriminated against. The applicant maintained that she was a supervisor because she supervised casuals and trainees but she acknowledged that she had never been formally promoted to a supervisor's position. When asked if it was the applicant's choice to work the number of hours she did the applicant stated that she was not directed to work the specific hours she worked however she worked the hours required to finish the job at hand. The applicant stated that she was expected to work autonomously and deadlines had to be met.

16 When questioned about the dates of meetings held with the applicant when she was told that her position had been made redundant and she had the option of taking a lower position the applicant stated that she may well have met with Mr McCasker in August and not July 2003 about her position no longer being available. When it was put to the applicant that the meeting with Mr McCasker took place on or about 13 November 2003, the applicant was unsure if this was the case. The applicant then stated that the conversation could have happened any time from August 2003 onwards and she then recalled having a meeting with Mr McCasker in mid November 2003 and that during this meeting Mr McCasker informed her that she had been made redundant and a letter of termination was given to her (Exhibit A3). The applicant stated that whilst she could not recall details of this conversation she remembered that she negotiated some alterations to the relocation expenses being offered to her and she asked why the respondent wanted her to remain working in the Wickham office for so long after her termination. The applicant stated that she was distressed at that time and therefore could not recall Mr McCasker discussing the reasons for her termination. The applicant could not recall Mr McCasker giving her another letter subsequent to this meeting. After considering this issue the applicant then stated that she could recall being given a further letter confirming some changes (Exhibit R2). The applicant agreed that at the meeting with Mr McCasker he offered her casual employment with the respondent at the Wickham office and she recalled having a discussion with Mr McCasker about taking leave to attend job interviews. The applicant maintained that there was no discussion with the respondent about alternatives to her being terminated nor was she offered counselling.

17 The applicant claims that at the time she was terminated there was an excessive amount of work for her to undertake.

18 The applicant confirmed that the respondent arranged for her to fly back to Perth after 19 December 2003 and the respondent arranged for her personal effects to be transported to Perth. The applicant also agreed that all entitlements due to her were paid by the respondent at termination.

19 The applicant maintained that it was unfair that she was terminated because the respondent had no problems with her performance, there was ongoing work at the Wickham office, she was committed to improving the respondent's operations, and she was kept in the dark about the developments about her position being made redundant.

20 John Englishby was the respondent's Regional Manager for Western Australia and worked with the respondent until the end of June 2003. Mr Englishby confirmed the respondent's contract with RRIA was initially $3million and this later increased to between $11 and $15million within the first year of the contract. As a result, the number of trades staff employed by the respondent increased and he stated there was no corresponding increase in administrative staff whose duties had increased. Mr

Englishby stated that despite attempts he was unsuccessful in increasing administrative staff numbers. Mr Englishby agreed that CAOs worked between 60 to 80 hours per week. Mr Englishby stated that the respondent did not have a written policy to take time off in lieu for extra hours worked and understood that the applicant was not entitled to be paid overtime as the applicant was on a salary. Mr Englishby stated that the respondent was flexible about taking time off in lieu for additional hours worked but this did not operate on a one for one basis for additional hours worked as time sheets were not kept. Mr Englishby confirmed that it was uncommon for time off in lieu to be taken given the amount of hours worked.

21 Under cross-examination Mr Englishby confirmed that time off in lieu operated on a give and take basis and time off was taken on an informal basis.

Respondent's Evidence

22 Katie Gulizia has worked with the respondent for nine years and has worked as a CAO at Wickham for two of those years. She deals with capital projects and her duties were complementary to those of the applicant. Ms Gulizia stated that she worked approximately fifty to sixty hours per week and her hours varied depending on the time of the month, the duties required of her and the urgency of the work required to be completed. Ms Gulizia stated that she usually starts work at 7.00 am and sometimes works through to the evening and at times as late as midnight and that this is not an everyday occurrence. From time to time Ms Gulizia takes her computer home to work in the evenings and on weekends. Ms Gulizia stated that she chose to work the hours she did and she was not directed to work specific hours. Ms Gulizia acknowledged that she worked the amount of hours necessary to complete the work required of her. Ms Gulizia stated that no time sheets were kept of the hours she worked and that as she was on a salary she was not entitled to be paid for working overtime. Ms Gulizia claimed she worked similar hours to the applicant and she confirmed that the applicant sometimes worked on weekends and that sometimes she and the applicant spent time at the office on the weekend discussing personal matters. Ms Gulizia recalled a meeting that she and the applicant attended with their manager Mr Brown about taking time off in lieu for additional hours worked and that at this meeting Mr Brown told her and the applicant that he had no difficulty with either of them taking time off to deal with personal matters under a give and take arrangement. Ms Gulizia stated that the respondent has never agreed to pay her for additional hours accumulated but not taken in lieu. When Ms Gulizia applies to take time off in lieu she understands that this is granted at the respondent's discretion.

23 When Mr McCasker became the respondent's Facilities Manager at the end of April 2003, replacing Mr Brown, he became the applicant's manager.

24 Mr McCasker detailed the steps taken by the respondent which lead to the applicant's position being made redundant. Mr McCasker stated that in October 2003 he had a discussion with Mr Barnes and Mr Ford about restructuring the respondent's administration section in Wickham and a joint decision was made to upgrade the applicant's position to a more senior role. Even though Mr McCasker initially thought that this upgraded position was unnecessary he eventually saw the benefit of this change as a substantial amount of administrative functions were required to be dealt with in the Wickham office and the respondent had operational requirements that needed to be undertaken by someone who was more senior than the applicant. The creation of this position would also remove a number of employees from reporting directly to Mr McCasker. Mr McCasker stated that the salary package of approximately $70,000 for this position reflected the seniority and experience required of the person undertaking this position compared to the salary of approximately $45,000 being paid to the applicant. Mr McCasker confirmed that as the respondent's contract with RRIA was on a cost-reimbursement basis and as the new position would result in an increased salary the respondent required RRIA's agreement to the proposed change. A meeting was then held with RRIA on or about 4 or 5 November 2003 about upgrading the applicant's position and RRIA accepted this proposal and subsequent to this meeting the respondent decided to advise the applicant that her position had been made redundant and that a decision had been made to recruit a person for the new position.

25 Mr McCasker confirmed that the contract the respondent had with RRIA had almost doubled in recent times.

26 Mr McCasker understood that at one stage the applicant had access to free fuel and that the applicant was using her own vehicle to undertake work related tasks. When Mr McCasker became aware of this situation he told the applicant to use one of the respondent's vehicles when undertaking work related duties and not to access fuel for her vehicle. Mr McCasker stated that a specific group of supervisors had been told when they were employed that they had private use of their work vehicle however this was later withdrawn as it was contrary to RRIA's policy and a vehicle allowance of $25.00 per week was then paid to this group of supervisors by way of compensation. Mr McCasker stated that new supervisors employed subsequent to this group of employees do not receive this allowance.

27 Mr McCasker stated that after meeting with RRIA in early November 2003 he returned to Wickham on or about 10 November 2003 and arranged to meet with the applicant in mid November 2003 to advise her that her existing position had been upgraded and her job was therefore redundant. Mr McCasker gave the applicant a copy of a draft letter explaining the respondent's decision and the entitlements owing to the applicant. When Mr McCasker informed the applicant that her position was redundant she was told that she could apply for the new position and the applicant was offered casual work with the respondent. Mr McCasker stated that the applicant declined this offer as it was a week by week proposition, the pay was less than what she was currently receiving, there was no accommodation provided with the position and the duties were low level. Subsequent to this meeting Mr McCasker met again with the applicant to confirm the respondent's final position in relation to the applicant's termination payments.

28 Under cross-examination Mr McCasker confirmed that no discussions were held with the applicant about her position being made redundant prior to the discussion he had with the applicant in mid November 2003. Mr McCasker confirmed that he was unaware if the respondent made any effort to seek out alternative employment for the applicant within the respondent's operations or its associated entities. Mr McCasker stated that he understood the applicant wanted to return to Perth. Mr McCasker maintained that the main increase in workload in the Wickham office was in the contracts area operated by Ms Gulizia. Mr McCasker stated that even though the RRIA contract doubled in recent times he did not agree that the applicant's workload had also doubled and Mr McCasker stated that the respondent ensured that the applicant was given assistance to deal with the increased work load. Mr McCasker disagreed that the applicant worked between 70 and 75 hours per week. Mr McCasker stated that he worked approximately 70 hours per week and the applicant was not in the office all of the time that he was in the office. Mr McCasker confirmed that both the applicant and Ms Gulizia worked in the respondent's office on some weekends. He stated that he generally left the office between 6.00 and 7.30 pm which was at the same time as the applicant and Ms Gulizia. He stated that it was rare that anyone was left in the Wickham office after he left for the day.

29 Mr McCasker confirmed that the applicant generated a number of emails about taking time off in lieu and Mr McCasker refuted that the respondent had a policy that all hours worked in excess of 42.5 hours per week Monday to Friday could be taken as time off in lieu. It was put to Mr McCasker that the casual position offered to the applicant when she was made redundant was insulting. Mr McCasker stated that it was the only position available at the time in Wickham.

30 Mr McCasker stated that he was unaware that other employees had used the applicant's private vehicle for work related purposes. Mr McCasker maintained that there was no necessity for the applicant to use her vehicle to undertake work related

duties as there were up to 30 vehicles available for her to use and if a vehicle was not available at any point in time the applicant could have waited for one to become available.

31 When asked why the applicant was not considered for the new administrative position in Wickham Mr McCasker stated that in his view the applicant was struggling in her existing position even though administrative assistance had been given to her.

32 Mr Barnes became the respondent's Regional Manager for Western Australia on 29 September 2003 and he manages the respondent's operations in Perth and also the RRIA contract. Soon after Mr Barnes commenced employment with the respondent a quarterly review meeting was undertaken in Perth. Mr Barnes stated that it became clear at this meeting that the respondent was suffering a substantial loss with its RRIA contract and part of the reason for the loss was the respondent's inability to obtain payments from RRIA as invoices were incorrect or not being submitted on time. This problem was confirmed in correspondence at the time from his manager, Mr Ford (Exhibit R4). Mr Barnes and Mr Ford then looked at employing a higher calibre administration manager to administer the RRIA contract and the person the respondent was looking for was someone who was more senior and more experienced than the current CAO staff. As a result the respondent decided to appoint a senior accounting manager. After Mr Barnes and Mr Ford decided to create this position they consulted Mr McCasker who initially was not keen to change the existing structure. Mr Barnes stated that Mr McCasker eventually agreed with their proposal and a Job Description Form was developed for the new position (Exhibit R5). Mr Barnes stated that this position had different duties to that of the applicant's position as the new position supervised and managed CAOs, the position had responsibility for stores acquisition as well as all relevant administrative and financial functions and this person would take over work done by the respondent's Commercial Manager in Perth, Ms Katrina Miller. Mr Barnes stated that in creating this position the applicant's position was displaced and as the RRIA contract did not allow for additional persons to be employed the applicant's position became redundant.

33 As the respondent required RRIA's approval to pay the increased salary in the new position, at a quarterly review meeting with RRIA held on 4 November 2003, RRIA agreed to upgrade the CAO position to that of a senior accounting manager (Exhibit R8) and the final Job Description for this position was confirmed on 5 November 2003 (Exhibit R9) and the job was advertised in the middle of November 2003 (Exhibit A2). Mr Barnes understood that Mr McCasker then had discussions with the applicant about her position being made redundant.

34 Mr Barnes confirmed that Exhibit R10 outlines the respondent's current organisational structure. Mr Barnes stated that in early December the applicant gave Mr Barnes a copy of her CV to be assessed for the senior accounting manager position. Mr Barnes reviewed the applicant's CV and determined that she was not suitable for this position and on this basis he did not pursue any other employment options for the applicant.

35 Under cross-examination Mr Barnes confirmed that when he commenced employment with the respondent he was aware that the work load for CAOs had increased as a result of the bigger contract with RRIA. Mr Barnes did not concede that the work load in the applicant's area tripled even though the value of the contract tripled. Mr Barnes stated that the work in the applicant's area increased one and a half times and that the most significant increase was in Ms Gulizia's area. Mr Barnes stated that the respondent wanted someone with more experience than the applicant in the new senior accounting manager position. Mr Barnes stated that the person who was appointed to the new position had approximately 30 to 40 years of experience in the accounting field and he had extensive experience in roles similar to the new position. In contrast, even though the applicant had relevant qualifications she did not have experience managing an accounting team.

36 Mr Barnes understood that the respondent's new administration position was advertised internally within the Tyco Group of Companies ("Tyco"), which included companies such as O'Donnell Griffin, Haden Engineering, Wormald and ADT Security amongst others. Mr Barnes stated that these entities had approximately 2,000 to 3,000 employees. Mr Barnes understood that a position was sought for the applicant but he was not sure that this actually occurred. It was put to Mr Barnes that the applicant was forced to stay on with the respondent until 19 December 2003 in order to access her redundancy entitlements plus relocation expenses. Mr Barnes understood that it suited both parties for the applicant to remain working with the respondent for approximately five weeks after being given notice of her termination. Mr Barnes stated that he was aware that staff worked long hours in the respondent's Wickham office.

Submissions

37 The applicant maintains that even though the duties expected of her position were more managerial after December 2003 the applicant should not have been terminated as the applicant argues that the respondent did not seriously consider her for the revised management position which replaced her position. The applicant also argues that as the respondent is part of Tyco there was a range of possible alternative positions which may well have been suitable for the applicant to undertake instead of being terminated. The applicant maintains the respondent made no effort to seek out positions for her within Tyco even though the applicant was prepared to relocate to take up another position. The applicant claims that the casual position offered to her was inappropriate given that there was no accommodation attached to this position and because this casual position did not guarantee the applicant ongoing employment.

38 The applicant argues that she was denied procedural fairness given the manner of her termination. The applicant was given no warning of her termination, she was not consulted about her termination, no counselling was given to her and she had no ability to negotiate alternatives to termination. The applicant argued that the respondent failed to take into account that the applicant had worked hard in her position, so much so that at the time of being made redundant she was unwell due to work related stress.

39 The applicant argues that she should be compensated for the losses she has suffered and any assessment of lost income between 19 December 2003 and 9 February 2004 should take into account that she was provided with housing and approximately $100 per month in electricity costs. The applicant is also claiming 'damages' of six months' wages as compensation over and above her loss of wages.

40 The applicant argues that she has mitigated her loss as she attended job interviews in Wickham prior to returning to Perth and eventually found a job in Perth within a relatively short space of time after being terminated. The applicant maintains that even though she was confused whilst giving some of her evidence this was as a result of the stress that she was under during her employment with the respondent and because she was extremely busy at work.

41 The applicant maintains that she is due $30,689.36 for time worked and not taken in lieu based on working an average of 27.5 hours per week over and above her normal hours of 42.5 hours per week and the applicant argues that her evidence about working additional hours was confirmed by Ms Gulizia. There was no question that the applicant used her private vehicle for work related purposes and as the applicant supervised other staff and had supervisory responsibilities she should have been treated in the same way as other supervisors and be paid the travel allowance claimed ($1675.00 dollars for travel allowance - $25 per week x 67 weeks).

42 The respondent maintains that the applicant was terminated due to a genuine redundancy situation and the respondent argues that there was no personal motive for abolishing the applicant's position as her position was made redundant based on financial

considerations and due to the necessity to upgrade her position. Further, evidence was given that Mr McCasker initially did not want to abolish the applicant's position.

43 The respondent argues that the applicant was advised of her termination as soon as practicable after a decision was made to abolish the applicant's position. Even though the decision to abolish the applicant's position was made during October 2003 the process was not finalised until it was endorsed by RRIA representatives on 4 November 2003. The applicant was informed that her job was no longer required by the respondent as soon as possible after the meeting held on 4 November 2003 because the meeting to advise the applicant of the respondent's decision could not take place until 13 November 2003 when the applicant returned from sick leave.

44 The respondent maintains that the applicant was given a fair go all round when she was terminated. The respondent maintains that alternatives to her existing employment were canvassed with the applicant as she was offered a casual position and she was given the opportunity and did apply for the position that replaced her position. The applicant was given the extended notice period she requested, she had time to access legal advice, the applicant was given the opportunity to negotiate her relocation expenses and the applicant was given a payment of four weeks' redundancy pay even though this was not an entitlement under the applicant's contract of employment with the respondent. The respondent therefore argues that there was sufficient compliance with s41 of the *Minimum Conditions of Employment Act 1998* ("the MCE Act").

45 The respondent argues that there was no evidence that a different outcome would have eventuated for the applicant if a different process was adopted.

46 The respondent argues that the applicant did not give credible evidence because her evidence was vague, inconsistent and uncertain and that the evidence given by Mr McCasker about his discussions with the applicant when advising the applicant that her position was redundant should therefore be preferred to the evidence given by the applicant.

47 The respondent maintains that there was no express or implied term in the applicant's contract of employment that the applicant would be paid for additional hours worked and not taken as time off in lieu. The applicant's contract of employment (Exhibit A4) does not include any entitlement to the payment of overtime nor was there any verbal agreement reached during the applicant's employment with the respondent that the applicant was entitled to a payment for additional hours worked and not taken in lieu. The applicant conceded that no records were kept of the hours she worked and even though the respondent concedes that the applicant worked additional hours over and above the hours specified in her contract the respondent maintains that the applicant's evidence was vague and inconsistent about the specific additional hours she worked and therefore the applicant should not be believed in this regard. Time off in lieu was granted to the applicant on two occasions but it was clearly at the prerogative of the management and this was a negotiable process. Furthermore, the applicant was not directed to work the hours she did. The applicant is therefore not due the payment claimed by her for additional hours worked.

48 The respondent maintains the applicant is not due payment for the vehicle allowance claimed for the use of her private vehicle as there was no provision to pay this allowance in the applicant's contract, there was no agreement made with the respondent to pay the applicant this allowance and the applicant was not employed as a supervisor.

Findings and Conclusion

Credibility

49 I have a difficulty with the applicant's evidence as in my view her evidence was inconsistent in parts, equivocal and unconvincing. For example the applicant maintained that she worked each day from 6.00 am to 10.00 pm seven days a week and yet her claim for a payment for additional hours worked does not reflect these hours. In my view the applicant was very vague when recalling details and dates of discussions which took place when she was told that her position had been made redundant. Initially the applicant stated that she was advised that her position was to be made redundant in July 2003 and the applicant later gave evidence about her position becoming redundant being raised with her in August 2003 and possibly November 2003. I found the applicant's evidence to be confusing in parts, for example her recollection about the dates that she was granted time off in lieu. Even though the applicant may have been unwell for a period in the latter stages of her employment with the respondent, in my view this does not excuse the applicant's lack of detail about significant events. On the other hand I found the evidence given by each of the respondent's witnesses to be straightforward, clear and credible and was not broken down during cross-examination. Given my concerns about the applicant's evidence where there is any inconsistency in the evidence given by the applicant and the respondent's witnesses I prefer the evidence given on behalf of the respondent.

50 Redundancy is itself a sufficient reason for dismissal (*Amalgamated Metal Workers and Shipwrights Union of Western Australia and Other v Australian Shipbuilding Industries (WA) Pty Ltd* (1987) 67 WAIG 733). Despite the requirement to accord procedural fairness, not every denial of procedural fairness will entitle an employee to a remedy. No injustice will result if after a review of all the circumstances of the termination it can be said that the employee could be justifiably dismissed (Shire of Esperance v Mouritz (1991) 71 WAIG 891; Byrne v Australian Airlines Ltd (1995) 185 CLR 410 at 430 per Brennan CJ, Dawson and Toohey JJ and at 466 per McHugh and Gummow JJ). If a decision is made to make an employee redundant based on the operational requirements of an employer that can be a valid reason for a dismissal.

51 Paragraph two of this decision confirms the details of the applicant's employment with the respondent.

52 In this case I am of the view that the applicant's position was abolished due to a genuine redundancy situation and that it was on this basis that the applicant was terminated. I find that soon after Mr Barnes took over as the respondent's Regional Manager for Western Australia in September 2003 he became aware that the respondent was experiencing financial difficulties with its RRIA contract due to administrative problems and that after a discussion between Mr Barnes and Mr Ford the respondent considered employing a senior manager to supervise the administration of this contract. I accept that as a result of these considerations in October 2003 the respondent decided to upgrade the applicant's existing position into a more senior administrative role. I find that when Mr Barnes first floated the idea of a senior administrative position with Mr McCasker he was initially reluctant to agree to the proposal, however after further consultation with Mr Barnes and Mr Ford, Mr McCasker accepted the view that it was appropriate that the applicant's position be upgraded to a more senior role and a Job Description Form was then developed for the new position. I accept that under the respondent's contract with RRIA it could not restructure its operations without approval from RRIA therefore the creation of the new position was not finalised until 4 November 2003 at the respondent's quarterly review meeting with RRIA. I find that when the respondent decided to abolish the applicant's position and upgrade it to a more senior position this rendered the applicant's position redundant. I therefore accept that the applicant's position was abolished due to a genuine redundancy situation and that the applicant was terminated as a result of this decision.

53 Having determined that the applicant was terminated due to a genuine redundancy situation it is appropriate to consider any unfairness in relation to the process used to effect the applicant's termination, as well as all of the circumstances surrounding the termination of the employment having regard to s26 of the Act. The question to be determined by the Commission is whether the legal right of the respondent to dismiss the applicant has been exercised harshly or oppressively against the

applicant so as to amount to an abuse of that right *(Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385).

54 The provisions of Part 5 of the MCE Act are implied into the applicant's contract of employment. A failure to comply with the mandatory requirements under s41 of the MCE Act is a factor to be taken into account in deciding whether a dismissal is unfair (see *Gilmore v Cecil Bros and Ors* (1996) 76 WAIG 4434, per the President at 4445; *WA Access Pty Ltd v Vaughan* (2000) 81 WAIG 373 at 378 and cases cited therein).

55 Section 41 of the MCE Act provides:

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

56 Section 43 of the MCE Act provides:

> **"43. Paid leave for job interviews, entitlement to** (sic)
>
> (1) An employee, other than a seasonal worker who has been informed that he or she has been, or will be, made redundant is entitled to paid leave of up to 8 hours for the purpose of being interviewed for further employment.
>
> (2) The 8 hours need not be consecutive.
>
> (3) An employee who claims to be entitled to paid leave under subsection (1) is to provide to the employer evidence that would satisfy a reasonable person of the entitlement.
>
> (4) Payment for leave under subsection (1) is to be made in accordance with section 18."

57 Section 41 provides that where an employer has decided to make an employee redundant the employee is entitled to be informed by the employer as soon as is reasonably practicable after the decision has been made about effecting the redundancy and discussions are to be held with the employee about the likely effects of the redundancy and measures that may be taken to avoid or minimise its effect. In this case not all of these requirements were met by the respondent.

58 I accept that the applicant was notified of her termination as soon as practicable after the decision was made by the respondent to make the applicant's position redundant. Even though there was a delay between when the decision was made to abolish the applicant's position on 4 November 2003 and the 13 November 2003 when the applicant met with Mr McCasker, I accept that in early November 2003 the applicant was on sick leave and the respondent therefore had to await her return to work to discuss its decision to terminate the applicant. I find that Mr McCasker had a meeting with the applicant on or about 13 November 2003 and that during this meeting Mr McCasker informed the applicant that her position was being made redundant and that as a result the applicant was to be terminated.

59 In my view insufficient discussions were held with the applicant about measures which may have been undertaken to avoid or minimise the impact of the redundancy on the applicant. I find that even though at the meeting held on 13 November 2003 the applicant was offered a casual position undertaking administrative work in Wickham I accept that this position did not guarantee the applicant ongoing employment with the respondent nor was accommodation to be provided. I find that there was no discussion with the applicant at this stage or thereafter about alternative employment options within Tyco and I am concerned that the respondent did not canvass employment options within Tyco. Evidence was given during the proceedings that the respondent is part of Tyco and this group of companies collectively employs between two and three thousand employees. Mr Barnes gave evidence that each entity within Tyco advertises vacancies across Tyco and it is my view that it would have been appropriate at this point for the respondent to have assisted the applicant to review job vacancies across Tyco at this time. Clearly this did not occur. To this extent it is my view that there were insufficient discussions about possible alternatives to termination even though the respondent offered the applicant a casual position at its Wickham office. As this position gave no guarantee to the applicant of long term employment with the respondent and as there was no accommodation attached to this position I accept that it was not a reasonable alternative that was offered to the applicant. Even though there was a discussion about the applicant's relocation to Perth and the applicant was able to negotiate a relocation package in my view this does not constitute full compliance with the necessity to discuss the impact of the termination on the applicant and what if any measures could be undertaken to ameliorate the impact of the termination on the applicant.

60 I find that the respondent had a discussion with the applicant about taking time off for job interviews and I find that this time could well have been accessed by the applicant given the time the applicant continued to work for the respondent after she was given her notice of termination. I therefore find that the requirements of s43 of the MCE Act have been met.

61 In the circumstances I find that to the extent that the applicant was not consulted about alternatives to termination and measures to minimise the impact of the termination on her, as required under s41 of the MCE Act, the applicant was unfairly terminated.

62 There is an onus on an applicant in a redundancy situation to demonstrate that another employee should have been selected for termination instead of the applicant. As the applicant has not demonstrated that any other employee should have been terminated instead of her I find that the applicant was not unfairly chosen for termination. I find that it was open to the respondent to conclude that the applicant was unsuitable for the new senior administrative position created by the respondent as this position required considerable experience at a more senior level than the applicant's CAO position and I accept the respondent's argument that even though the applicant was well qualified she did not possess the necessary experience required for this position. I also accept that, apart from the casual position offered to the applicant, there were no other vacancies at the respondent's Wickham office at the time the applicant's position was made redundant.

63 Reinstatement or re-employment is not being sought by the applicant and in any event it is my view that in this instance it is inappropriate and impracticable.

64 As I have found that the applicant was unfairly terminated I am required to assess whether or not in all of the circumstances compensation is due to the applicant. In the decision of the Full Bench in *Budget Airconditioning v Steven Rainsford Penn* (2004) 84 WAIG 2171 at 2177 Smith, C reviewed the relevant authorities when determining compensation in a case of this nature.

"In *Garbett v Midland Brick Company Pty Ltd* (2003) 83 WAIG 893 Heenan J (with whom Parker J agreed) at [85] observed:

> ".... Leaving aside cases where an order for reinstatement might be made, which are likely to be rare where there has been dismissal for genuine redundancy, issues of the claimant's entitlement to the payment of any moneys due under his contract of employment, or to compensation for the loss or injury caused by the dismissal are discretionary under s 23A of the Act. There can be little doubt that the discretion should be exercised in favour of the claimant where actual loss or damage can be proved, but where no loss or damage is proved, or where any entitlement to damages or compensation is adequately covered by payments made by the employer to the employee at the time of termination, whether as wages in lieu of notice and/or for other accrued benefits, will always be a matter for investigation. If no loss or damage, nor entitlement to compensation for the former employee is established beyond payments which have been made by the employer then there would be no entitlement to redress because the powers conferred under s 23A are intended to compensate the employee who has been harshly, oppressively or unfairly dismissed in respect of losses so caused and no more. They are not a means for punishing the employer or for conferring any windfall gain upon the claimant. This does not mean that the compensation which the Commission may order under s 23A(1)(ba) of the *Industrial Relations Act* (sic) is restricted to the damages which might be recovered at law for wrongful dismissal, but it does mean that payments ordered under s 23A must be in respect of a lawful entitlement and/or as compensation for a demonstrated loss or injury caused by the harsh, oppressive or unfair dismissal."

In relation to Mr Garbett at [101] Heenan J held:

> " In my view, this decision will require a finding to be made about whether the failure of the respondent to observe its contractual obligation to inform Mr Garbett of the action on the redundancy and to discuss the matters required by the term of the contract imported by s 41(2) of the *MCEA* resulted in any identifiable loss or damage for the appellant, such as the loss of a real opportunity to take up some alternative position with the respondent, or to apply for, or obtain, another employment opportunity elsewhere. It also seems to require a finding to be made whether the likely effects of the redundancy might have been avoided or minimised by any discussion which the employer should have initiated but, in breach of its contract, failed to do."

In Hooker *v The Owners of Strata Plan 5679 Kashmir* (2003) 83 WAIG 3948 ("Hooker's case") Mr Hooker was employed by the Respondent as a caretaker. The reason for termination was that his employer no longer had funds to employ him. There was a finding that the employer made no attempt to comply with the requirements of s 41(2) of the *Minimum Conditions of Employment Act* (sic). The Application and the Notice of Answer referred to some residual cleaning duties continuing at $75.00 per week. However, no evidence was given by either party that that was the case. It was argued on behalf of the (sic) Mr Hooker that he was entitled to claim a loss of an opportunity to obtain alternative employment with the Respondent and compensation should have been assessed on that basis. The Commission at first instance found that the Appellant would not have undertaken the residual cleaning duties if they were offered to him. The President, with whom Coleman C.C. and Gregor C agreed, held at paragraph [54] that the onus is on the Appellant to establish he had suffered a loss caused by the unfair dismissal, in this case a loss of an opportunity to obtain alternative employment from his employer or to obtain other employment elsewhere. Mr Hooker's evidence was that he might have taken a position if it was a "Strata Act" position. At [59] the President held, "... it was not established by Mr Hooker that an opportunity existed on the balance of probabilities which he had lost by the breach of the implied s 41 term of the contract by the employer and by the unfairness of the dismissal occasioned by that breach." Accordingly the appeal was dismissed.

In Hooker's case the Appellant was unable to prove that he suffered a loss as a result of the employer's failure to comply with s 41(2) of the MCE Act. In facts (sic) of this matter are, however, are different (sic). Mr Penn was deprived of continuing employment with the Appellant, that is, as a refrigeration mechanic at a salary of $36,000 per annum. His position of service manager/refrigeration mechanic at a salary of $44,000 was made redundant. It is clear that he could not have continued in that position. The consequence of these findings is that Mr Penn's loss, caused by the unfair dismissal, was the loss of the opportunity to take up the position as refrigeration mechanic at a salary of $36,000 per annum and his loss should not be assessed on the basis of $44,000 per annum. Accordingly, I am of the view that Ground 4 of the Grounds of Appeal is made out."

65 In my view the applicant has not discharged the onus on her to demonstrate that she has suffered any loss as a result of the respondent's failure to comply with s41 of the MCE Act. The applicant did not identify any specific job opportunities with the respondent or within Tyco that were denied to her nor did she demonstrate that someone else should have been terminated instead of her. Further, the applicant did not quantify any loss she suffered by not having discussions about the impact of the termination on her. It is therefore my view that the applicant is not entitled to any compensation.

Are benefits due to the applicant under her contract of employment?

66 The applicant is claiming payment for additional hours worked and not taken as time in lieu and a vehicle allowance which she claims is due to her for the duration of her employment at Wickham. In an application for contractual benefits under s29(1)(b)(ii) of the Act, the onus is on the applicant to establish that the subject of the claim is a benefit to which the applicant was entitled under his or her contract of employment. It is for the Commission to determine the terms of the contract of employment and to ascertain whether the claim constitutes a benefit which has been denied under the contract of employment, having regard to the obligations on the Commission to act according to equity, good conscience and the substantial merits of the case (*Belo Fisheries v Froggett* (1983) 63 WAIG 2394; *Waroona Contracting v Usher* (1984) 64 WAIG 1500; *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307).

67 In my view the applicant has not demonstrated that she is owed a payment for hours worked over and above the applicant's standard hours. The applicant's contract of employment (Exhibit A4) does not contain a provision for the applicant to be paid for hours worked in excess of normal hours and no evidence was given in the proceedings that the respondent agreed to pay the applicant for all hours worked by the applicant over 42.5 hours per week which were not taken as time in lieu. There is no provision in the applicant's contract for a set amount of hours to be worked each week (apart from a reference in Clause 16 - Hours of Work to the applicant being required to work additional hours over and above the normal hours that are worked between 8.00am to 5.00pm Monday to Friday and a 30 minute lunch break) and the applicant was aware that as she was on a salary she did not expect to be paid for any additional hours worked. In support of her claim the applicant maintains that during a discussion she had with her manager Mr Brown in October 2002 she was informed that she would be given the

opportunity to take time in lieu for hours worked over her normal hours and that as a result on two occasions the respondent granted the applicant time off in lieu. I accept Ms Gulizia's evidence that Mr Brown told the applicant and Ms Gulizia at this meeting that time off in lieu would be granted to the applicant on a give and take basis and that time off in lieu would only be taken at the respondent's discretion. In the circumstances I find that there was no agreement, either express or implied, that the applicant had an entitlement under her contract of employment with the respondent to be paid for additional hours worked. Notwithstanding this view, I accept that the applicant was genuinely aggrieved about the excessive hours that she worked for the respondent in an effort to meet the respondent's increasing demands and I accept that the applicant worked a substantial amount of hours over and above what is considered to be a normal working week during her employment with the respondent. In any event, even if the applicant had demonstrated that she had an entitlement to this payment, which I do not concede, I would have difficulty ascertaining the amount of additional hours that the applicant worked as no record was kept of the hours she worked. Further, I have doubts about the extent of the additional hours worked by the applicant as her evidence on this issue differed from the evidence given by Mr McCasker and Ms Gulizia.

68 As the applicant has not demonstrated that it was a term of her contract of employment that she be paid for all additional hours worked over and above her normal hours worked between 8.00am and 5.00pm Monday to Friday the applicant has not made out this claim.

69 In my view the applicant has also failed to demonstrate that under her contract of employment with the respondent she was entitled to be paid a vehicle allowance of $25.00 per week for each week worked. The applicant's written contract of employment does not provide for the payment of this allowance and there was no evidence given in these proceedings that the respondent verbally agreed to the applicant being paid this allowance. Whilst I accept that from time to time the applicant used her personal vehicle for work related purposes I accept Mr McCasker's evidence that once he became aware of this he instructed the applicant not to use her vehicle and to use one of the many vehicles owned by the respondent which were in the main readily available to the applicant. Furthermore, I accept that the $25.00 vehicle allowance which the applicant was claiming was only given to some supervisors under an arrangement which arose when a particular group of supervisors were employed by the respondent and were told they could use their work vehicle for private use and they were later told that this use was withdrawn. By way of compensation an allowance of $25.00 per week was paid to this group of supervisors. I also reject the applicant's claim that she was a supervisor even though she supervised some casual staff in the office at Wickham, as her position was as a CAO and she was not a designated supervisor.

70 As I have found that the applicant is not due the benefits she is claiming under her contract of employment and that she is not due any compensation for her unfair termination this application will now be dismissed.

2004 WAIRC 13621

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LORNA LUEN LLOYD
	APPLICANT
	-v-
	HADEN FM PTY LTD T/AS RESOLVE FM
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 13 DECEMBER 2004
FILE NO/S	APPL 1924 OF 2003
CITATION NO.	2004 WAIRC 13621

Result	Application alleging unfair dismissal upheld no compensation ordered. Application for contractual benefits dismissed.

Order

HAVING HEARD Mr P Sorensen of counsel on behalf of the applicant and Mr J F I Curlewis 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 dismissal of Lorna Luen Lloyd by the respondent was unfair and that reinstatement or re-employment is impracticable.

2 ORDERS THAT the application for compensation be dismissed.

3 ORDERS that the application otherwise be and is hereby dismissed.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2004 WAIRC 13474

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NEIL PORTER
	APPLICANT
	-v-
	ANDANTINO PTY LTD T/A OUTDOOR WORLD WANGARA
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 29 NOVEMBER 2004
FILE NO.	APPL 301 OF 2003
CITATION NO.	2004 WAIRC 13474

CatchWords	Termination of employment – Harsh, oppressive and unfair dismissal – Whether applicant an employee or independent contractor – Principles applied – Employment relationship found to exist - Applicant harshly, oppressively and unfairly dismissed – Application upheld – Compensation ordered – Industrial Relations Act 1979 (WA) s 7, s 26(1)(a), s 26(1)(c) & s 29(1)(b)(i)
Result	Application upheld, compensation ordered
Representation	
Applicant	Mr D Clarke, agent on behalf of the Applicant
Respondent	Mr O Moon, agent on behalf of the Respondent

Reasons for Decision

1 The Applicant, Mr Neil Porter, claims that he was unfairly dismissed from his position as a salesperson with the Respondent company, Andantino Pty Ltd, which trades as Outdoor World, Wangara ("ODW", "the Respondent").

2 The Respondent opposes the claim and submits that the application is beyond the jurisdiction of the Commission as Mr Porter was "an independent contractor and as such there was no employer-employee relationship in existence".

3 Mr Porter had at various times prior to his appointment as a salesperson with the Respondent, in July 2001, been engaged as an installer of patios with that company. He acknowledges that his status in that capacity was that of a contractor. Mr Porter had worked at sales for several months at the end of 2000. He combined installing and selling for approximately six months before again taking on the sales role in July 2001. It was from this appointment that his services were terminated in February 2003.

4 When Mr Porter recommenced in the sales position in July 2001 he was familiar with the Respondent's operation and the requirements of his position. There was no letter of appointment or induction. He had initiated the shift from installer to salesperson after injuring his back. The arrangement to transfer from installing to sales was organised with Mr Allan Davidson, the principal of the Respondent company.

5 According to the Applicant the only instructions he received were that he was required to attend the office in accordance with the roster, which included a weekend commitment; he was required to provide his own car and mobile phone and follow the arrangement that other salespersons were using for invoicing the Respondent company for payment of his sales commission.

6 From evidence presented by the Applicant and from Mr Rees, another salesperson working with the Respondent, the rostering arrangement was shared by three salespersons working a "fortnightly rotation roster". Work on the roster was unpaid. One salesperson was required to be in attendance at the sales office between the hours of 8.30am and 5.00pm weekdays. The rostered time was split into three shifts: 8:30am to 11:00am, 10:30am to 2:00pm and 1:30pm to 5:00pm, Monday to Friday. One salesperson worked the weekend. There were three salespersons based at the Wangara Sales office. They shared the shifts so that each would have a "three day weekend every second week". According to Mr Porter the rostered Friday off each fortnight was subject to the salesperson being up to date with their paperwork. Otherwise the Respondent required that to be done on that day. Attendance at the sales office on a rostered shift was not optional. If the attendance commitment could not be met, arrangements had to be made for someone else to fill in for the salesperson. Usually that was achieved by swapping times with other salespersons. On one occasion the Applicant, at Mr Davidson's direction arrange for the receptionist (employed by the Respondent) to fill in for him. Mr Porter was required to pay her for the time she spent covering his roster. However, on another occasion when Mr Porter was convalescing after being discharged from hospital, Mr Davidson arranged for the receptionist to work Mr Porter's shift. Mr Porter understands that on this occasion Mr Davidson paid the receptionist for her time. It was Mr Rees evidence that swapping shifts between salespersons could be done without reference to Mr Davidson. However, Mr Porter stated that Mr Davidson had to be informed as to any arrangements to maintain coverage on the roster.

7 According to Mr Porter there was no provision for annual leave for salespersons and any time off had to be approved by Mr Davidson and that approval was subject to the shifts being covered. Notification of an intention to have time off had to be placed on the noticeboard in Mr Davidson's office.

8 The strict requirement to undertake rostered attendances at the sales office was emphasised at sales meetings. Family emergencies were recognised as being a contingency that the Respondent had to accommodate. However, Mr Porter had never been in the position of not having the roster commitment covered and he gave evidence that he never felt threatened either with the prospect of dismissal or discipline if he never filled the roster.

9 The Applicant states that he was not made aware of any requirement for him to cover workers' compensation nor for him to have public liability insurance. He was not told that he could not delegate his duties nor that he could not engage employees or sub agents.

10 Mr Porter emphasised the importance of his attendance at the sales office as that was the source of inquiries for patios either by telephone or through visits from members of the public that he would follow up and endeavour to convert to signed contracts. He would make appointments from these inquiries. The next step would be to visit the client's home, measure up for the proposed patio, prepare a quote and then endeavour to secure the deal with their commitment to a contract. Mr Porter stated that in "measuring up", quoting and selling he was unsupervised. He was provided with a digital camera and was required to include site photographs and plans of the job. Without these attachments to the contract the Applicant would not be paid.

11 Mr Porter was provided with the Respondent's price list and quoting instructions (Exhibit F). He had discretion to discount up to 20% on the list price to secure a sale. Deals below the list price reduced his commission on the sale. According to Mr Porter the Respondent operates within the middle of the price range of the patio market. Sometimes the opportunity presented to secure a sale above the listed price. In such cases the salesperson earns a commission at the rate of 25% of the additional price. Mr Porter had the flexibility to negotiate sales within the price limits set down by the Respondent. As noted this discounting affected the level of his commission.

12 All contract proposals were submitted to Mr Davidson for acceptance. There was no deal with the customer without Mr Davidson's signature on the contract. If there was a complex design or other issues about the job which concerned Mr Porter, he could order a "site measurement" or "sale check". This would be undertaken by the Respondent at a cost of $25 to Mr Porter. Also, if Mr Davidson considered that it was warranted, he could require a site measurement. Again, the cost of this ($25) would be deducted from Mr Porter's commission. The Applicant was instructed to identify a job for site measurement if he "wasn't certain about it".

13 The Applicant was required to submit invoices for weekly payment of commission due to him on contracts secured by Wednesday of each week. (Exhibit 3). "Lead Sheets" had to accompany the Applicant's invoice. These documents set out the customers visited, their location, the product that had been the subject of the enquiry and its value. Information was also required on the source of the customer's enquiry; (phone, showroom or yellow pages), and comments as to why a sale was not effected. If there were any disputes over the level of commission or deductions, including matters relating to site measurements, Mr Davidson was the arbiter. The goods and services tax was included in each payment of commission the Applicant received from the Respondent. Mr Porter remitted the GST to the ATO quarterly. The payments of commission were identified as "wages" in the summary of transactions supplied to the Applicant in order that he could complete his BAS statement.

14 Mr Porter gave evidence that the Respondent provided him with business cards. These identified him as the "Area Manager" or "Building Consultant" and identified the locations of the Respondent's sales offices, the Applicant's mobile telephone and after hours contact numbers. As far as Mr Porter was aware the business cards were supplied at the Respondent's cost. The designation of his status on the cards was something he determined; however, he merely followed what other salespersons had done. The different designation did not change his role with the Respondent. According to Mr Rees salespersons used titles which gave them "credibility in the industry".

15 After securing contacts through attendances at the sales office or from telephone enquiries, it was Mr Porter's evidence that he could arrange the interviews to suit his convenience (and that of the customer). However, it was his understanding that the Respondent wanted him to attend three interviews a day and four "if things were busy". Anymore than that according to Mr Davidson would reduce Mr Porter's effectiveness in being able to secure the sale of a patio at the meeting with the client. It was emphasised to the Applicant that a proposed deal should be finished at the time the quote was given at the client's home; of course the contract was still to be confirmed by Mr Davidson. Although he was not given a budget to perform to and his sales were not monitored in that respect, it was Mr Porter's understanding that Mr Davidson wanted him to write up $100,000 worth of business each month. Mr Porter claims that on his performance he was one of the top salespersons for the Respondent.

16 Mr Porter submitted that he was supplied with four shirts, two pairs of trousers and two jumpers all with the ODW logo. He said that he was required to wear these in the performance of his duties. This apparel was supplied without cost to him.

17 According to the Applicant the tenor of the relationship with the Respondent can be gleaned from notes of sales meetings which he was required to attend. The meetings commenced at 5.00pm on a weekday and the salespeople were given copies of notes of matters discussed immediately after the meeting. (It is noted that three sets of notes were tendered. One is dated 26 June 2001 which predates the commencement of the applicant's last term as a salesperson. The other two sets of notes are undated (Exhibit D)). Extracts from the notes include the following directions and/or information:

> "(3) Don't give quote over phone unless we have their name, address and phone number".
>
> (Notes 26 June 2001)
>
> "(4) We should only quote 3 leads per day until you are competent enough, not making mistakes (then) you can go to 4 maximum per day but not every day. 3 is comfortable – not under pressure – and you can make a good living. Don't cheat."
>
> (Notes 26 June 2001)
>
> "(6) Everybody to look at their opposition's display centres to update our knowledge on our opposition products. I want you to write down what you see and I will look also. We will talk about this at our next meeting. Don't cheat."
>
> (Notes 26 June 2001)
>
> "(12) You can have Fridays off if your paperwork is up to date. If you need more info. on building use part of your Fridays to see how they are built. (See Greg)."
>
> (Notes 26 June 2001)
>
> "(8) I see on a salesperson's lead form that he is waiting for the client to phone back! We don't wait for the client to phone back. Also some people do a lot of quotes in the office. This is not good quoting, your chances are not good."
>
> (Undated notes)
>
> "(21) If you are not up to date on your paperwork, quotes, etc you don't have the Friday off."
>
> (Undated notes)
>
> "(22) If a salesperson needs to learn more we will demand they spend a large part of their Fridays on site with contractors."
>
> (Undated notes)
>
> "(3) Pays must have an invoice, lead sheet and all contracts must have photos. If not I won't even see your contract or pay book. How to fill I lead sheets. If you cheat you will be caught."
>
> (Undated notes)
>
> "(6) If you sign a job up in the office and don't go to site you will not be paid commission and if it costs me it will cost you. I will not lose money because you don't play the rules."
>
> (Undated notes)

"(9) How should we answer the phones? Good morning …... speaking."

(Undated notes)

"(15) I will arrive and go to quote with a salesperson unannounced.

(Undated notes)

"(16) Office hours, North start 8.30am – 11.00am, 10.30am – 2.00pm, 1.30pm – 5.00pm. Don't be late. South 9.00am – 12.00pm, 12.00pm – 4.00pm, Saturday 9.00am – 12.00pm, Sunday 10.00am – 1.00pm. You must be on site – Family emergency."

(Undated notes)

18 Although the notes of the sales meeting dated 26 June 2001 entreated the salesperson that he or she should be "selling yourself, your company, your service…."(Exhibit D) the Applicant was emphatic that at no time was he an incorporated business. He provided his services exclusively to the Respondent and could not quote in competition with ODW. Mr Porter pointed out that he had the Respondent's price list and that he "knew about their jobs". Entrusted with that information he stated that he "could never do it". However, he was never required to sign a confidentiality agreement nor was he told that he could work for another company. Mr Porter stated that at no time was he ever told that he was a contractor. He acknowledged that although his business card identified him as an "Area Manager" the only person he managed was himself. Mr Porter was never told that he could not delegate his duties.

19 It was Mr Porter's evidence that at a sales meeting some time around the end of 2002 he was given an Australian Workplace Agreement ("the AWA") by Mr Davidson "to read and make a decision". Attached to the document was a covering sheet which summarised the arrangement whereby the AWA would replace the terms of the Commercial Travellers' Award. The terms of the AWA would offset the award provisions with respect to sick leave and annual leave. The sales commission paid by ODW would be altered "in line with the changes." The note also identified that a "Pty Ltd" was another option. Mr Porter was requested to "check out both options and make a decision by 1 January 2003 as we have to have these in place by then" (Exhibit H).

20 Mr Porter considered his position; he read the document and consulted his father. He noted that the provisions of the AWA were blank. When he spoke with the Respondent Mr Davidson acknowledged that he had not "fully gone over it". Mr Porter noted that the hourly payment was blank. He informed Mr Davidson that the AWA "wasn't for me".

21 On 27 February 2003, Mr Porter had a phone discussion with Mr Davidson. He asserted that Mr Davidson inquired as to whether he had formed a proprietary limited company. He told Mr Davidson that he had not. With that Mr Porter claimed Mr Davidson said "Well in that case you can bring your things in and you can leave." Mr Porter then attended the office and again spoke with Mr Davidson. Again it was put to Mr Porter as to whether he would form an incorporated company. He said that Mr Davidson expressed regret at seeing him leave, but that was the way things had to be done. When Mr Porter reiterated his position he states that Mr Davidson told him "you can leave."

22 Under cross-examination Mr Porter affirmed that at no time during his service with the Respondent had he been warned regarding his performance nor counselled concerning his conduct or behaviour. On the matter of his attitude Mr Porter recalled that on the day before his services were terminated there had been a discussion with Mr Davidson about locking up the showroom early on Sunday and Monday of the long weekend as business was quiet. He had been reproached by Mr Davidson and told he could not go home early. Mr Porter acknowledged that mention was made by Mr Davidson of his attitude in regard to working on the long weekend when he attended the office after the phone call on the afternoon of 27 February. Mr Porter rejects that in that conversation Mr Davidson said "the way you are carrying on, you might as well leave." Mr Porter also rejects that he answered, "All right. I will." It was also put to the Applicant that another salesperson, Mr Hodgkinson had left because of the Applicant's attitude. This was the first that Mr Porter had heard of that allegation. As far as he was concerned Mr Hodgkinson left ODW because he re-located to Mandurah. Nothing about that person's views about him had ever been raised with him before.

23 The Respondent's position was re-affirmed at the outset of the presentation of its case. It is simply that the Commission does not have jurisdiction because the nature of the relationship with the Applicant is one of a contract for services. In addition to this it was submitted that in the alternative, if there is found to be an employment relationship, there was no dismissal at all; "the Applicant left of his own volition."

24 Mr Davidson, the Principal of ODW, presented evidence for the Respondent. He confirmed that the relevant period of Mr Porter's tenure as a salesperson extended from 2 July 2001 until 27 February 2003.

25 Mr Davidson addressed the exhibits tendered by the Applicant. The Card Transaction Sheets which details payments to Mr Porter involved the use of a computer programme that only provided for "wages" and not "commission" (Exhibit A). The payments were commission and the erroneous title was merely a convenient means of identifying the amounts due to Mr Porter.

26 In Mr Davidson's view the notes of the sales meetings (Exhibit D) reflected discussions that took place between the Respondent's salespeople and him where ideas were exchanged and the efficacy of different approaches were examined. With respect to rostering requirements, Mr Davidson stated that those were "just a guide to try to be fair to all the salespeople" so that they would have access to leads and inquiries. The times of attendance were not strictly adhered to, "they would always roll up at say 9.00 o'clock or later and sometimes they wouldn't roll up." He stated that if people were late or did not turn up at all, nothing could be done.

27 Mr Davidson expressed the position that the Respondent had no control and that the salespeople "just did what they wanted."

28 Matters such as the request for salespeople to visit competitors' displays went unanswered and Mr Davidson claimed that the Respondent had "little control" in the matter. The requirement to have paperwork up to date so that Friday could be taken off was really left to the salespeople to organise. According to Mr Davidson if they wanted to change it they could. It was important to ODW to have all the quotes up to date. Customers would complain if their quote was not ready. However, according to Mr Davidson it was up to the salespeople whether they took Friday off.

29 Issues such as measuring jobs, phone call strategies to sell the Respondent's products and a rejection of the practice of waiting on customers to call back, were all matters which were discussed with salespeople to encourage them to adopt better approaches to secure more sales. Knowledge of ODW jobs and how patios and buildings could be put together was useful and while the Respondent encouraged salespersons to attend sites to become conversant with the techniques and products of construction, it was Mr Davidson's evidence that not one salesperson availed themself of the opportunity.

30 According to Mr Davidson much of the information set out in the sales meeting notes were merely reiterations of administrative procedures necessary for salespeople to access their commissions. They reflected the requirement for comprehensive documentation to support the contract upon which their commission was paid.

31 Mr Davidson confirmed the flexibility open to salespeople in quoting jobs from the Respondent's price list (Exhibit E). There was discretion to discount or "add more money on". According to Mr Davidson the documentation from which the salesperson quoted was a guide.

32 The requirement not to cheat in documenting lead sheets referred to in the sales meeting notes merely reflected the Respondent's attempt to "try and talk to them (salespeople) … a lot of them would do a lot more leads than what they would write down, you know, because they wanted us to think that they're too busy but they do too many leads." In attending to phone enquiries, Mr Davidson emphasised that it was up to the salesperson to organise the time to go out and give a quote. He agreed that at sales meetings he had emphasised that salespeople should do three leads a day but this he said was disregarded.

33 In regard to the consideration that was given to establishing AWAs, this arose from an investigation as to whether they were appropriate to the business. It was submitted to the salespeople for their consideration. However, it became apparent that it would not work. Reference to the Commercial Travellers' Award ("the CTA") was "scrubbed". From Mr Davidson's evidence it appears that as far as he was concerned the proposal for AWA's was only on offer for about one week. Then it was no longer considered an option.

34 Mr Davidson stated that the option of going to proprietary limited companies was discussed with the salespeople. That, according to Mr Davidson, was an option that had been taken up by some. However, others remain as "contract salespeople". With reference to Exhibit H (the covering sheet to the proposed AWA) it was Mr Davidson's evidence that it had been explained to Mr Porter that the CTA did not apply and that he understood the situation. According to Mr Davidson there was discussion with the salespeople about the way they wanted to go. Some elected to incorporate. Mr Porter was uncertain and said to him that he did not know what to do. However, despite the offer to sit down and discuss whether Mr Porter had any problems about becoming a proprietary limited company, Mr Davidson stated that the Applicant never availed himself of that opportunity. It was Mr Davidson's evidence that the Applicant merely stated that "I don't want to do it" to which Mr Davidson replied "no worries". He was never given a reason as to why Mr Porter rejected this course.

35 Under cross-examination Mr Davidson relayed how he had asked Mr Porter many times to sit down with him to go through the cost of establishing a proprietary limited company but that the Applicant had refused; he merely stated that he just "didn't want to do it". Although Mr Davidson in evidence reiterated that it was Mr Porter's choice, nevertheless he continued to approach him. They were still "reasonable friends". Mr Porter's position with the Respondent was never in jeopardy and there were never any counselling sessions. According to Mr Davidson they talked as friends. He would have raised the issue of incorporating as a business "four or five or something" times with him.

36 Mr Davidson confirmed that the Applicant was given business cards, paid for by the Respondent. The Applicant determined the title by which he wanted to be identified and the inclusion of telephone and fax numbers were at the Applicant's discretion.

37 When ODW decided to have a uniform the matter was discussed with the salespeople. It was Mr Davidson's evidence that they agreed to be part of the move to wear uniforms. The cost of apparel was, according to Mr Davidson, deducted from payments made to the salespeople, however, the Respondent never got around to charging Mr Porter for the supply he was given. A record of charges for the supply of uniforms was tendered (Exhibit 7).

38 Mr Davidson confirmed that there was no written contract with the Applicant. However, he submitted that Mr Porter knew the arrangement "very clearly", both through his friendship with other salespeople and from his experience as a member of the sales group on previous occasions. The conditions under which he operated in the period from July 2001, until February 2003 were identical to those under which he had provided his services previously. Mr Porter was remunerated solely by commission. Mr Davidson could not recall the claim that Mr Porter had at one time been paid for training; he doubted whether that had been the case. Mr Davidson stated that Mr Porter knew how to erect patios and that this was a big advantage to him in selling. He accepted that the titles used by Mr Porter for his business cards which were supplied at the Respondent's cost, did not reflect positions within ODW but they were chosen at the salesperson's discretion. He stated that the Respondent had no control over it.

39 While Mr Porter received phone calls in the Respondent's office and prepared quotes while there, he was not working for ODW. Phone enquiries were referred to the Applicant. He followed up those and made his own arrangements. Mr Davidson stated that the Respondent "never knew where he (Mr Porter) was at any time." He stated that Mr Porter might be having a day off or anything. The Respondent had no control over that. The Applicant had no input into the Respondent's "overall budget" and was not given a sales target. According to the Respondent he was not required to attend sales seminars or to undergo specific training. There was no requirement for Mr Porter to solicit business through telephone calls or door to door canvassing.

40 Mr Davidson explained that if salespersons could not keep to their Monday to Friday roster "they would just ring up and say 'I can't make it', 'I've got a headache', 'I'm changing my tyres" or whatever, and they would just not make it." The roster requirements (as set out in the sales meeting notes (Exhibit D page 5, point (16)) were only a guide according to Mr Davidson. While the Respondent liked salespeople to be on site at the end of the day they could "come and go as they please". If they wanted leads they would attend the office. According to Mr Davidson it was up to them. No one ever had to have another person (other than a salesperson) fill in for them on the Monday to Friday roster. However, Mr Davidson acknowledged that weekends were the best time for leads and that was the only time when someone filled in for a salesperson so that they could get their leads. It was Mr Davidson's evidence that Mr Porter had on one occasion paid Ms Jane Ross to come in and work on Saturday and Sunday so that he could take the leads she had received. Mr Davidson went on to explain that salespersons swapped their rosters and sometimes what ended up happening was that their sister, daughter, mother or friend would take their position, but it happened very infrequently. All they did was take an enquiry and advise the customer that no one was available at present and that they would get a salesperson to call out and see them. However, these arrangements were made with Mr Davidson's approval. Mr Davidson denied that the receptionist, who had stood in for Mr Porter on the weekend roster, had been paid for her time by Mr Porter at Mr Davidson's direction. Although the notes of the sales meetings expressed as a directive that salespeople "must be on site" during their rostered periods, that they must be on time and that their job was to sell and answer the phones, these were discussion points at sales meetings according to Mr Davidson. It was Mr Davidson's evidence that salespersons would rarely answer the phones. The requirement expressed in terms of what would appear to be an ultimatum that "if you are not up to date with your paperwork you don't take Fridays off" was in Mr Davidson's view, probably put the wrong way. He reiterated that "we had no control over that. They made up their own mind."

41 With respect to "site checks" it was Mr Davidson's evidence that because of his experience it was unlikely that ODW would initiate a re-measurement without first consulting the Applicant. He also gave evidence that the rate of $25 was determined by reference to salespeople. Mr Davidson could not recall if he ever overruled Mr Porter on whether a site check was needed. Mr Davidson went further and claimed that if ODW initiated a site check but found the salesperson's paperwork to be correct they would not charge the $25. This he claimed was an agreement reached with the salespeople. So the arrangement was that the site check fee would only be charged if the salesperson's measurements were wrong or if the salesperson initiated the site check.

42 Mr Davidson stated that some salespeople did not attend sales meetings.

43 It was Mr Davidson's evidence that Mr Porter was never given directions on how to sell and that the Respondent was not obliged to accept the quotes he submitted. If there were mistakes in the salesperson's calculations the proposed contracts would be referred back to him. According to Mr Davidson, the Applicant was not supervised in his work. There was no upper or lower limit on the amount of work he was expected to quote on or expected to bring in. There was no assessment of his performance. The Applicant never had to obtain permission as to how a job had to be done. As to a requirement to register any leave requirements on a whiteboard, Mr Davidson said there was no such instruction. The Respondent's wages employees would record their leave on the whiteboard and "then the salespeople would then…also if they wanted time off, they would just come in, write up their time they're having off and there was never… a question asked. If they wanted time off, they were contractors so … they took off as much time off as they wanted or required." (transcript pp 127 - 128).

44 Mr Porter supplied his own equipment – tape measure, computer (if he wanted to), vehicle, petrol and mobile phone. Mr Davidson confirmed that the Respondent provided workers' compensation cover for Mr Porter as well as public liability insurance.

45 As to the circumstances under which the Applicant's services with the Respondent came to an end, it was Mr Davidson's evidence that over the last three months with ODW Mr Porter's attitude changed. Mr Davidson stated that he got on well with the Applicant and that they "would talk about … basically his attitude." Mr Davidson cited the deterioration as being manifested in Mr Porter becoming uncooperative with other salespeople in not changing weekend rosters. According to Mr Davidson he received complaints from other salespeople about the Applicant's attitude and his unwillingness to follow systems in the office which had been agreed to by the other salespeople.

46 The last time Mr Davidson spoke with Mr Porter about his attitude was on the day on which their relationship came to an end. His evidence was that on the morning of 27 February 2003, Mr Porter was asked by Mr Davidson whether he was working on the weekend. To this he responded in the affirmative but added that if it was quiet "I'm leaving early". Mr Davidson stated that he advised Mr Porter that ODW advertised that the business would be open certain times. To this Mr Davidson claimed that the Applicant just responded "I don't care. I'm leaving early". According to Mr Davidson the Applicant's tone and manner was abrupt and rude. It was Mr Davidson's evidence that Mr Rees, another salesperson, was privy to this discussion. Mr Davidson stated that he responded "Neil" but the Applicant merely reiterated his position by stating "I don't care. If it's quiet, I'm leaving early". The conversation concluded and Mr Davidson stated that Mr Porter left the office. Later that day he telephoned the Applicant and told him that he would "like to have a talk to you". Mr Porter wanted to know what it was about but Mr Davidson said he wanted it to be face to face. At that time Mr Porter said that he was giving a quote and that he would get back to Mr Davidson. He telephoned a short time later and according to Mr Davidson wanted to know what was to be discussed. Although Mr Davidson told the Applicant that he wanted to talk to him in the office Mr Porter was insistent about wanting to know the issue there and then. Mr Davidson stated that he informed the Applicant that it was about his attitude and according to him Mr Porter started "going on" along the lines of, "no, no I don't care. I'm not going to help these blokes. They don't help me". It was Mr Davidson's evidence that there seemed to be "a bit of confrontation between … especially one of the gentlemen, John Hodgkinson, and Neil". Finally, Mr Davidson stated that he told Mr Porter that, "… with your attitude, you may as well leave" and Neil's exact reply was, "I will." With that the Applicant attended the office half an hour later and on Mr Davidson's evidence handed over his contracts and an invoice for his commission and walked out. It was Mr Davidson's evidence that he did not intend terminating the relationship with the Applicant when he said, "you may as well leave."

47 Mr Davidson denied that any pressure was put on the Applicant to operate as a proprietary limited company on the day the relationship came to an end or at any other time. Discussions about being incorporated were done at sales meetings, "it wasn't done privately with Neil" according to Mr Davidson. Although Mr Porter was asked why he would not establish a proprietary limited company Mr Davidson stated that all Mr Porter would say was that, "I'm just not doing it." These discussions took place two or three times a week and Mr Davidson conceded that he may have asked Mr Porter about that matter on the morning of 27 February 2003.

48 As far as the Applicant was concerned the issue of whether or not he was an employee or independent contractor could be resolved by reference to the dicta in two principal cases: *Hollis v Vabu Pty Ltd* [2001] ALJR 1356(HC) and *Ryder v Beaulieu of Australia Ltd* (2003) 83 WAIG 1133 (FB).

49 It was submitted that the control test is still an important element in identifying the distinction between an employee and an independent contractor. In this respect the control that vested in the hands of ODW was claimed to be seen in the rostering arrangements, the necessity to attend sales meetings, the submission of lead sheets and the adherence to the Respondent's price sheet in quoting jobs.

50 Furthermore, having regard to matters canvassed in these principal cases it was submitted that the position of salesperson needed no special qualification, the discharge of those duties did not generate goodwill for the benefit of the Applicant and devolved to the Respondent. The Applicant did not enter into legal relationships with the clients; that was between them and ODW. There was no contract until it was signed by Mr Davidson.

51 The Applicant was required to adhere to practices and procedures set down by the Respondent. These included invoicing, the remittance of GST and sales practices in limiting the daily number of quotes. There was of course the incidence of workers' compensation and public liability insurance, indicia which reflected the true nature of the relationship.

52 There was in the Applicant's view a realisation on the part of the Respondent that the Commercial Traveller's Award applied in the circumstances of the Applicant's employment. The attempt to retrieve the situation by having the Applicant sign an AWA was said to be evidence of this. When looked at in the context of the provision of business cards, the provision of a uniform and the work done in the Respondent's office, the conclusion was in the Applicant's view, overwhelming. He was an integral part of the Respondent's business. This was confirmed in the totality of the contracts. This, it was submitted, is not answered by the fact that Mr Porter was unsupervised in his attendance while measuring up and quoting and the arrangements for the remittance of GST to the Australian Tax Office. The Applicant followed practices and procedures dictated to him by the Respondent.

53 The Respondent referred to the same cases to indicate that the jurisdictional question should be determined in its favour. In this respect it was submitted that the character of ODW's relationship with Mr Porter can be distinguished from that in the case of *Ryder v Beaulieu of Australia Ltd* (2003) 83 WAIG 1133. In the circumstances of this matter there is no written contract. The arrangement was devoid of any "employee benefit" with respect to matters such as superannuation, leave, sickness benefits, the payment or provision of a car, petrol or a telephone. There was, in the Respondent's view, no control exercised by it and the Applicant was not "part and parcel" of the business. There was a changing relationship between the two parties which saw Mr Porter move from an installer to salesperson to installer-salesperson then to salesperson exclusively. Mr Porter chose his own title and what particulars he wished included on his business card. He managed no one but himself. The fact that he did not pay for his uniforms was an oversight.

54 According to the Respondent's assessment of the evidence the roster merely provided a guideline in which the Applicant could be available to collect leads. He chose his time and swapped when the roster was inconvenient. He got a replacement when he was unable to do this. There were no problems when he was late. He was not paid for his time in the office and there were no hard and fast rules about attending sales meetings. Mr Porter was not given sales targets, nor did he have any input into a budget. It was claimed that there were no fetters on his employing staff to help him or in delegating his duties. The Applicant could do jobs for someone else.

55 The Respondent was free to reject the quotes Mr Porter submitted and he operated from only an indicative price list supplied by ODW. He was not required to sign a confidentiality agreement and could, it is claimed, work for someone else. The fact that he provided details of proposed leave on the Respondent's noticeboard was a courtesy not an obligation.

56 With respect to the payment of workers' compensation and public liability insurance by the Respondent on the Applicant's account, it was submitted that was not unusual in cases of small contractors and subcontractors.

57 Finally, it was submitted that if it was accepted that an employment relationship was found to have existed, there was no unfair dismissal to consider as the Respondent had not intended to terminate the services of the Applicant. It was he who elevated the discussion to a termination by taking a discussion and turning it into an ultimatum. The discussion had been about his attitude.

58 On the basis of the alternative submission that in the event that an employment relationship was found and from this a determination of unfair dismissal arose, the Respondent submitted two things. First, that the Applicant's failure to mitigate his loss was fatal to the claim. Next, that if any loss was considered that should not be determined by reference to the Commercial Travellers' Award as the "employee" did not come within the scope of that award. Employment covered by the Commercial Travellers Award was not that which Mr Porter performed. The major and substantial part of his work, given the nature of receiving leads, measuring and quoting as a manager or building consultant, was not soliciting, promoting or marketing the Respondent's products.

59 The fundamental question to be determined is whether or not the Applicant was an employee. In the course of proceedings both parties made considerable reference to *Ryder's case* (supra), in which the Honourable President addressed the distinction between an agent and an employee. Although reference was only made in passing in this matter to the possibility that Mr Porter may have been acting as an agent in his capacity as salesperson for ODW, I would, with respect adopt what the Hon. President noted in *Ryder's case* (supra):

> "Agency is a more difficult relationship to distinguish from a contract of service than is a contract for the provision of services. That is because every employee is also an agent of the employer for the purposes of his/her employment. An agent is "a person who is authorised to act for a principal and has agreed to so act, and who has the power to affect the legal relationship of his principal with a third party" (see generally, Macken, O'Grady, Sappideen and Warburton "*The Law of Employment*", (5th Edition), at page 24) (op cit at 1136)."

60 The facts clearly establish that the Applicant could not enter into any binding contractual commitments on the Respondent's behalf. All contracts arising from his responses to enquiries, measurements for patios and quotes had to be submitted to Mr Davidson. It was he and he alone that entered into the binding contract with the client.

61 An apposite summary of principles relevant to determining the distinction between independent contracts and employees is set out by the Honourable President in *CFMEU v Personnel Contracting Pty Ltd T/as Tricord Personnel* (2004) 84 WAIG 1275. Therein the Honourable President states:

> "In distinguishing whether an employment relationship exists, there is no single test to be applied. The correct approach is to consider a wide range of indicia which is what I will do in this matter.
>
> The control test, of course, remains significant (see *Hollis v Vabu Pty Ltd* (op cit) and *Stevens and Gray v Brodribb Sawmilling Co Pty Ltd* (op cit)), but it is not itself sufficient to conclusively determine the nature of the relationship. I do not read any of the reasons for decision in *United Construction Pty Ltd v Birighitti* (IAC) (op cit) to say different, and, in particular, not that of Hasluck J (at page 441, paragraph 62).
>
> It is fair to say that the courts engage in balancing a number of factors when determining such question (see *United Construction Pty Ltd v Birighitti* (FB) (op cit) at pages 2414-2415, citing *Hollis v Vabu Pty Ltd* (op cit) and *Stevens and Gray v Brodribb Sawmilling Co Pty Ltd* (op cit)) (see also *Augustyn v Vistadale Pty Ltd as trustee for the Ranger Family Estate t/a Ranger Contracting* (2002) 82 WAIG 939 (FB)).
>
> However, a considerable amount of discretion is obviously left in the hands of the court determining the issue, and this should not be forgotten.
>
> There are a number of factors, which do not constitute an exhaustive list, which can be taken into account in these matters. None is necessarily determinative of the question on its own.
>
> These include the mode of remuneration, the provision of benefits usually provided to an employee, such as holiday pay, sick leave, long service leave, superannuation and PAYE tax, accident insurance cover, perhaps workers' compensation, whether a worker generates and can sell goodwill, whether a worker is part and parcel, that is an integral part of the business of the notional employer, whether the worker can delegate or contract out his contractual obligations to the notional employer, whether tax is deducted, and whether the employees provide equipment. Further, these indicia include whether the worker is in business on her/his own account. The list, as I have recounted it above, is not exhaustive and includes, too, such things as the skilled nature or otherwise of the work performed.
>
> I refer to the following other principles. I do so because as Gleeson CJ said in *Connelly v Wells* (1994) 55 IR 73 at 74 (CA NSW):-
>
> > "Where the relationship between two persons is founded in contract, the character of the relationship depends on the meaning and effect of the contract. In the absence of a suggestion that a contract was varied after it was originally made, its meaning and effect must be determined as at the time it was entered into. If the contract is in writing then the court would in considering the nature of the relationship between the parties is directed to an examination of the terms of the written agreement in light of the circumstances surrounding its making".
>
> I would add to that as McCusker DPJ did in *Country Metropolitan Agency Contracting Services Pty Ltd v Slater and Another* (op cit) at page 309, the following passages from the reasons of the majority in *Hollis v Vabu Pty Ltd* (op cit):-
>
> The first passage states (at 33 [24]; 87):-
>
> > ". . . It should be added that the relationship between the parties, for the purposes of this litigation, is to be found not merely from the contractual terms. The system which was operated there under and the work practices imposed by *Vabu* go to establishing "the totality of the relationship between the parties; it is this which is to be considered: *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 29".

The second passage from *Hollis v Vabu Pty Ltd* (op cit) refers with approval to *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681 at 692 and reads as follows:-

> "… There, an "owner-driver" vehicle courier employed under a standard form contract was held to be an independent contractor. One term of the contract stated that "The relationship between the Contractors and the Company is and shall be for all purposes that of independent Contractor and neither this Agreement nor anything herein contained or implied shall constitute the relationship of employer and employee between the parties". Although such terms are not of themselves determinative, as parties cannot deem the relationship between themselves to be something it is not, (see *R v Foster; ex parte Commonwealth Life (Amalgamated) Assurances Ltd* [1952] 85 CLR 138 at 150-151; *Adam v Newbigging* (1888) 13 App Cas 308 at 315; *ex parte Delhasse; re Megedand* (1878) 7 ChD 511 at 526, 528, 532) (see also *TNT Worldwide Express (NZ) Ltd v Cunningham* at page 699): "The proper classification of a contractual relationship must be determined by the rights and obligations which the contract creates, and not by the label the parties put on it", this term was held to summarise the relationship between the parties accurately. Casey J pointed out that the contract contained terms which suggested "each party was generally trading off benefits under one relationship for perceived advantages under the other (at 695)."

62 In *United Construction Pty Ltd v Birighitti* (2003) 83 WAIG 434 (IAC) at 440 Hasluck, J observed that:

> "Further, in *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 a majority of the High Court adopted a similar approach. In that case, the majority held that bicycle couriers performing work for courier firm should not be classified as independent contractors. The majority noted that the couriers were not providing skilled labour, they had little control over the manner of performing their work, they were presented to the public in their uniforms and by the use of the Vabu logo as emanations of Vabu and their finances were superintended by Vabu. It followed that the relationship between Vabu and the bicycle courier who had caused an injury to a third party was that of employer and employee."

63 The majority said at par 47:

> "In classifying the bicycle couriers as independent contractors, the Court of Appeal fell into error in making too much of the circumstances that the bicycle couriers owned their own bicycles, bore the expenses of running them and supplied many of their own accessories. Viewed as a practical matter, the bicycle couriers were not running their own business or enterprise, nor did they have independent in the conduct of their operations.
>
> These previously decided cases indicate that care must be exercised in applying general precepts to particular circumstances. However, the decided cases strongly suggest that in having regard to the totality of the relationship between the parties the control test remains relevant and an important factor will be whether a person is acting on his own behalf or simply as a representative of the putative employer's enterprise.
>
> The decided cases, indicate also that the nature of the relationship between the parties in an employment situation must be resolved not by reference to the label used but by an examination of the substance of the matter."

64 It is the relationship between Mr Porter and ODW as at February 2003 that must be ascertained and not that which existed at various times when the Applicant admits to being a contractor-installer or when he combined selling with the installation of patios. At one time he was in partnership with another person but that was not the case at the time relevant to these proceedings.

65 It is common ground that the contract was not formalised by deed or even a letter of appointment. The terms were expressed to the Applicant by Mr Davidson when he resumed selling in July 2001. These were the requirements to perform the roster commitment, to invoice in accordance with the procedure followed by other salespeople and to provide his own car, petrol and mobile phone. Implied into that appointment as a salesperson were requirements to sell the Respondent's products to clients for whom measurements, quotes and contract proposals were entered into by the Applicant. In the first instance it is the determination of facts which arise from these obligations that must be undertaken.

66 I accept the evidence of Mr Porter and Mr Rees that performance of the roster commitment was not optional. If a salesperson could not get anyone to replace him then he had to be there. Although some distinction can be made between the rigour of attending weekend and Monday to Friday, nevertheless, it is clear that if a salesperson could not arrange for a colleague to do the shift he had to undertake the commitment. I do not accept that the business functioned on the basis that attendance times were only guidelines and requirement for attendance was beyond the Respondent's control. The arrangements for replacement by people such as sister, brother and friends were so exceptional that they could not be considered to be part of the administration of the rosters. The fact that Mr Davidson deemed it necessary to speak to Mr Porter when he indicated some desire to leave early on a long weekend illustrates the importance of maintaining the roster to the Respondent's business. Furthermore, it is improbable that a salesperson designated to perform the roster would just leave without completing their shift. The terms by which the requirement to perform the roster commitments are expressed show the importance the Respondent attributed to the performance of that task.

67 The superintendence of the Applicant's accounts requiring supporting documentation for proposed contracts, the attachment of lead sheets to invoices and the Respondent's discretion to adjust payments demonstrate the control exercised by the Respondent in managing Mr Porter's claims.

68 The Respondent's prerogative to institute a site check, to seek the re-calculation of quotes and to adjust commission subsequent to the contract being presented and accepted, characterise the degree of control the Respondent vested in itself in maintaining control over a crucial part of its business.

69 The Applicant participated in a commission arrangement but the Respondent ensured that GST payments were facilitated by the accounting system it required the Applicant to submit to.

70 It is clear that in order to undertake the role of salesperson the Applicant required certain equipment. It was stipulated in the oral contract that he was to supply the car, petrol and mobile phone. These items and the fact that ownership rested in the Applicant are indicia to be considered in favour of the status being that of contractor. They do not determine that issue entirely.

71 Implicit in the contract was the requirement for the Applicant to undertake selling, measuring and quoting. These demands required a level of skill. While they were by and large discharged without direct supervision, there was nonetheless an imperative attached to each which gave the Respondent the capability and prerogative to oversee. The phone calls from interested members of the public were taken in the Respondent's show room. The number of interviews conducted was required to be logged on the lead sheet. The notes of sales meetings record that Mr Davidson could accompany a salesperson when undertaking quoting duties without notice. The extent to which a salesperson conducted daily interviews was the subject

of control both through the identification of performance on a lead sheet and by direction as recorded in the sales meeting sheets.

72 Those notes were more than a record of initiatives discussed between salespersons. They specify the requirements as to how and when duties are to be performed. They reflect the power vested in the Respondent to direct and control the discharge of duties and the adherence to policy. Fridays could not be taken off unless things were up to date, supporting documentation must accompany invoices and salespeople were directed to attend the showroom in accordance with the roster.

73 The discretion that was given to salespeople in the identification of their title on their business cards shows the extent to which they could hold themselves out to the public as a credible senior person within the organisation. It is just that point; the design clearly identifies them with the Respondent's business and no other. Similarly the uniforms, albeit that the Applicant was not charged for his, gives the salesperson whether in the showroom or out measuring and quoting, the credibility of being a person from within the Respondent's organisation.

74 It is noted that the Applicant remitted GST to the Australian Tax Office on Commission sales. No PAYE deductions were made and although at one point the possibility of award coverage was accepted those arrangements were not changed.

75 In line with what could be expected of employment the Applicant was covered for workers' compensation and public liability insurance. But again, this does not dispose of the question. Against this conclusion is the fact that the Applicant did not have an entitlement to sick leave, or annual leave. There is, however, sufficient evidence to conclude that there was a procedure in place for approval to be given by Mr Davidson when time off was to be taken. In accepting that to be the position I reject the notion that it was merely a courtesy extended to Mr Davidson and follows on from arrangements for wages employees in employment with the Respondent.

76 Mr Davidson explained that the Applicant was not given sales targets nor required to work to a budget. There was evidence from Mr Porter that the Respondent wanted him to write $100,000 of business per month. I accept that any control in this respect was informal and that performance in this respect was not subject to scrutiny. There was, however, the direct monitoring by way of lead sheets and the completion of those was a condition of the payment of commission.

77 Mr Porter was not required to sign a confidentiality agreement. Indeed that seems never to have been raised during the term of his relationship with the Respondent. However, Mr Porter was armed with ODW's price sheet and he accepted the responsibility attached to that. How could he quote for another patio supplier while he was privy to the rates that ODW worked on? It is nonsense to say that he could have worked for someone else as a salesperson providing quotes and writing up contracts for someone else. That would have been a breach of his fiduciary duty no matter what his status, an employee, contractor or agent. As an installer things may be different but that was not the issue at the relevant time.

78 The terms of his contract, albeit brief, required Mr Porter to discharge his duties on the roster. The evidence shows that this was a primary responsibility. Although there are isolated examples of where an outsider undertook the role, they were exceptional and in Mr Porter's case came about as a result of hospitalisation. Mr Rees was unequivocal in his evidence – performance of the roster was not optional – if you could not make arrangements with another salesperson you had to be there at the designated time. To argue that Mr Porter could have employed someone else on this facet of his appointment would have been in breach of the term under which he was appointed. As to the possibility of delegating the task of measuring and quoting to someone else, the requirement to document customer contacts (including those that failed to enter into contract proposals) would seem to be contrary to the possibility of the Applicant retaining someone else to do the task. Furthermore, the direction that Mr Davidson could, unannounced, accompany a salesperson while they were measuring and quoting would seem to be another limitation on the possibility of delegation.

79 The flexibility inherent in the role of quoting for the construction of patios was limited to parameters set down by the Respondent. The salespersons had to balance the price necessary to secure the job with the incentive to maximise commission. They could not go outside the limits set by ODW's price structure save and except when they were able to get someone who, for whatever reason, would accept a price above the limits of competitive pricing. Even then the Applicant could not retain the total windfall or even share it "fifty-fifty" with the Respondent. He was limited to a commission of 25% with ODW retaining the balance. The limits of independence and flexibility vested in the role precluded the salesperson from retaining all of the additional income above the Respondent's maximum pricing structure.

80 One other matter for consideration in the identification of the character of the relationship between the Applicant and the Respondent is the question of goodwill. Did Mr Porter develop the goodwill of an enterprise of his own as distinct from that of his principal? It is apparent from the circumstances of the relationship that there was no business that Mr Porter could sell or develop beyond the provision of his own services which could operate separate from that of ODW.

81 On the basis of the totality of the relationship which is gleaned from the work practices imposed on the Applicant it is clear that the contract performed by Mr Porter for the Respondent was that "of service". The control that vested in ODW strongly suggests that he was not acting on his own behalf but rather as a representative of the employer's enterprise. That control extended from the requirements to attend the sales office at designated times, to account for the leads that were followed up, to the pricing and quoting requirements and to the superintendence of the Applicant's accounts. The arrangements for payment, the supply of equipment and the absence of employee benefits are insufficient to alter the finding that as a matter of law the relationship was that of an employee and employer.

82 The provision of a uniform (albeit that the Applicant should have paid for it) and the authority to distribute business cards which effectively identified the Applicant within the structure of the Respondent's operation hold the Applicant out as being integrated into its business.

83 It is difficult to comprehend that given the structure of the Respondent's operation that without the strict observance of the requirement for salespeople to comply with the showroom roster, how enquiries about patios etc. could be converted into sales. If salespeople were free to come and go as they pleased, if they could work for someone else at the same time and quote for the Respondent's competitors, if there was no regime in having quotes ready and not the discipline of keeping them up to date with the requirement to work on a Friday which might otherwise be a day off, then without alternative arrangements the business would be subject to the vagaries of the salespersons' particular interests. That could involve having time off without notice, favouring the provision of material through another supplier with whom they were free to work or leaving quotes unanswered for some time. These things do not occur because of the work practices and procedures adopted by ODW. It maintains an effective operation through the on-going control it exerts on salespeople. This is reflected in the notes of sales meetings. The sales, measuring and quoting functions are an integral part of the Respondent's operation.

84 With the determination of the preliminary issue that the Applicant is an employee, the next question is whether he was dismissed or did he elect to terminate his services. In other words was there a dismissal from employment necessary for the jurisdiction to be enlivened?

85 The respective positions on the circumstances and discussions that surround the way the employment relationship came to an end on 27 February 2003, have been set out in detail herein. For the Applicant's part a termination of employment arose out of

his refusal to accept that he should become an incorporated entity for the purposes of the discharge of duties with the Respondent. In the circumstances of that discussion he understood that he was left with no option but to go, that the relationship was at an end.

86 The Respondent's recollection was that the Applicant terminated the relationship on a day following an exchange about the requirements to have the showroom open for the advertised time. Later that day in a telephone call between Mr Davidson and Mr Porter which concerned the Applicant's attitude, it was asserted that Mr Porter acted peremptorily and said that he would leave. Within a short time he made good those words by attending the office, depositing quotes and submitting a closing invoice.

87 It is noted that no one else was privy to the telephone discussions between the parties that culminated in the employment relationship coming to an end. However, it was asserted by Mr Davidson that Mr Rees had been present on 27 February when the alleged discussion took place with Mr Porter about keeping the showroom open on the long weekend. Mr Rees attended the hearing under summons. The fact that he was not examined by the Applicant on his knowledge of events surrounding the termination is understandable. Mr Porter had given his evidence on the circumstances of his alleged dismissal; the discussion about the showroom being closed early, had on his evidence, taken place the day before and had nothing to do with the termination of employment. That arose from the discussion about becoming an incorporated entity. Why Mr Rees was not cross-examined on an issue which, on the Respondent's evidence, was part of the sequence that ended in the termination of the relationship, is unknown. Be that as it may, there were factors which impinged on the relationship between Mr Porter and Mr Davidson for a number of months.

88 In late 2002 the proposal for signing AWAs had been floated. That was withdrawn after one week. However, as Exhibit H (the attachment to the proposed AWA) shows there was some imperative to a decision being made about becoming an incorporated entity. A decision was required by 1 January 2003. Although Mr Davidson gave evidence that the Applicant was free to choose whether he remained a "contract salesperson" or operated as an incorporated entity, he said that the matter was never discussed with Mr Davidson privately. It was always done at sales meetings. However, the evidence is that Mr Davidson spoke to Mr Porter a number of times. That was in the period of two to three months, which coincides with the time over which Mr Davidson asserted that Mr Porter's attitude changed and that he became uncooperative. Mr Porter's evidence was that during this period he felt pressured by Mr Davidson. The Respondent even offered to make a financial contribution to the cost of incorporating. It is open on the evidence to conclude that Mr Davidson was frustrated by Mr Porter's refusal to explain to him the basis of his objection to forming a proprietary limited company.

89 There is little to suggest that apart from the issue of incorporation, that any discussion about Mr Porter's attitude or not cooperating with other salespeople was the subject of any discussion promoted by Mr Davidson. I accept that the alleged reasons for Mr Hodgkinson's departure from ODW were never raised with the Applicant.

90 On matters where the extent of control was in issue, on matters going to the efforts of the Respondent to effect incorporation and the alleged concerns about the Applicant not cooperating with other sales people and not following unspecified office practices, I find Mr Davidson's evidence unreliable. I accept the Applicant's evidence that at no time was he counselled nor was any concern about Mr Hodgkinson ever raised with him. He was a credible witness. I accept his evidence about events on 27 February 2003, as being plausible.

91 As to whether the discussion that took place amounted to a dismissal I am satisfied that the words uttered by the Respondent's principal were intended to bring the relationship to an end. Unless Mr Porter operated as an incorporated entity the relationship was over. Mr Porter's actions in attending the office, in submitting the final quotes and in tendering the closing invoice were consistent with the direction that he could leave. If the Respondent's intention was to get Mr Porter to sign up for incorporation but not to sever the relationship the words never conveyed that impression. It was an ultimatum which, given his circumstances, Mr Porter had no option but to act upon.

92 Having discharged the onus of establishing jurisdiction through the finding that the Applicant's status in the relationship with the Respondent was that of an employee and that he had been dismissed from employment, the issue is then whether the dismissal was unfair. The test is whether in all of the circumstances he was given a "fair go all round" (*Undercliffe Nursing Home v FMWU* (1965) 65 WAIG 385).

93 In the circumstances of this matter the question is whether it was reasonable to terminate the relationship because Mr Porter refused to establish an incorporated entity. There was nothing to detract from his performance as a salesperson. On his assessment he was near the top based on sales. The Respondent assessed him at little lower down the order. The figures supplied by the Respondent attest to his share of overall all sales by ODW (Exhibit 8). The Applicant's behaviour, diligence and competency were never questioned. It was, in all the circumstances unreasonable to terminate his services for refusing to incorporate.

94 The Applicant seeks compensation for the loss which he claims arises from the unfair termination.

95 There is a duty on an employee to mitigate his loss (*Growers Market Butchers v Backman* (1999) 79 WAIG 1313 at 1316 (FB)). The employee is required to diligently seek suitable alternative employment. The onus of proving mitigation has not occurred is on the employer (*Westen v Union des Assurances* (1996) 88 IR 259).

96 Under cross-examination of the Applicant, the Respondent established that for several months after the termination at the end of February 2003, Mr Porter did nothing to mitigate his loss. He just stayed at home: He stated that he did not know what to do with himself. Mr Porter did not seek employment and it was not until a friend requested that he build him a patio that Mr Porter decided that he could operate his own business selling and building patios.

97 The fact that Mr Porter failed to take reasonable steps to secure employment or take any steps at all for a considerable period after the termination of employment must be taken into account in assessing the loss. Not only does it negate the period during which he would otherwise have been experiencing the impact of the termination but to a significant extent opens up the question of whether any remaining loss should be discounted given that the failure to act may infer that the effect of the termination may not have impacted so significantly as to cause a loss or a limited loss.

98 Mr Porter is a young man with the skills that he possessed in pricing, selling and installing patios and the prospects in time of a buoyant building industry were most advantageous. He elected to do nothing. It could reasonably have been expected that he would have sought employment, but that was not the case.

99 While he was shocked by the dismissal from employment with the Respondent there is no evidence that his physical or mental well-being was such that he suffered injury which would otherwise explain his failure to mitigate the loss. The possibility of injury was only faintly referred to in passing. It is accepted that a dismissal from employment for many, causes a loss of esteem and in some instances it can be traumatic. That is not the case here.

100 While the Applicant could reasonably have expected on-going employment with the Respondent for some time, given the standard of his performance and the state of the industry it should not be thought that the loss would necessarily have reflected

the level of earning he attracted through commission, in the period immediately prior to his termination. Furthermore, the level of income from commission had regard to the expenses incurred by way of the use of a car, petrol and mobile phone. To accept that the level of commission established the loss would in that respect be a windfall. It must also be appreciated that in addition to income derived from efforts when the Applicant commenced to mitigate his loss that his new venture established the value of some goodwill for the business.

101 Taking all of these factors into account, the Applicant's failure to mitigate his loss for a considerable period, the on-going effect of that failure, the income (less expenses) he may have lost from termination of his employment and the fact that in establishing a new venture he not only gained income but also built up the value of that enterprise, I have assessed compensation for loss to be $10,800.

102 This has been calculated taking into account the following:

- An acceptance that average weekly commission for the period from July 2001 until the end of February 2003

  $1,549.17 per week

  (As per Exhibit K)

- That a notional amount for expenses which were not incurred and which would normally be accommodated in the amount paid as commission:

  (This takes into account depreciation on a motor vehicle, petrol, the costs of repairs, telephone, faxes, etc.)

  $500.00 per week

- The income derived from efforts following the termination of employment

  (As per the information tendered in Exhibit K):

  $100.00 per week

- A notional amount for the additional value which devolves his enterprise in the sale and installation of patios as goodwill:

  $50.00 per week

103 The loss to be compensated taking these factors into account amounts to $900.00 per week (rounded) for a period of twenty-six weeks (the statutory limit). Then having regard for the failure to at all mitigate his loss for a considerable period following the termination of employment the compensation for the loss is discounted by fourteen weeks. The amount due to Mr Porter, therefore, stands at $10,800.

104 A minute of proposed Order now issues reflecting these reasons for decision.

2004 WAIRC 13481

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NEIL PORTER
	APPLICANT
	-v-
	ANDANTINO P/L T/A OUTDOOR WORLD WANGARA
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	TUESDAY, 30 NOVEMBER 2004
FILE NO/S	APPL 301 OF 2003
CITATION NO.	2004 WAIRC 13481

Result	Order issued
Representation	
Applicant	Mr D Clarke, agent on behalf of the Applicant
Respondent	Mr O Moon, agent on behalf of the Respondent

Order

HAVING HEARD Mr D Clarke as agent on behalf of the Applicant and Mr O Moon as agent on behalf of the Respondent, the Commission pursuant to the powers conferred on it by the *Industrial Relations Act, 1979* hereby orders –

THAT the nature relationship between the Applicant and Respondent was that of employee and employer;

THAT the Applicant, Neil Porter, was harshly, oppressively and unfairly dismissed by the Respondent;

THAT reinstatement of the Applicant is impracticable;

THAT the Respondent pays to the Applicant a sum of $10,800 as compensation for his loss as a result of the unfairness of the dismissal;

THAT the Respondent pays to the Applicant this amount within 14 days of the date of this order.

(Sgd.) W S COLEMAN,
Chief Commissioner.

[L.S.]

2004 WAIRC 13682

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALBIE ANTHONY STANDLEY
	APPLICANT
	-v-
	TISALA PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	THURSDAY 16 DECEMBER 2004
FILE NO.	APPL 912 OF 2004
CITATION NO.	2004 WAIRC 13682

CatchWords	Contractual benefits – payments to be shared by two people – subject to funding – no funding requirement to trigger payment absent – no entitlement – *Industrial Relations Act, 1979 s29 (1)(b)(ii)*
Result	Dismissed
Representation	
Applicant	Mr A.A. Standley appeared on his own behalf
Respondent	Mr P. Vincent, of Counsel, appeared for the Respondent

Reasons for Decision
(Ex tempore as edited by the Commissioner)

1 This is an application which was filed in the Commission on or about the 15th July 2004. Then again, it may have been finally filed on 29th July 2004; there has been some doubt about that. But nevertheless, it is a valid application, and the Commission has proceeded to hear it.

2 It is an application that calls in aid the right given an employee under s.29 of the *Industrial Relations Act, 1979* (the Act) to refer a matter to the Commission that he has not been allowed by his employer a benefit, not being a benefit under an award or order to which he is entitled under his contract of employment. The key issues therefore are: was the applicant an employee; and what were the terms of the contract.

3 In this case there is no doubt that Albie Standley, (the Applicant) was an employee so he has locus standi to make the claim, and the Commission is empowered to entertain it.

4 The next issue is whether there was in his contract of employment with Tisala Pty Ltd (the Respondent) the benefit that he claims of $500.00 per week.

5 Mr Standley told the Commission that he had an interest raised in working at Pinjin Station, which is a property about 180 kilometres north east of Kalgoorlie, through Victor Cooper. Mr Cooper gave evidence about these discussions, and I will review his evidence later.

6 Mr Cooper had a family connection with the Applicant's partner. The Applicant and his partner, Ms Cooper, went and had a look at the property and were not too impressed with what they saw. It was run down and required a lot of work but eventually after some deliberation both the Applicant and Ms Cooper agreed to move out to the property.

7 The Applicant in examination-in-chief says that the deal he did with Victor Cooper was that he and his partner Ms Cooper would be jointly paid $500.00 per week. He modified that assertion in his cross-examination by Mr Vincent of Counsel, who appeared for the Respondent, to say that it was $500.00 per week, subject to funding. He eventually agreed with Mr Vincent that was the arrangement.

8 What has happened to the Applicant is that he went and worked on the property at Pinjin. It is obvious on the evidence that he put his heart and soul into working hard to make a go of the property. Soon after he arrived he was paid $1500.00. He thinks this was based on $500.00 a week, and in line with the agreement that had been made between the parties. It was an indication that the deal that he did with Victor Cooper would continue to operate.

9 But after the $1500.00 there were no more payments. In fact, there were no more payments for 3 years. The Applicant and Ms Cooper continued to work at Pinjin, getting a mixture money from Community Development Employment Projects (CDEP) payments, part-time work for a sandalwood cutter, and driving a grader. When he did not qualify for CDEP payments he earned money from those other sources.

10 Ms Cooper continued to receive CDEP payments throughout the time the Applicant and herself were on the property.

11 There were also various earnings from a wool clip and the sale of some feral goats. Mr Victor Cooper conceded that with the proceeds of those sales were rightly used by the Applicant to run the property by paying off debts and buying new equipment. The property operated for 3 years on that basis.

12 In 2003 the Applicant wrote to the Respondent's Directors personally (Exhibit V4). He told them in his letter that there had been no help from anyone apart from the $1500 from CDEP. He conceded that the wool clip and mustering money had been used to operate and run the property.

13 The Applicant then outlined the difficult conditions under which he and Ms Cooper lived. There was no air conditioning, no flyscreens, no radios or vehicle radios or satellite phone, no computer, no fax - and he suggested to compound all of that there was sometimes problems with the telephone so that there were no reliable means of communication from the Pinjin into Kalgoorlie.

14 The Applicant further explained how life became more difficult on Pinjin when the rain comes. He reminded the Directors that they had an agreement to pay $500.00 per week. There had been no replies to his consistent inquiries about what was going to happen to the weekly payments and he wanted to know exactly where he stood.

15 The Applicant then attached to his letter to the Director's some schedules which set out the money that had been earned and the spending that had taken place. He also set up some options as to how the parties might jointly deal with the matter. Those options included leasing, and signing over, and selling the property, all of them were designed to draw to the attention of the Directors that something needed to be done.

16 According to the Applicant, nothing was done and eventually he decided that he ought to resign (Exhibit S2). There was an amount of wages in the sum of $52,000.00 he thought owing to him and he wanted that money paid.

17 That is his story. He says he is still entitled to the money.

18 The Commission heard from Mr Victor Cooper, he is currently the Secretary of the Respondent. He has been involved with the company for a short time.

19 He told the Commission of the difficult financial situation that the Respondent has been in all the time that he has been involved and of the attempts that the Respondent has made to obtain funding from the various funding bodies in order to plough money into Pinjin to get it running properly.

20 Mr Cooper made it clear that part of that funding would have been to honour a commitment made to the Applicant, which was a similar commitment which had been made to other employees who went to the property, that if funding could be obtained they would be paid $500.00 a week. Mr Cooper said that it was foremost in the mind of the Respondent that they would have to pay that money if funding could be obtained. They knew that the basic sustenance payments would be made out of CDEP funds and they knew that Ms Cooper and the Applicant both would qualify. They were not sure that if the Applicant qualified first up, but eventually he did.

21 They knew there was some other income coming in from agistment and that the value of that money was paid in kind in the form of fuel. There were also various other intermittent forms of income. The Respondent acquiesced that the Applicant could use those funds to keep the property operating, and, by implication, to defray some of his own personal expenses by taking some addition on his wages.

22 The Respondent had put forward a proposition that the property would be established to run feral goats, the boundary fences would be reconstituted, and that would be a management plan to run the property.

23 In the time that the Applicant was employed on the property none of these funding options came to pass. One of them had looked promising, but the application had been, in Mr Cooper's words, 'pulled' by the Executive Director of the Respondent at the time, for reasons unknown to Mr Cooper. No funding proposal ever came to fruition during the Applicant's tenure on the property over the 3 years.

24 Mr Cooper says that when he had the conversations with Ms Cooper and the Applicant he said that the pay would be $500.00 per week between the both of them and that would be consistent with what other people had been offered, subject to funding.

25 Both on the evidence of Mr Cooper and the Applicant I find that the agreement was that he and Ms Cooper would be paid $500.00 per week subject to funds. That it was an agreement is given some weight by the fact that in the first 3 weeks $1500.00 was paid but as Mr Cooper says the money ran out after that. He did not know exactly where that money came from, but he knew that there was no more, and that would be consistent with paying the Applicant $1500.00 from funds. If there were no funds, the money can not be paid according to Mr Cooper.

26 In cases such as this, what the Commission's task is set out in two cases, *Perth Finishing College Pty Ltd v Susan Watts (1989)* 69 WAIG 2307 and *Reginald Simons v Business Computers International Pty Ltd (1985)* 65 WAIG 2039. In the Perth Finishing College case, his Honour the President added to the rule that had been established by the Acting President Edwards in Simons v Business Computers (*ibid)* when he said the Commission's role is to:

> *"... discover the terms of a contract. If those terms of the contract reveal an entitlement, discover whether the entitlement has been given; and if it has not been, it has the power under section 29 to order that the entitlement be given effect to."*

27 As President Sharkey said in Perth Finishing College *(ibid)*:

> *"That function is a judicial function. It is not the Commission sitting in its role as an equity based court. That is, the command in section 26 that the Commission act in accordance with equity, good conscious and the substantial merits of the case are not applicable in the process of deciding whether there is an entitlement."*

28 Therefore, what I have to do in this case is draw conclusions from the evidence, discover the terms of the contract, and give effect to it if it has not been given effect to.

29 I have heard evidence from the Applicant and from Mr Cooper. There is no reason for me to conclude that either of them have done anything other than tell me the truth of the situation and recited the events as best they could from their memory. They appear to be both credible and honest people.

30 What I have to do is analyse the evidence, and draw a conclusion from what the witnesses have said. The key issue here is that both the Applicant under cross-examination and Mr Cooper in examination in-chief have said the same thing about the formulation of the contract. That is, there was to be $500.00 a week, payable to the Applicant and Ms Cooper, subject to funding.

31 What I have to decide is whether there was funding or not. I accept Mr Cooper's evidence, as I accept the Applicant's, that there was never any funding. Part of the difficulty with this whole project has been the inability to raise the funds necessary to run the property in a in a businesslike way. Those funds never came to pass. The contract to pay $500.00 per week was conditional upon funding. It was not just a contract to pay $500.00 a week, as in normal employment contracts; it was an agreement to pay $500.00 a week to be shared by the Applicant and Ms Cooper if the money was available in the funds.

32 It is clear on all of the evidence that the property has not been funded. The Applicant had to run the property the best he could, and one would have to say, and agree with Mr Cooper, that he and Ms Cooper did a marvellous job trying to make it work. Eventually it was too much for them. They say that their health suffered, and the safety issues meant that they had to resign.

33 In these circumstances, I am bound to find that there is no contractual entitlement. There has been no denial of the benefit, and the application will have to be dismissed.

2004 WAIRC 13684

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALBIE ANTHONY STANDLEY
	APPLICANT
	-v-
	TISALA PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	THURSDAY, 16 DECEMBER 2004
FILE NO/S	APPL 912 OF 2004
CITATION NO.	2004 WAIRC 13684

Result Dismissed

Order

HAVING heard Mr A.A. Standley on behalf of the Applicant and Mr P. Vincent (of Counsel) 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 be dismissed.

[L.S.]

(Sgd.) J F GREGOR,
Senior Commissioner.

2004 WAIRC 13563

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IVAN STRYDOM
	APPLICANT
	-v-
	COMPOWER ACES (WA) PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 9 DECEMBER 2004
FILE NO.	APPL 1361 OF 2004
CITATION NO.	2004 WAIRC 13563

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 be exercised - Acceptance referral out of time granted - Industrial Relations Act 1979 (WA) s 29(1)(b)(i) (2) & (3)
Result	Application to accept applicant's claim which was lodged out of time granted
Representation	
Applicant	Mr I Strydom on his own behalf
Respondent	Mr C Vella

Reasons for Decision

1 On 19 October 2004 Ivan Strydom ("the applicant") referred an application to the Commission pursuant to s29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") claiming that he was harshly, oppressively and unfairly dismissed on 20 September 2004 by Compower Aces (WA) Pty Ltd ("the respondent").

2 Section 29(2) of the Act requires that applications pursuant to s29(1)(b)(i) of the Act be lodged within 28 days after the day on which an employee is terminated. As this application was lodged on 19 October 2004 it is one day out of the required timeframe for lodging a claim of this nature.

3 The matter was listed for hearing to allow the parties to put submissions and give evidence as to whether or not this application should be accepted under s29(3) of the Act. Section 29(3) of the Act reads as follows:

> "(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 In reaching a decision in this matter as to whether it would be unfair not to accept this application out of time I take into account the relevant factors outlined in the Industrial Appeal Court decision in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683 at 686, as follows:

> "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."

5 In applying these guidelines I am mindful that there is a 28 day timeframe to lodge an application and the Commission's discretion in relation to a matter of this nature should not be exercised unless it would be unfair not to do so.

Background

6 It was not in dispute that the applicant commenced employment with the respondent as a Service Manager on 12 January 2004 and that he was terminated in a summary manner on 20 September 2004. It was also not in dispute that the applicant's contract of employment with the respondent was confirmed by the respondent in a letter dated 18 December 2003. The respondent operates an air conditioning and refrigeration business and services commercial outlets, government offices, schools, prisons and other public utilities.

Applicant's Evidence

7 The applicant gave evidence that he has an extensive and long-term work history in the air conditioning and refrigeration industries since the late 1960's. The applicant stated that soon after he commenced employment with the respondent as its Service Manager it became clear to him that there were a number of issues facing the respondent due to a substantial turnover of staff in December 2003. As a result the applicant spent the first few months of his employment dealing with a heavy backlog of work. The applicant stated that he spent a significant amount of time motivating employees in his area and that this resulted in the respondent having a productive and valuable team under his control. As installations and repairs declined after March 2004 due to seasonal changes the applicant had difficulty keeping the technicians busy. The applicant gave evidence that during this slow period he had a number of discussions with one of the respondent's directors Mr Charles Vella about a number of issues. The applicant stated that notwithstanding the slowdown in activity, he renegotiated two major contracts in June 2004. The applicant stated that at a meeting he had with Mr Vella in early September 2004 the applicant agreed to charge his time out more productively and the applicant stated that at this meeting Mr Vella complimented him on his performance.

8 The applicant gave evidence that during a meeting with Mr Vella on 20 September 2004 he was told to cease employment with the respondent that day and to hand over his petrol card, phone and vehicle keys to the respondent.

9 The applicant stated that he was given no written warnings about his behaviour or performance nor was he demoted by the respondent as claimed by the respondent in its Notice of Answer and Counter Proposal. The applicant maintained that at no stage throughout his employment did he behave in an inappropriate manner and he never refused to obey instructions given to him. The applicant stated that when carrying out his duties he always conducted himself with due care and he did not misappropriate any monies. The applicant acknowledged that in April 2004 he was asked to fill in time sheets and did so from June 2004 onwards.

10 The applicant stated that he had never been terminated before and he was distressed by his treatment.

11 Subsequent to his termination the applicant emailed the respondent about outstanding wages and entitlements due to him but he had no response. After contacting Mr Vella's partner about paying the monies due to him Mr Vella then telephoned the applicant and told him he would not be making the payments claimed by the applicant.

12 When explaining the delay of one day in lodging this application the applicant stated that when he obtained an unfair dismissal form from the Commission in mid-October 2004 he was advised by the Commission that he could fax the Form 1 to the Commission and then come to the Commission to pay the filing fee at a later date. The applicant stated that he faxed the Form 1 and attached documents to the Commission on 15 October 2004 however due to an error whilst inputting the documents into the fax machine Form 1 was not faxed to the Commission. When the applicant visited the Commission the following Tuesday to pay the filing fee he was advised that his Form 1 had not been received and the applicant then submitted the Form 1 on that date (19 October 2004).

13 Under cross-examination the applicant conceded that the non-completion of time sheets was raised with him by the respondent and he conceded that from time to time documentation required to be generated by him was not ready on time for invoices to be sent. The applicant agreed that he had a number of meetings with Mr Vella about these issues and that the respondent provided two employees to assist him to complete his duties. The applicant stated that this support enabled him to make site visits. The applicant gave evidence that he could not recall receiving any written correspondence outlining problems with his performance. The applicant conceded that Mr Vella expressed concerns to him about the productivity of the technicians he supervised and the applicant agreed that at the meeting held with Mr Vella on 20 September 2004 Mr Vella raised a concern with the applicant about problems with a quote for work being undertaken at Nyandi Prison. The applicant stated that even though this job went over budget there were reasons for this happening which were outside of the applicant's control. The applicant agreed that at this meeting Mr Vella raised the issue of the respondent losing money.

Respondent's Evidence

14 Mr Vella gave evidence that the applicant made a number of representations when he was employed by the respondent which he did not live up to in his role as Service Manager. Mr Vella maintained that throughout the course of his employment the applicant failed to carry out his responsibilities as a Service Manager by failing to: plan manpower requirements and productivity; review technicians timesheets for accuracy to ensure that they account for their productivity so that time and parts are charged for and invoices are processed and sent to customers; charge his time for work performed in the applicant's role as a specialist technical advisor; exercise discipline and enforce the respondent's established business practices and procedures; ensure that confidential financial data and information is kept at a managerial level; provide accounting and other information that is true and correct to plan and manage, control and develop the business; process documentation and prepare quotations on time and document variations to contracts in order to charge customers in accordance with the respondent's and their customers' expectations (see the respondent's Notice of Answer and Counter Proposal).

15 Mr Vella stated that notwithstanding two full time employees assisting the applicant and despite numerous requests and meetings with the applicant, the applicant did not perform to the respondent's expectations. The applicant was asked to

improve reporting procedures and time sheet details and to complete relevant documentation and when this was not done the respondent decided to demote the applicant as at 13 September 2004 (Exhibit R4).

16 Mr Vella stated that the respondent respected the applicant's technical abilities however, there were weaknesses in the applicant's management skills.

17 The respondent argues that the applicant was fairly dismissed as he failed to carry out his responsibilities and did not honour the undertakings he gave.

18 Mr Vella stated that even though the applicant was given significant support to be more productive the respondent continued to lose money because of the applicant's actions. As a result of significant losses incurred by the respondent due to the applicant's inability to undertake his role as required Mr Vella told the applicant on 20 September 2004 that it was preferable if the parties part company and the applicant agreed to do this. Mr Vella conceded that the applicant was not paid for the last two weeks that he worked with the respondent and that annual leave entitlements were owing to the applicant. The respondent argued that as the applicant did not fulfil the requirements on him as an employee the respondent did not believe that the applicant was entitled to these payments.

Submissions

19 The applicant maintains that as his application was only one day late due to a technical hitch it would be fair for the Commission to accept his application. The respondent maintains that even though it had good reason to terminate the applicant the respondent does not oppose the Commission accepting this application even though it was filed one day out of the required timeframe.

Findings and Conclusions

20 On the evidence currently before me it could well be the case that there is merit to the applicant's claim that he was unfairly terminated. For example the respondent claims that due to the applicant's poor performance the applicant was demoted at a meeting held on 13 September 2004 and this was confirmed in a memo given to the applicant (Exhibit R4). However a review of this memo does not refer to the proposed changes to the applicant's duties as being a demotion. Further, I accept the applicant's evidence that he was not advised in September 2004 that unless his performance improved his ongoing employment was at risk. It was common ground that the applicant was summarily terminated and it appears that he was not given any opportunity to respond to the respondent's decision that he be terminated when he was advised that his services were no longer required.

21 I find that the applicant has an acceptable reason for the delay in lodging the application. I find that the applicant had every intention of lodging this application within the required timeframe and that if the receipt of Form 1 of this application was not delayed due to a technical problem when the applicant faxed his application to the Commission this application would have been received by the Commission on time.

22 Even though the applicant did not directly contest his termination with the respondent after 20 September 2004 I find that the respondent was aware that the applicant was concerned about his termination as he not only sought payment for outstanding wages and annual leave entitlements owing to him he also sought payment for a period of notice.

23 The respondent does not claim that it will suffer any prejudice if the Commission allowed this application. On the contrary the respondent consents to this application being accepted by the Commission. I therefore find that there is no prejudice to the respondent in allowing this application apart from the normal disadvantage associated with a claim for unfair termination.

24 As I have found that there was an acceptable reason for the delay in lodging this application, there is sufficient to establish that the applicant has an arguable case and that the respondent will not be prejudiced in allowing this application, it is my view that it would be unfair for the Commission not to exercise its discretion to grant an extension of time within which to file this application. For these reasons an extension of time in order to lodge this application is granted.

25 An order will issue to that effect.

2004 WAIRC 13625

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IVAN STRYDOM
	APPLICANT
	-v-
	COMPOWER ACES (WA) PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 10 DECEMBER 2004
FILE NO/S	APPL 1361 OF 2004
CITATION NO.	2004 WAIRC 13625

Result Application to accept applicant's claim which was lodged out of time granted

Order

HAVING heard Mr I Strydom on his own behalf and Mr C Vella 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 to accept the application out of time be and is hereby granted.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2004 WAIRC 13685

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER IAN WOODS
	APPLICANT
	-v-
	MGM EXPORTS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 16 DECEMBER 2004
FILE NO.	APPL 1889 OF 2003
CITATION NO.	2004 WAIRC 13685

CatchWords	Contractual entitlements claim – No applicable award – matter heard ex parte – Entitlements granted
Result	Denied contractual benefit awarded
Representation	
Applicant	Mr P Woods
Respondent	No appearance

Reasons for Decision

1 This is an application made pursuant to s.29(1)(b)(ii) of the *Industrial Relations Act, 1979* ("the Act"). The applicant says that he worked as a maintenance man for the respondent at their abattoirs in Gingin for the period April 2002 to 21 August 2003. He claims the amount of unpaid wages of $8,550 and unpaid annual leave of $1,800. Both amounts are said to be net amounts. The matter was heard in the absence of the respondent. The reasons for that were expressed at hearing. Following the hearing, the transcript of the matter was forwarded to the respondent and the respondent was requested to make any submission within 7 days. No submission was received from the respondent. The correct identification of the respondent is MGM Exports Pty Ltd. The applicant in an attachment to his application set out his calculation of the amounts owing. In the calculation he indicated that an amount of $1,000 had been paid in cash and hence the total amount owing is $9,350 net.

2 Mr Woods' evidence is that he was paid $1000 gross per week. His job was to keep the abattoir running. If something broke then he fixed it or got contractors in to fix it. He performed day to day maintenance on the abattoir. He says he typically worked 50 hours per week. His salary was paid each week into his bank account. Mr Woods forwarded, at the request of the Commission, a number of documents following the hearing. His Bankwest statements display a regular amount of $1,498 being deposited into his bank account by MGM Exports Pty Ltd. The most recent deposit being $750 in July 2003 from MGM Exports Pty Ltd. Mr Woods also exhibited a letter dated 20 January 2003 signed by Mr Shane Murray Manager on MGM Exports Pty Ltd letterhead being as follows:

> "TO WHOM IT MAY CONCERN
>
> This letter is to confirm that Peter Ian Woods is currently employed by MGM Exports Pty Ltd on a full time basis. Mr Woods has been employed by MGM Exports Pty Ltd for 12 months.
>
> If you require further information please contact our office."

3 Similarly Mr Woods displayed a group certificate for the financial year ending 30 June 2003. The payer's name was MGM Exports Pty Ltd.

4 Mr Woods says that he originally did some weekend work for the respondent. Following which Mr Shane Murray contacted him and asked him to take over the running of the abattoir. He agreed to do this and commenced in June 2001. He worked at an hourly rate of $20 per hour. He says that every Friday he submitted a timesheet to Mr Murray for everyone who worked there. He was then paid his wage via his bank account. He made various entries in his diary for the hours which employees worked and goods which were required for jobs. Mr Woods submitted these diaries to the Commission for verification.

5 The abattoir then opened in February 2002. At that time Mr Woods says he went on to a salary. He says Mr Murray indicated that he would be paid a full time salary, he would work roughly 50 hours a week and would be paid $1000 per week. Mr Woods states that Mr Murray told him that he would get a pay rise in the form of annual leave. Mr Woods says he received 4 weeks holiday per year. He never took any holidays as he was always busy. He says that he did take two days off for illness. He had to follow the rules and regulations of the respondent and submitted an employee hand book which by its appearance Mr Murray and he signed in October 2002.

6 Mr Woods says that the abattoir ceased operating and Mr Murray kept him on as he wanted Mr Woods to keep an eye on the place, clean up and keep it ready for people who were going to lease the premises. He says he chased Mr Murray for the money and was advised that his pay would be sorted out the following week. In the end he says he advised Mr Murray that he could not continue like that and Mr Murray promised to pay him some money. This never happened. Mr Woods says that finally the abattoir was leased by a new proprietor and they employed him. That operation was not successful and the receivers moved into the business. The business has since had new owners and Mr Woods is working there again. Mr Woods says that Mr Murray agreed that he owed him the money as claimed.

7 I have no doubt as to Mr Woods' honesty and the materials provided to the Commission support the claims he made at hearing. That said I have no doubt that he was employed by the respondent and was not paid the amounts of salary and leave as claimed under his contract of employment. There is an issue as to whether Mr Woods was covered by an award but there is no evidence to this effect, and I can find no common rule award which necessarily covers the varied jobs he performed at the abattoir.

8 I would therefore order that the respondent pay within 7 days of the order of the Commission an amount of $9,350 to the applicant by way of a denied contractual entitlement.

2004 WAIRC 13756

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER IAN WOODS
	APPLICANT
	-v-
	MGM EXPORTS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	FRIDAY, 24 DECEMBER 2004
FILE NO	APPL 1889 OF 2003
CITATION NO.	2004 WAIRC 13756

Result	Denied contractual entitlement awarded
Representation	
Applicant	Mr P Woods
Respondent	No appearance

Order

HAVING heard Mr P Woods on his own behalf and there being no appearance by the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the respondent, do hereby pay, as and by way of a denied contractual entitlement, the amount of $9,350.00 to Peter Ian Woods within 7 days of the date of this order.

(Sgd.) S WOOD,
[L.S.] Commissioner.

SECTION 29(1)(B)—Notation of—

Parties		File Number	Commissioner	Result
Aaron Steele	Ingrey Ford	APPL 1443/2004	Kenner C	Discontinued
Adrian Wright	Flexi Staff	APPL 352/2004	Gregor SC	Dismissed
Adriana Petronella Manning	LJ Hooker Gosnells	APPL 1471/2004	Gregor SC	Discontinued
Alexander Scott Dunkley	Securtity Operations Group	APPL 648/2004	Smith C	Dismissed
Amanda Elizabeth Kennaway	Weeding Women Rockigham ABN 68378391992	APPL 1325/2004	Coleman CC	Discontinued
Andrew Clifford McCashney	Batavia Coast Caravan Land	APPL 811/2004	Harrison C	Discontinued
Andrew Mark Raynes	Remet Engineers Pty Ltd	APPL 1094/2004	Scott C	Discontinued
Andrew Pettit	Freshmeadow Pty Ltd	APPL 573/2004	Kenner C	Discontinued
Angela McNally	P.K.B. Investments Pty Ltd	APPL 164/2004	Harrison C	Dismissed
Anthony Robert Jukes	Alatact Pty Ltd t/as Livingstone Paving Products	APPL 908/2004	Smith C	Discontinued
Anthony Todd Ghisalberti	Kammanns Bulk Haulage	APPL 1147/2004	Gregor SC	Discontinued
Anton Pate	Buckeridge Nominees Pty Ltd T/A BGC Windows	APPL 803/2004	Smith C	Dismissed
Armando Antonia Dimasi	Premier Building Solutions	APPL 395/2004	Gregor C	Discontinued
Arthur Lee	Town of Vincent	APPL 1239/2004	Coleman CC	Discontinued
Barbara Gaye McCormick	Geraldton Personnel Incorporated	APPL 806/2004	Harrison C	Discontinued
Barry William Dalton	Peter Costa t/as Budget Air	APPL 1231/2004	Smith C	Order Issued
Bart Van Der Groen	Fugro TGS (Australia) Limited	APPL 163/2004	Smith C	Dismissed
Benjamin Stuart Smith	Whittingtons Australia Pty Ltd	APPL 964/2004	Smith C	Discontinued
Bernard Tynas	Colliers International (WA) Pty Ltd	APPL 992/2004	Smith C	Discontinued
Bo Sven Arvid Arwidson	Karriview Management Pty Ltd and Cadagi Holdings Pty Ltd AFT The Karriview Unit Trust	APPL 1024/2004	Gregor SC	Discontinued

Parties		File Number	Commissioner	Result
Brad Jason Smedley	Lord Forrest Nominees	APPL 1242/2004	Gregor SC	Discontinued
Brian Pettit	Freshmeadow Pty Ltd	APPL 577/2004	Kenner C	Discontinued
Brooke Caie	Roy Galvin & Co Pty Ltd	APPL 844/2004	Scott C	Discontinued
Bruce William Reynolds	General Practice Divisions of Western Australia Ltd	APPL 1002/2004	Smith C	Dismissed
Candido G Novelli	Iron Corp	APPL 1164/2004	Smith C	Discontinued
Carolyn Clarke	Department Of Justice	APPL 1030/2004	Scott C	Discontinued
Catherine "Kate" M Mitchell	Goldburn Fishing Co. Pty Ltd	APPL 242/2002	Harrison C	Discontinued
Catherine Byrne	Hegde Enterprises Pty Ltd t/a McKenzies Chemist	APPL 1166/2004	Kenner C	Discontinued
Charles Peterson	Symplistic Moulding Pty Ltd	APPL 927/2004	Scott C	Discontinued
Cheryl May Hayward	Noongar Alcohol & Substance Abuse Service (Inc)	APPL 186/2004	Scott C	Discontinued
Christiana Wierobiej	Pilbara Medical Services Pty Ltd	APPL 816/2004	Beech CC	Discontinued
Christine Annette McManus	TJPD Nominees Pty Ltd as trustees for Davenport Family (ABN 94 905 471 934) Elizabeth Davenport Agencies	APPL 1250/2004	Kenner C	Discontinued
Christine Caffin	Louise Nominees Pty Ltd	APPL 93/2004	Harrison C	Discontinued
Christine Judith Te Rangi	Wangara Holdings Pty Ltd Trading as Leinster Tavern & Lodge	APPL 1255/2003	Harrison C	Dismissed
Christopher Allen Matthews	Bouvard Smash & Windscreen Service	APPL 1228/2004	Harrison C	Discontinued
Christopher Forsythe	Narayana Pty Ltd (ACN 008 959 635) t/a Dee Seed Real Estate	APPL 1272/2004	Beech CC	Discontinued
Christopher John Sanford	Big Bang Creations	APPL 357/2004	Gregor SC	Discontinued
Clive Robert Gee	Econstruct	APPL 1233/2004	Gregor SC	Dismissed
Corry Denhollander	Small Motors Mower City	APPL 1485/2004	Kenner C	Discontinued
Craig Pettit	Freshmeadow Pty Ltd	APPL 575/2004	Kenner C	Discontinued
Craig William Pendlebury	Pilatus Pty Ltd t/as Abrasive IndustrialDistributors	APPL 1330/2004	Kenner C	Discontinued
Crisian Delacy	Abacus Calculators (WA) Pty Ltd	APPL 685/2004	Wood C	Discontinued
Daniel James Black	Richards Tyrepower	APPL 1060/2004	Smith C	Dismissed
Danny Aaron Ferullo	Reclaim Industries Corporation	APPL 1363/2004	Smith C	Discontinued
Darren Clancy Shaddick	Silversands Tavern	APPL 1224/2004	Smith C	Discontinued
David John Jackson	Coca-Cola Amatil (Aust) Pty Ltd	APPL 287/2004	Kenner C	Discontinued
David Peter Denver	Big Rock Toyota Pty Ltd	APPL 137/2004	Harrison C	Discontinued
David Peter Denver	Big Rock Toyota Pty Ltd	APPL 1679/2003	Harrison C	Discontinued
Deborah Joan Irene Cufley	Rottnest Malibu Diving	APPL 114/2004	Harrison C	Discontinued
Debra Jean Black	Goldie's Lunch Bar	APPL 1212/2004	Smith C	Discontinued
Demir Ibraimoski	Metro Security Services Pty Ltd	APPL 1628/2003	Wood C	Dismissed
Dene Laurie Martin	Fabre Pty Ltd T/As Kalbarri Tudor Caravan Park	APPL 917/2004	Kenner C	Discontinued
Donna Lee Ellery	Conscious Living Co-Creations Pty Ltd ATF The PH Trust ABN 30064748794	APPL 1122/2004	Wood C	Discontinued
Donna Maire Martin	Knitting Australia Pty Ltd	APPL 1204/2004	Kenner C	Discontinued
Eden-Elska Shepherd-Bendtsen	Llewes Pty Ltd	APPL 854/2004	Harrison C	Discontinued
Eric Frei	Phil Burnett	APPL 926/2004	Kenner C	Discontinued
Frank Sacca	Worsley Alumina Pty Ltd	APPL 416/2004	Kenner C	Discontinued
Gavin Edward Maverick-Phillips	Biblos Nominees Pty Ltd atft Palma Unit Trust t/as Artifex Australia	APPL 1019/2004	Harrison C	Discontinued

Parties		File Number	Commissioner	Result
Geoffrey William Harris	BGC Residential Pty Ltd trading as Go Homes	APPL 261/2004	Scott C	Discontinued
Germaine Francis Garcia	Goldburn Fishing Co. Pty Ltd	APPL 237/2002	Harrison C	Discontinued
Graham Baker	Priority Glass	APPL 276/2004	Kenner C	Discontinued
Gregory Hawtin	Integrated Power Services Pty Ltd	APPL 705/2004	Smith C	Discontinued
Gregory Robert Walker	Reclaim Industries	APPL 1310/2004	Smith C	Discontinued
Gregory Youlton Tate	Glen Augustine Allsteel Designs	APPL 216/2003	Harrison C	Discontinued
Haley Janet Mason	East Fremantle Yacht Club	APPL 986/2004	Gregor C	Discontinued
Harry George Arris	Cooks Construction Pty Ltd	APPL 1275/2004	Scott C	Discontinued
Harvey Ronald Rear	Broome International Airport Pty Ltd	APPL 1458/2004	Beech CC	Discontinued
Helen Faye Robins	ASA Windows Pty Ltd	APPL 1203/2004	Kenner C	Discontinued
Helen Marcia Kuipers	Consolidated Paper Industries Pty Ltd	APPL 938/2004	Gregor C	Discontinued
Jacob Matthew Seinemeier	Australian Islamic College	APPL 1278/2004	Gregor SC	Discontinued
Jane E Deely	Tambellup Co-Operative Ltd	APPL 1556/2004	Beech CC	Discontinued
Jane Frances Arwidson	Karriview Management Pty Ltd and Cadagi Holdings Pty Ltd AFT The Karriview Unit Trust	APPL 1025/2004	Gregor SC	Discontinued
Jay Cant	Freshmeadow Pty Ltd	APPL 576/2004	Kenner C	Discontinued
Jay Peter Gadsdon	Acme International Refrigeration Engineers Pty Ltd	APPL 1256/2004	Coleman CC	Discontinued
Jeffrey Harris	White Eagle Transport	APPL 372/2004	Gregor C	Discontinued
Jeffrey Lawrence Ferroa	Challenge 2000	APPL 1153/2004	Smith C	Discontinued
Jennifer Gwenyth Davidson	Intelecom Australia	APPL 856/2004	Smith C	Discontinued
Jessica Ann Corry	People in Property Recruitment Professionals	APPL 1322/2004	Gregor SC	Discontinued
Jessica Louise Woodley	Lovegrove Turf Services Pty Ltd	APPL 1202/2004	Wood C	Discontinued
Joanne Armstrong	Hanson Construction Materials Pty Ltd (ACN: 009 679 734)	APPL 916/2004	Smith C	Discontinued
Joanne Gansberg	Shire of Carnarvon	APPL 1710/2003	Harrison C	Discontinued
Jo-Anne Green	Fuchs Lubricants (Australasia)	APPL 1135/2004	Scott C	Discontinued
John Balgalvis	SKG Radiology	APPL 1243/2004	Wood C	Discontinued
John Fogarty	Moola Bulla Pastoral Company	APPL 1311/2004	Kenner C	Discontinued
John Kipling Sparkman	Fugro Airborne Surveys Pty Ltd	APPL 1/2004	Harrison C	Discontinued
John Litherland	SDR Australia Pty Ltd	APPL 1372/2003	Wood C	Discontinued
John Metzakis	Tubular Creations	APPL 989/2004	Kenner C	Discontinued
Joseph Christopher McCarron	Focus Recruitment	APPL 1144/2004	Scott C	Discontinued
Judy Gladys Christiansen	Positron Trident Pty Ltd	APPL 1174/2004	Smith C	Discontinued
Kathleen Margaret O'Connor	Cool and Cosy	APPL 1468/2004	Coleman CC	Discontinued
Keith Dennis Turner	FDL Security	APPL 1205/2004	Kenner C	Discontinued
Keith Stephen Kavanagh	South West Printing & Publishing Company Ltd (ACN 008 671 065)	APPL 34/2004	Harrison C	Discontinued
Kelly Marie Markham	Riverslea Holdings Pty Ltd (ABN 67823328168) t/as ABC Blinds & Curtains	APPL 1133/2004	Smith C	Discontinued
Kenneth Peter Stokes	AG Direct Pty Ltd	APPL 1463/2004	Coleman CC	Discontinued
Kerry Scanlan	Alternative Bites Pty Ltd	APPL 966/2004	Kenner C	Discontinued
Kevin Duncan Thompson	Polymetals (WA) Pty Ltd	APPL 563/2004	Harrison C	Discontinued
Kevin Kenneth Kennedy	Bellway Holdings Pty Ltd t/a Paramount Instruments	APPL 1469/2003	Beech SC	Discontinued
Kieran Terence Wilson	Bone Densitometry Australia Pty Ltd	APPL 1000/2004	Smith C	Discontinued
Kim John Bland	Manfred Hans Poggondorff	APPL 542/2004	Smith C	Discontinued
Kris-Anapong Roongrote	Footlocker Morley	APPL 456/2004	Kenner C	Dismissed

Parties		File Number	Commissioner	Result
Kristy Leearna Rodney	Divine Boutique	APPL 1112/2004	Smith C	Discontinued
Krystle Blackie	Hyde and Sinico Pty Ltd t/as Just Spectacles	APPL 1428/2004	Coleman CC	Discontinued
Lauren Claire Cooper	The Walk Cafe - Regal Magic Pty Ltd	APPL 1332/2004	Coleman CC	Discontinued
Lauri Sepe	Airlite Maintenance Services Pty Ltd, Airlite Management Pty Ltd, Central Building And Maintenance (2002) Pty Ltd	APPL 1110/2004	Scott C	Discontinued
Leonie Margaret Scrogings	Broome Airport Services Pty Ltd	APPL 1148/2004	Gregor SC	Discontinued
Lesley Georgina Rayment	Multigroup Distribution Services Pty Limited (Star Track Express)	APPL 1369/2004	Coleman CC	Discontinued
Leslie Norman Moulton	Electrolux Construction Products Australia Pty Ltd ACN 005 603 305	APPL 1448/2004	Harrison C	Discontinued
Lisa Jayne Clarke	P & P Higginson Pty Ltd T/as York Concrete	APPL 1108/2004	Smith C	Discontinued
Lise Partridge	RCI Pacific Ltd	APPL 562/2004	Kenner C	Discontinued
Martin Francis Kelly	To - Cool Pty Ltd T/As Tropical Refrigeration	APPL 1177/2004	Gregor SC	Discontinued
Martin James Roach	Pascoe's Pty Ltd	APPL 1884/2003	Harrison C	Discontinued
Mary Honora Thompson	Elle Pty Ltd t/a Elle	APPL 830/2004	Smith C	Discontinued
Mary Rebecca Kean	Nigel Redwood	APPL 1496/2004	Beech CC	Discontinued
Matthew John Morris	Kitchens By The Maker	APPL 1362/2004	Kenner C	Dismissed
Maurice John Vickers	The Salvation Army	APPL 678/2004	Harrison C	Dismissed
Maurizio Grandoni	Chubb Security Australia Pty Ltd	APPL 480/2004	Gregor SC	Discontinued
Michael John Cook	Loon's Cabinet Works	APPL 1263/2004	Kenner C	Discontinued
Michaela Maloney	Nagar Holdings t/as Taylor Street Tearooms	APPL 1229/2004	Beech CC	Discontinued
Mike Kantzidis	Merchinson Exploration Drilling	APPL 1180/2004	Smith C	Discontinued
Modris Roland Janis Lozenicins	Action Industrial Catering Pty Ltd	APPL 1156/2004	Coleman CC	Discontinued
Ms Rosalind Day	Roy Weston Carousel	APPL 1572/2004	Beech CC	Discontinued
Nadia Lee Manning	Mundaring Medical Centre	APPL 1370/2004	Kenner C	Discontinued
Naomi Cassandra Doherty	Global Foods Pty Ltd	APPL 1139/2004	Kenner C	Discontinued
Neil Frederick Edmonds	Rexel Australia Pty Ltd	APPL 960/2004	Gregor SC	Discontinued
Nicole Bradley	Stellar Call Centre - Joondalup	APPL 1161/2004	Kenner C	Dismissed
Nicole Rena Johnston	Graham Pierre	APPL 1074/2004	Harrison C	Discontinued
Norelle Rodrigues	Innovative Solutions	APPL 674/2004	Kenner C	Dismissed
Paul Tassone	Aaron Lee Pest Management	APPL 942/2004	Gregor SC	Order (Arbitration)
Paul Trevor Wales	Starbound Pty Ltd	APPL 1105/2004	Smith C	Discontinued
Peta Elizabeth Hall	Carousel Glass Pty Ltd t/as Modern Glass	APPL 1132/2004	Wood C	Dismissed
Peter Anthony Haley	Jeffrey Markoff (Belrose Care)	APPL 709/2004	Gregor SC	Discontinued
Peter Wallace	Professional Executive Coastal	APPL 1338/2004	Wood C	Discontinued
Phillip Harold Thomas	Automotive Holdings Group t/a Chellingworth Motors	APPL 1636/2004	Beech CC	Discontinued
Phillip Laurence Barnes	GE Commercial Corporation (Australia) Pty Ltd (ACN 000 974 747)	APPL 588/2004	Smith C	Discontinued
Phillip Peter Marc Asker	General Cable Australia	APPL 1087/2004	Smith C	Discontinued
Rebecca Kate O'Sullivan	LNCJ Pty Ltd T/As H20	APPL 1049/2004	Harrison C	Discontinued
Rebecca Louise Emerson	Jolly Frog Childcare Centre	APPL 1328/2004	Kenner C	Discontinued
Rebecca Pettit	Freshmeadow Pty Ltd	APPL 574/2004	Kenner C	Discontinued
Robert Lance	CTI Logistics	APPL 1223/2004	Smith C	Discontinued

Parties		File Number	Commissioner	Result
Robert William Pampling	New Horizons Learning Centre (Perth) Pty Ltd	APPL 1017/2004	Gregor C	Discontinued
Robyn Lynnette Parker	Steven P Jones & Karen M White	APPL 900/2004	Harrison C	Discontinued
Ronald Peter Bowman	Konica Minolta Business Solutions Australia Pty Ltd	APPL 23/2004	Smith C	Discontinued
Rosemary Kopcsandy	J.E. Murray Homes Inc.	APPL 838/2004	Smith C	Discontinued
Rowan Rothenbury	Vocon Pty Ltd	APPL 1344/2004	Kenner C	Discontinued
Russell Dickson	Weatherford Australia Pty Ltd	APPL 1167/2004	Kenner C	Discontinued
Samantha Elizabeth Whitelaw	Pemberton Sports Club Inc	APPL 937/2004	Beech CC	Dismissed
Scott Scanlan	Alternative Bites Pty Ltd ABN 21098599216	APPL 967/2004	Kenner C	Discontinued
Shanan Brown	Boat Spray	APPL 974/2004	Gregor C	Discontinued
Sharon Bryce	Pilbara Homecare Inc	APPL 1095/2004	Coleman CC	Discontinued
Shereen Lim	Joondalup City Dental Surgery	APPL 1036/2004	Coleman CC	Discontinued
Simon William Whicker	Captain Cook Cruises	APPL 1238/2004	Smith C	Discontinued
Stephanie Squiers	Hills Child Care Centre	APPL 1255/2004	Gregor C	Discontinued
Stephany Brook Maree Winter	DMG Radio Pty Ltd	APPL 1214/2004	Gregor C	Discontinued
Stephen Andrew Hagan	Western Range Wines Ltd	APPL 993/2004	Kenner C	Discontinued
Stephen John Batchelor	Freemasons Homes for the Aged (Inc)	APPL 710/2004	Kenner C	Discontinued
Stephen William Truscott	R & G Services Unit Trust	APPL 1240/2004	Wood C	Discontinued
Stephen William Webb	Jaxon Construction Pty Ltd	APPL 1491/2004	Coleman CC	Discontinued
Steward James Olman	CO & CA Millington Shearing Contractors	APPL 567/2004	Scott C	Discontinued
Susan Battensby	Hamersley Nursing Home	APPL 318/2004	Smith C	Discontinued
Tammy Jean Ball	OES Oilfield Servcies Pty Ltd	APPL 898/2004	Smith C	Discontinued
Timothy Jon Stratton	Pure And Healthy	APPL 778/2004	Smith C	Dismissed
Timothy Walker	Toodyay SupaValu	APPL 1126/2004	Wood C	Discontinued
Trevor Brown	Boat Spray	APPL 973/2004	Gregor C	Discontinued
Trudi Ann McPhee	Hitachi Constrcution Machinery Australia	APPL 978/2004	Gregor SC	Discontinued
Vicki Collette Bennett	Handsworth Nominees Pty Ltd T/A Bunbury Chrysler Jeep	APPL 1109/2004	Gregor SC	Discontinued
Vickie Anne Hansson	Hopetoun Telecentre Inc	APPL 526/2004	Wood C	Discontinued
Victoria Janette Davies	Soiland	APPL 999/2004	Smith C	Dismissed
Walter Wynn Jones	Wescobee Limited	APPL 1487/2004	Beech CC	Discontinued
Wayne George Renton	Terrace Takeout (Wildweek Enterprises Pty Ltd) ACN 105 894 031	APPL 1315/2004	Kenner C	Discontinued
Wendy Varcoe	George K Sawiris	APPL 1114/2004	Scott C	Discontinued
Zejna Caluk	Prestige Property Services Tempo	APPL 1221/2004	Wood C	Discontinued
Zoe Clare Dickson	Create A Look Beauty Salon	APPL 1222/2004	Smith C	Discontinued

CONFERENCES—Matters arising out of—

2004 WAIRC 10631

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT** **-v-** SNC-LAVALIN PTY LTD & OTHERS **RESPONDENTS**
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 4 FEBRUARY 2004
FILE NO/S	C 13 OF 2004
CITATION NO.	2004 WAIRC 10631

Result	Direction issued
Representation	
Applicant	Mr T Kucera of counsel
Respondents	Mr P Cooke as agent on behalf of SNC-Lavalin Pty Ltd, Mr M Hotchkin of counsel on behalf of BGC Contracting Pty Ltd and Mr P Thompson on behalf of Shamrock Holdings Pty Ltd t/a Killarnee Formwork

Direction

HAVING heard Mr T Kucera of counsel on behalf of the applicant, Mr P Cooke as agent on behalf of SNC-Lavalin Pty Ltd, Mr M Hotchkin of counsel on behalf of BGC Contracting Pty Ltd and Mr P Thompson on behalf of Shamrock Holdings Pty Ltd t/a Killarnee Formwork the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs –

1. THAT the applicant file and serve upon the respondents an amended schedule B to its notice of application, particularising any relief and remedies sought by it no later than 6 February 2004.
2. THAT the respondents file and serve upon the applicant a notice of answer and counterproposal no later than 13 February 2004, including full particulars of any objections to the jurisdiction of the Commission to hear and determine the matter.

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

CONFERENCES—Matters referred—

2004 WAIRC 13529

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH **APPLICANT** **-v-** BHP BILLITON IRON ORE **RESPONDENT**
CORAM	COMMISSIONER S WOOD
DELIVERED	MONDAY, 6 DECEMBER 2004
FILE NO	CR 118 OF 2004
CITATION NO.	2004 WAIRC 13529

Catchwords	Industrial Law (WA) – Termination of Employment – Harsh, unjust and unfair dismissal – Harsh, unjust and unfair disciplinary action – Procedural fairness – Credibility of witnesses – Verbal and Physical Abuse – Fair go all round afforded – Application dismissed
Result	Application dismissed
Representation	
Applicant	Mr M Cox of Counsel
Respondent	Mr A D Lucev of Counsel and with him Mr R Kelly of Counsel and later Ms P Smith of Counsel

Reasons for Decision

1 This is an application pursuant to s.44 of the *Industrial Relations Act, 1979* ("the Act"). The matter came on for conference on 21 June 2004, was not resolved in conference and was referred to hearing in the following terms:

Schedule of matters referred for hearing and determination in relation to Mr Anthony Ryman

THE APPLICANT

1. Mr Anthony Ryman is a member of the Applicant Union.
2. The applicant claims that on 22 April 2004 Mr Ryman, the site Occupational Health and Safety Representative, raised ongoing safety issues during a shift start up meeting attended by his supervisor Mr Gregory Fletcher and other employees.
3. The applicant claims that an argument ensued between Mr Ryman and Mr Fletcher in relation to the safety issues raised by Mr Ryman, and further claims that statements made by Mr Ryman were in direct response to comments by Mr Fletcher regarding their strained relationship and his invitation to "put everything on the table."
4. The applicant claims that on 4 May 2004, following a disciplinary inquiry conducted on 28 April and 3 May 2004, Mr Ryman's employment was terminated by the respondent for allegedly verbally and physically abusing his supervisor during and subsequent to the meeting of employees on 22 April 2004.
5. The applicant claims that the findings of the disciplinary inquiry are contrary to the evidence of witnesses, including Mr Ryman's denial that he physically and verbally assaulted Mr Fletcher, and further claims that undue weight was given to the statement of Mr Fletcher compared to that of Mr Ryman.
6. The applicant claims that the termination of Mr Ryman's employment by the respondent is in part due to Mr Ryman's role in the Union and his pro-active stance on occupational, health and safety issues.
7. The applicant claims that in all the circumstances the termination of Mr Ryman's employment by the respondent is harsh, unjust and unfair and seeks an order for Mr Ryman's reinstatement and the fixing of an appropriate level of compensation for all losses suffered.

THE RESPONDENT

The respondent:

1. denies that the termination of Mr Ryman's employment was harsh, unjust or unfair as claimed;
2. opposes the applicant's claim and the orders sought; and
3. states that Mr Ryman's employment was terminated on the basis set out in the letter from the Company to Mr Ryman dated 4 May 2004.

Schedule of matters referred for hearing and determination in relation to Mr Glen Neale

THE APPLICANT

1. Mr Glen Neale is a member of the Applicant Union.
2. Mr Neale is currently employed by the respondent
3. The applicant claims that on 22 April 2004 Mr Neale (who at the time was a leading hand) was supported by Mr Anthony Ryman (the then site Occupational Health and Safety Representative) in raising ongoing safety issues during a start up meeting attended by his supervisor Mr Gregory Fletcher and other employees.
4. The applicant claims that an argument ensued between Mr Neale, Mr Ryman and Mr Fletcher in relation to the safety issues raised by Mr Ryman, and further claims that statements made by Mr Neale were in direct response to comments by Mr Fletcher regarding their strained relationship and his invitation to "put everything on the table".
5. The applicant claims that on 4 May 2004, following a disciplinary inquiry conducted on 28 April and 3 May 2004, into the alleged incident on 22 April 2004, Mr Neale was demoted and transferred to permanent day shift for allegedly verbally abusing his supervisor and for lack of candour in responding to questions in the inquiry and showing no remorse.
6. The applicant claims that the findings of the disciplinary inquiry are contrary to the evidence of witnesses and Mr Neale's denial that he "verbally abused" Mr Fletcher, and further claims that undue weight was given to the statement of Mr Fletcher compared to that of Mr Neale.
7. The applicant claims that the disciplinary action against Mr Neale is in part due to Mr Ryman's role in the Union and his pro-active stance on occupational, health and safety issues.
8. The applicant claims that in all the circumstances the disciplinary action against Mr Neale is harsh, unjust and unfair and seeks an order for Mr Neale to be reinstated as leading hand, returned to shift work and the fixing of an appropriate level of compensation for all losses suffered.

THE RESPONDENT

The respondent:

1. denies that the disciplinary action taken against Mr Neale was harsh, unjust or unfair as claimed;
2. opposes the applicant's claim and the orders sought; and
3. states that the disciplinary action was taken against Mr Neale on the basis set out in the letter from the Company to Mr Neale dated 4 May 2004.

2 The matter came on for hearing on 21 and 22 July 2004 in the Newman Court House, was adjourned part heard, and was heard again on 17 to 19 August 2004. Final submissions in writing were lodged between 16 and 28 September 2004. Evidence for the applicant was given by Mr John Johnston, Deputy TWU Convenor, Mr Glen Andrew Neale, Mr Anthony David Ryman, Mr Richard White, Plant Mechanic in Field Maintenance, Mr Clayton Scott Hilton Chadwick, Boilermaker/Welder at Shovels and Drills, Mr Gordon Michael Carroll, Mine Worker. Evidence for the respondent was given by Mr Gregory Ian Pepprell-Fletcher, Special Projects Foreman, Mr Robert Evans, Field Maintenance Mechanical Superintendent, Mr Michael Dennis Lohse, Senior Employee Relations Adviser, Mr Dean Merrylees, Drill and Shovel Foreman, Mr Geoff Alan Knuckey, Manager Maintenance and Mr Michael Michoff, Mechanical Foreman.

3 This matter involves an incident in the smoko room on 22 April 2004 between Mr Fletcher, Mr Neale and Mr Ryman. There were other employees present in the room when the exchange commenced but it is common ground that these employees left soon after Mr Fletcher invited Mr Neale and Mr Ryman to put their issues on the table (I will refer to this as the "invitation"). This was an invitation to air all their grievances. Following the incident Mr Ryman and Mr Neale were stood down from work on pay. An investigation and disciplinary inquiry followed and both Mr Neale and Mr Ryman were found to have abused Mr Fletcher verbally; Mr Ryman was also found to have physically assaulted Mr Fletcher by chesting him and yelling aggressively in his face. Mr Fletcher alleged that Mr Ryman was so close that their noses touched and Mr Fletcher's face was sprayed with Mr Ryman's saliva.

4 Mr Ryman and Mr Neale are part of the A5 shift. A previous dispute was lodged in the Commission whereby the respondent sought to transfer some employees from that shift. The matter was settled before the Commission on the basis that a four month trial would be put in place. I recite the terms of settlement, which were committed to writing by the Commission following conference and settled with the parties. The terms of resolution were:

> "Matter No: C 238 OF 2003
> AFMEPKIU v BHP BILLITON IRON ORE LTD
>
> The parties in conference on 19 November 2003 have agreed to a trial in A5 Shift for four months subject to review on a monthly basis using the following criteria:
>
> • Completing daily "plod" sheets with detailed information.
>
> • Doing time confirmations, raising notifications in SAP and ordering parts.
>
> • Completing Service Sheets, signing off and providing history.
>
> • Communicating with the Foreman, Planner and Mining Department Supervision/ Dispatchers in a positive and constructive manner on job progress, estimates of completion times and on problems/hurdles in advance to avoid delays at the last minute.
>
> • Getting involved with input to major outages and their planning.
>
> • Improving timekeeping on jobs and at smoko and lunch time.
>
> • Commitment to getting jobs done in the required set time frames and to using own expertise and experience to overcome hurdles on jobs.
>
> • Participation in doing JSA's and SAO's and developing Safe Work Procedures.
>
> • Working side by side with AWA employees, contract labour and OEM Representatives when required.
>
> An overview of the trial to check on progress will be carried out between Mr Evans, Mr Fletcher, Mr McKean and Mr Johnston on a monthly basis.
>
> The ultimate assessment of the success or otherwise of the trial is for the respondent to make.
>
> It is understood if individual problems arise then it is expected that they will be addressed promptly and not deferred to a monthly discussion".

5 The respondent maintains that there is a history to this application that must be understood. Hence they sought to lead evidence which goes to the issues canvassed in conference in matter C 238 of 2003. Much of this evidence was ruled out by the Commission for the following reasons. Both parties decided on a course of action arising from that conference and both parties are then bound by their agreed settlement. In my view the matters raised in C 238 of 2003 have only limited relevance to deciding the matter in dispute now. The trial was said to be successful and the evidence of Mr Evans supports this view. In fact the evidence of Mr Johnston and Mr Evans displays that considerable efforts were made by both supervisors and employees to ensure that the trial worked. I would add that both parties to the earlier dispute sensibly chose to put differences behind them and work on improving working relations and production during the trial. They are bound by their undertaking in that dispute. They did not seek to arbitrate matters at that point and should not be allowed to re-ignite that dispute in the context of determining the facts and fairness of events that occurred on 22 April 2004.

6 It is the case that the incident of 22 April 2004 stands alone and what is important is to determine the facts of what occurred in the smoko room on that date. It is not necessary to trawl through the facts of those earlier events for the sake of assessing the credibility of witnesses. That point could be readily assessed by the Commission at hearing in relation to the events of 22 April 2004. I should add that if I took the other view, and heard evidence about all these suggested background of events, then I am sure that I would have been involved in an extensive hearing about the day to day interaction of management and employees on A5 shift and others. In so doing, I would have been no closer to deciding what actually happened during a relatively brief but heated exchange in the smoko room on the evening of 22 April 2004, and for which both men were disciplined. Both counsel in their closing submissions concentrated helpfully on that incident.

7 There is one point of relevance, in terms of the earlier dispute, as it relates to the penalty which was applied. As indicated to both parties I was interested to hear if either man had previously been warned about relevant matters. There is no evidence to suggest that they were. The respondent submits that both men were clearly on notice that aggressive behaviour or intimidation toward supervisors would not be tolerated. I accept this point in so far as it relates to management's expressed concern about employees on A5 shift. This is different from saying that I find that A5 shift and especially Mr Ryman and Mr Neale were previously guilty of such conduct. The applicant maintained that management was also at fault. I have excluded such evidence for the reasons expressed and hence could not form such conclusions. However, it is the case that at least during the previous dispute management made their concerns clear. The union party did not accept the veracity of management's claims but did accept, as they must, that aggressive or intimidatory behaviour directed at supervisors (and I would add fellow employees) is of course not to be tolerated. The issue will be to judge the reasonableness of penalties within the context of findings about what actually happened. It is not the case, however, that Mr Ryman or Mr Neale had received previously a formal warning about such behaviour. It is the case that managers and employees on A5 shift knew clearly that such behaviour was a problem and was not acceptable.

8 My rulings at hearing also had the effect that evidence to be led on behalf of the respondent concerning various occupational health and safety issues could not be led. These were matters raised in the context of the letters [Exhibit A8] which Mr Ryman and his wife wrote to various company representatives about safety incidents and concerns they had. The evidence of Mr Ryman was that he could not get his concerns addressed. I do not go to the detail of those letters because it is abundantly clear to me from the extensive cross-examination of Mr Ryman that he based his judgements and allegations on hearsay. His evidence repeatedly was that the matter was something he had heard "down the pub". He did not mean the "pub" precisely but it was something that had seemingly been passed to him in general conversation. I make two points about this. The issue of health and safety was raised in the memorandum of hearing and determination at paragraphs 2, 3 and 6 in Mr Ryman's

schedule and paragraphs 3, 4 and 7 in Mr Neale's schedule. In both cases it states that ongoing safety issues were raised by Mr Ryman in the shift start up meeting, an argument ensued in relation to safety issues raised by Mr Ryman, and the disciplinary action taken against Mr Ryman and Mr Neale was in part due to Mr Ryman's active role in the union and his pro-active stance on occupational health and safety issues. I will deal in full with the events in the smoko room on 22 April 2004, however, it is the case that the evidence of Mr Neale and Mr Ryman does not support the first proposition. Mr Ryman asked for time to complete some grievances and Mr Fletcher asked him whether there was anything he should know. The issue that was volatile at that stage was an issue to do with overtime and that was one of the grievances which Mr Ryman wanted to write up. I take that point no further at this stage. The second point is that even if this dispute and hearing were about safety issues per se, then I would need better evidence than that provided by Mr Ryman to take the matter further. Such evidence could not advance the actual dispute before me.

EVIDENCE FOR THE APPLICANT

9 Mr John Johnston gave evidence that he has been employed by the respondent for some 19 years and is employed in field services. He says that the language on site is fairly colourful but it has become part of the every day routine. He has known Mr Ryman for the past 16 ½ years and says that Mr Ryman is very good at using that type of language. Mr Johnston is not offended by it. There was a trial period that ran for about 4 months. At a meeting on 14 April 2004 the trial was deemed a success. Mr Johnston says that he had a discussion with Mr Evans sometime between March and April about Mr Fletcher remaining on as Foreman. Mr Evans' response was, "he's going; he's fucking useless John". He says that on the same day he went to see Mr Fletcher who told him that he no longer wished to be Foreman.

10 Mr Johnston says that there was an overtime issue with the crew. Mr Fletcher came into the smoko room and asked Mr Neale if anyone was interested in overtime. Mr Neale said, "no", and then said, "If me and the old fellow can come in and do 5 'O' then we'll do three night shifts". Mr Fletcher said that he would have to check and he left the room. Mr Johnston says that he was not present for the response. Mr Ryman and Mr Neale reported for overtime and were advised by Mr Michoff that there was no breakdown and they were to do planned work, they queried this as they were told by Mr Fletcher that they were in for 5 'O'; Mr Michoff replied, "You're not here to sit on your arse as far as I am concerned". A meeting occurred with Mr Ryman, Mr Johnston, Mr Evans and Mr Fletcher where Mr Ryman raised a grievance over how he and Mr Neale were treated on overtime. He says that there was some carry on between Mr Fletcher and Mr Ryman and Mr Ryman said, "Listen, I'm not going to listen to you any more. You're a liar. You're useless". He says that Mr Evans did nothing in regards to the comments. He says that later in the day he had another discussion with Mr Evans over an allegation made by Mr Fletcher that the guys had gone missing. He spoke to Mr Ryman about the matter and conveyed this response to Mr Evans. He met Mr Evans later, he is not sure if it was during the same shift, and said that the guys would stay away from Mr Fletcher and vice versa Mr Fletcher should do the same.

11 In relation to the compressor incident Mr Johnston says that Mr Fletcher attended the job, decided there was nothing wrong with the oil and told the team to run the compressor. When the compressor cut out again Mr Fletcher told them to take it to light vehicles as there was something else wrong. The compressor simply needed oil. The following shift Mr Fletcher was a bit of a laughing stock and copped some flak.

12 Mr Johnston says that he attended the disciplinary inquiry and took notes. Mr Neale was asked by Mr Lohse if Mr Ryman got out of his chair during the incident and Mr Neale said "no". Mr Lohse also put the allegation that Mr Ryman had spat, abused and chested Mr Fletcher. The investigation commenced with Mr Neale then Mr Ryman, Mr Chadwick, Mr Carroll, Mr Ryan and a boilermaker named Steve. He says that each witness was asked to demonstrate what had occurred in the smoko room. According to each witness Mr Fletcher was insistent on getting an answer from Mr Ryman and Mr Neale. When there was no response he went over to the table and leant on it. Mr Johnston says that a number of the witnesses began to leave as they were uncomfortable as Mr Fletcher was normally laid back. At the conclusion of the inquiry Mr Lohse said that Mr Neale had shown no candour and was to be stripped of his leading hand duties and transferred to vehicles services with no loss of income for three months. Mr Johnston says that he raised with Mr Lohse the treatment of an employee on an AWA in relation to stealing. Mr Ryman was informed that his services were terminated for misconduct. Mr Johnston told Mr Lohse that this was totally unjustified. His impression of Mr Ryman is that he is a bit of a larrikin but he is not aggressive.

13 Under cross examination Mr Johnston says that some of the witnesses indicated that Mr Fletcher leaned forward on the table and then sat on the table. He has heard the expression "get it on the table" and agrees that it relates to getting issues on the table and discussing them. He says that it is not an excuse to abuse someone but it does happen. Mr Johnston agrees that the disciplinary notes [Exhibit R1] are fairly accurate. His notes [Exhibit A2] are a true and accurate reflection of events in the meetings. He was not present during the shift where Mr Michoff allegedly made the "sitting on arse" comment. He is not aware of a discussion between Mr Ryman and Mr Fletcher where Mr Ryman allegedly told Mr Fletcher, "I don't give a fuck". He says that he had discussions with Mr Evans around this time in relation to the overtime issue and the allegation that the blokes had gone missing from shift. There was a meeting on 20 April with Mr Ryman, Mr Evans, Mr Fletcher and himself in which Mr Fletcher disputed that he told Mr Ryman to come in for 5 'O'. Mr Johnston says that Mr Ryman may have made some comments about Mr Michoff and he also did the same. At that meeting he says that Mr Evans told them he was going to send out an email about overtime. Following the meeting he spoke to Mr Evans who advised that he did not want things to go back to the old ways. He says that during the meeting Mr Ryman made the comment "No, come on now. You know you're fucking lying". Copies of Mr Evans' email [Exhibit R2] were left on the table in the smoko room.

14 Mr Glen Neale gave evidence that he has been employed by the respondent for eight years. On 22 April he entered the smoko room with Mr Ryman. There was a discussion between Mr Ryman and Mr Penfold over the compressor incident. In addition, Mr Bevan told Mr Ryman that he had been in on overtime doing breakdown. Mr Fletcher came in and handed over the work to Mr Ryman. Mr Neale says that Mr Fletcher was not speaking to him and had not done so for three nights. After the work was handed out Mr Fletcher asked if anyone was interested in overtime. No one replied. Mr Fletcher turned to Mr Ryman and Mr Neale and demanded a yes or no response. Mr Neale says that he was surprised at this as Mr Ryman had told Mr Fletcher that he was not coming in to do the grunt work and be accused of skiving off. Mr Fletcher insisted on an answer. Mr Neale said to Mr Fletcher, "You've got to be joking". Mr Fletcher asked again and Mr Neale said, "You can shove it up your arse". Mr Fletcher then asked what was the problem and Mr Neale told him, "There are too many lying dogs around here". Mr Fletcher then walked over to the table put his hands on the desk and asked what the problem was. Mr Ryman and Mr Fletcher had a dispute about the compressor incident and the overtime issue. Mr Fletcher then asked, in regards to the lying dogs, whether it referred to him or Mr Michoff. Mr Neale says that he did not respond. There was further discussion between Mr Ryman and Mr Fletcher and finally Mr Fletcher said, "Well, come on, let's fuckin have it". Mr Fletcher sat down on the table asked what the problem was and Mr Neale told him, "You are a lying, fucking dog".

15 On a previous shift Mr Neale and Mr Ryman were asked if they wanted to work overtime. Mr Neale asked Mr Fletcher how many people were required and what the work was. Mr Fletcher's response was, "As far as I'm aware, it's to cover breakdown". Mr Neale then said to Mr Fletcher that if two people were required he and the old fellow would come in

(meaning Mr Ryman). Mr Fletcher then went to find out how many persons were required. He says that he contacted Mr Fletcher to say if only one person was required he would still come in and do overtime. Ten minutes later Mr Fletcher came down to the lockers and advised them that they could both come in. He says that for the previous 6 to 8 weeks people coming in on overtime did the breakdown work. He specifically mentioned breakdown work to Mr Fletcher during their conversation. Mr Fletcher never came back to him to say he was doing anything other than breakdown. When they went in on the first shift Mr Michoff read out the jobs. Mr Neale and Mr Ryman told him that they were there to cover breakdown. Mr Michoff responded by saying, "You're not coming in here to sit on your arse for three nights". Mr Ryman took some offence at this comment. Mr Michoff then contacted Mr Evans and had a discussion with him at the conclusion of which he advised them that, according to Mr Evans they were to do whatever work he instructed them to do. They responded by indicating they would go home. Mr Neale says that Mr Michoff advised them that at a handover in the morning he was told that they were in to do planned work. Mr Neale says that would have come from the night shift foreman, Mr Fletcher.

16 In relation to the comment "lying fucking dog" he says that he explained to Mr Fletcher that he had lied about the overtime and that he was a dog for reporting them to their supervisor for not being on a job when they were. He says that that was the extent of his participation in the discussion. At the end of the conversation Mr Fletcher got up from the table and went to the door, then turned around and asked Mr Ryman if he was going to call Mr Evans. Mr Ryman said, "no, you are". Mr Fletcher then said, "now who's fucking lying". Mr Ryman told him to fuck off. Mr Fletcher asked him to repeat this about three or four times and Mr Ryman told him to fuck off; Mr Fletcher then said to him that he had gone too far; to go to his office as he was making it official. He says that during the conversation he was seated at the table as was Mr Ryman with his feet on the table. Mr Ryman was fairly relaxed. He was surprised when Mr Fletcher said lets make this official as he thought they were airing their dirty laundry.

17 Mr Neale says that Mr Fletcher had a fair bit of difficulty understanding the type of work that was being done. Mr Merrylees was brought in to assist Mr Fletcher. Mr Fletcher is very non confrontational and lets people have their say. Mr Neale has previously seen Mr Fletcher in a screaming match with Mr Menner. Mr Neale says that allegations against Mr Ryman of abuse are rubbish and that Mr Ryman never got out of his chair. On that evening Mr Fletcher was aggravated and aggressive which is not in his character. He says that Mr Ryman brought up the compressor incident with Mr Fletcher on 22 April and Mr Fletcher was quite aggravated.

18 Under cross examination Mr Neale agreed that he had been in Vehicle Services for 3 months and does not wish to return to Field Services. He agrees that he was not present when Mr Bevan was given instructions regarding overtime or when Mr Bevan reported for duty. In relation to the overtime incident Mr Neale was not present for any discussion between Mr Michoff and Mr Fletcher. Mr Neale says that they asked Mr Michoff who had given him the instruction about overtime work but he would not tell them. Mr Neale agrees that Mr Michoff or Mr Fletcher could have made a mistake. In regards to the incident in the smoko room Mr Neale says he made the comment "There are too many lying dogs around here". Mr Fletcher queried this and Mr Neale did not proffer any response. Mr Neale says that during the earlier overtime discussion Mr Fletcher had to check the numbers required. Mr Johnston was there for the whole discussion. Mr Neale agrees that as a supervisor Mr Fletcher was entitled to an answer over his query of overtime. He does not know why Mr Fletcher was querying Mr Ryman and him about overtime. He agrees that it was possible that Mr Ryman had already agreed to do overtime on some equipment.

19 Mr Neale says that on his first night shift Mr Fletcher went straight to Mr Ryman with regards to handing out the work. Mr Neale was by-passed and he had no idea why. There was no communication between Mr Neale and Mr Fletcher for three nights until the demand for an answer on the overtime issue. He says that he read a copy of the new protocol for overtime [Exhibit R2] on the day it was issued but that was after 22 April.

20 A number of allegations were put to Mr Neale in the course of cross examination. He denies that he said to Mr Fletcher in relation to the crane drivers, "You want to be very careful of what happens on that job". He denies saying to Mr Fletcher, regarding working with a workplace agreement employee, "Smack the bastard out, so then you'll be looking for two new fitters". He denies saying to Mr Fletcher in relation to strike action, "You would be one of the last fucking wankers I would want to talk to" (see transcript p.79-81). In relation to the disciplinary inquiry on 28 April, Mr Neale says that Mr Johnston, Mr Evans, Mr Lohse and himself were present. Mr Neale says he set things out to the best of his recollection but it is possible that he may have left things out. In relation to [Exhibit A2] he says the notes are complete.

21 During the incident in the smoko room Mr Neale said, "There are too many lying dogs around here". He says this was not directed at Mr Fletcher until after the invitation to put matters on the table. He agrees that the disciplinary inquiry notes do not reflect this statement. He agrees that Mr Fletcher sat on the corner of the table facing Mr Ryman. He denies that after telling Mr Fletcher to shove the overtime, he said, "You're nothing but a fucking lying dog". Mr Neale says that this comment did not occur until after the invitation. He denies that Mr Fletcher responded by saying, "excuse me", and denies that his response was, "You heard You're a fucking lying dog". He agrees that Mr Fletcher said, "let's get it out in the open". He denies abusing Mr Fletcher until Mr Fletcher invited an open discussion. Mr Neale says he made the comment, "too many lying dogs in this section"; but it was not directed at Mr Fletcher. He denies saying, "You're all lying dogs". Apart from Mr Fletcher, Mr Neale says the other lying dog was Mr Michoff. He says that a "dog" is someone who goes behind your back. In his mind Mr Michoff was a dog but Mr Neale never actually said this. In response to Mr Fletcher's query, Mr Neale indicated it related, "to all of you". He says that the "all of you" must have been a reference to Mr Fletcher and Mr Michoff but he never stated this to Mr Fletcher. He agrees that the rest of the crew were leaving as Mr Fletcher came across to the table. He does not know if Mr Ryman called Mr Fletcher a "lying dog". He does not recall any discussion on 22 April concerning the 5 'O' breakdown duties or Mr Fletcher making a comment that he stood by what he had said earlier. Mr Neale denies that following this Mr Ryman and he became abusive and called Mr Fletcher a liar. He denies that he said that Mr Fletcher and Mr Michoff were liars and not to be trusted. Mr Ryman may have said this.

22 Mr Neale agrees that at some point Mr Fletcher made the comment to him that that he (Mr Neale) may have it wrong. He agrees Mr Ryman accused Mr Fletcher of causing them to lose $1,500. He says that he called Mr Fletcher a "fucking liar" but not until the discussion was opened up. Mr Neale agrees that in hindsight there could have been a better approach. He does not recall Mr Fletcher querying him over having a beef over the lost money. He says that he was asked to do 5 'O' breakdown. He denies that Mr Ryman got out of his chair, chested Mr Fletcher and got in his face while shouting abuse. He also denies that he got up and tried to calm Mr Ryman. Mr Neale says that both Mr Ryman and he were seated during the whole incident. Mr Neale denies that Mr Ryman slumped in his chair and Mr Fletcher said, "That's it, you've gone too far". Mr Neale denies that Mr Ryman responded by saying, "There's only one of you and two of us and you haven't any witnesses". Mr Neale says that he did not hear Mr Ryman say, "Nothing happened here". He agrees that during the incident Mr Ryman said, "I just fucking told you". He does not recall when Mr Ryman made the comment. Mr Neale agrees that Mr Fletcher was visibly distressed when he left the room. He says that he did not see his hands and he had not seen him that distressed before.

23 After Mr Fletcher left the room Mr Ryman and Mr Neale left, grabbed a trolley and began moving drinks. Mr Neale says that they did this for about 20 minutes; Mr Carroll assisted them. Mr Neale says that he probably had a discussion with Mr

Chadwick about the incident prior to Mr Evans standing him down. He attended a further disciplinary proceeding on 4 May 2004, but does not recall saying that he did not wish to comment when the allegation was put that he had called Mr Fletcher, "fucking lying dog" prior to him coming to the table.

24 In relation to the overtime incident Mr Neale agrees that they told Mr Michoff they were only in to cover breakdown. Mr Michoff told them that there was no breakdown work and that they were to work on Shovel 93. They said they were there for breakdown and if there was none they were going home. Mr Michoff rang Mr Evans. Mr Neale did not listen to the conversation. Mr Ryman then had a discussion with Mr Evans at the conclusion of which he put the phone down and said, "we are out of here". Mr Michoff asked if they were coming in for the other three shifts and they said no. Mr Michoff stated to them, "he wasn't having blokes coming in on overtime sitting on their arse".

25 Of the four month trial Mr Neale says that management wanted them to smarten up their act in regards to response time and production. He says that around the time of returning from his annual leave he went to see Mr Evans. He agrees that he advised Mr Evans that he had been to see a counsellor. He was having some personal problems and that work was becoming difficult. He told Mr Evans that he could not continue like this. He asked to be considered for the leading hand and he said he had come back to work following annual leave with a different outlook. Mr Neale agrees that proper and decent communication with supervisors would be part of the leading hand duties. Mr Neale agrees that before he went on annual leave Mr Knuckey told him that he had problems with his behaviour in a workshop situation.

26 Under questioning from the Commissioner, Mr Neale says that he does not want to go back to the A5 shift. He is quite happy to stay in vehicle services but he wishes to be reinstated back onto shift. At present he is the only person on permanent days, ie Monday to Friday.

27 Mr Anthony Ryman gave evidence that he has been employed with the respondent since 1975. He is a union and occupational health and safety representative. Prior to his dismissal he worked on the A5 shift crew. On 22 April when he entered the smoko room the topic of discussion was the "compressor incident". On a previous shift a new compressor had been cutting out. Mr Ryman asked one of the fitters to call Mr Fletcher to determine the type of oil required. His concern was what oil they had in stock which equated to the prescribed oil for the compressor. Thirty minutes later Mr Fletcher arrived. There was some debate between Mr Fletcher and Mr Ryman about what should be done with the compressor. The end result being the compressor was sent to light vehicles to be inspected. Mr Bevan had a discussion with Mr Ryman. Mr Bevan said he was doing breakdown overtime. Mr Fletcher then entered the room. Mr Ryman says that he very quietly, and not in front of anyone else, commented to Mr Fletcher that all the compressor needed was oil. Mr Fletcher responded by saying there were other things wrong with the compressor. Mr Ryman says that Mr Fletcher was very agitated by this. Mr Fletcher then handed out the work to him for a fourth night in a row. He did not say anything as it was Mr Fletcher's last night on shift. Mr Fletcher asked if everything was okay and Mr Ryman asked if he could have time with Mr Neale to write out some grievances to forward to Mr Goodyear, Mr Shaw and Mr Evans. He asked Mr Fletcher to call Mr Evans and advise him what he was doing. Mr Fletcher appeared even more agitated and queried Mr Ryman. Mr Ryman responded by saying that he was very unhappy about Mr Knuckey being put in charge of his grievance, the overtime incident and incidents on Shovel 95 and 23. He says that Mr Fletcher became really agitated and said, "you're going to phone Robbie" (meaning Mr Evans). Mr Ryman said "no" and would Mr Fletcher as a courtesy like to call him. He says that Mr Fletcher in his agitated state looked around and picked up the overtime sheet and asked if anyone wanted overtime, to which he got no response.

28 Mr Ryman says that he spoke to Mr Neale about only coming in on breakdown as he had a bad back. Mr Neale said he would see if Mr Ryman could come in on breakdown. On the night Mr Neale and he attended for overtime Mr Neale queried Mr Michoff and said that they were in for breakdown work. Mr Michoff advised them to do specific tasks. Mr Neale again said they were in for breakdown. Mr Michoff said he was, "not having people sat on their arse in here doing nothing". Mr Ryman says that he got up and said he was leaving. Mr Neale did the same. He says that Mr Michoff then rang Mr Evans and said "I've got fitters in here sat on their arse. I'm not gonna have that and they're going home" (Transcript p.136). On his next night shift Mr Ryman went to see Mr Evans and Mr Fletcher in the company of Mr Johnston. He told them he was upset about how overtime was run and that he did not appreciate being accused of sitting on his arse. He showed Mr Evans his work diaries and Mr Evans told him that he believed him and that he did not need to see them. Mr Ryman says that at the meeting he told Mr Fletcher he was useless and that none of this would have occurred if he had told the truth. He says Mr Fletcher denied saying that they were coming in on breakdown.

29 In the smoko room on 22 April, Mr Fletcher approached Mr Neale and Mr Ryman and stated that he must have an answer, "Who wants overtime". Mr Ryman said that he did not want overtime as he got all the grunt work and was then accused of sitting on his arse. Mr Fletcher again stated, "I must have an answer". Mr Neale told him to shove it up his arse. Mr Fletcher said it would not fit and said, "I must have an answer yes or no". Mr Ryman says that by this stage Mr Fletcher had come across to the table and was leaning on it saying that he must have an answer. Mr Neale then said, "there's too many lying dogs around here". Mr Fletcher said "beg your pardon" and Mr Neale again stated, "There's too many lying dogs around here". Mr Fletcher then asked if that was a reference to Mr Michoff or himself. Mr Neale said, "There's just lying dogs around here". Mr Fletcher asked for an explanation. Mr Ryman then said to him that there would not have been a problem if the foreman had been told that they were in on breakdown. He said that Mr Brown (another foreman) always wrote it down. Mr Fletcher responded by saying that "he was not fucking Ron Brown".

30 Mr Ryman says that Mr Fletcher then sat on the table and said, "Come on then let's have it out. Let's have it fucking all out. Let's get it out into the open". Other people then began to move out of the room. Mr Neale said to Mr Fletcher that this would not have happened if he had been truthful about the overtime. Mr Ryman said to Mr Fletcher that apart from lying he was pretty hopeless as he did not know when a compressor needed oil. Mr Ryman says that Mr Fletcher came down into his face and said that there were other things wrong with it. Mr Ryman laughed at Mr Fletcher and this got him "jacked up". Mr Fletcher got up, walked to the door and asked Mr Ryman if he was calling Mr Evans. Mr Ryman told Mr Fletcher that he could not even get that right. Mr Fletcher then accused him of being a liar. Mr Ryman then told Mr Fletcher about three times "Come on, come off of it. You're a liar. You've got cloth ears".

31 Mr Ryman believed that the invitation from Mr Fletcher was to get all the past history out into the open. He says that Mr Fletcher was being taken off the crew as he was not very good. He says that it would have been difficult to jump out of the chair as he has a bad back. He denies chesting Mr Fletcher or being in his face and screaming at him. Mr Ryman says Mr Fletcher had accused him of not being on the job during a night shift. He explained the situation to Mr Johnston and he (Mr Ryman) was really mad about it. He says that Mr Fletcher and Mr Menner used to have stand up bingles over a lack of direction. Mr Chadwick has had a number of arguments with Mr Fletcher over the same issue. Mr Ryman felt uneasy on entering the inquiry as Mr Lohse was involved. Mr Ryman had written previously to Mr Goodyear and made reference to Mr Lohse. He says that during the course of the inquiry Mr Johnston raised incidents involving other BHP employees. Mr Lohse dismissed these incidents as not as serious as telling your supervisor to fuck off. Mr Ryman says that there were allegations brought against him by a previous foreman and he was totally cleared. The matter was shelved by Mr Evans.

32 Under cross examination Mr Ryman agrees that he has not applied for any jobs post his dismissal. He cannot recall if Mr Neale said to Mr Fletcher, "You have got to be fucking joking", when asked about overtime. He does not recall Mr Neale saying to Mr Fletcher "You're nothing but a fucking lying dog". Following the open invitation he heard the phase "lying dogs" but does not know whether it was directed towards Mr Fletcher. He denies that Mr Neale said to Mr Fletcher in the presence of other crew members, "You heard. You're a fucking lying dog" or that he called Mr Fletcher a "lying dog". He says that before Mr Fletcher's open invitation he told him that none of this would have occurred if Mr Fletcher had just told the truth. He cannot recall Mr Fletcher denying that he said they were doing 5 'O' overtime. He cannot recall calling Mr Fletcher a liar, or that Mr Fletcher and Mr Michoff were liars and not to be trusted. He says that Mr Fletcher said that it may have been him that had it wrong. Mr Neale said that Mr Fletcher had cost them $1500 and Mr Fletcher said that he had not promised them breakdown. Mr Ryman says that Mr Fletcher, not he, became more heated. He only abused Mr Fletcher's character when he referred to Mr Fletcher as a bad tradesman in relation to the compressor incident and when he called him useless.

33 Mr Ryman says that he did not get out of his chair, he did not chest Mr Fletcher and he did not shout at him with his fists clenched at his side. He said to Mr Fletcher "come on, come on" about three times. He was shouting at the time and Mr Fletcher may have said, "I'm not accepting this behaviour"; he cannot recall. Mr Ryman is unable also to recall what he said as a parting shot to Mr Fletcher. He denies saying that, "There's only one of you and two of us and you haven't any witnesses", or that, "Nothing happened here". He denies that Mr Fletcher told him that he had gone too far, his behaviour was not acceptable and left the room. During the incident he says that he may have called Mr Fletcher, "fucking useless". He says that he cannot recall Mr Evans coming to him with Mr Fletcher following the incident. He says that Mr Evans came alone to see him. Mr Fletcher was "shitty" when he left the smoko room and in a temper as Mr Ryman had just laughed at him.

34 At the commencement of the start up Mr Fletcher handed the jobs to him. When Mr Fletcher asked about overtime he did not get a response. Mr Neale said, "You're all lying dogs" and Mr Fletcher asked him to repeat it. Mr Neale made the "lying dogs" comment three times and also told Mr Fletcher to "stick it up his arse" in relation to overtime. Mr Fletcher suggested they have it out, before everyone left the room, and after everyone had left the room he reiterated, "Come on let's have it all fucking out. Let's get it all on the table. Let's air our grievances". Mr Ryman says that Mr Fletcher said at least two of these phrases. He did not tell the disciplinary inquiry that Mr Fletcher had said "Let's air our grievances"; or that Mr Fletcher had used the word "fucking", but he should have. He told Mr Fletcher on a number of occasions during the incident, "You get everything fucking wrong". He has never heard Mr Fletcher use the phrase "Let's get it in the open", or, "Let's have it out".

35 Mr Ryman says that he rubbished Mr Fletcher over the compressor incident because Mr Fletcher was so angry and he wanted to bring him down. He did not do it to make him angrier. He says that he laughed at him and that made Mr Fletcher angrier. He agrees that he told the disciplinary inquiry that Mr Fletcher reminded him of Woody Woodpecker. After he had laughed at him, Mr Fletcher threw his arms in the air and walked away. Mr Fletcher then said to Mr Ryman that he was to call Mr Evans. Mr Ryman says that he told Mr Fletcher, "You can't even get that right". He denies that he said "You fucking lying dog. You're going to phone him". Mr Fletcher was very upset. Mr Ryman said to Mr Fletcher on three occasions, "come on come off of it, you're fucking lying". Mr Ryman says that during the repetition he put different things in. On the final repetition the door was open and he hollered at the top of his voice. Mr Fletcher was at the door and told Mr Ryman to come into the office, that he was making it official. Mr Ryman responded by telling Mr Fletcher, "No way, fuck off". Mr Ryman says that he did not go into the office as Mr Fletcher was angry and he wanted him to cool down. He says that Mr Fletcher's hands were shaking with anger and that Mr Fletcher had made himself angry. Mr Ryman agrees that rubbishing Mr Fletcher over the compressor incident may have made Mr Fletcher angrier. During the incident he may have yelled at Mr Fletcher, "I just fucking told you".

36 Following the incident Mr Ryman went out of the smoko room and brought in cans of soft drink. Mr Merrylees and Mr Carroll assisted. Mr Merrylees queried him about what was going on and Mr Ryman told Mr Merrylees that he did not know. They continued to load the cans. He went back into the smoko room after loading some cans and Mr Fletcher came in and told him to stay there as Mr Evans was on his way. Mr Evans arrived and came into the smoko room alone. Mr Ryman cannot remember if Mr Fletcher was with Mr Evans, or if Mr Fletcher disputed the version of events as portrayed by him. He cannot remember saying to Mr Evans that he would not discuss the matter while Mr Fletcher was around.

37 Mr Ryman cannot recall Mr Michoff saying to him that there was no other work for him on the first overtime shift. He is also unable to recall an incident on 19 April when Mr Fletcher sought to speak with him and his response was that he was not interested and did not give a fuck. Mr Ryman says that this may have occurred but he cannot remember. He confirmed later in cross examination that this did occur. Mr Ryman agrees that he saw the email regarding overtime prior to the incident on 22 April. He says that Mr Michoff made the "arse" comment to Mr Evans on the phone in front of him.

38 Mr Richard White gave evidence that he has been in field maintenance for 5 years and is on the B5 Shift. He says that on 16 April he had a discussion with his Foreman, Mr Michoff, during the shift handover in which Mr Michoff asked what Mr Neale and Mr Ryman were in for. Mr White says that he told him that they were in for overtime to cover breakdown. Mr Michoff said, "I will see about that". He says that the job that was on was a shutdown job and that was "pretty" common knowledge. He recalls a meeting on 8 December 2003 in which an issue being raised of alleged victimisation of Mr Neale and Mr Ryman by Mr Michoff. Under cross examination he says that he had no other involvement in the alleged victimisation and was not responsible for that allocation of work for overtime.

39 Mr Clayton Chadwick gave evidence that he works in mine maintenance on the same crew as Mr Ryman, Mr Neale, Mr Mark Ryan and Mr Carroll. The Foreman is Mr Fletcher and the Supervisor is Mr Evans. On 22 April he was in his usual spot in the smoko room. He had a discussion with Mr Bryce Bevan who advised him that he had been in that day doing breakdown, which is 5 'O' duties. He says Mr Bevan on departing the smoko room had a discussion with Mr Ryman. Mr Fletcher came into the room and handed out and explained the jobs. At the end of this Mr Ryman said he needed time to write out some grievances in relation to shovel 95, lifting jig 23 and the overtime issue from the previous block. He says that Mr Fletcher picked up the overtime sheet and asked, "Would anyone be interested in doing these days of overtime". He did not get a reply and he looked to Mr Neale and Mr Ryman. Mr Fletcher asked them, "I need to know whether you want to do overtime or not". He received no reply and asked again. Mr Chadwick thought that this was a bit pushy. He says that Mr Fletcher said, "I have to have a reply out of each one of you". Mr Chadwick says that he thinks Mr Ryman made a comment to Mr Fletcher that Mr Bevan had been in doing 5 'O', which was contrary to what had occurred on the previous block. He then says that Mr Neale stated, "If there wasn't such lying dogs about we wouldn't be in this predicament". He says that there were further comments back and forth and lying dogs was mentioned on a few occasions. He said that Mr Fletcher appeared to be agitated. He went over to the table, put his arms down on the table and stated, "Who are you referring to, me or Michoff". Mr Fletcher then sat on the table and said, "Well, come on then. Let's have it out. Let's get it all out". Mr Chadwick said that people had begun to leave the smoko room and Mr Fletcher wanted to have the issue out with Mr Neale and Mr Ryman, so Mr Chadwick left.

40 Mr Chadwick recalls attending the disciplinary inquiry on 28 April with Mr Evans, Mr Lohse and Mr Johnston. He says that both Mr Lohse and Mr Johnston took notes during the inquiry and that Mr Lohse's notes are not the complete version of his

statement. He says that he did not think that it was correct the way Mr Fletcher asked people to do overtime. He considers that Mr Fletcher's approach was pushy and aggressive which is unlike Mr Fletcher as he is a non confrontational person. His behaviour was totally out of character.

41 Mr Chadwick says that during a start up meeting with Mr Fletcher and another boilermaker, Mr Grant Mitchell, jobs were handed out for the day. Mr Fletcher said there was a job on Shovel 93 and a job in the workshop. Mr Chadwick says he went up to the hill to check the machine which he found to be working. He came back down to the fabrication shop and queried Mr Fletcher about this. Mr Fletcher denied having given him the job. Mr Chadwick says that he then called Mr Mitchell over to confirm what Mr Fletcher's instruction had been. He says that he then said the following:

> "I'm sick of these cryptic crosswords you give out at the start of our meetings. We don't know where we're going with them. In future I'd appreciate it if you can give me a job hand-over sheet which you're reading off so if there's any sort of problem there I can decipher it off the sheet immediately and quiz you on - - on the issue" (Transcript p.258).

Mr Chadwick says that Mr Fletcher's response was that that was not going to happen. The exchange was heated and they raised their voices. Mr Fletcher was not competent in the hand overs and did not know the jobs and was unable to elaborate on the job which made things difficult.

42 In relation to Mr Fletcher asking him on 19 April to do work on shovel 23, Mr Chadwick says that Mr Ryman and Mr Neale came with him as they had finished their work on shovel 93. They left shovel 93 at 3:30 am and returned about 5:00 am. Mr Chadwick was not spoken to about this matter the following day. There was also an incident with a compressor continuing to cut out. Mr Neale looked at the compressor and it was diagnosed as needing oil. Mr Fletcher was contacted and when he arrived he looked at the compressor, ran it and said that it did not need oil. It again cut out and Mr Fletcher was contacted. Mr Fletcher told them to"get it on the back of a truck and I'll have a look at it at light vehicles in the morning". Light vehicles subsequently advised that all it required was oil. Mr Chadwick says that when the shifts swapped over the following day there were comments made by the day shift about the compressor. Mr Ryman made the following comment to Mr Fletcher at the start up meeting, "so what was the go with the compressor" (Transcript p.262).

43 Mr Chadwick says that he has known Mr Ryman for 14 years and that he is colourful in his expression but he is not an aggressive person. He says that a boilermaker, Mr Steve Menner, had loud discussions/arguments with Mr Fletcher on a frequent basis. Mr Menner was aggressive and loud. In relation to Mr Neale he says that he is very diligent but he does get frustrated with incompetence.

44 Under cross examination Mr Chadwick says that he does not trust Mr Fletcher. He saw Mr Ryman and Mr Neale prior to the disciplinary inquiry. He says that he has probably discussed his lack of trust of Mr Fletcher with Mr Ryman and Mr Neale. He saw Mr Ryman at his home and spoke about how out of character Mr Fletcher's actions were on 22 April, but they did not go into details of what occurred. He agrees that he does not know what occurred on 22 April after he left the smoko room. In relation to the compressor, he was not present when it went to the workshop. He only knows what people told him on the following shift. He was not present during the overtime incident with Mr Michoff. On 22 April Mr Ryan had volunteered for overtime, but he does not know for what duties. He says that Mr Carroll and Mr Ryan were in the room when the lying dog comment was made. He does not know whether Mr Ryman used the phrase lying dogs but he may have. He says the comment about lying dogs was made, Mr Fletcher then confronted Mr Neale and Mr Ryman and asked whether they were referring to Mr Michoff or him. Mr Fletcher then sat on the table.

45 Mr Chadwick says that after the incident Mr Neale came over to his work bench. Mr Chadwick commented that it had become a bit heated in the room, Mr Neale said that it had got heated and carried on. Mr Chadwick says that he was aware that Mr Evans was on his way in as phone calls had been made. He knows this as Mr Fletcher started to say that the issue was going to be taken further. Mr Chadwick did not speak to or observe Mr Fletcher closely following the incident.

46 Under questioning from the Commissioner Mr Chadwick says that there was no swearing between the commencement of the start up meeting on the 22 April and the time he left the room. He says that Mr Fletcher was with Mr Ryman and Mr Neale when he walked out. He assumed that when Mr Fletcher said "let's have it out" that he meant that the gloves were off. He thinks that they wanted to sort out the overtime issue.

47 Mr Gordon Carroll says that he has worked for the respondent for 19 years and is currently employed on the A5 shift. Up until 22 April the Foreman was Mr Fletcher, the Fitters were Mr Ryman, Mr Neale, Mr Ryan and himself. The new Foreman is Mr Merrylees. He says that when he first started he was taken aback at the use of language and was advised by his supervisor that that was how they talk and he had to get used to it.

48 In relation to the incident on 22 April Mr Carroll says that Mr Fletcher completed the handover. Mr Ryman said that he needed a note as he was going to write a grievance in relation to his treatment on the previous overtime block and past issues. Mr Ryman also said to Mr Fletcher that Mr Bevan had been in on 5 'O' overtime. Mr Ryman requested that Mr Fletcher ring Mr Evans to tell him he would be writing a grievance. He would give him a copy in the morning and would send a copy to Mr Goodyear. There was then some further discussion between Mr Fletcher and Mr Ryman. Mr Fletcher leant forward on the table and picked up the overtime sheet, looked at Mr Neale and Mr Ryman and said, "But you guys like overtime". Mr Neale and Mr Ryman were not looking at Mr Fletcher and Mr Fletcher then said, "So any of you guys like overtime". No one replied. Mr Carroll then asked what the job was, was advised by Mr Ryan that it was drill 101 and he agreed to do overtime. Mr Carroll said that Mr Fletcher was standing against the table. He then took a few steps towards Mr Neale and Mr Ryman and said, "You guys like any overtime". He still did not receive a response. Mr Ryman then responded with the following:

> "Well when I come on overtime I get all the shitty and grunt work to do and then told I sit on my arse and do nothing all day. So, no, thanks, I don't want any overtime" (Transcript p.285)

Mr Fletcher asked again whether they wanted overtime. Mr Carroll said, "What's going on here." He turned around to wash his cup when he heard someone saying "lying dogs". He turned and saw Mr Fletcher, Mr Neale and Mr Ryman all speaking at the same time. He sat down and Mr Neale said, "There are too many lying dogs around here". Mr Fletcher had gone back to his table he did not look happy. He said, "What do you mean, you're talking about me or Michoff". Mr Fletcher walked forward to the table and leaned forward. Mr Carroll said that he did not want to stay in the room so he got up and left.

49 In relation to the notes of the inquiry, Mr Carroll says Mr Lohse's notes are not a complete record. He says that Mr Fletcher and Mr Ryman were doing all the talking. The only time Mr Neale said anything was in relation to the "lying dogs" comment. He said that Mr Fletcher looked very edgy when the lying dogs comment was made. He says that he did not think that Mr Fletcher was himself.

50 Mr Carroll says that on one occasion Mr Fletcher asked him to come into town to pick him up from his house at lunchtime; which he did. On the following day Mr Fletcher said to him that Mr Knuckey wanted to know why he (Mr Carroll) was in town. He says that at first he could not remember and then he said to Mr Fletcher, "I came to pick you up from your house, you asked me". Mr Fletcher's response was that he had forgotten about that. He said that he had a further issue with Mr

Fletcher in relation to his personal performance review. He says that he has known Mr Ryman for 15 years and that he never seems to get upset and he teaches all the young apprentices. He says that there was a previous employee, Mr Steve Menner, who had a problem every time a job was given to him. Mr Menner would complain to Mr Fletcher and the language he used was colourful.

51 Under cross examination he says that there are some matters missing from Mr Lohse's notes of the inquiry. His issue with the use of language on site occurred in 1986.

EVIDENCE FOR THE RESPONDENT

52 Mr Evans says that at a meeting on 21 October 2003 between Mr Knuckey, Mr McKay, Mr Ryman, Mr Johnston and himself it was made clear that shift A5 issues were not going to be tolerated and their behaviour and intimidation of supervision would not be tolerated. He says that there is nothing, to his knowledge, past that meeting that could be construed as a warning to Mr Neale or Mr Ryman concerning intimidatory behaviour.

53 Mr Evans says that on the night of the incident he received a telephone call from Mr Fletcher. It took him 15 minutes to get to work. Mr Fletcher advised him that he had some very serious problems at the shift change over and requested Mr Evans to come in and sort it out as he (Mr Fletcher) had had enough. Mr Evans asked Mr Fletcher what the problem was and was advised that Mr Fletcher had been verbally and physically assaulted; verbally assaulted by Mr Neale and Mr Ryman and physically assaulted by Mr Ryman. Mr Evans was not given any detail of the physical assault. When he arrived Mr Merrylees and Mr Fletcher were in the foreman's office, Mr Fletcher looked distressed and visibly shaken. Something had obviously transpired. When he spoke to Mr Fletcher he was not himself, his hands shook, he looked distressed and his eyes were glazed. He says that his witness statement is possibly not correct in relation to Mr Neale and Mr Ryman physically abusing Mr Fletcher. He agrees that he made a comment to Mr Johnston that he had to stand by his foreman.

54 At a meeting on 20 April he does not recall Mr Ryman saying "fucking liar" and "fucking useless" he does recall Mr Ryman saying "Come on, Greg, you know you're fucking lying". Mr Evans did not reprimand Mr Ryman for this comment. He simply advised Mr Ryman that it was not appropriate.

55 Mr Evans says that Mr Fletcher described the incident to him. Mr Fletcher said that Mr Ryman came at him in an aggressive manner with fists clenched at his side, chested him which pushed him backwards, their noses touched and spit was flying out of Mr Ryman's mouth. Mr Evans asked Mr Fletcher to again go through the incident so that he could be clear what had occurred. He then asked Mr Fletcher to accompany him to see Mr Neale and Mr Ryman. Mr Evans told Mr Ryman that there had been serious allegations of physical and verbal abuse, Mr Ryman responded by saying that he would not speak in front of Mr Fletcher. Mr Fletcher left the room and Mr Evans asked Mr Ryman if he could obtain representation. He did not give Mr Ryman details of the allegation. Mr Neale was also in the smoko room and Mr Evans likewise did not give him details of the allegation. He says that he told them that, "There's been an allegation of verbal abuse". He agrees that there was no mention, at that initial stage, of a physical assault. He says that Mr Neale and Mr Ryman seemed very calm. Mr Ryman was calm and he wanted to make sure that he understood that this was a serious matter. He agrees that after speaking to Mr Fletcher, and standing Mr Ryman and Mr Neale aside, he telephoned Mr Lohse. He explained the situation, and the action he had taken.

56 Mr Evans agrees that at the inquiry Mr Carroll said he heard Mr Neale make the comment "too many lying dogs", but he does not recall Mr Carroll mentioning the "me or Michoff" comment. He says that his notes of the events on 22 April were made when he got home. There are different coloured pens in his diary as it was probably what he had at hand. From these hand written notes he created a typed document as his hand writing is not the best. He denies adding in additional information for convenience. He says that in his opinion the "lying dogs" comment was directed towards Mr Fletcher.

57 Of the overtime incident on 16 April Mr Evans says that Mr Ryman hung up on him. A meeting occurred on 20 April, following the overtime incident on 16 April. After this meeting Mr Evans says that he discussed with Mr Johnston his concern that they (meaning the trial) were going backwards. He agrees that Mr Johnston said Mr Fletcher was leaving soon and that all parties should stay out of each others way and it would be over soon.

58 Mr Evans agrees that no feedback was given to Mr Ryman or Mr Neale. Feedback was given to Mr Fletcher to see if he had anything further to say in response to the denial of physical abuse. The particulars of the physical abuse were put to Mr Ryman on 28 April for the first time. Mr Evans agrees that when told of these Mr Ryman looked shocked. On a separate occasion, Mr Fletcher advised him that he had some difficulty locating some of the crew on the night shift. Mr Evans did not follow the matter up or put that matter to Mr Ryman or Mr Neale. He says that he is not aware of heated discussions between Mr Fletcher and Mr Menner or Mr Chadwick. Mr Evans says that he has called Mr Fletcher "fucking useless" but that it was not directed personally at him.

59 Mr Evans recalls that at the meeting on 20 April Mr Fletcher made a comment about past practice and the boys may be doing breakdown. Mr Evans says that he spoke to Mr Johnston following the meeting to advise that there had been an incident where Mr Ryman had told Mr Fletcher to "fuck off". He told Mr Johnston to tell them to pull their heads in.

60 In regards to the incident where Mr Ryman and Mr Neale allegedly went missing Mr Evans says that this was not raised in the meeting on 20 April. He preferred that the Foreman handle the matter. He agrees that he asked Mr Fletcher to follow up on that issue. There was no opportunity to do so prior to the incident on 22 April. He agrees that there might have been an explanation as to why Mr Ryman and Mr Neale were missing. He says that the email of 21 April was designed to clarify the position in relation to overtime. He was not aware of a practice of coming in on overtime to do breakdown. The email was sent so that everyone was clear that when overtime was offered it was not to work 5'O' but to work as directed.

61 Mr Evans says that he and Mr Lohse decided that Mr Neale was no longer fit to be the leading hand due to the abuse he had directed at his supervisor; namely calling his supervisor a "lying dog", other swear words and the comment "shove your overtime up your arse". Mr Ryman was dismissed based on the adamant claims of Mr Fletcher regarding the physical assault and his emotional condition on the night of the incident. Mr Evans says that he took into account what had occurred on that night and not issues that had occurred in the past. He recalls that during the inquiry Mr Chadwick raised the issue of a comment he had made to Mr Fletcher about Mr Evans not sorting out the overtime matter and Mr Fletcher responding that he did not know and that Mr Chadwick found this dishonest.

62 Mr Lohse says that Mr Evans rang him after the incident to advise him what had occurred and to seek his advice. He advised Mr Evans to stand down Mr Neale and Mr Ryman on pay. The following day Mr Lohse received an email from Mr Fletcher. During the inquiry he agrees that Mr Ryman reacted when Mr Fletcher's statement was read out to him and said, "Well, how would I go from hilarity to anger". He says that he did not provide copies of his notes to Mr Ryman or Mr Neale. He provided them to Mr Fletcher to get his understanding of whether he believed them or otherwise. He agrees that this may be one sided.

63 He says that if the matter were to go further then the statements would have come out. He has no explanation why they were not provided to Mr Neale and Mr Ryman. He denies that it was in an effort to make sure Mr Fletcher's case was improved against Mr Neale and Mr Ryman. Mr Lohse says that he did not give copies to Mr Neale and Mr Ryman but that they were

aware of what were the allegations against them. He says of Mr Fletcher that he was given feedback. Mr Lohse says that Mr Ryman and Mr Neale were not asked to reconsider their position but they were asked during the second disciplinary inquiry whether there was anything further they wished to add. Mr Neale and Mr Ryman went over what had occurred at the previous inquiry.

64 Mr Lohse says that the various departments look after day to day industrial relations. He has not had any dealings with Mr Ryman or Mr Neale in relation language used or any threatening or intimidating behaviour. In relation to paragraph 72 (c) of his witness statement he agrees that he relied upon the evidence of Mr Carroll, Mr Fletcher, Mr Ryman and Mr Chadwick.

65 He recalls a statement being made in the inquiry, "Who are you referring to me or Michoff", but he cannot recall at what time it was said or by whom. He says that it would be in his notes somewhere but it was not made by Mr Carroll. Mr Lohse says that Mr Carroll did not say that the "lying dogs" comment was directed to Mr Fletcher. Mr Chadwick said that he just heard the statement. He does not recall Mr Chadwick making any reference to "cryptic crossword" or his explanation for wanting a job sheet. Mr Lohse says that getting things off the chest does not give the person the right to abuse somebody.

66 Mr Knuckey says that it is not a matter of whether he likes Mr Neale and Mr Ryman but how they behaved. In his 15 years of experience in the mining industry he is no stranger to colourful language. Whether the language is tolerated or not he says depends on the circumstances. Language in a off the record discussion may get colourful. However, it has been his experience that the language may be colourful but never personal and never directed at an individual. He says that "off the record" is just that, whereas "let's get it out in the open" is designed to establish what the issue is and try to resolve it. He agrees that the comment, "If you're right I will suck your dick" is a personal comment. This has been said to him and the person was told to cut it out.

67 Mr Knuckey agrees that his knowledge of the events on 22 April came from information from Mr Evans, Mr Lohse and Mr Fletcher. He read the statements of the witness from the inquiry; the only witness that he spoke to was Mr Fletcher. He says apart from the information provided by Mr Lohse and Mr Evans and his discussion with Mr Fletcher there were other factors he considered in coming to a decision. In his view Mr Ryman's comments were particularly personal. He says that the other factors are the statements that he read. He did take into account recent events between himself and Mr Ryman. In relation to whether there were any other matters taken into consideration he says that there was one other matter. He agrees that he jumped at the opportunity to get rid of Mr Ryman. The other factors he took into account relate to a meeting he had with Mr Ryman, meetings Mr Ryman had with Mr Evans and Mr Knuckey's assessment of the events on the evening of 22 April. Mr Knuckey says that the other matters related to behaviour at previous meetings that was indicative of the behaviour which was demonstrated on the night. He made a comparison between the behaviour with the incident and behaviour at a previous meeting. He denies that he did not afford Mr Neale and Mr Ryman an opportunity to be heard. He did not speak to them personally, that was the purpose of the investigation.

68 Mr Fletcher says that on 22 April at the start up meeting in the smoko room he presented the shift requirements and handed out the jobs. He clarified a question Mr Chadwick had and finalised the meeting. He asked Mr Neale and Mr Ryman if they were available for overtime and Mr Neale's response was, "You've got to be fucking joking". He says that Mr Ryman also made a comment but Mr Fletcher cannot recall what it was. Mr Fletcher said to Mr Neale and Mr Ryman that he needed a yes or no answer. Mr Neale told him to, "stick my overtime up my fucking arse". Mr Fletcher then turned his attention to both men and said, "come on, let's find out what was going on". He cannot recall everything that was said. He does recall being called a "fucking lying dog". This was in front of the crew and said with some malice. He then approached the table occupied by Mr Neale and Mr Ryman and sat on the corner of it. The comment "lying fucking dog" was again made and Mr Ryman called him a "lying dog". Mr Fletcher says that he stood up as it was quite a serious matter and he did not want his back to Mr Ryman. The arguing continued and a previous meeting regarding overtime was raised. He says that Mr Ryman accused him of being a liar and lying in relation to the overtime issue. Mr Fletcher says that he reiterated to them a previous comment he had made to them, that is if past precedents were followed they may be doing 5 'O' overtime. He says that a comment was made that Mr Michoff and he could not to be trusted and were liars.

69 Mr Fletcher says that he came to the view that the discussion was not going anywhere and went to leave. He opened the door and then went back into the room and asked Mr Ryman who was to call Mr Evans. Mr Ryman became quite angry and said, "I just fucking told you", made some further comments and said, "are you deaf or just fucking stupid". He says he was close to the table and Mr Ryman got out of his chair still yelling his hands by his sides with fists clenched. Mr Ryman walked slowly and deliberately towards him. Mr Ryman was yelling as he approached Mr Fletcher. Mr Fletcher says that he cannot recall all that was said but he could feel Mr Ryman's spit on his face. He was repulsed by this. He says that Mr Ryman was right in his face and their noses touched. He says that he felt perturbed about was going to happen or could happen. Mr Ryman at the same time said, "Come on, come on, what do you want to do about it" and was chesting Mr Fletcher with his chest. Mr Fletcher is not sure for how long Mr Ryman continued to spray him with spit. He says that Mr Ryman's nose was cold and that is how he knew that their noses had touched. Mr Neale then got up and went to Mr Fletcher's side to pacify Mr Ryman. Mr Ryman backed off and Mr Fletcher says that was as far as it got. Mr Fletcher then told Mr Ryman, "Tony, you've gone too far this time. I'm not accepting that sort of behaviour. Tony, my office now". He says that Mr Ryman ignored him and he repeated himself. Mr Ryman told him, "do what you like. There's only one of you and two of us. You've got no witnesses. Nothing happened here". He says that Mr Ryman walked back to his chair slumped in it and went white in the face. He again told Mr Ryman that he did not accept the behaviour and he then left the room; on entering the foreman's office he had a discussion with Mr Merrylees about what he had heard. Mr Merrylees heard Mr Ryman yell "I just fucking told you". Mr Fletcher says that he briefly discussed the matter with Mr Merrylees and then contacted Mr Evans and asked for him to come in as he needed his help. Following his discussion with Mr Evans he had Mr Merrylees accompany him to the smoko room as a witness and told Mr Ryman to remain in the room until Mr Evans arrived, Mr Ryman responded "Righti ho" as if nothing was wrong.

70 He had a discussion with Mr Evans upon his arrival and they then went to the smoko room and had Mr Ryman come out into the workshop and give his version of events. Mr Fletcher says that he interjected while Mr Ryman was telling his side of the story and Mr Ryman became angry and refused to discuss it in front of him. Mr Fletcher says that Mr Evans and Mr Ryman then went into the smoko room and he returned to the Foreman's office. He says of the overtime issue that he raised the question a number of times as he needed to make sure that there was coverage for overtime as a major job was coming up. He typed up his recollection of the events that night. He forwarded some notes to his home and worked on them in the morning. He then forwarded to Mr Evans his notes [Exhibit R14]. An amended copy was prepared to ensure the sequence of events were correct [Exhibit R15], a further amended copy was sent to Mr Evans [Exhibit R16]. He says that today the incident still disturbs him and it was not a very pleasant experience.

71 Under cross examination Mr Fletcher says that it is possible that Mr Ryman made a comment to the effect that all the compressor needed was oil and he responded by saying there were other things wrong with it. He agrees that there could have been comments made about his abilities as a tradesperson. He says that he thought Mr Ryman's grievance was in relation to

the 5 'O' overtime. He could have asked if there was anything he needed to know about. He agrees that Mr Ryman could have mentioned Mr Knuckey investigating his own grievance and the overtime issue. He cannot recall making a comment to Mr Ryman about not being Ron Brown. He says that he cannot be one hundred percent sure but he thinks that he picked up the handover sheet with the request for overtime on it. When he asked the question about overtime Mr Neale straight away said, "You've got to be fucking joking". As a result of the statement he needed clarification. He believes that he asked about overtime twice. He says that it is possible on asking the first occasion that there was no response. He agrees that upon asking a second time Mr Neale made the "fucking joking comment". Mr Fletcher asked again and Mr Neale said "stick it up your arse". Mr Fletcher responded by saying that "I doubt that will fit". He says that a comment was made, "You're a fucking lying dog". He denies making the comment "who are you referring to me or Mick Michoff". He was taken aback at the "fucking lying" comment. It was his choice to deal with the problem the way he did. He cannot recall everything that was said as he was in a bit of a state of shock. It is possible that he said, "who are you referring to, me or Mick Michoff". He made the "out in the open" comment as there was a problem that needed to be sorted out prior to the work commencing.

72 Mr Fletcher agrees that he has had exchanges with Mr Steve Menner. He says he had also an exchange with Mr Chadwick, although he does not recall the incident. It is possible that Mr Chadwick during the exchange asked for written work instructions. He does not recall the time or instance but it is possible that he asked Mr Carroll to pick him up. It is possible that he went to Mr Carroll and said to him Mr Knuckey wanted to know why he was in town. It is possible that Mr Carroll told him that he, Mr Fletcher, had asked to be picked up. He does recall an incident involving Mr Johnston being in town in which he questioned his absence, got an answer and realised he had given Mr Johnston leave.

73 Mr Fletcher says that he sought clarification as to who was to contact Mr Evans. Mr Ryman said, "I just fucking told you". This was before Mr Ryman got out of his chair. He says that Mr Ryman did not exactly jump out of his chair, he got out of his chair quickly. He agrees that Mr Ryman came at him yelling abuse, spitting in his face and their noses touched. He agrees that he told Mr Evans that Mr Ryman had chested him and pushed him backwards. He stood his ground by putting a foot behind himself and Mr Ryman was pushing back on him.

74 He says that the comment, "Tony my office now", was to get Mr Ryman away from the situation and into Mr Fletcher's office so that formal disciplinary proceedings could be undertaken. He told the inquiry that he felt intimidated and threatened and just wanted to get out of the room. He agrees that at some stage during the disciplinary inquiry he was given copies of witness statements.

75 Mr Fletcher says that the difference in the abuse by Mr Menner compared to that of Mr Neale is that Mr Neale's abuse was directed at a personal level. Mr Fletcher says that he does not recall using colourful language during the incident, but he cannot deny it. In relation to getting things wrong Mr Fletcher says that he is only human. He concedes that he got the incident of Mr Johnston going to town wrong. He does not recall the incident with Mr Chadwick involving Shovel 93. He cannot recall an incident involving Mr Caroll picking him up or why he would have asked him to do so.

76 Mr Fletcher did not carry out Mr Evan's request to sort out the crew concerning the going missing incident on 19 April as he was waiting for an opportunity to do so. He does not recall Mr Chadwick querying him over the overtime incident. He does not recall advising Mr Chadwick that he did not know why Mr Evans had not done anything about it.

77 Mr Fletcher says that a compressor kept shutting down. He discussed the matter with vehicle services to find out what oil it took and checked the gauge which indicated that the oil was okay. There was another underlying problem. It was difficult to find the right oil on night shift. He agrees that the following morning light vehicles put oil into the compressor and got it going. He does not think that he was a laughing stock. Mr Fletcher said to Mr Ryman on 22 April, "there was something else wrong with it", as he assumed there was and he had not had any feedback from the department as to what was the problem. He says that he was not infuriated by Mr Ryman's comments about his skills as a motor mechanic. He went through the manufacturer's manual with the vehicle services to attempt to cross reference oil on site. He agrees that both Mr Ryman and Mr Ryan raised the issue of the compressor just needing oil.

78 He does not recall saying to Mr Ryman, "I contacted the manufacturer and it's not an oil problem". That was suggested to him but that it was not an option at night. He has no knowledge of what occurred with the compressor before the start up shift on 22 April. He was not angered that Mr Ryman wished to write some grievances. He does not recall Mr Ryman calling him "cloth ears". At the start up meeting Mr Ryman may have made a comment in relation to the compressor only needing oil. In relation to Mr Ryman wanting to write out grievances it is possible that he said, "Is there anything I need to know about". He says that he may have leaned on the table. Mr Fletcher says that as he was leaving the room he came back in and queried who was calling Mr Evans. Mr Ryman said, "I just fucking told you". He thinks he may also have said, "you are going to phone him", but he is not sure. Mr Fletcher says that he does not recall Mr Ryman laughing at him during the incident. He says that he put in his statement what was relevant at the time. He did not see the grievance issue as being relevant. He does not recall asking Mr Ryman what it was like to be a liar. He does not recall making a statement, "I'm not fucking Ron Brown" but it is possible. He does not think that he said "Let's fucking get it out in the open".

79 Under questioning from the Commissioner Mr Fletcher says that his demeanour on the night was much the same as any other. He disagrees that he was edgy or not himself on the night. He says that Mr Neale's first comment, "you're a fucking lying dog" was directed to him.

80 Mr Dean Merrylees gave evidence that he is the drill and shovel Foreman and has been since February. He says that on 22 April he was sitting at a desk in the Foreman's office checking emails when he heard raised voices and a loud yell. The smoko room is next to the Foreman's office; separated by a photocopy room without a door on it. He says that he heard a loud yell. It was Mr Ryman saying, "I just fucking told youse". He knew this from his accent. The whole scenario lasted about 10 minutes. Mr Fletcher was quite pale when he came into the Foreman's office. He asked him what had occurred and Mr Fletcher's speech was broken. It appeared as if he was going to cry. Mr Fletcher then said, "Tony's gone too far". Mr Fletcher did a circle of the room and called Mr Evans. Mr Merrylees says he heard some parts of the conversation in which Mr Fletcher told Mr Evans that Tony had gone too far and he needed his help. He says that Mr Fletcher told him that Mr Ryman was in his face and when he talked spit was going into his face. Mr Fletcher demonstrated to him how far Mr Ryman was from him. It was a distance of 15 centimetres away from his face. Mr Merrylees says that Mr Evans asked him to write out his recollection of the events [Exhibit R11], which he did the following morning.

81 Under cross-examination he says that he watched Mr Carroll, Mr Neale and Mr Ryman unload coke cans. He says that Mr Fletcher walked out of the smoko room and straight into the office.

82 Mr Michael Michoff gave evidence that he is a Mechanical Foreman and has been employed by BHP for 14 years. On 16 April he had a discussion with Mr Neale and Mr Ryman in the smoko room at the start of shift. He told them about a job on a swing gear box on shovel 91 or 93. They responded that they were only in for breakdown work. Mr Michoff said that he did not have any breakdown work and that this job needed to be done. They replied that they would go home. He told them to hang on and he contacted Mr Evans. He explained the situation to Mr Evans and asked if there was any previous overtime

arrangement. Mr Evans said there was no arrangement. Mr Michoff then handed the phone to Mr Ryman who spoke to Mr Evans. Mr Ryman then put the phone down hard on the table and said, "Right, we're gone". They were heading out the door and Mr Michoff queried them about the remaining overtime days. They said they would not be coming in. He is not sure if Mr Evans was still on the phone, but he spoke to him again and told him they had gone home.

83 Mr Michoff says that he is very careful about how he speaks. He did not swear at Mr Ryman or Mr Neale as he knows how politically correct they are. He denies that he said he was, "not having them sit on their arse all night". He says his words were, "I can't have you sitting down all night". He provided to Mr Evans at a later date an email setting out the events of the incident [Exhibit R10].

84 Under cross examination he says that the email was written on 27 April at the request of Mr Evans. He does not know why Mr Evans requested the document. He says that he may have heard over the years Mr Ryman use the odd swear word when they used to change-over shifts. He believes that Mr Ryman talks fairly normally. He denies making the "sitting on your arse" comment and says he is absolutely certain and absolutely careful about what he says to people like Mr Neale and Mr Ryman in conflict situations. He says that as they are not on his crew and he is very politically correct as to how they are handled. As a rule he says that he does not use colourful language.

85 Mr Michoff says that he reprimanded Mr Neale on one occasion over taking too long during a smoko break. Mr Neale had taken 1 hour and 10 minutes for a 30 minute break and he advised him to keep his breaks to the regular or the award. He entered the incident on his computer and advised Mr Evans. He says that the rest of the crew were late returning to work. He denies that he cornered Mr Neale and reprimanded him in strong terms. He also had cause to reprimand Mr Neale over an issue of wearing proper protective eyewear. He says that he has no feelings either way towards Mr Ryman or Mr Neale. He does not see them socially and they are not on his crew. He does not recall a conversation with Mr White regarding what work Mr Neale and Mr Ryman were in to do. He also denies saying, in response to Mr White's comment about them doing overtime, that he said "we will see about that".

ISSUES

86 A central issue is the credibility of the three main protagonists in this matter, that is Mr Fletcher, Mr Ryman and Mr Neale. Clearly each of them cannot be telling the Commission the full truth as they differ on the essential component of the events, that is whether Mr Ryman got out of his chair, approached Mr Fletcher, abused, chested him and in the process sprayed his face with saliva. Mr Fletcher has one version; Mr Ryman and Mr Neale have another. Apart from this issue the evidence given by each of these witnesses has a fair degree of similarity. There are of course different recalls as to precisely what was said, who said what and in what order. This is the case also for the other witnesses. Mr Ryman and Mr Neale were seemingly quite open in giving their evidence about the language they used and the annoyance and frustration which they exhibited. On the face of it Mr Neale was a good witness who answered questions directly though he appeared uncomfortable at having to give evidence. That is often the case as people are unfamiliar with the process before the Commission. In Mr Neale's case it would appear to me to be more a matter of reticence, cautiousness and even frustration at having to give evidence. Mr Ryman's evidence and credibility is harder to assess. He varied in directness in responding to questions. He would seek to persuade the Commission in answers at times rather than address the question more directly. His evidence under cross-examination concerning his role as an occupational health and safety representative is the most obvious example of this. The cross examination turned out to be lengthy as Mr Ryman's passion for the subject competed with his oath to give evidence. In short, however, I became uncertain as to the reliability of Mr Ryman's evidence. Mr Fletcher's credibility as a witness was also difficult to assess as his recall of many events was limited. He was also vague about instances when other employees had sworn at him. I was left to ponder initially whether he was evading questions, however, he readily conceded many points in cross examination as being possible. I did not accept his response to my question as to his demeanour in the smoko room on 22 April 2004. The weight of evidence would suggest that he was agitated and not quite himself. The evidence is that he is a non-confrontational person, and I accept that from my own viewing of him at hearing. However, the common evidence is that he kept asking Mr Ryman and Mr Neale about overtime and appeared pushy. I was left with an overall impression of Mr Fletcher's evidence that he had limited recall of many events. This in essence is not dissimilar to the complaints made of him by Mr Chadwick and Mr Carroll about matters he had asked them to do and then promptly forgot. This is also a point which counsel for the applicant made in his closing submissions (see paragraph 55 of those submissions) albeit he submits that Mr Fletcher was not credible. On hearing and seeing Mr Ryman and Mr Fletcher give their evidence I would have more faith in the evidence of Mr Fletcher. There is also some inconsistency in evidence between Mr Ryman and Mr Neale and I would ultimately favour Mr Fletcher's evidence over that of Mr Neale. I conclude that Mr Neale is covering for his work mate. However, I will have more to say about this in my assessment of the actual events that night.

87 I do not have difficulty with the evidence given by any other witness except that I would make the comment that I doubt greatly that Mr Michoff was so careful in his use of language around Mr Ryman and Mr Neale. This simply did not ring true. Mr Johnston and Mr Merrylees were good witnesses in terms of the clarity and directness of their evidence. I accept their evidence without reservation.

88 Mr Cox as counsel for the applicant made a number of points in closing submission about the lack of procedural fairness in the respondent's investigation of the events of 22 April 2004. His submission is as follows:

> "27.1 the members had never previously been warned about their behaviour or in any real sense put on notice about this sort of exchange[3] (on the contrary prior experiences indicated that it was tolerated);
>
> 27.2 they were not told what the other witnesses statements were (except that they contradicted the members — which was a misrepresentation of the evidence), whereas Fletcher was so as to be given an opportunity to plug up his version of events;
>
> 27.3 the decision was based on evidence that did not exist (to the effect that Chadwick and Carroll said they heard abusive comments directed at Fletcher);
>
> 27.4 as the statements filed in the proceedings by Evans, Lohse and Knuckey show, the ultimate decision was based on cumulative findings that cannot be sustained: findings that certain things were done or said were used to find that the members lacked candour by denying those matters (for example, at what stage Fletcher was called "a lying dog", whether Ryman assaulted Fletcher);
>
> 27.5 the Lohse inquiry notes reflect a one sided and incomplete record of what the witnesses said. Important pieces of evidence were not recorded, as was acknowledged by Evans and Lohse;
>
> 27.6 the decision was based on other matters that were not put to the members such as allegations of what was said to be similar conduct by Ryman towards Knuckey in March 2004; it was also very apparent that Knuckey's unparticularised view of the members past poor performance, preceding the Commission facilitated trial period, bore on the ultimate decision (and the Respondent's view of the outcome of the May to August trial for Neale);

27.7 the way in which the inquiry was conducted, evidence gathered and the matters taken into account, both those put to and those not put to the members for them to respond to indicate, as Knuckey said, the Respondent jumping at the opportunity to take action against the members; and

27.8 for example, Fletcher's and Evan's notes, diary notes and statements were worked on and reworked, and comments added that were not in the original form. The typed versions attached to their statements filed in the proceedings cannot be said to be contemporaneous and yet they were treated as such by the Respondent to bolster their credibility;

27.9 the members were treated more harshly than others who had, for example, stolen diesel, made racist remarks, and engaged in similar conduct with Fletcher (eg Menner, Chadwick), or the case involving personal and threatening abuse by another supervisor which was dealt with in disciplinary proceedings in which Evans was involved and did not result in substantial punishment; and

27.10 Ryman and Neale were often bundled together when reference was made to one or other's conduct. For example Evan's Anx A "diary note" referred to Fletcher reporting that he had been verbally and physically assaulted by Ryman and Neale; Evans said he told Johnston to talk to Ryman and Neale about Ryman's exchange with Fletcher on 19 and or 20 April. The Respondent appears to have treated the conduct of the one as that of the other as well."

89 I will address each of those points, as they are relevant, well made, and are matters that concerned me during the hearing. It is the case that a matter of unfair dismissal needs to be viewed as a whole as to whether there has been a fair go all round (see *Byrne v Australian Airlines Ltd* (1994) 47 FCR 300, *Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385). A dismissal may be considered unfair due to the procedure adopted or may be procedurally unfair but not substantively unfair (see *Shire of Esperance –v- Peter Maxwell Mouritz* 71 WAIG 891).

90 As stated, it is the case that neither Mr Ryman nor Mr Neale had been formally warned for verbal abuse. However, a verbal attack on a supervisor or employee is not to be treated lightly and Mr Ryman and Mr Neale were, in my view, aware of this. The question is the degree of severity and the context of the action. Mr Cox submits that such activity has been tolerated. Certainly it is the case that foul language has been tolerated in this environment and is part of the mining environment. The weight of evidence makes this clear. The respondent distinguishes the actions of Mr Neale and Mr Ryman in that they made a personal attack on Mr Fletcher. The evidence of similar past behaviour relates to the actions of Mr Menner and Mr Ryman. At a meeting on 20 April involving Mr Evans, Mr Fletcher and Mr Johnston, Mr Ryman abused Mr Fletcher. There is a difference in evidence as to what was said precisely, but it is clear Mr Ryman accused Mr Fletcher of lying and swore at him in the process. Mr Evans says that he indicated to Mr Ryman that his comments were not appropriate.

91 There is evidence from a number of witnesses that Mr Menner was abusive towards Mr Fletcher and never reprimanded. Mr Fletcher's evidence is that he did not consider Mr Menner to have been personally abusive. Mr Menner obviously acted in front of other employees, as they have given evidence of this. In short, there is evidence to support a finding that verbal abuse toward Mr Fletcher by Mr Menner had previously been tolerated. Albeit Mr Fletcher, who was on the receiving end, was seemingly not affected by this.

92 The submission on behalf of the applicant at paragraph 27.2 of counsel's closing submission also has some substance. In my view it would have been better if Mr Evans had directly after the incident simply instructed Mr Fletcher, Mr Ryman and Mr Neale to separately commit to paper their recall of the events in the smoko room. That would have provided him with a better basis for assessing what action was then to be taken, including whether Mr Ryman and Mr Neale should have been stood down. I would add that it may also have been appropriate, but not as necessary and perhaps not expedient at that point in time, to ask others to commit the events to paper. The alternative would have been to talk separately with Mr Fletcher, Mr Ryman and Mr Neale at that time. Similarly, it is Mr Evans' evidence that he did not advise Mr Neale and Mr Ryman of the specifics of the allegation against them until the time of the investigation meeting on 28 April 2004. He did however advise both Mr Ryman and Mr Neale on the night of the incident that an allegation had been made that they had verbally abused Mr Fletcher. Mr Evans says that he did not advise Mr Ryman of the alleged physical abuse. This was an error on his part. This approach, together with Mr Evans' comment to Mr Johnston that he stood by his supervisor and the fact that Mr Fletcher was advised of the comments of other employees during the investigation and asked to comment, whereas Mr Ryman and Mr Neale, were not, all create an impression of potential bias and cause some doubt about the process and even the allegation. I make this comment in a cautionary sense because quite often the process adopted can contaminate the perceived fairness of the result of any investigation. I am very mindful, however, that when alleged events occur in a workplace managers need to act promptly and fairly, but do not enjoy the same level of scrutiny and reflection available to the Commission.

93 Having said this, if one compares the version of the statements provided by Mr Fletcher [Exhibits R14, R15 and R16] there is little of substance that has been added to those statements. For my purposes I am happy to restrict my consideration to Exhibit R14 which on the evidence was the most immediate statement made by Mr Fletcher. Importantly though I was not convinced at hearing or subsequently on reading the transcript that Mr Evans or Mr Fletcher sought to "plug up" Mr Fletcher's version of events. Both witnesses were cross-examined extensively about this matter. There was also a submission made that some form of investigation should be made of Mr Evans' technology. I was prepared, though reluctantly, to have my Associate attend at the respondent's premises with Mr Evans to elicit the information sought on behalf of the applicant. In short, this line of questioning in cross-examination, and upon further reflection by the Commission, has produced nothing of relevance for the applicant. Mr Fletcher and Mr Evans were not diminished in cross-examination on those issues and in my view answered the questions to the best of their ability and recollection. This addresses the submission at sub-paragraph 27.8.

94 The points made in sub-paragraphs 27.3 and 27.4 of the applicant's submissions depend on my assessment and ultimately the findings I make and I will deal with them more fully later. In relation to sub-paragraph 27.5, I am happy to accept, based on the weight of evidence for the applicants which has not been controverted, and which has received some support from the evidence of Mr Lohse under cross-examination, that the notes of Mr Lohse and Mr Evans are incomplete. Not all matters spoken can be taken down and individuals have differing views of the important points. The issue is where this leaves me; it leaves me with placing more reliance on the notes made by Mr Johnston, and I take this approach.

95 I will address sub-paragraphs 27.6, 27.7, 27.9 and 27.10 together. It is the case that Mr Knuckey's judgment of Mr Ryman and Mr Neale was affected by his opinion of them and his previous experience with them, and I so find. Mr Knuckey says as much. In fact, he says with disarming frankness that he jumped at the opportunity to fire Mr Ryman and Mr Neale (Transcript p.610). The passage in cross-examination is as follows:

"Well, I put it to you that you jumped at the opportunity to get rid of Ryman and Neale?---That's right.

> And you jumped at the opportunity because, as you say, there were these other factors that bore on your view of them, in your workplace'?---Those other factors were related to one particular meeting that I had with Mr Ryman and those other factors were related to meetings that Mr Ryman had had with Mr Evans, Robbie Evans, and, of course, my assessment of the events that took place on the night when the incident occurred."

There was also a lumping together of Mr Ryman and Mr Neale by Mr Evans and Mr Fletcher. Ultimately this latter point mattered little in my view as the allegations against them were made clear. The issue is really whether the allegations have substance and, if so, was the penalty appropriate.

96 I need to say something about how I have approached my task of deciding the last two issues. It is for the applicant to bear the onus of proving their case. If that burden is not discharged then the application must fail. However, I have chosen to take the course whereby I needed to be satisfied that I could make a judgement as to what most probably occurred in the smoko room on 22 April 2004. I cannot of course know for certain. As indeed Mr Evans, Mr Lohse and Mr Knuckey cannot know. I can only make an assessment of the evidence before me and the submissions as to that evidence. In essence it is the word of Mr Fletcher against that of Mr Ryman and Mr Neale and I must make an assessment of their credibility, and to an extent their character, on what I have seen of them. I must of course assess this against the evidence of the context of the incident and must judge what, in my view, most probably happened. It is not a case of proving or disproving beyond doubt that Mr Ryman and Mr Neale acted as alleged.

97 I state all of this because I am caught by the view that to properly assess whether there has been a fair go all round (*Undercliffe*) I must review the evidence of what occurred, including the notes of Mr Johnston as to what was said during the investigation, and come to a conclusion as to what was the most probable scenario. If I cannot reach that conclusion I would give Mr Ryman and Mr Neale the benefit of the doubt. This could be said to alter the burden of proof. However, it is a case of one employee's word against two other employees. Two against one does not give weight to their evidence, and vice versa, the fact that one employee is a supervisor does not give weight to his evidence. This may sound trite. However, I am concerned by the comment of Mr Evans that he needed to stand behind his supervisor and Mr Knuckey's comment that he would jump at the chance to fire the two employees. This leaves a strong impression that they may have acted without good cause. I make it plain that I do not make such a conclusion, however, I am simply explaining my approach in assessing whether a fair go all round was delivered.

98 I do consider that Mr Knuckey was heavily guided by his view of the past behaviour of these two men. The past behaviour of the two men, whatever that might be, is less of an issue for me and my rulings during the hearing go to this point. The first task is to assess whether Mr Ryman and Mr Neale did or did not act as alleged on 22 April 2004. A broad history of aggravations in the workplace, other than the matters that immediately precede the event and bear on the event are likely to help little in reaching conclusions on this essential issue. The issue of penalty is slightly different but I note again that no formal warning was given to either Mr Ryman or Mr Neale. Finally, I would say that notwithstanding my reservations about how the investigation may have been better handled, I am not convinced that the procedure adopted by the respondent was so flawed as to amount to being procedurally unfair or incapable of delivering an unbiased outcome. A range of individuals were interviewed, the allegations were put, Mr Ryman and Mr Neale had the chance to put their cases, their views were considered and an assessment made. The process was not carried out in any perfunctory manner and I do not have a sense that those who conducted the process were out to get Mr Ryman or Mr Neale.

CONCLUSION – MR NEALE

99 The findings against Mr Neale and his penalty were expressed in a letter dated 4 May 2004 to Mr G Neale from Mr G Knuckey, Manager Mine Maintenance, which states:

> "Dear Glen
>
> I refer to the disciplinary inquiry conducted on 28 April and 3 May 2004 in relation to the events of 22April 2004,
>
> In the inquiry you admitted that you verbally abused your supervisor and acknowledged that verbal abuse of a supervisor is serious misconduct
>
> The inquiry has found that you verbally abused and humiliated your supervisor and that such behaviour is completely unacceptable. All employees have a right to be protected from such behaviour in the workplace.
>
> Further, the inquiry found that you lacked candour in responding to questions in the inquiry and showed no remorse for your behaviour.
>
> In all the circumstances, including those referred to above, and having considered all matters raised by you the Company considers that you are unsuitable to continue in the position of leading hand and to remain on shift work. Further, should you be involved in any similar behaviour in future it will not be tolerated and it will result in the termination of your employment.
>
> Effective Friday 14 May 2004 you will transfer to Vehicles Services reporting to Martin Large, Vehicle Services Foreman. You will work permanent day work, Monday to Friday."

100 The penalty applied to Mr Neale was that he was transferred to Vehicles Services, was put on trial for three months, lost his leading hand allowance, was warned that a recurrence of similar behaviour would result in the loss of his employment and he was paid salary maintenance (during the trial) to cover his shift penalties. I am aware separately that Mr Neale's performance has since been reviewed, has been found to be adequate, and he has lost the salary maintenance for his shift penalties. There are said to be no shift positions for him to transfer to; albeit he can apply for them if they arise.

101 Mr Neale's defence is based on the submission that swearing is common on the mine site. Mr Neale did not swear at Mr Fletcher until after he invited him to put matters on the table. Mr Fletcher was aggressive in his actions, previous instances of abuse toward Mr Fletcher were ignored and the disciplinary procedure was flawed.

102 One matter in contention is whether Mr Ryman and Mr Neale were expected to do 5'O' overtime on April 2004. I have no doubts that they expected to do this overtime and were aggrieved by Mr Michoff's comments and the loss of the $1,500 in payments. They left shift that night after it became apparent that they would not be doing 5'O' overtime. If they were expecting otherwise then there was no need to leave that shift and no need for Mr Michoff's comment. Mr Michoff clearly was not aware of any arrangement for the two men to work 5'O' overtime. Mr Ryman raised his concerns about this with Mr Evans. He was clearly still aggrieved some days later. He discovered also to his annoyance, in the smoko room on 22 April, that Mr Bevan was doing 5'O' overtime.

103 The other issue is whether that expectation was legitimate. Mr Fletcher says that he never promised they would be doing 5'O' overtime. Mr Johnston says that Mr Neale proposed that Mr Ryman and he would do such overtime. Mr Johnston was not present for Mr Fletcher's reply. Mr Evans had to later take steps to clarify overtime arrangements and it is clear that 5'O' overtime had been a practice about that time. This coincided with Mr Evans being on leave. Mr Fletcher says that he did not

guarantee that they would be doing 5'O' overtime but he did not clarify with them that they would not. Mr Neale had put that proposition to him and that was the practice at the time. Hence I consider that their expectation was legitimate and they were understandably aggrieved when they turned up to work and were told of a different arrangement and would have received less money as a consequence.

104 The other matter which served as a prelude to the exchanges in the smoko room involved the maintenance on the compressor. The evidence points to Mr Fletcher having been wrong in his assessment of what was needed to fix that problem. I do not go to all the detail of the incident but it is clear that all that was required was some additional oil and Mr Fletcher was derided as a consequence of having been wrong. These then were two areas of direct or potential conflict between Mr Fletcher and Mr Ryman and Mr Neale leading to the incident on 22 April. Mr Neale at hearing appeared particularly annoyed about the compressor incident. It would seem that he takes some pride in his technical competence and getting the job done properly. Mr Ryman and Mr Neale both appeared concerned about the overtime incident and Mr Fletcher, in their minds, went back on his undertaking to them. Mr Neale and Mr Ryman were also wrongly accused, in my view, that they had gone missing on shift. Mr Chadwick's evidence supports this conclusion and the matter was never investigated properly by Mr Fletcher.

105 Weighed against this is the evidence that Mr Fletcher was coming to the end of his time as a supervisor on A5 shift. It is not the case that 22 April was his last time on that shift, but Mr Fletcher was moving to another job. Mr Johnston says that arising from the trial the crew were happy for Mr Fletcher to continue as supervisor notwithstanding their reservations about him. He advised Mr Evans of this and was told that Mr Fletcher was to be moved. Mr Johnston's evidence is that Mr Evans described Mr Fletcher as "fucking useless". Mr Evans evidence is that he said these words but they related only to Mr Fletcher's technical appreciation of the work.

106 Mr Fletcher denies that he was agitated during the events in the smoko room on 22 April. The evidence is against him on that point. Mr Chadwick says that Mr Fletcher did not appear to be himself. He says that he cannot understand why Mr Fletcher insisted on an answer from Mr Ryman and Mr Neale concerning additional overtime. The overtime sheet was on the table for all who were interested to sign up. It is the case that Mr Fletcher repeatedly asked Mr Ryman and Mr Neale whether they would do overtime even though he must have known of their concerns given the previous meeting with Mr Ryman, Mr Johnston and Mr Evans, and given that Mr Neale had already told Mr Fletcher where to put his overtime. Mr Fletcher says that he simply sat on the end of the table which Mr Ryman and Mr Neale were sitting at; Mr Chadwick says that he lent towards the men. Mr Chadwick says also that others left the room as they (meaning Mr Fletcher, Mr Ryman and Mr Neale) were getting into it. Mr Fletcher had invited the two men to "get it out on the table". I accept that Mr Fletcher was in a somewhat agitated state during the time he was in the smoko room and before any exchange with Mr Ryman and Mr Neale. The other evidence of somewhat strained relations is that Mr Fletcher had not worked with or through Mr Neale in the allocation of work for about three days, even though he was the leading hand on shift.

107 It is important then to understand the sequence of events in the smoko room. Prior to any invitation by Mr Fletcher to get matter out on the table Mr Neale said loudly that "there are too many lying dogs around here." Mr Neale admits in cross-examination that he was referring to Mr Fletcher. He also advised Mr Fletcher to stick the overtime up his arse. It is common ground that what followed, and after Mr Fletcher made the invitation, was further abuse of a personal nature toward Mr Fletcher by both Mr Ryman and Mr Neale. It is clear from the evidence of all three men that the bulk of the abuse came from Mr Ryman. Mr Fletcher is unsure if he also swore but does not deny doing so. There would appear to have also been some trading of insults in the form of referring to each other as liars.

108 The sequence of events that evening leads to the following conclusions in my view. There was some use of swear words in the room prior to any invitation to air grievances between the three men in question. Mr Neale uttered some words to the effect that there were too many lying dogs and told Mr Fletcher abruptly where to put his overtime. Both Mr Neale and Mr Fletcher gave evidence that Mr Neale told Mr Fletcher to shove his overtime up his arse. This was a response unprovoked by any action by Mr Fletcher and before Mr Fletcher made the invitation. The evidence differs as to the precise words which were said, or whether it was directed to Mr Fletcher or more generally. The evidence of Mr Fletcher is that it was directed at him. He says that Mr Neale said, "you are a fucking lying dog". Mr Neale in effect says that his statement was more general, but he accepts in cross-examination that he meant Mr Fletcher. Mr Carroll says that he did not see who made the statement, but Mr Fletcher was affected by the statement. The point is that the statement was delivered and it was meant for Mr Fletcher. He took it as such. The statement was made prior to any invitation by Mr Fletcher to get things out on the table and was prior to any alleged persistence or provocation by Mr Fletcher. The statements made by Mr Neale are statements of aggression and likely to offend. In my view, this point is obvious and Mr Neale's explanation of the meaning of the term "lying dog" confirms this view. Mr Neale then added to that repertoire of insults shortly thereafter. It is not a case of using colourful language in discussion. This is a mining site and it is common evidence that colourful language is used regularly. Mr Neale's comments are not just statements of annoyance or complaint. They are also abusive and aggressive, were directed at Mr Fletcher and were in the presence of his work colleagues. Mr Fletcher sought clarification as to whether the "lying dog" comment was meant to apply to him.

109 There is no justification to be found in the 5 'O' overtime issue or the "compressor oil" incident to warrant such unprompted abuse from Mr Neale. The evidence given, which I accept, regarding Mr Fletcher's level of agitation or uncustomary behaviour does not lead to any conclusion that Mr Fletcher somehow brought the abuse upon himself by his own actions in the smoko room, prior to the comments being delivered or at all. The respondent complains that Mr Neale's comments were made in front of fellow employees and shift members. This is so for the initial comments made by Mr Neale. However, the other witnesses do not give evidence that Mr Neale told Mr Fletcher where to put his overtime. Mr Fletcher and Mr Neale provided this evidence. The fact that Mr Neale addressed Mr Fletcher in this way in front of others is likely to be more offensive. Mr Fletcher does not give evidence to this effect though. Nevertheless, Mr Neale did not seek to address his grievances with Mr Fletcher separately; either in discussion with Mr Fletcher or through Mr Evans. This is not the behaviour to be expected of an employee who is operating as a leading hand.

110 I am mindful that previous incidences of swearing directed at Mr Fletcher by Mr Menner have gone unchecked. I am mindful also of Mr Evans' comment to Mr Johnston about Mr Fletcher being 'fucking useless'. This is not an excuse for Mr Neale to then freely abuse Mr Fletcher. Nor is the invitation by Mr Fletcher to get matters on the table an invitation to abuse. I can understand that such an invitation might involve conflict, some heated exchange even and swearing. The invitation was made once Mr Fletcher was alerted to Mr Neale being annoyed; it was not as a consequence directly of Mr Ryman stating that he wanted time to write out some grievances. There is another factor that relates to Mr Neale and that is the honesty he displayed to his employer and the Commission. I will deal with this fully in relation to Mr Ryman, but I consider that Mr Neale is covering for his workmate.

111 I wish to add some further comments which occurred to me during hearing and which have since arisen from a subsequent dispute as to the work and payment which Mr Neale is to receive. The penalty applied to Mr Neale is that he was stripped of his leading hand allowance and taken off shift work. I understand the first penalty and endorse it as appropriate. Mr Neale

deserved to loose his role and payment as a leading hand for his actions. It is the second part of the penalty that I do not understand; namely his removal from shift work per se, but with no additional financial penalty. My impression is that it has something to do with Mr Neale requiring an increased level of supervision. I may be wrong about this and I do not understand how this may result from being taken off shiftwork. The evidence rightly does not suggest that shiftwork is unsupervised and the modern communications used by the respondent would suggest otherwise. However, Mr Neale says that he is happy working in his current work area and does not seek to go back to A5 shift. What I do not understand is why Mr Neale cannot go back to shiftwork, but more importantly why in the context of this dispute he had to be taken from shiftwork. I separate this from any action to remove him temporarily from A5 shift, as given Mr Neale's actions, the tensions generated and the subsequent inquiries which have involved several workers, there may have been a need for a cooling off period. No other employee on A5 shift was concerned about Mr Neale or his work. Mr Fletcher was due to leave A5 shift. Mr Ryman was dismissed.

112 I make these comments also because I do not understand the actions of the respondent whereby they decided to remove Mr Neale from shiftwork per se, but pay him salary maintenance, put Mr Neale on trial for three months and then once Mr Neale has completed successfully the trial then remove this salary maintenance on the basis that no shiftwork positions exist. The evidence was that Mr Neale had caused no further problems since the smoko room incident. However, the trial had yet to be fully assessed and discussed with Mr Neale. Separate to this and in the context of a subsequent dispute I am aware that Mr Neale's assessment post trial was positive. It is difficult then to understand why many months after the smoko room incident, when Mr Neale has been placed under special scrutiny and assessment, and when he has performed at least adequately, he should then suffer a further financial penalty by the removal of this allowance. The fairness of these actions by the respondent is questionable and seems to impose a double and belated penalty upon Mr Neale after he had performed appropriately.

113 The respondent may complain that I have gone beyond this dispute in making such comments and without the opportunity for them to properly put their case. I would simply reiterate that on the evidence before me in this dispute I would endorse the removal of the leading hand allowance. I would endorse the transfer of Mr Neale from A5 shift, at least for a period of time. I would not have endorsed the removal of Mr Neale from shiftwork per se. One must see the incident in the smoko room and Mr Neale's actions with some balance. He escalated his abuse of Mr Fletcher after the invitation but in a way that was a repeat of his earlier comments. One should not excuse his actions but one could expect that given the situation, and given an environment where swearing was common, and given Mr Neale had sworn at and abused Mr Fletcher before the invitation, then having made the invitation Mr Fletcher was likely to have to face more as both sides got matters of their chests. Mr Neale in my view was not honest with his employer (or the Commission) in that he sought to protect his workmate. He was honest about his own behaviour before the Commission. The respondent when they applied the penalty decided to protect one part of Mr Neale's remuneration, subject to review. This review would appear to have produced positive results on the part of Mr Neale.

114 In the context of this dispute, I would dismiss the application as it relates to Mr Neale.

CONCLUSION – MR RYMAN

115 The letter of termination dated 4 May 2004 to Mr A Ryman from Mr G Knuckey reads:

> "Dear Tony
>
> I refer to the disciplinary inquiry conducted on 28 April and 3 May 2004 in relation to the incident on 22 April 2004.
>
> The disciplinary inquiry was conducted into allegations that you had verbally abused and intimidated your supervisor and physically assaulted him by coming right up to him, yelling in his face whilst making contact with him with your chest.
>
> In the inquiry you admitted verbally abusing your supervisor but claim that your abuse was justified.
>
> The inquiry has found that you abused and intimidated your supervisor and that that behaviour was totally unacceptable and unjustifiable. All employees have the right to be protected from such behaviour in the workplace.
>
> Further, the inquiry has found that notwithstanding your denial, you physically assaulted your supervisor in the maimer set out above. Such behaviour is also entirely unacceptable, and cannot be tolerated.
>
> In addition, the inquiry found you lacked candour in responding to the questions in the investigation and showed no remorse for even the behaviour to which you have admitted.
>
> In all the circumstances, including those referred to above, and having considered all the matters raised by you the Company considers that you are unsuitable for further employment and your employment is terminated in accordance with clause 9(3) of the Award with a payment in lieu of notice.
>
> Please contact HR Services to finalise the procedural aspects of the termination of your employment."

116 I do not go to the issue of whether Mr Ryman verbally abused Mr Fletcher. Clearly on his own evidence he did and engaged in this more so than Mr Neale. I do not consider that Mr Fletcher's invitation or his own actions following the invitation warranted such excessive behaviour. Nor do I consider that the matters of conflict prior to 22 April 2004, namely the overtime, compressor and alleged absence from shift incidents, warranted such abuse by Mr Ryman. However, these actions alone could not justify his dismissal. I will therefore concentrate on the allegation of physical assault. On the evidence of Mr Fletcher this occurred late in the exchange and just prior to his departure from the room.

117 Counsel for the applicant in closing submissions says as follows:

> "46. It is respectfully submitted that the Commission cannot be satisfied that the alleged assault on Fletcher by Ryman occurred for the following reasons.
>
> 47. Fletcher's account of the circumstances of the assault, particularly what he says precipitated the assault (or what he says Fletcher responded to) is improbable. It is improbable that Ryman would have reacted to Fletcher's question as to who would phone Evans about Ryman's grievances by attacking Fletcher in the way alleged or at all.
>
> 48. Fletcher is about 3 ½ inches taller than Ryman and so their noses could not have touched. It is improbable that Fletcher would have faced down if he were being screamed at, chested and pushed backwards. Ryman is a good deal older than Fletcher and has a back problem.
>
> 49. Fletcher saw Merrylees immediately after the event and told Merrylees, by indicating with his hand, that Ryman was 15 cm away from him. Merrylees did not say he saw spit on Fletcher's face or that Fletcher wiped his face.
>
> 50. The smoko room door was open during the whole time of the alleged assault and all Merrylees heard was "I just f'g told you", despite that Fletcher says Ryman continued to scream a tirade at him at the top of his voice while chesting him and being in his face.
>
> 51. It is highly unlikely that Fletcher would have told Ryman to go with him to his office if the assault had occurred and/or if he was shaking, felt threatened, intimidated and "just wanted to get out of there".

52. If the assault had occurred or the exchange taken place as Fletcher alleged, it is highly unlikely that Ryman would have been cheerful and casual immediately thereafter, and up to the time at the disciplinary inquiry on 28 April that that allegation was put to him for the first time. This is all the more so given the evidence that such conduct was out of character for Ryman and Fletcher's evidence that, after Neale intervened, Ryman turned white and slumped into his chair.

53. All of the witnesses, some of whom have known Ryman for a verylong time, including Evans, said they had never known Ryman to be an aggressive person or to have ever been involved in an altercation.

54. It is submitted that Fletcher had a particular dislike for Ryman in particular because: He saw Ryman as the ringleader of a crew for which he was not capable of being a competent foreman; he said they took advantage of his inexperience; he was ridiculed at the shift start up meeting about the compressor incident; Ryman had previously called him useless and a liar in the presence of Johnston and Evans and repeated this during the incident; Ryman was planning to write a grievance about the way Fletcher handled the overtime incident; Ryman had already complained to Evans and caused Evans to take certain actions including speaking to Fletcher about the overtime incident. If Fletcher was in the state Merrylees and Evans say he was after he walked out of the smoko room, it was probably because he felt humiliated at the whole exchange and Ryman had screamed "I just f'g told you", etc."

118 I make nothing of the difference in height of the two men. Mr Fletcher is not that much taller than Mr Ryman so as to make it improbable that their noses could have touched. Particularly as the allegation is that Mr Ryman was chesting Mr Fletcher and hence pushing forward. Similarly I make nothing of the suggestion that Mr Ryman could not have physically assaulted Mr Fletcher as he was casual and attending to restocking drinks shortly thereafter. Mr Ryman's own evidence displayed considerable annoyance and heat in the exchange.

119 The evidence of Mr Merrylees was unchallenged. Indeed Mr Merrylees was a good witness. He states in the statement he made on 23 April [Exhibit R11] as follows:

> "On the 22/4/04 at 6:30pm I was sitting in the foreman's office waiting for a lift home. I heard voices being raised in the smoko room where Greg Fletcher was having his start up meeting, by this time Marc Ryan, Gordon Carroll, and Clayton Chadwick and Zabar had all been seen by myself to leave the room. I heard Anthony Ryman yell at the top of his voice "I just fucken told you".
>
> After this the voice of Glen Neale was heard by myself at a lower level than Anthony but not to the level to hear what he was saying. At the end of this Greg Fletcher came back into the office where I was sitting and I said to him. What was that all about he replied "That that was it he has gone to far this time. Anthony was this close to me yelling" this was as he showed me with his hand how close he was.
>
> Greg Fletcher was upset and very shaken by what ever happened in that room when he returned. The tone of his voice was the way I could tell he was very upset. After he made the phone call to Rob Evans he then went on to tell me that Anthony was that close that his spit was getting his face as he yelled and how he tried to move him backwards with his chest. I just spoke to him and calmed him down."

120 On Mr Merrylees account, Mr Fletcher, having come directly from the smoko room, was visibly upset by something to the point where Mr Merrylees thought Mr Fletcher might cry. This is the most direct and immediate evidence of Mr Fletcher's state directly following the incident. It is supported in part by Mr Neale's evidence. It is the evidence on behalf of the applicant that Mr Fletcher was subjected to strong language and challenge from Mr Menner on several occasions. There is no suggestion that he was adversely affected by this. In fact, no action was taken by Mr Fletcher or anyone else. It is then probable that what occurred in the smoko room is substantially more severe than the exchanges which had taken place between Mr Menner and Mr Fletcher. Mr Fletcher, as I have found, was most likely annoyed on 22 April 2004. He was not himself. However, he went from that state to one whereby he was shaking and on the verge of tears in a fairly short period of time. His initial response to Mr Neale was muted. He did not get angry, he asked Mr Neale and Mr Ryman to get the matter on the table. There has been some evidence as to how Mr Fletcher approached them. This approach was persistent but not aggressive; he sat on the edge of the table at least a metre from them (given the demonstrations in Court) and encouraged them to air their thoughts.

121 I compare this to the clear and spontaneous annoyance of Mr Neale. His outburst towards Mr Fletcher unprovoked was to tell him to shove his overtime and in effect call him a lying dog. Mr Ryman in turn was clearly very annoyed about the overtime issue and had been so for a number of days. In my view, he baited Mr Fletcher with his comment about the compressor. He readily resorted to a heated exchange of abuse towards Mr Fletcher, and repeated comments several times. Even his own demonstration in court of how he reacted to the comment about who would contact Mr Evans was one of complete exasperation and I consider anger. He says he did not get out of his chair. I consider this improbable given the extent of frustration and resentment he held toward Mr Fletcher at that time. Mr Neale says that Mr Ryman was calm. Mr Ryman's own evidence and demonstration in court about how he behaved that night contradicts Mr Neale's evidence. I find that Mr Fletcher's version of events to be more consistent and probable than that of Mr Ryman.

122 It is the evidence of Mr Merrylees that he heard voices being raised in the smoko room after Mr Carroll and others had left. He saw them leave the room. He later heard Mr Ryman yell out at the top of his voice "I just fucking told you". This seemingly was Mr Ryman's response to Mr Fletcher, late in the exchange in the smoko room, in response to who would contact Mr Evans. On the evidence of Mr Fletcher this preceded the assault. Mr Merrylees then says he heard Mr Neale "at a lower level than Anthony's but not to the level to hear what he was saying". Mr Fletcher then entered the office where Mr Merrylees was sitting. Mr Fletcher says that Mr Neale sought to intervene to calm Mr Ryman. The alleged assault was said to have occurred nearer to the door of the smoko room, rather than at the table. It is probable then, in my view, that Mr Neale was more audible to Mr Merrylees at that time, albeit he did not hear what he actually said. He understandably heard clearly Mr Ryman as on Mr Ryman's evidence he yelled out very loudly. The importance of this is that in the sequence of events for Mr Merrylees to hear Mr Neale, it is probable that Mr Neale got out of his chair. This would support Mr Fletcher's account of events than that of Mr Ryman and Mr Neale.

123 Mr Merrylees says that after Mr Fletcher spoke to Mr Evans, Mr Fletcher then told him that Mr Ryman "was that close that his spit was getting his face as he yelled and how he tried to move him backwards with his chest". This is consistent with Mr Fletcher's account of the events. There has been no suggestion that Mr Merrylees somehow conspired with Mr Fletcher to support a particular version of events. My impression of Mr Merrylees' evidence is that he gave a frank and matter of fact recall of the events as he knows them to be. In short, he reported what he saw, what he heard and what Mr Fletcher told him shortly after the dispute in the smoko room. It strikes me that, if Mr Merrylees' account is to be accepted, which I do accept, and Mr Ryman's account is to be accepted, which I do not accept, then Mr Fletcher must be a very good actor, to appear so distressed, and a very quick thinking liar to have made up the events. Either that or he conspired to set up Mr Neale and Mr

Ryman. This last scenario is so highly improbable that it can be readily discounted. It would have relied on Mr Fletcher knowing that he could be alone in the smoko room with Mr Neale and Mr Ryman. The earlier scenario is also in my view improbable as I simply did not form such a view of Mr Fletcher, that is of a quick thinking liar. My difficulty with his evidence lay more in its vagueness or forgetfulness.

124 There is no evidence that Mr Fletcher was out to specifically get Mr Ryman. He had reported that Mr Ryman and Mr Neale together had recently gone missing on shift. He had not earlier complained about Mr Ryman's behaviour towards him in the meeting with Mr Johnston and Mr Evans. If anything he had displayed some concern about Mr Neale, not Mr Ryman, by not allocating work in conjunction with him as the leading hand.

125 I have considered closely the possibility that, as Mr Ryman was continuing to complain, was intent on writing further grievances, and his abuse of Mr Fletcher was the more severe, that Mr Fletcher then sought to get Mr Ryman dismissed. As stated, it is highly improbable that this could be pre-mediated. Therefore, it would have been a spontaneous response to Mr Ryman's abuse. In other words, Mr Fletcher would have had to have reached the point where enough was enough and so decided to lie and say Mr Ryman, but not Mr Neale, had physically assaulted him. Mr Fletcher had earlier simply wanted to know if he needed to know anything about the grievances; did they relate to him or the work. His invitation to get things on the table was really off the back of Mr Neale's comments. I can point to nothing specific which would lead me to a conclusion that Mr Fletcher wanted to get Mr Ryman.

126 The more probable explanation is that Mr Ryman lost control during a heated and abusive discussion which on his own evidence had escalated and where he became immensely frustrated by Mr Fletcher. This is not to say that Mr Ryman was a violent or physical man. The evidence is against such a finding being made. However, it is possible and I consider probable, that Mr Ryman simply lost control momentarily and came at Mr Fletcher to reinforce his poor opinion of Mr Fletcher. I find that Mr Ryman physically assaulted Mr Fletcher as alleged by Mr Fletcher.

127 There is an issue as to whether the penalty applied to Mr Ryman is excessive given his otherwise unchallenged record as a Tradesman, his thirty or more years of service and the fact that this is an isolated incident. There is no record of similar physical or verbal abuse or a warning to this effect. There is evidence that Mr Ryman swore liberally and had used such language in relation to Mr Fletcher in the days leading up to the incident of 22 April 2004, and in one instance accused Mr Fletcher of lying. This was at the meeting with Mr Evans concerning overtime. As I have indicated I accept that all employees on the A5 shift were on notice that abusive behaviour toward supervisors was not acceptable.

128 In judging whether the penalty of dismissal was unfair the test to be applied is that in *Undercliffe* of a fair go all round. The issue for the Commission is also whether the employer has acted in a manner so as to abuse that right, hence warranting the interference of the Commission. As indicated, I do not find there to have been any procedural unfairness in the inquiry. Whilst there are matters which may have been handled slightly differently all relevant persons had the opportunity to put their version of events, to know the matters against them and to put any issue or matter before the decision maker that may have assisted their case.

129 The physical assault is made worse by the barrage of abuse Mr Ryman directed at Mr Fletcher, however, I do not consider that the verbal abuse alone would have justified his dismissal. Mr Ryman's level of abuse was worse than that of Mr Neale. Mr Neale was not dismissed and nor, in my mind, could the respondent have justified terminating Mr Ryman' services if he had not also physically abused Mr Fletcher. His work record alone would not have justified such a penalty. His work record does not though protect him from the much more serious circumstance of physical assault upon Mr Fletcher. The physical contact was threatening but did not cause any physical injury. In that sense one might be tempted to downplay its seriousness. That would be the wrong course in my view. It is a physical assault and needs then to be treated very seriously, whether Mr Fletcher had been an employee or supervisor. Added to this is the fact that Mr Ryman has not been honest with his employer about his actions, has shown no remorse for his actions, has offered no apology to Mr Fletcher either immediately, shortly thereafter or to this date. The latter point is important in my view. A momentary loss of control may cause less damage to the working relationship if a sincere and fairly immediate attempt at contrition is shown. This did not happen and it further damages the trust required of the employment relationship.

130 I am reinforced in my view of the seriousness of what some might view as a minor assault by a decision of the Industrial Appeal Court. Mr Ryman's circumstances are analogous to that of Mr Barron in the matter of *The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch v Dampier Salt Operations Ltd* 80 WAIG 4. Mr Barron was a Mechanical Tradesman and had been employed by Dampier Salt for 18 years. He was respected as a good tradesman, with a great store of knowledge and was regarded as being difficult. He was alleged to have assaulted Mr Cockrill, the maintenance superintendent, and was dismissed. The union maintained that the dismissal was unfair and the allegation was a conspiracy by management to get rid of Mr Barron as he was an active union member who passionately pursued his rights. The alleged assault was that Mr Barron had screwed up a piece of paper containing a roster, grabbed Mr Cockrill's open neck shirt by the collar and thrust the roster down his front. In doing so, he made contact with Mr Cockrill's chin and scratched his neck. Mr Barron was said to have immediately afterwards indicated that he should not have done that. Mr Barron in turn said that he simply screwed up the roster and dropped it on the floor. The Commission believed Mr Cockrill, not Mr Barron and dismissed the application. I will recite several passages from the decision as they display both the reasoning and circumstances of Mr Barron's case, which has relevant similarities to Mr Ryman's actions.

131 The Court dismissed the appeal and relevantly, for this matter, stated:

> "There can be no doubt that, on the basis of the Senior Commissioner's findings, Mr Baron committed an assault upon Mr Cockrill - see the definition of the expression in s 222 of the *Criminal Code*"

132 The Court went on to say:

> "If the assault had occured as Mr Cockrill had alleged, then, as the Senior Commissioner indicated, the appellant would be hard pressed to say that the respondent had abused its right in the normal industrially accepted sense to terminate Mr Baron's employment. He found that Mr Baron had been given a full opportunity to be heard and he accepted the evidence of Mr Cockrill."

133 The Court then says as follows:

> 13 The appellant now appeals to this Court against the decision of the Full Bench on the ground that the Senior Commissioner's discretion miscarried in that he failed to have regard to any relevant factor, apart from the fact of the assault itself. The relevant factors to which, it was claimed, he should have had regard, were specified as follows:
>
> (a) the immediate acknowledgment of fault by Mr Baron;
>
> (b) the extremely minor nature of the assault;
>
> (c) the fact that the assault was incidental to the stuffing of the roster down the shirt rather than intentional;

(d) Mr Baron's long and unblemished service as a competent tradesperson;

(e) Mr Baron's exemplary character;

(f) whether there was any other appropriate way with which the misconduct should have been dealt.

14 Mr Baron obviously exhibited anger and frustration during the assault. The evidence of Mr Kibble was that Mr Baron was shaken by the incident. It was an assault which took place at a time when Mr Cockrill was endeavouring to resolve with Mr Baron his entitlement to days off, a matter which had apparently been the subject of some previous disagreements. There is nothing at all to suggest that Mr Cockrill was acting officiously or provocatively or that he was in any way antagonistic towards Mr Baron, although Mr Baron had in fact walked out of his earlier meeting with Mr Perry and Mr Cockrill. The contention that a failure to have regard to what was described as the immediate acknowledgment of fault by Mr Baron contributed to an unjust and unreasonable decision cannot possibly be sustained, having regard to Mr Baron's denial of any such acknowledgment of fault and his further denial that the incident had occurred as Mr Cockrill, whose evidence was believed by the Senior Commissioner, had stated. Mr Baron was also unco-operative in failing to respond to repeated requests for his side of the story.

15 The assault cannot fairly be characterised as being of an extremely minor nature. This was an assault upon an officer of the respondent and had the effect of undermining his authority. The claim that the assault was incidental to the stuffing of the roster down the shirt rather than intentional is specious and devoid of merit. It was an act done in anger and by way of insubordination in relation to a matter for which Mr Cockrill was fully entitled to require an explanation. The President was correct in saying that the act was a serious act, not lightly to be condoned or considered to be trivial - see *Qantas Airways Limited v Cornwall* (1998) 83 IR 102, at 110, and see also Whincup M, "The Right to Dismiss" (1986) at 90 - 91.

16 Whilst it is true that Mr Baron had a good reputation in the general community, as demonstrated by the references which were submitted on his behalf, and notwithstanding his acknowledged capabilities as a tradesman, there were some not insubstantial questions associated with his attitude to his work. In my view, on the facts as found, the respondent was entitled to take the action which it did and it was not required to seek some other way in which Mr Baron's misconduct might have been dealt with, particularly having regard to his denial of the event having occurred. I do not consider that the decision of the Full Bench was erroneous in law."

134 In my view, the similarities to this matter are obvious. The actual allegations of assault are different but both involve a limited degree of physical contact. In Mr Ryman's case the contact was not accidental. On Mr Fletcher's evidence, which I accept in preference to that of Mr Ryman or Mr Neale, Mr Ryman got out of his chair and came toward Mr Fletcher with fists clenched and proceeded to chest him. His actions lacked a spontaneity, proximity or accidental contact.

135 In my view there is much in this dispute to compare with the matter that was before the Court. I consider that Mr Ryman's actions were at least as serious if not more. I do not then, for the reasons expressed, consider the penalty applied to Mr Ryman to be unfair or an abuse of the employer's right to terminate. I would therefore dismiss the application.

2004 WAIRC 13530

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	BHP BILLITON IRON ORE
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	MONDAY, 6 DECEMBER 2004
FILE NO	CR 118 OF 2004
CITATION NO.	2004 WAIRC 13530

Result	Application dismissed
Representation	
Applicant	Mr M Cox of Counsel
Respondent	Mr A D Lucev of Counsel and with him Mr R Kelly of Counsel and later Ms P Smith of Counsel

Order

HAVING heard Mr M Cox of Counsel on behalf of the applicant and Mr A D Lucev of Counsel and with him Mr R Kelly of Counsel and later Ms P Smith 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 13645

UNFAIR DISMISSAL OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT** **-v-** MTA DEMOLITIONS PTY LTD **RESPONDENT**
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	TUESDAY, 26 OCTOBER 2004
FILE NO.	CR 160 OF 2004
CITATION NO.	2004 WAIRC 13645

CatchWords	Termination of Employment – Unfair Dismissal – Principles Applied Contractual benefits wages and Overtime Unpaid – Principles Applied *Industrial Relations Act 1979 s27 (1) (d), s.44*
Result	Unfairly dismissed. Compensation awarded.
Representation	
Applicant	Ms K. Scoble of Counsel appeared on behalf of the Applicant
Respondent	No appearance for the Respondent

Decision
(Ex Tempore as edited by the Commissioner)

1 This is a matter before the Commission by virtue of a process which is established under *Industrial Relations Act 1979* (the Act) emanating in s.44. That process started with a notice of application by the Construction, Forestry, Mining and Energy Union of Workers (the Union) on the 5th of August 2004 when the union applied for a compulsory conference pursuant to s.44.

2 The subject matter of the conference dealt with Lewis Flood who is said to have commenced work on or about the 5th of May 2004 with MTA Demolitions Pty Ltd (the Respondent). His employment was terminated on or about the 30th of July but it may have been on the 2nd of August. The precise date is not germane to the determination of the matter; suffice to say his services were terminated. The Union maintain that the circumstances of the termination were unfair. The matter was not solved during conferences held on the 30th of August 2004 and on the 8th of September 2004 and it was referred for hearing and determination pursuant to s.44(a).

3 The matter referred is described in the schedule attached to the Memorandum for Hearing and Determination in the following way.

> *"The Construction, Forestry, Mining and Energy Union of Workers*
>
> *(the CFMEUW) claims their member, Mr Lewis Flood, was dismissed by the respondent on the 30th of July 2004 and that the dismissal was unfair. The CFMEU seeks compensation in lieu of reinstatement.*
>
> *MTA Demolitions Pty Ltd refutes the claim."*

4 The transcript of proceedings held on 26th October 2004 set out the reasons why the Commission has decided under s.27 (1)(d)to hear and determine the matter in the absence of the Respondent. The Commissioner heard evidence from Lewis Flood. He confirmed that he had been employed by the Respondent following an approach by an employment service on his behalf. He had been interviewed by Michael Gallucio. Mr Flood has been involved in the industry for a long time and he has 30 years experience as an excavator driver. According to Mr Flood he was to be paid $20.00 per hour plus sick leave and annual leave. This is confirmed by Exhibit S1 which is a certificate signed by Michael Gallucio that Lewis Flood was employed by the Respondent and he was earning $800.00 per week gross.

5 The evidence of Mr Flood is that after the first two pays, the payments by the Respondent became irregular. He was so concerned about the situation that he served a letter of demand upon the Respondent on or about the 23rd of July 2004. He drew to the attention of the Respondent that he was owed monies and he had not received compensation forms for a claim formedical expenses as a result of an accident that he had suffered at work. He gave notice that if the moneys that he said were owing to him were not paid he would take action to recover them. He later took that action by drawing the attention of his claim to the Union and by informing the Department of Consumer Affairs and Employment.

6 The Respondent, according to the evidence of Mr Flood, did make some payments but by the 26th of July there was still $700.00 owing. He drew the shortfall to the attention of the Respondent in a letter dated the 26th of July. He also copied that letter to his Union. In addition to the $700.00, he informed the Respondent there was still money owing for overtime.

7 It appears this further demand was a catalyst for action by the Respondent. According to Mr Flood, Mr Gallucio took him to task, told him he was a trouble maker and castigated him for going to his Union. Eventually the dissatisfaction of the Respondent with Mr Flood manifested itself either on the 30th of July or on the 2nd of August by Mr Gallucio telling Mr Flood to get off his property. This Mr Flood took to be a dismissal.. At that time Mr Flood says he was still owed $700.00 for wages plus an amount of money for overtime which he put at $300.00, making $1000.00 in wages still owing to him.

8 Since this time, Mr Flood says he has attempted to obtain work but because of his medical condition he has been unable to do so. He has not received any payments for worker's compensation but there are worker's compensation proceedings on foot (Exhibits S4 and S5). For the purpose of this case these exhibits do no more than give corroboration to Mr Flood's contention that he was unable to work during the period between the time he was dismissed on the 2nd of August and now I regard them as a support for that contention, not as any indication that he has a viable worker's compensation claim or that he had been paid anything for compensation.

9 I have had the opportunity to see and hear Mr Flood give his evidence.. Even though he was not cross-examined there is nothing which indicated to me that he is not a witness of truth or that his evidence should be disbelieved. He seemed to be a conscientious person, trying to relate his story from the best of his memory. Because of that and because of his general demeanour I have reached the conclusion that he is a credible witness and his evidence ought to be accepted.

10 The Commission is required to apply the tests set out in the *Undercliffe Nursing Home v Federated Miscellaneous Workers Union (1985)* 65 WAIG 385. An employer, although having the right to hire and fire should not abuse that right and that in the exercise of a termination there should be a fair go all round.

11 On the evidence, such as it is, there has not been a fair go all round. From early in the employment relationship the employee was asking the employer to pay him the money for his labour to which he was entitled. The evidence is that the money was not paid and when it was paid it was not fully paid. The Respondent also took issue with Mr Flood seeking support from his Union to pursue the Respondent to pay the monies it rightfully should have paid. This culminated in the employer throwing Mr Flood out as it were. He was dismissed and told to leave the property merely because he had asked for entitlements under his contract of employment. Such conduct must be unfair. The unfairness was compounded by the fact that the dismissal was summary. Summary dismissal is justifiable when there has been misconduct of the employee that goes to the root of a contact of employment. That has not occurred in this place. All Mr Flood was doing was asking for the wages to which he was entitled under his contract of employment and it was inappropriate, unfair, and harsh of the employer to dismiss for that reason.

12 I find that the applicant was unfairly dismissed by the Respondent. The history of the matter, as I have outlined earlier in these Reasons for Decision, is that the Respondent appears as though it is not trading at the moment although there is no proof that the respondent has gone out of business. What it does mean though is that it is impossible to order reinstatement and therefore reinstatement would not be viable. I do intend to order compensation. The compensation should be assessed at the rate of $800.00 per week gross between the 2nd of August and today's date, which is the 26th of October.

13 There will be a further order, for wages in the sum of $1000.00; this Commission being satisfied that sum has not been paid. Mr Flood will receive a payment for wages lost between the 2nd of August and the 26th of October without deduction the Commission being satisfied that when he was able to work he attempted to mitigate his loss and then later when it was apparent that he was unable to work because of soft tissue injuries there should be no deduction for that period.

14 Orders will issue that Lewis Flood was unfairly dismissed; reinstatement is unavailing. Compensation of $9600.00 for loss will be awarded. A sum of $1000.00 will be paid in addition as a contractual benefit unpaid at the time the employment relationship ended.

2004 WAIRC 13678

UNFAIR DISMISSAL OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	MTA DEMOLITIONS PTY LTD **RESPONDENT**
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	THURSDAY, 16 DECEMBER 2004
FILE NO/S	CR 160 OF 2004
CITATION NO.	2004 WAIRC 13678

Result Unfairly dismissed. Compensation awarded

Order

HAVING heard Ms K. Scoble of Counsel who appeared on behalf of the Applicant and there being no appearance for the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

1. THAT Lewis Flood was unfairly dismissed and reinstatement is unavailing.
2. THAT compensation of $10,600.00 for loss and contractual benefit will be awarded.

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

2004 WAIRC 10880

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	SNC-LAVALIN (SA) INC & OTHER **RESPONDENTS**
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 15 MARCH 2004
FILE NO/S	CR 13 OF 2004
CITATION NO.	2004 WAIRC 10880

Catchwords	Industrial Law (WA) – Right of authorised representative to enter employers' premises for discussions with employees – the nature of the right of entry – definition of "purpose" – dispute relating to refusal of employer to allow entry to the site – *Industrial Relations Act* 1979 s 6(ab), s 6(ad), s 6(af), s 6(d), s 6(f), s 44(9), Div 2F, Div 2G, s 49H, s 26(1)(b), s 27(1)(a), s 27(1)(q), s 27(1)(r), s 49I, s 49J, s 49N, *Industrial Relations Commission Regulations 1985* (WA), *Workplace Relations Act 1996* (Cth) s 170VR, s 285B, s 285C, Div 11A, s 170VJ(1), s 170VJ(2), *Commonwealth Constitution* s 109, *Judiciary Act 1903* (Cth) s 78B, *Interpretation Act 1984* (WA) s 18.
Result	Application upheld. Declaration issued.
Representation	
Applicant	Mr T Dixon of counsel and with him Mr T Kucera of counsel
First Respondent	Mr D Parker of counsel and earlier Mr T Caspersz of counsel
Second Respondent	Mr M Hotchkin of counsel

Reasons for Decision

1 The present matter is one referred by the Commission pursuant to s 44(9) of the Industrial Relations Act 1979 ("the Act") for determination by arbitration. The subject matter of the dispute relates to right of entry of accredited representatives of the applicant, to premises at the Ammonia Plant construction site on the Burrup Peninsula in the Northwest of the State. Whilst the notice of application initiating these proceedings cited as respondents SNC - Lavalin (SA) Inc ("SNC"), BGC Contracting Pty Ltd and Shamrock Holdings Pty Ltd trading as Killarnee Formwork ("Killarnee"), the proceedings as against the second respondent, BGC Contracting Pty Ltd were later discontinued by order of the Commission.

Background

2 The matter in dispute is set out in the schedule to the memorandum of matters for hearing and determination under s 44 of the Act, which relevantly provides as follows:

"1. The applicant says that it is in dispute with the respondents at the Ammonia Plant Construction Project (the site) located in the North West of the State in relation to the applicant's officials' rights of entry to the site, to hold discussions with employees and to inspect areas where persons who are members of or eligible to be members of the applicant are employed.

2. The applicant says that on 17 January 2004 two of its officials attempted to enter the site to hold discussions with construction workers employed by BGC and Killarnee Formwork. The officials contacted SNC-Lavalin Pty Ltd prior to attending the site and advised it of its intentions to enter the premises to hold discussions with BGC and Killarnee Formwork employees.

3. The applicant says the officials were refused entry to the site by a security guard employed by SNC-Lavalin Pty Ltd. The officials were advised that they were not entitled to exercise right of entry powers pursuant to the provisions of either the Act or the Workplace Relations Act 1996 (Cth) despite the fact that SNC-Lavalin Pty Ltd had previously recognised the rights of the same two applicant officials to exercise rights of entry under the provisions of the Act.

4. The applicant contends the issue giving rise to the dispute has the potential to cause a serious breakdown in industrial relations between the parties.

5. The applicant seeks the following relief:

(a) that until all matters referred in the herein application are determined, the respondents should allow the authorised representatives of the applicant entry onto the Ammonia Plant Construction Project to exercise their rights of entry under the Act in relation to relevant employees of Shamrock Holdings Pty Ltd trading as Killarnee Formwork.

(b) a declaration that by reason of the terms of Division 2G of the Act the respondents are not entitled to deny right of entry to an authorised representative of the applicant, in possession of the requisite authority, exercising rights pursuant to Division 2G of the Act in respect of relevant employees working on the premises of the respondents.

6. The respondents object to and oppose the applicant's claim."

3 Given the nature of the dispute and the issues raised by the respondents, the Commission directed the respondents, pursuant to the terms of the Industrial Relations Commission Regulations 1985 ("the Regulations"), to file and serve notices of answer setting out with particularity, their contentions in relation to the claims made by the applicant. The respondents duly did so, which save for one material distinction, were in essentially the same terms. For present purposes, it may be helpful to set out the notices of answer filed by the then third respondent which is as follows:

"1. Killarnee Formwork does not control the site.

2. All employees on the site are parties to AWAs pursuant to part VID of the Workplace Relations Act 1996 ("the Federal Act"); and

(a) By virtue of Section 170VQ(1) of the Federal Act, the AWA excludes the operation of any award that might otherwise apply;

(b) By virtue of Section 170VQ(4) of the Federal Act, the AWA operates to the exclusion of any State Award or State Agreement that would otherwise apply to the emlployees' employment;

(c) By virtue of Section 170VQ(1) of the Federal Act, an AWA prevails over conditions of employment specified in a State Law, to the extent of any consistency;

(d) The only matters in an AWA which are subject to the provisions of a State Law are those prescribed by Section 170VR(2) of the Federal Act, which do not include rights of entry under the State Law;

(e) Any right of entry provided by the Industrial Relations Act 1979 ("the State Act") is a term and condition of employment and is thereby excluded.

3. Alternatively, the right of entry provisions under the State Act are inconsistent with the provisions of Sections 285B and 285C of the Federal Act and are invalid to the extent of that inconsistency.

4. Alternatively, if Section 49H of the State Act applies to give any right of entry to an authorised representative of the Applicant, it is conditional upon such entry being for the purpose of discussions with employees who wish to participate in those discussions and the Applicant:

(a) Failed to inform those with power to permit entry onto the site which employees, if any, wished to participate in any discussions with such authorised representatives; and

(b) Has failed to identify any such employees with such a desire so as to permit entry onto the site for the relevant purpose."

4 The notice of answer filed by SNC as the Commission has already observed, was in essentially the same terms as that above, save for the fact that it further avers at par 1 "SNC - Lavalin Australia Pty Ltd does not employ any person on the site who does work that falls within the eligibility rule of the applicant."

5 At all material times for the purposes of proceedings before the Commission, including matters raised at s 44 compulsory conferences and interlocutory applications, about which further will be said below, the central contentions in dispute, raised by the respondents, to the applicant seeking a right of entry pursuant to s 49H of the Act, were the effect of Australian Workplace Agreements ("AWAs") said to be in existence on the site, made under the Workplace Relations Act 1996 (Cth) ("the WR Act"). It was contended that the operation of s 170VR of the WR Act excluded the operation of Division 2G of the Act, dealing with right of entry. Secondly, was the issue of an alleged inconsistency between the provisions of ss 285B and 285C of the WR Act and Division 2G of the Act, arising under s 109 of the Commonwealth Constitution. Finally, the respondents agitated the issue of the proper construction of s 49H of the Act, as set out in the notices of answer. No other contentions, by way of defences to the applicant's assertion of right, were ever raised by the respondents at any stage of the proceedings.

6 Importantly also, it is to be noted that the respondents in their notices of answer, save for SNC, admitted that there were employees of the respondents on the site, however those employees were parties to AWAs made under the WR Act, as alleged.

7 The substantive application was listed for hearing and determination in Karratha on 23 February 2004. The notice of hearing was sent to the parties, bearing the stamp of the Registrar of the Commission dated 12 February 2004. The Commission listed the matter for hearing and determination in Karratha, because the Commission was informed that it was likely that evidence would be called from at least some of the parties to the dispute, and the Commission itself formed the view, that inspections of the relevant site may be helpful in the resolution of the dispute by the Commission.

Perth Proceedings

8 Somewhat surprisingly, on 17 February 2004, solicitors for the then second and third respondents, Messrs Hotchkin Hanley by letter, informed the Commission that an application had been filed in the Federal Court of Australia Western Australia District Registry, for declaratory and injunctive relief under the terms of the WR Act. Additionally, was a claim for an interlocutory injunction, in the nature of an anti-suit injunction, to prevent the proceedings before this Commission taking place in Karratha. Because of this application in the Federal Court, the solicitors for the then second and third respondents, sought that these proceedings before this Commission be stayed, or alternatively adjourned. Given the proximity to the hearing date listed in Karratha, the Commission convened proceedings urgently, to hear the application brought by the then second and third respondents, which was subsequently joined by the first respondent.

9 In those proceedings, a number of submissions were made by the then second and third respondents, joined by the first respondent, who was at that time represented by Mr Caspersz of counsel.

10 Firstly it was submitted that because a constitutional issue had arisen under s 109 of the Commonwealth Constitution, then that matter was better to be heard and determined in the Federal Court. There were submissions about the applicability of s 78B of the Judiciary Act 1903, in relation to this issue. Some reference was made to proceedings before an Industrial Magistrate in *The Construction, Forestry, Mining and Energy Union of Workers v Woodside Energy Limited & CBI Constructors Pty Ltd* 2003 WAIRC 07369 *("the Woodside case"*) and concurrent proceedings on foot between those parties in the Federal Court. There were also general submissions in relation to alleged cost savings if proceedings in this Commission were stayed, pending the outcome of any proceedings in the Federal Court.

11 The application to stay the proceedings before the Commission was strongly opposed by the applicant. Counsel for the applicant, Mr Dixon made a number of submissions including that the Commission was the best forum for the resolution of all matters in dispute. Furthermore, counsel submitted that the subject matter of the proceedings was an industrial dispute requiring resolution by the Commission, using all of its powers under the Act. He submitted that the Federal Court proceedings could not do the same. Other submissions were made in relation to distinguishing the *Woodside case*, given that both sets of proceedings in those matters were enforcement proceedings. Furthermore, counsel submitted that there was not the identity of parties in the proceedings before the Commission and before the Federal Court, as was the situation in the *Woodside case*. The general submission of the applicant was that the application to stay, alternatively adjourn these proceedings, was simply an exercise in forum shopping and a belated attempt to delay the ultimate determination of the issues before the Commission.

12 After considering the submissions of counsel for the parties, the Commission was not to any extent persuaded that it ought stay, alternatively adjourn these proceedings because of the application in the Federal Court, for reasons to be published in due course. The Commission came to that conclusion for a number of reasons. First, the constitutional issue said to be agitated by the notices of answer filed by the respondents, giving rise to consideration of s 109 of the Commonwealth Constitution, is a matter quite often raised in arbitral proceedings in industrial courts and Commissions given the federal scheme and was not in any sense unique. Second, and in any event, significant State issues arise in the application, concerning the construction of relevant provisions of the Act, not capable of being determined by the Federal Court. Third, matters of fact may need to be established, in particular the existence and extent of coverage of AWAs under the WR Act, and their operation and effect. This was facilitated by the Commission listing the proceedings in Karratha so such evidence could be led conveniently by the parties. Fourth, the Commission considered the circumstances in the *Woodside case* as being distinguishable. There is not identity of parties in both sets of proceedings in these matters and that both of the proceedings in the *Woodside case* were prosecution proceedings. More particularly, up until as late as 17 February 2004, only days before the hearing listed in Karratha was to commence, no issue was taken by the respondents as to the Commission being the proper forum in which the issues in dispute should be heard and determined.

13 In light of the lateness of the application, and all of the other factors, the Commission concluded it would be positively against the public interest, for the grant of a stay or an adjournment.

14 Given that matters had been raised and seemed would be pressed, under s 109 of the Commonwealth Constitution, the Commission directed that that issue be severed from the proceedings to be heard in Karratha, and notices under s 78B of the Judiciary Act 1903 (Cth), be sent to the Commonwealth and State Attorneys-General, for them to consider whether they wished to seek leave to intervene in the proceedings in that regard. That aspect of the application was adjourned to Friday 27 February 2004.

15 As a consequence of the respondents application that the Commission stay, alternatively adjourn these proceedings not being successful, the respondents pressed the application in the Federal Court, as the Commission has been informed, for an anti-suit injunction. The Commission was informed that the respondents were not successful in persuading the Federal Court to grant the application for an interlocutory injunction.

Karratha Proceedings

16 The Commission convened the proceedings in Karratha on 23 February 2004 as listed. Prior to the hearing commencing, the Commission was assisted by the conduct of an inspection of the Ammonia Plant construction site, on the Burrup Peninsula, helpfully arranged by SNC. All parties were present during the inspections, which the Commission confirmed would take place the week before the hearing. The Commission viewed the work being performed by Killarnee on the site and was informed, quite unremarkably given the site is a construction project, during the course of the inspections, by the principal of Killarnee, Mr Thompson, that he employed categories of employees including carpenters, steel fixers, general labourers and crane drivers. The Commission makes this observation, in light of subsequent submissions made by in particular by the second respondent and in view of the specific matters in relation to which the respondents joined issue in the notices of answer as filed, none of which took issue with the existence or not, as the case may be, of the employment by Killarnee of "relevant employees" for the purposes of s 49H of the Act, at any stage.

17 In this respect, the Commission notes that the applicant filed a notice to admit under the Industrial Relations Commission Regulations 1985, which was not, in any respect, answered by the respondents. There was no request from the applicant in the notice to admit, for the respondents to admit that employees of Killarnee, engaged on the Ammonia Plant construction site, were eligible to be members of the applicant, which is the relevant criterion for the purposes of s 49H of the Act. As the Commission has already of observed, at no stage was such a matter put in controversy by the respondents and the Commission never understood that this matter was in issue between the parties.

18 Furthermore, and in any event, after the submissions of the parties concluded, the Commission informed the parties of the information provided to it on the inspections, and the parties were afforded a further opportunity to be heard, both in writing by letter from my Associate and orally, when the Commission re-listed the application for this purpose on 27 February 2004, having regard, if it were necessary, to the provisions of s26(3) of the Act.

19 Despite the Commission listing the hearing in Karratha to conveniently accommodate the calling of witnesses, evidence was only led from one witness for the applicant, Mr Buchan, one of the applicant's organisers. The respondent elected to call no evidence, or indeed, as will be set out below, put any submissions on the substantive issues arising in the arbitration.

20 Mr Buchan has been an official of the applicant for some time and has spent approximately 16 years in the construction industry. It was common ground that Mr Buchan possessed an authority issued by the Registrar of this Commission, pursuant to s 49J of the Act. A copy of Mr Buchan's authority was tendered as exhibit A1. Mr Buchan testified that he uses his authority to enter premises to hold discussions with employees in relation to a range of matters including health and safety issues, suspected award breaches and under payment issues, and sometimes personal issues with employees. He testified in relation to the itinerant nature of the construction industry, and that employees are very mobile. He also gave evidence about the procedure that he normally uses, seeking to exercise right of entry.

21 Mr Buchan testified that he had an initial contact with Killarnee when in January 2004, he visited employees of Killarnee, employed as formwork carpenters and steel fixers, at the desalination plant next to the Ammonia Plant construction site. He testified that he spoke with "Irish", who is Mr Thompson, the principal of Killarnee. Mr Buchan's evidence was that there was no issue taken with his right of entry on this occasion. Mr Buchan testified that he returned to the desalination plant and visited Killarnee employees and also again, Mr Thompson. He testified that on this occasion, he obtained some union memberships. He said the applicant also had existing members at that location.

22 In relation to the Ammonia Plant construction site, Mr Buchan said that he visited the site early on a Saturday morning, in the company of another official of the applicant, Mr Hudson. On their arrival at the gate to the premises, Mr Buchan said he spoke to an employee who he understood was employed by a business known as Shelf Security. Mr Buchan testified that he told this person that he and the other official wanted to visit the workers on the site. According to Mr Buchan, both he and Mr Hudson were refused access. Apparently, on the day prior, Mr Hudson spoke with Mr Gamble of SNC and requested access to the site. Despite these approaches, on the evidence, it seems that neither Mr Buchan nor Mr Hudson, were permitted access to the premises.

23 According to Mr Buchan's evidence, he returned to the Ammonia Project construction site, on or about 19 February 2004, to visit the Killarnee workforce. Mr Buchan testified that he had in his possession a letter from the applicant, dated 18 February 2004, setting out the purpose of his visit and requesting entry to the premises in accordance with his authority issued under s 49J of the Act. Mr Buchan said that before visiting the site, he spoke to Mr Thompson on the telephone, who agreed to meet him outside of the gate. Mr Buchan informed him of his request for access to the site, and handed Mr Thompson the letter. A copy of the letter was tendered as exhibit A2. According to Mr Buchan's evidence, Mr Thompson informed him that he thought this was alright but would have to check. On his return, Mr Thompson informed Mr Buchan that no access to the premises would be given.

24 Evidence was also adduced from Mr Buchan in relation to an employee of Killarnee whom he knew, a Mr Kuret. Mr Buchan said he had spoken recently with Mr Kuret who informed him that he had never signed an AWA. Mr Buchan said he knew that Mr Kuret worked for Killarnee on the Ammonia Plant construction site as he had seen him in that area previously and also saw him during the inspections with the Commission on the morning of the hearing. However, in cross-examination a document was put to Mr Buchan by counsel for Killarnee that appeared to be a filing receipt from the Employment Advocate under the WR Act in respect of Mr Alan Kuret. This document also appeared to contain an AWA number. The letter appeared to carry a date of 7 January, and presumably 2004, although the year of the letter was not firmly established on the evidence. No other documents or questions were put to Mr Buchan by counsel for the respondents, in relation to this or any other matter.

Contention of Parties

25 Mr Dixon on behalf of the applicant, submitted that the evidence led by the applicant had established that Mr Buchan, as a duly accredited representative of the applicant, had made unsuccessful attempts to enter the premises where relevant employees of Killarney were employed, for the purposes set out in s 49H of the Act. He also referred to the applicant's registered rules, and submitted that employees of Killarnee were members of or eligible to be members of the applicant. Counsel also submitted that the relevant State award having application, that being the Building Trades (Construction) Award 1987 ("the Award"), at clause 40 - Right of Entry, did not require any notice to be given prior to a duly accredited official visiting an employer's premises. It was therefore submitted, that pursuant to s 49H(2), Mr Buchan was not required to give notice prior to exercising his right of entry, even though on the evidence, prior arrangements were sought.

26 In connection with the construction of s 49H of the Act, the applicant relied upon its written outline of submissions, to the effect that on its proper interpretation, s 49H does not require an authorised representative to establish, as a precondition to a right to enter, that relevant employees wish to have discussions with the authorised representative, as was contended by the respondents in their notices of answer. In the applicant's submissions, the construction of s 49H to be preferred is that the "purpose" of the attempted entry to premises is paramount, and the possession of the requisite purpose establishes the right alleged.

27 Counsel for the applicant therefore submitted that on the basis of the evidence and materials before the Commission, consistent with its construction of the relevant provisions of Division 2G of the Act, the Commission should grant the relief sought.

28 Both counsel for the respondents, Mr Hotchkin and Mr Parker, submitted that the applicant had failed to establish on the evidence, as the Commission infers, the requisite "elements" to enable relief to be granted. As the Commission has already observed, the respondents led no evidence and did not put any substantive submissions in relation to the defenses raised in their notices of answer. The only submissions put by counsel for the respondent, were that the applicant, on all of the evidence, had not established that Mr Buchan had a relevant right of entry for the purposes of s 49H of the Act.

29 As the Commission understood the submissions, it was put that there was no evidence of an employee to whom an award extended. There were further submissions that the applicant had not established there were any employees on the premises and furthermore, there was no evidence that at least 24 hours notice in writing was given for the attempted entry to the premises. As to the submission by the respondents that there were no employees on the site, the Commission simply refers to the notices of answer set out above. Additionally, the Commission refers to the statement of claim filed in the Federal Court proceedings, a copy of which was provided to the Commission in the course of hearing the stay application, to the effect that both BGC and Killarnee employ workers on the site and all are parties to AWAs under the WR Act. There was also a submission that the applicant had failed to lead any evidence in relation to the purpose for the right of entry on the relevant occasions.

30 In all, the respondents therefore submitted that the application should be dismissed.

Consideration

31 As the Commission has already observed, the only evidence before the Commission in relation to the matters in dispute, was from the applicant. Additionally, the Commission has been assisted by site inspections, in relation to the matters in dispute, and refers to its relevant statutory powers in this regard, in particular ss 26(1)(b), 27(1)(a), (q), and (r) of the Act, which procedure is of itself quite unremarkable in the context of industrial arbitration for the resolution of an industrial dispute before this Commission.

32 I deal firstly with the construction point. I refer to the decision of the Commission as presently constituted in the *AFMEPKIU v Transfield Services (Australia) Pty Ltd and Another* (2002) 83 WAIG 376, in relation to the statutory scheme as set out in Divisions 2F and 2G of the Act. I do not repeat what I said in that matter but adopt and apply those observations for present purposes.

33 Specifically, s 49H of the Act, the particular provision arising in these proceedings, is as follows:

> *"(1) An authorised representative of an organisation may enter, during working hours, any premises where relevant employees work, for the purpose of holding discussions at the premises with any of the relevant employees who wish to participate in those discussions.*
>
> *(2) If an award, order or industrial agreement that extends to the relevant employees makes provision as to entry onto premises by an authorised representative and —*
>
> *(a) does not require notice to be given by the representative; or*
>
> *(b) requires a specified period of notice to be given by the representative,*
>
> *the authorised representative is not required to give notice under this section.*
>
> *(3) If subsection (2) does not apply, the authorised representative is not entitled to exercise a power conferred by this section unless the authorised representative has given the employer of the employees concerned at least 24 hours' written notice."*

34 Additionally, s 49G of the Act is relevant and that provides as follows:

> *"In this Division —*
>
> ***"authorised representative"** means a person who holds an authority in force under this Division;*
>
> ***"relevant employee"**, when used in connection with the exercise of a power by an authorised representative of an organisation, means an employee who is a member of the organisation or who is eligible to become a member of the organisation."*

35 As I observed in *Transfield Services*, the statutory scheme in Divisions 2F and 2G of the Act is in similar terms to the right of entry provisions contained in Division 11A of the WR Act. The statutory scheme in relation to right of entry under the Act as it now is, seems to seek to balance the legitimate interests of both employee organizations and employers. In relation to employee organizations, the right of entry provision enables accredited representatives to enter employer premises, for the purposes of holding discussions under s 49H. Presumably, the intention of the legislature in relation to a provision of this kind, is to enable registered organizations under the Act, to communicate with and to service existing members in relation to matters concerning their employment or union affairs, and additionally, no doubt to enable an opportunity to recruit new members.

36 Additionally, the right of entry prescribed by s 49I of the Act, perhaps as complimentary to the scheme in Divisions 2F and 2G of the Act as a whole, seems to acknowledge the legitimate role of registered organizations in the process of observance and enforcement of awards, industrial agreements and other legislation relevant to the workplace, as recognized in a long line of authority of industrial courts and tribunals throughout the various jurisdictions.

37 The rights of employee organizations under the scheme, are balanced against those of employers, as in recognition that a right of entry to an employer's premises can involve a substantial interference with an employer's rights otherwise possessed, a power exists under s 49J of the Act, for the Commission to suspend or revoke an authorized representative's authority to enter premises in the event that such a representative acts in an improper manner or intentionally and unduly hinders an employer or employees during their working time. In this regard, by s 49N of the Act, the Commission is given a general supervisory power in relation to matters arising under Divisions 2F and 2G, as long as it does not make any award, order or register an industrial agreement, containing provisions additional to or inconsistent with the statutory scheme.

38 Also in my view, the statutory scheme under the Act in relation to right of entry, must be interpreted consistent with the principal objects of the Act, in particular those contained in ss 6 (ab), (ad), (af), (d), and (f).

39 In my opinion, as a matter of construction, the approach adopted by the applicant as to the meaning and effect of s 49H is to be preferred to that suggested by the respondents. That is, the focus of the inquiry when one considers the operation and effect of s 49H is the relevant "purpose" for which a right of entry is sought to be exercised. It seems to me that the same rationale of construction, would also apply to s 49I of the Act, in relation to the right of entry to investigate the various breaches, set out in this section. In my view, as a matter of plain language, taking the words used in s 49H(1) on their ordinary and natural meaning, the words "for the purpose of" control and condition the operation of the preceding words in the subsection, by which the right to enter is invoked.

40 What s 49H does in my opinion, is enable an authorised representative, to enter premises during working hours to hold discussions with relevant employees, who wish to participate in those discussions. There is no obligation on any relevant employee to participate in those discussions. Whether a relevant employee wishes to do so or not, is a matter entirely for him or her.

41 If the contention of the respondents as to the proper construction of s 49H were correct, it seems to me that there would be such barriers to a right of entry, for discussion purposes, to effectively render s 49H otiose and of no effect. That is, it is difficult to see in practical terms, if an accredited representative of an organization cannot enter relevant premises for the purposes of holding discussions, without first identifying the relevant employees who wish to participate in those discussions, how such matters could be ascertained. It seems unlikely that parliament would have intended that the employer would effectively maintain an ongoing survey of employee wishes in this regard, about which accredited representatives could be informed, on seeking to exercise a right to enter to hold discussions. Furthermore, such a construction is predicated upon the assumption, that employees would be sufficiently informed and aware of their rights, in relation to the expression of such a desire.

42 Given the general purpose of right of entry provisions, including those existing in the Act prior to the legislative amendments in August 2002, such a construction in my opinion, would have been very unlikely in the ordinary course. In that regard, it is appropriate, as the applicant did in its written submissions, to have regard to the relevant parliamentary debate leading to the enactment of Divisions 2F and 2G of the Act, as an aid to construction, having regard to s 18 of the Interpretation Act 1984 (WA) and as is permitted by s 19 of that Act. In that regard, it seems to be the case that the intention was to repeal the existing provisions in ss 49AB and 49B of the Act, which relied upon provisions in awards, industrial agreements and orders of the Commission, and replace them with comprehensive provisions similar to those contained in the WR Act. Given that the rights of entry under the Act prior to its amendment, were conditioned by such rights existing in awards, industrial agreements and orders of the Commission, and no such instruments that the Commission is aware of, required the ascertainment of the expressed wishes of employees as a condition precedent to entering premises, it would be a surprising result, if the new provisions were intended to erode rights which formerly existed.

43 Furthermore, some assistance can be gained from the terms of the right of entry provisions contained in the WR Act as set out in Division 11A, particularly section 285C dealing with the right to enter to hold discussions, which is in similar terms as s 49H of the Act. Whilst great weight cannot be placed on it, some support for the "purpose" focus of the interpretation of s 49H, can be drawn from the fact that a proposed amendment to the terms of Division 11A of the WR Act, to restrict right of entry to accredited representatives (permit holders under the WR Act) who had been expressly invited or requested by employees to enter premises, was not favored by the Commonwealth Senate: See Senate Employment, Workplace Relations, Small Business and Education Legislation Committee "*Consideration of the Provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999"*1999. Presumably, if the contention of the respondents was correct, then such an amendment would be unnecessary.

44 Generally and furthermore, it is also trite to observe that a statutory power may only be exercised for the purpose for which the power was conferred and any purported exercise of a power for an ulterior purpose, would be of no effect: *Melbourne Steamship Co v Moorehead* (1912) 15 CLR 333.

45 On all of what is before the Commission, I am satisfied that Mr Buchan, a duly accredited representative of the applicant, sought on at least two occasions, to enter premises where relevant employees worked, for the purposes of holding discussions. I accept the evidence of Mr Buchan, that on the first occasion, he, in the company of another official, presented at the gate of the Ammonia Project construction site, and requested entry to the premises to "visit the workers on the site", and that request for access was refused. The Commission is able to infer from this the purpose of holding discussions, given that to "visit", in its commonsense and dictionary meaning, is not simply to view but also to engage in discourse. The uncontradicted evidence is that a request for access to the site was made the day prior on the Friday.

46 Furthermore, as a part of the factual matrix in this dispute, there was a second request to enter the premises on 18 February 2004, to hold discussions with employees, during which Mr Thompson was handed exhibit A2. This attempt to enter the premises was also refused. It would seem on all occasions, no reason was advanced to the applicant, as to why access to the premises was being refused.

47 In my opinion, from all of what is before the Commission, there are employees employed by Killarnee, members of or eligible to be members of the applicant organization. Furthermore, in the absence of any evidence to the contrary led by the respondents, upon whom an evidential burden rests to establish their contentions, the terms of the Award would apply by common rule, given the provisions of clause 3 - Scope of the Award. By clause 40 of the Award, the relevant right of entry provision contained in the Award does not require any prior notice to be given and therefore the terms of s 49H(2) would seem to have no effect in the present circumstances. There was no evidence or other material before the Commission, to establish the existence of AWAs as a matter of fact, covering the employees of Killarnee. The Commission accepts that there was some evidence that a "filing receipt" for the filing of an application for an AWA under the WR Act existed for a Mr Kuret, but of course, that is not determinative of the operation and effect of such an AWA, under the WR Act, given the terms of ss 170VJ(1) and (2) of the WR Act, about which there was no evidence or submissions.

Conclusion

48 In conclusion therefore, and regrettably in the absence of any evidence or submissions from the respondents as to their central contentions in opposition to the applicant's claims, the Commission can only proceed upon what is before it, and the parties are bound by the cases as they were put. For the reasons the Commission determined in *Transfield Services,* a declaration is an appropriate remedy in the present circumstances and one will issue.

2004 WAIRC 10900

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	SNC-LAVALIN (SA) INC & OTHER **RESPONDENTS**
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 17 MARCH 2004
FILE NO/S	CR 13 OF 2004
CITATION NO.	2004 WAIRC 10900

Result	Direction issued
Representation	
Applicant	Mr T Dixon of counsel and with him Mr T Kucera of counsel
First Respondent	Mr D Parker of counsel
Second Respondent	Mr M Hotchkin of counsel

Direction

HAVING heard Mr T Dixon of counsel and with him Mr T Kucera of counsel on behalf of the applicant, Mr D Parker of counsel on behalf of the first respondent, and Mr M Hotchkin of counsel on behalf of the second respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs –

> THAT the applicant file and serve upon the respondents particulars of the grounds for the costs application and a bill of costs no later than 12.00pm 18 March 2004.

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

2004 WAIRC 10962

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	SNC-LAVALIN (SA) INC & OTHER **RESPONDENTS**
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 24 MARCH 2004
FILE NO/S	CR 13 OF 2004
CITATION NO.	2004 WAIRC 10962

Catchwords	Industrial Law – Further reasons for decision – Reasons for decision and minute of proposed declaration previously issued by Commission – Statutory duty of Commission to publish its decision in the form of an award, order or declaration – Declaration issued – *Industrial Relations Act* 1979 s 34(1), s 35(1), s 35(3); *Workplace Relations Act 1996* (Cth).
Result	Declaration issued
Representation	
Applicant	Mr T Kucera of counsel
First Respondent	Mr D Parker of counsel
Second Respondent	No appearance

Further Reasons for Decision

1 On 15 March 2004, the Commission published its reasons for decision in this matter, accompanied by a minute of proposed declaration. As is required by s 35(1) of the Industrial Relations Act 1979 ("the Act"), the minute of proposed declaration was provided to the parties, with an opportunity given as to whether any party wished to speak to the matters contained in the minute, in accordance with s 35(3) of the Act. By letter of 16 March 2004, the solicitors for the first respondent, Messrs Blake Dawson Waldron, requested an opportunity to speak to the minutes. Various matters were raised in that correspondence, going to the terms of the proposed declaration. The applicant did not seek a speaking to the minutes, but foreshadowed, as previously raised in the substantive proceedings, pursuing an application for costs against the respondents.

2 In accordance with those requests, the Commission listed the matter for a speaking to the minutes on Friday 19 March 2004. The application for costs brought by the applicant was listed for hearing earlier that day. After the notices of hearing had been sent to the parties, the solicitors for the applicant, requested changes to the hearing dates because of proceedings before the Federal Court. Accordingly, the matters were then re-listed for 22 and 23 March 2004 respectively.

3 By letter dated 18 March 2004, the solicitors for the first respondent advised my Associate that at the speaking to the minutes, they proposed raising further issues concerning the operation of the proposed declaration, and relevant provisions of the Workplace Relations Act 1996 (Cth), and Australian Workplace Agreements purportedly made under that legislation. The Commission considers this request to be startling and audacious. This is so given the complete failure by the respondents, to any extent, to ventilate the not insignificant federal and State matters that were alleged and raised by them in their notices of answer and counterproposal in these proceedings, and which were apparently the subject of submissions and evidence in the Federal Court, and in relation to which the respondents were afforded every opportunity of putting squarely before the Commission for determination. For reasons which still remain largely unexplained, the respondents elected not to do so.

4 Subsequently, by letter dated 19 March 2004, the solicitors for the second respondent, Messrs Hotchkin Hanly, notified my Associate that in proceedings before the Federal Court on the previous day, orders were apparently made by the court, restraining the applicant union in these proceedings, from taking any further steps both as to costs and as to a speaking to the minutes of proposed declaration, amongst other things. The final paragraph of the letter from Messrs Hotchkin Hanly, advises that as a consequence of this, "the parties will not be attending the Commission in accordance with the Notices of Hearing published by the Commission yesterday.". Presumably, this was a reference to only the second respondent, inadvertently referred to as "the parties", given that Messrs Hotchkin Hanly only act for the second respondent.

5 At the speaking to the minutes listed for 22 March 2004, Mr Parker, notified the Commission that it appeared, despite previously requesting a speaking to the minutes, as a courtesy to the Commission, and referred to a letter to my Associate of the same date, advising that as the first respondent is also an applicant in the proceedings before the Federal Court, it did not consider it appropriate to take any further steps in the speaking to the minutes. However, Mr Parker submitted that his client still wished to reserve his rights in relation to the issues raised in his firm's earlier correspondence, in relation to the terms of the proposed declaration. There was also a request that the hearing listing be vacated.

6 Whilst Mr Kucera appeared at the speaking to the minutes, he did so as a courtesy and made no submissions.

7 The Commission is not minded to adjourn the speaking to the minutes proceedings. The Commission is under a statutory duty to publish its decisions in the form of an award, order or declaration: s 34(1) Act. Such a decision is to be in every case, signed and delivered by the Commissioner constituting the Commission that heard the matter to which the decision relates. As I have already observed, s 35 of the Act, further requires, as a mandatory obligation, the Commission to first publish its decision as a minute and to enable any party to the proceedings to speak to the minute, if they wish to do so. The requirements of s 35(1), may be waived, with the consent of the parties, if in the Commission's opinion, such a procedure is either inappropriate or unnecessary.

8 Furthermore, the Commission is not of itself subject to the orders that have been made by the Federal Court, and it is difficult to see how it could be subject to such orders, except perhaps in proceedings for a constitutional writ, which is not the case presently.

9 In light of the mandatory statutory duty imposed on the Commission to perfect its decisions in the form of an award, order or declaration, independent of the position of any party to the proceedings, the Commission now does so.

2004 WAIRC 10954

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT** **-v-** SNC-LAVALIN (SA) INC & OTHER **RESPONDENTS**
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 24 MARCH 2004
FILE NO/S	CR 13 OF 2004
CITATION NO.	2004 WAIRC 10954

Result	Declaration issued.
Representation	
Applicant	Mr T Dixon of counsel and with him Mr T Kucera of counsel
First Respondent	Mr D Parker of counsel and earlier Mr T Caspersz of counsel
Second Respondent	Mr M Hotchkin of counsel

Declaration

HAVING heard Mr T Dixon of counsel and with him Mr T Kucera of counsel on behalf of the applicant, Mr D Parker of counsel and earlier Mr T Caspersz of counsel on behalf of the first respondent, and Mr M Hotchkin of counsel on behalf of the second respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 ("the Act"), hereby declares –

> THAT representatives of the applicant, holding the requisite authority under the Act, are entitled to enter the Ammonia Plant construction site premises on the Burrup Peninsula for the purpose of holding discussions with relevant employees of the second respondent who wish to participate in those discussions.

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

2004 WAIRC 10755

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	SNC-LAVALIN (SA) INC & OTHERS **RESPONDENTS**
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 24 FEBRUARY 2004
FILE NO/S	CR 13 OF 2004
CITATION NO.	2004 WAIRC 10755

Result	Order issued
Representation	
Applicant	Mr T Dixon of counsel and Mr T Kucera of counsel
Respondent	Mr D Parker of counsel on behalf of SNC-Lavalin (SA) Inc and Mr M Hotchkin of counsel on behalf of BGC Contracting Pty Ltd and Shamrock Holdings Pty Ltd trading as Killarnee Formwork

Order

HAVING heard Mr T Dixon of counsel and Mr T Kucera of counsel on behalf of the applicant, Mr D Parker of counsel on behalf of SNC-Lavalin (SA) Inc and Mr M Hotchkin of counsel on behalf of BGC Contracting Pty Ltd and Shamrock Holdings Pty Ltd trading as Killarnee Formwork the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the herein application as against BGC Contracting Pty Ltd be and is hereby discontinued.

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

2004 WAIRC 13512

ALLEGED UNFAIR DISMISSALS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH **APPLICANT**
	-v-
	HAPPY FACE CHILD CARE CENTRE **RESPONDENT**
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 6 DECEMBER 2004
FILE NO.	CR 269 OF 2003
CITATION NO.	2004 WAIRC 13512

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissals – Whether constructive dismissals – Intent of parties considered – Dismissals at the initiative of the employer – Employees harshly, oppressively and unfairly dismissed – Application upheld – Reinstatement impracticable – Determination of quantum of compensation – Principles applied – No loss demonstrated for two employees – Some Compensation awarded – Industrial Relations Act 1979 (WA) s 44(9)
Result	Application alleging unfair dismissals upheld and some compensation ordered. Compensation for injury awarded.
Representation	
Applicant	Mr M Swinbourn
Respondent	Mr A Pass (of counsel)

Reasons for Decision

1 Kylie Lamb, Paula Lopresti and Elizabeth Jolly ("the employees") were employed by Happy Face Child Care Centre ("the respondent") until 10 December, 28 November and 28 November 2003 respectively. As a result of the employees ceasing employment with the respondent the Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch ("the applicant") commenced proceedings under s44 of the *Industrial Relations Act 1979* ("the Act") alleging that the employees had been terminated in a harsh, unfair and oppressive manner. Conciliation proceedings did not resolve the claim and the matter was referred for arbitration under s44(9) of the Act. The schedule of memorandum of matters referred for hearing and determination is as follows:

> "1. The applicant union claims the respondent dismissed Kylie Lamb on 10 December 2003 and Paula Lopresti and Elizabeth Jolly on 28 November 2003 in circumstances which were harsh, unfair or oppressive within the meaning of the Industrial Relations Act 1979.

2. The applicant union seeks orders that the respondent pay the employees reasonable notice, compensation for loss of ongoing employment and non-transferable benefits, and compensation for harsh, unfair or oppressive dismissal.
3. The respondent opposes the claim and orders sought."

2 A number of matters were agreed between the parties and are as follows:

"1. Happy Face Child Care Centre ("the respondent") is the proprietor of a Child Care Centre in East Cannington ("the Centre").
2. Ms Joanna Eszenyi ("Ms Eszenyi") was the owner, manager and licensee of the Centre from January 2003, and continues to be the owner and manager of the Centre.
3. The terms and conditions of employment of Ms Lamb, Ms Jolly and Ms Lo Presti were governed by the *Children's Services (Private) Award No.A10 of 1990.*
4. Kylie Lamb ("Ms Lamb") was employed by the respondent from 1 March 2003 to 10 December 2003.
5. Ms Lamb commenced her employment as a Qualified Childcare Worker, on a part-time basis, working 20 hours per week.
6. On the week commencing 28 April 2003 Ms Lamb's hours were increased to full-time and she was paid at the new rate of $16.33. At this time Ms Lamb also became the Co-ordinator of the Centre.
7. Ms Lamb and Ms Eszenyi later signed a new written contract of employment on 3 June 2003, which states that her position is that of Co-ordinator.
8. On 13 October 2003 another new written contract was signed between Ms Lamb and Ms Eszenyi. Ms Lamb was now said to be in the position of Director/Contact Co-ordinator. Ms Lamb was paid the rate of $17.88 per hour.
9. At the time of termination Ms Lamb was employed as the Director/Contact Co-ordinator, at the ordinary rate of $17.88 per hour.
10. Elizabeth Jolly ("Ms Jolly") was employed by the Respondent from 13 January 2003 until 5 December 2003.
11. Ms Jolly had worked at the Centre for the previous owners, and had worked at the Centre since 2000.
12. Ms Jolly handed a resignation letter to Ms Eszenyi on 24 November 2003, giving Ms Eszenyi two weeks (sic) notice, ending on 5 December 2003.
13. Ms Eszenyi asked Ms Jolly to leave on 28 November 2003 and agreed to pay Ms Jolly the remaining notice in lieu.
14. Paula Lo Presti ("Ms Lo Presti") was employed by Happy Face Child Care from 13 January 2003 until 5 December 2003.
15. Ms Lo Presti had worked for the previous owners of the Centre.
16. Ms Lo Presti was engaged as a Senior Untrained Childcare Giver. She commenced as a part-time employee on a minimum of 20 hours per fortnight.
17. At the time of termination Ms Lo Presti continued as a Senior Untrained Childcare Giver at a rate of $13.33 per hour. At the time of termination she had worked 37.5 hours per week for six out of the last eight weeks.
18. Ms Lo Presti handed a resignation letter to Ms Eszenyi on 24 November 2003, giving Ms Eszenyi two weeks (sic) notice, ending on 5 December 2003.
19. Ms Eszenyi asked Ms Lo Presti to leave on 28 November 2003 and agreed to pay Ms Jolly the remaining notice in lieu."

(Exhibit 1)

Applicant's Evidence

3 Angelika Klatt's son was at the child care centre operated by the respondent ("the Centre") for approximately six months in 2003. Ms Klatt stated that during a conversation with Ms Johanna Eszenyi approximately two months prior to Christmas 2003 Ms Eszenyi told her that she was closing the Centre so that employees would leave and she could then employ her own staff. Ms Klatt stated she was annoyed by Ms Eszenyi's comments as she believed this was not the proper way to treat staff. Ms Klatt stated that she then relayed this conversation to the employees. Ms Klatt stated that around the time of this conversation the employees told her that they were looking for other employment and she then started looking for an alternative child care centre for her son.

4 Melanie Jones has had a child at the respondent's premises since 2001. Ms Jones stated that the employees were friendly, caring workers and she was pleased with the way they looked after her son. Ms Jones stated that she spoke to Ms Eszenyi on a couple of occasions and she was aware that the respondent had operational problems towards the end of 2003. Ms Jones stated that Ms Jolly told her of a rumour that the respondent was closing on 18 December 2003. Approximately one week later Ms Jones had a conversation with Ms Eszenyi about the possibility of the Centre closing. Ms Jones stated that Ms Eszenyi told her that this was a rumour and she had let the rumour go on so the employees would quit. Ms Jones stated that she was taken aback by this comment and as a result started looking for new child care arrangements for her son. The day after this conversation with Ms Eszenyi Ms Jones wrote a letter summarising her concerns (Exhibit A1) which she gave to Ms Jolly. This letter reads in part as follows:

> "On the 20 November, (sic) I was approached by Elizabeth who told me that there was concern over the future of the centre, and that there was a possibility that the centre might close down on the 18th December 2003 without prior notice to parents. Elizabeth made sure I understood that this was only a possibility, as the Childcare Board had reached no final decision at that time and Joanne had the opportunity to remedy the situation. As a single mother who is working, it would have been difficult for me to find another centre at such short notice, especially as the Christmas period would have been upon us. I greatly appreciated being forewarned of this situation.
>
> On the 27th November 2003 Joanne, who owns the Happy Face Childcare Centre, was talking to another parent in front of the centre and stopped me as I was about to enter the centre to drop Matthew off for the day. She told the other parent and myself that the rumours about the centre closing were untrue, that the centre was not closing down nor had she had any intention of closing the doors, but that she had let the girls believe that it would be, so that they would quit. Joanne said that the girls were not very good at their jobs. Joanne then told us that she had already employed new staff, and that she had done things this way on the advice of the board.

I have given notice that I will be removing Matthew from the centre as of the 5th December, 2003. My decision to move Matthew is based on the fact that the owner of the centre is using underhanded tactics to replace staff who, in my opinion, put the best interests of the children in their care first."

(Exhibit A1)

5 Ms Jones stated that she decided to remove her son from the Centre given Ms Eszenyi's treatment of the employees.

6 Under cross-examination Ms Jones confirmed that she told the employees about her conversation with Ms Eszenyi on 27 November 2003 and Ms Jones stated that the letter she gave to Ms Jolly was written after the employees requested her to do so.

7 Ms Lamb is a qualified child care worker and completed an Associate Diploma of Social Science (Child Care) in 1997. Ms Lamb has worked continuously as a qualified child care worker since then, except for taking time off after the birth of her two children. Ms Lamb confirmed that her contract of employment with the respondent was governed by written contracts (Exhibits A3 and A4). Ms Lamb stated that in her role as the respondent's Director/Contact Co-ordinator she had to ensure that the respondent conformed to the required licensing standards. Ms Lamb stated that she handled her position to the best of her ability but on occasions she had problems with staff ratios as Ms Eszenyi sometimes overruled her when she was deciding on the mix of staff the Centre should have. Ms Lamb stated that she had a very good relationship with Ms Eszenyi until Ms Eszenyi started talking about closing the Centre. Ms Lamb stated that at one stage during her employment with the respondent she was not being paid the correct wages for undertaking the co-ordinator position and after Ms Lamb sought the applicant's assistance this issue was resolved.

8 Ms Lamb was aware that the respondent had applied for accreditation in early 2003 and again in June or July 2003 and that the respondent failed both times. Ms Lamb was also aware that the respondent was due to apply again for accreditation some time after she ceased employment with the respondent.

9 Ms Lamb stated that she was not given any written or verbal warnings about her performance however Ms Eszenyi once accused her of stealing money from the Centre. As a result of Ms Lamb believing that Ms Eszenyi no longer trusted her she handed back the Centre's keys to Ms Eszenyi. Ms Lamb stated that in October or November 2003 Ms Eszenyi asked her to become the respondent's licensee but she declined.

10 Ms Lamb stated that at several staff meetings Ms Eszenyi told staff that the Centre may have to close due to her inability to obtain a licence. Ms Lamb stated she took the statement seriously and asked Ms Eszenyi if this was going to happen. Ms Eszenyi responded by saying that it was possible.

11 As Ms Eszenyi had failed her licence test three times by the beginning of November 2003 and the Centre had failed the accreditation process twice Ms Lamb understood that the respondent's situation would not improve. Ms Lamb therefore decided to look for alternative employment as she understood that Ms Eszenyi would be closing the respondent's premises. Ms Lamb stated that even though she was aware that alternative positions at other child care centres were available she continued working with the respondent for as long as possible. Ms Lamb confirmed that when she handed her letter of resignation to Ms Eszenyi on 26 November 2003 (Exhibit A5) Ms Eszenyi said to her that she understood that Ms Lamb would not be leaving. Ms Lamb confirmed that even though she told Ms Eszenyi the previous week that she would not be leaving she told her that she could not afford to be out of work. Even though Ms Eszenyi asked her to stay on as she did not have a replacement for Ms Lamb, Ms Lamb declined. Ms Lamb stated that she had every intention of continuing employment with the respondent for some time. Ms Lamb is currently employed as a co-ordinator with the Cuddles Group in Forrestfield and she started there on 15 December 2003. Exhibit A6 confirms her earnings since ceasing employment with the respondent.

12 Under cross-examination Ms Lamb stated that she handed in notice of her resignation once she had obtained a position elsewhere. Ms Lamb understood that the Centre was closing because Ms Eszenyi told her that she had failed her licence test and as the Centre could not operate without a licence, Ms Eszenyi told her that the Centre would therefore have to close down in December 2003. Ms Lamb stated that Ms Eszenyi regularly told employees at staff meetings that the Centre would be closing if she continued to fail the licence test. Ms Lamb stated that she resigned from her employment with the respondent as she needed ongoing income and could not wait to be terminated. It was put to Ms Lamb that she told some parents of children at the Centre that it was closing. Ms Lamb stated that she did not go out of her way to advise parents of this however she conceded she discussed this issue with Ms Jones when Ms Jones approached her about the Centre's future. Ms Lamb stated that she resigned as it was her view that the Centre was likely to close because Ms Eszenyi was not passing the license test and Ms Lamb understood that Ms Eszenyi would close the respondent's premises without prior warning.

13 Ms Lopresti is an unqualified childcare worker and has worked for nearly four years in the child care industry. Ms Lopresti had two written contracts of employment with the respondent, one dated 31 January 2003 and the other 10 June 2003 (Exhibits A8 and A9). Ms Lopresti stated that she was given one written and one verbal warning by Ms Eszenyi but after the applicant intervened, these warnings were revoked. Ms Lopresti gave evidence that she had an issue with her rosters in November 2003 which led to conflict between her and Ms Eszenyi (Exhibits A11 and A12). Ms Lopresti stated that on a couple of occasions Ms Eszenyi told Centre staff that if she failed her licence test then staff would be out of a job. Ms Lopresti took this statement seriously and after Ms Eszenyi continued to fail the licence test she was doubtful that the Centre would continue to operate. Ms Lopresti understood that because Ms Eszenyi failed her licence assessment for a second time the Centre would close around 18 December 2003. Ms Lopresti stated that as she believed Ms Eszenyi's statements about closing the Centre, she started looking for alternative employment. After Ms Lopresti resigned she sent a letter to Ms Eszenyi outlining the reasons for her resignation (Exhibit A13).

14 Ms Lopresti stated that she had discussions with Ms Klatt and Ms Haniardey Hourani, who had children at the Centre, about the Centre closing as she felt it was appropriate to let parents know that it was possible that the Centre would close. Ms Lopresti has been employed at Balmain House Childcare Centre since 8 December 2003 and a breakdown of her earnings since her resignation from the Centre is contained at Exhibit A14.

15 Ms Lopresti stated that she had no intention of leaving the Centre and wanted to stay on indefinitely as she enjoyed working at the Centre and working with the respondent's staff. However, as her future at the Centre was uncertain and as she needed secure employment she looked for alternative employment. Ms Lopresti stated that she felt uncomfortable about leaving the Centre and she was under stress when she resigned.

16 Under cross-examination Ms Lopresti confirmed that she told two or three parents at the Centre that it could be in their interests to look for alternate care for their children because it was possible that the Centre would close on 18 December 2003 if Ms Eszenyi continued to fail the licence test. Ms Lopresti stated that she started looking for alternative employment in November 2003 when Ms Eszenyi told her that she could again fail her licence test and that the Centre could therefore close on 18 December 2003. Ms Lopresti assumed Ms Eszenyi would fail the test as she had already failed it twice. When asked why she did not wait to see whether or not the Centre would close Ms Lopresti stated that she had to look after her future. Ms Lopresti confirmed that she was told by one of the parents at the Centre that Ms Eszenyi had told her that the Centre was closing as a ruse to get the employees to leave.

17 Ms Jolly holds a Certificate III in Children's Services and worked for the previous two owners of the Centre. Ms Jolly had two written contracts of employment with the respondent (Exhibit A15 and A16). Ms Jolly stated that she was given two verbal warnings by the respondent and that the second warning was removed from her file after the applicant intervened.

18 Ms Jolly stated that she was committed to working at the Centre and once helped Ms Eszenyi with an assignment in her own time.

19 Ms Jolly stated that several months before December 2003 Ms Eszenyi told the Centre's staff that if she continued to fail the licence test the Centre would close. Ms Eszenyi also told staff that even if she passed the licence test the Centre would close over the Christmas period for approximately six to eight weeks. Given these ongoing comments Ms Jolly understood that the Centre would be closing one way or another. When Ms Jolly asked Ms Eszenyi when parents were going to be told about the Centre closing Ms Eszenyi told her that "she wasn't going to let them know about anything". As Ms Eszenyi continued to say that if she failed the licence test the Centre would close Ms Jolly looked for alternative employment and resigned on 24 November 2003 (Exhibit A17). When she handed her resignation letter to Ms Eszenyi she asked her if she wanted to know the reasons for her resignation. Ms Jolly stated that Ms Eszenyi told her that she did not care why she was leaving. Ms Jolly subsequently posted a letter to Ms Eszenyi outlining the reasons for her resignation (Exhibit A18). Ms Jolly commenced employment at another child care centre on 8 December 2003 and a summary of her earnings since leaving the Centre is contained at Exhibit A20. Ms Jolly stated that the main reason for her resignation was the lack of certainty about her ongoing employment at the Centre. She stated that she wanted to continue working at the Centre which was her first job, she enjoyed her work, she had become attached to the children and she was upset at having to leave.

20 Under cross-examination Ms Jolly stated that when she discussed Ms Eszenyi's failure to pass the licence test with staff she did not denigrate Ms Eszenyi during these discussions. Ms Jolly stated that Ms Eszenyi made her believe that the Centre was closing because she told her that if she failed the licence test a third time the Centre would close and staff would be out of a job. Ms Jolly confirmed that she had another job in place when she resigned. Ms Jolly stated that when she approached parents about the Centre closing she told them that there was a high probability that the Centre would be closing on the basis of what Ms Eszenyi had told her. Ms Jolly understood from Ms Eszenyi that even if Ms Eszenyi did pass the licence assessment it was more than likely that the Centre would close down for six to eight weeks over Christmas.

21 Louise Judge is an organiser with the applicant and has been organising in the child care and children's services area since November 2002. Ms Judge stated that she had several dealings with the respondent in 2003 concerning pay, compliance with regulations, disciplinary processes and dispute settlement procedures not being followed. Ms Judge visited the Centre on three or four occasions in 2003. Ms Judge confirmed that the contents of Exhibits A21 and A22 outline the nature of discussions held between the applicant and the respondent and details the under payments rectified as a result of the applicant's intervention at the Centre. Ms Judge stated that in November 2003 the employees contacted her about the Centre closing and the respondent not meeting its licence requirements. Ms Judge stated that it was most unusual for a child care centre to close as there is and was at the time a shortage of centres and it was rare that licences would be revoked given the high demand for child care centres. Ms Judge stated that it was unusual for the owner of a child care centre to discuss the viability of its operations with its staff. Ms Judge was asked under cross-examination if she advised the employees that it was unlikely that the respondent would close its operations. Ms Judge stated that by the time she spoke to the employees they had already resigned.

Respondent's Evidence

22 Ms Hourani has had three children at the Centre since May 2001 and Ms Hourani's children currently remain at the Centre. Ms Hourani was aware that the employees ceased employment at the Centre at the end of last year and that at this time there were concerns over whether or not the Centre would continue to operate. Ms Hourani stated that when Ms Lamb and Ms Jolly told her in late November 2003 that the Centre would possibly be closing she panicked as she had a business to run and needed child care. Ms Jolly told her that Ms Eszenyi had failed her licence test and that she did not believe she would pass the next test and that the Centre would be closing down in a few weeks. As she was concerned about where to place her children, Ms Lamb suggested another child care centre that was opening and she told Ms Hourani that she was going to be the Co-ordinator at that centre. Ms Hourani confirmed that she raised the issue of the Centre closing with another employee at the Centre, Lisa Morriss, and advised Ms Morriss that she was considering removing her children from the Centre. In response Ms Morriss told her that there was no guarantee that the Centre would be closing. Ms Hourani stated that she did not approach Ms Eszenyi about the Centre closing as she did not know her that well and she believed that the employees had been honest with her about the Centre closing. Ms Hourani stated that she appreciated being told by Ms Jolly that the Centre may be closing.

23 Ms Eszenyi purchased the Centre in January 2003 and it was the first time she had been involved in running a child care centre. Ms Eszenyi stated that she had a reasonable relationship with the Centre's employees after allaying their initial concerns about their jobs. Ms Eszenyi stated that when she took over the Centre, as existing employees were used to running the Centre without interference it was therefore hard for her to implement change. As a result Ms Eszenyi sought advice from a colleague Ms Kaye Ralph. Ms Eszenyi stated that Ms Ralph then visited the Centre and tried to discuss problems at the Centre, however staff were resistant to attempts to change the status quo.

24 Ms Eszenyi stated that at first she thought Ms Lamb would be a good co-ordinator as she said she had previous experience as a co-ordinator. However, after a couple of months Ms Eszenyi realised that there were issues with Ms Lamb's performance. It was also her view that Ms Jolly had entrenched ideas about running the Centre.

25 Ms Eszenyi stated that as part of improving the Centre's performance and as it was a requirement of accreditation employees were given the opportunity to undertake in-service training, but some staff did not complete this training.

26 Ms Eszenyi admitted that at some staff meetings she talked about her inability to pass the licence tests as she believed employees had a right to know what was happening with the Centre. Ms Eszenyi confirmed the respondent had a permit to operate until 17 December 2003 and she had to successfully apply for a licence prior to this date and that part of this requirement was for her to pass a written test. Ms Eszenyi agreed that at one point she asked Ms Lamb to be the respondent's licence holder and to sit the licence test. Ms Eszenyi understood that if she failed the licence test the Centre could close but she understood that in the event this happened she could reapply for her licence and then reopen the Centre. Ms Eszenyi stated that on 28 November 2003 she sat the licence test for a third time and passed and she advised Ms Lamb at the end of November 2003 that she had passed this test.

27 Ms Eszenyi stated that she did not discuss the Centre's licensing difficulties with any of the parents with children at the Centre. Ms Eszenyi stated that at the end of November 2003 one parent came in and asked her what was happening with the Centre as she had heard a rumour that it was closing. Ms Eszenyi told her that she would do her best to keep the Centre going. Ms Eszenyi confirmed that both Ms Jones and Ms Klatt approached her about a rumour about the Centre closing and Ms Eszenyi told them that she would do her best to keep the Centre operating. Ms Eszenyi gave evidence that she did not say that the Centre would close so that the employees would resign.

28 Ms Eszenyi stated that she was constantly in touch with the relevant authorities about licensing issues.

29 Ms Eszenyi stated that she advertised for extra qualified staff from July 2003 onwards as she had been advised by the licensing board that she needed to have more qualified staff.

30 Under cross-examination Ms Eszenyi maintained that the Centre's problems with gaining accreditation were caused by Ms Lamb as it was her responsibility as Co-ordinator to ensure that relevant regulations were followed at the Centre. Ms Eszenyi agreed that some of the in-service training undertaken by the respondent's employees was completed in their own time. It was put to Ms Eszenyi that Ms Lamb was described as a co-ordinator to the licensing authorities but was not paid the full rate of a co-ordinator and that Ms Lamb's rate of pay only increased to the co-ordinator rate because of the applicant's intervention. Ms Eszenyi stated that Ms Lamb's pay rate was discounted as she was given free child care for her children. Ms Eszenyi disagreed that she would override Ms Lamb's decisions about rostering and stated that she did not always have the final say on rosters.

31 Ms Eszenyi confirmed that on more than one occasion she told employees at staff meetings that if she did not gain her licence the Centre would have to close.

32 Ms Eszenyi stated that she was surprised when the employees left because she did not want them to leave.

33 Ms Eszenyi was referred to a letter she wrote to the Department for Community Development ("the Department") dated 9 December 2003 concerning her application for a childcare service licence and was asked to explain the reference in this letter (as follows) to a dismissal process being put in place:

> "During this time extra staff had been employed and a decision was made to put into to (sic) start the dismissal process for staff who were unwilling to change unsatisfactory practices. From 18 Nov (sic) Paula Lopresti's hours were reduced which resulted in written correspondence between her and myself (See letters) (sic)
>
> At this point I believe Paula Lopresti and Elizabeth Jolly mounted an active campaign to discredit myself and the centre. There were allegations made to the licensing board on 21 Nov (sic). On 24 Nov (sic) both staff above mentioned resigned.
>
> Kylie Lamb resigned on the (sic) 26 November with her last day of employment 10 Dec..(sic) "
>
> (Exhibit A23)

34 Ms Eszenyi stated that these paragraphs refer to the employees being subject to a performance appraisal process. Ms Eszenyi stated that the dismissal process was put in place to deal with employees who refused to undertake training. When asked about the reference to changing Ms Lopresti's hours Ms Eszenyi claimed that this was not done to pressure Ms Lopresti into leaving.

35 Ms Eszenyi was asked why the warnings given to Ms Lopresti were attached to her letter to the Department (Exhibit A23) when she had agreed to remove the warnings from Ms Lopresti's personal file. Ms Eszenyi stated that there was only one written warning and she included this warning because it remained on her computer.

36 When asked about her conversation with Ms Jones and Ms Klatt, Ms Eszenyi stated that she told them that she would try her best to keep the Centre open.

37 Ms Eszenyi denied that she told the employees that the Centre would be closing to have the employees leave.

38 When asked about the letters sent by Ms Jolly and Ms Lopresti to Ms Eszenyi after they handed in their resignations (Exhibits A18 and A13), Ms Eszenyi stated she never received these letters. Ms Eszenyi confirmed she was unhappy about the applicant's ongoing involvement at the Centre and the time staff spent with the applicant's representatives during work time when they should have been looking after the children.

39 When asked why Ms Lamb was asked to take on the respondent's licence around October 2003 Ms Eszenyi stated that she had no choice at the time. Ms Eszenyi agreed that she blamed Ms Lamb for the Centre failing to meet a number of its licence requirements in her correspondence to the Department (Exhibit A23).

40 Ms Eszenyi stated that she was unaware of the employees' financial commitments at the time they ceased employment with the respondent however she then clarified this by saying that she was aware that Ms Jolly had some financial difficulties at one point. Ms Eszenyi agreed that she told Ms Lamb that she would close the Centre until the Centre's licence was approved if the respondent lost its licence. Ms Eszenyi denied that she created an environment at the end of November 2003 whereby the employees understood that the Centre would close.

41 Under re-examination Ms Eszenyi confirmed that she never told the employees that the Centre was closing and that she only stated that it was possible that the Centre may close. Ms Eszenyi confirmed that in addition to the employees the respondent employed Ms Louise Roby and Ms Celina Gatiss in 2003. Ms Eszenyi stated that Ms Morriss was employed in September 2003, Ms Luana Bong in November 2003 and Ms Simmons and Ms Parab in December 2003.

42 Ms Gatiss commenced employment with the respondent in January 2003. At first Ms Gatiss enjoyed a good relationship with Ms Eszenyi and she had a good relationship with the employees. Ms Gatiss recalled Ms Eszenyi telling staff sometime prior to the employee resigning that if she did not pass her licence test she would re-sit it and if she did not obtain her licence the Centre might have to close. Ms Gatiss stated that the employees did not believe that Ms Eszenyi would pass the test as she had failed before and they believe that the respondent's operations would definitely close. Ms Gatiss stated that she had similar views. Ms Gatiss stated that on more than one occasion the employees encouraged her to resign. Ms Gatiss stated that the employees had become bitter towards Ms Eszenyi. Ms Gatiss stated that she felt uneasy when she was working with Ms Eszenyi because of the possibility that she may lose her job. Ms Gatiss stated that at one stage Ms Eszenyi reassured her that the respondent's operations would continue until she gained her licence.

43 Under cross-examination Ms Gatiss stated that she believed that the Centre would close as the employees were saying it would close and Ms Eszenyi stated that she would not pass her license test. Ms Gatiss confirmed that Ms Eszenyi stated that it was possible that the Centre may close until she obtained her licence. Ms Gatiss agreed that she was looking for alternative employment towards the end of 2003 but when Ms Eszenyi reassured her that the Centre was not going to close and that her licence was in place she stopped looking and continued working with the respondent.

44 Ms Morriss commenced employment as a relief worker with the respondent on 6 October 2003 and was later appointed as the Centre's non-contact director. Ms Morriss has had ten to twelve years experience in the child care industry. When Ms Morriss commenced employment as a relief worker she stated that she was appalled by the management of the Centre and the care given to the children. When she was asked in December 2003 to take on the respondent's licence she declined because of the state the Centre was in as the respondent had twice failed to become accredited and had breached regulations on a number of occasions. Ms Morriss understood that even though there was an issue with Ms Eszenyi's licence at the end of 2003 she was unaware of any threat to close the Centre. Ms Morriss stated that she had never been told that the Centre would close and it was her view that the employees assumed that the respondent would close its operations. Ms Morriss stated that she did not attend staff meetings at the end of 2003 as she was a relief worker at the time, but she recalled a discussion with the employees

about the Centre closing and she was advised that Ms Eszenyi had mentioned licence problems at staff meetings and that the Centre may close. The employees told her that parents should be advised about the closure but Ms Morriss responded by saying that as it was only hearsay that the Centre was closing parents should only be advised of this after Ms Eszenyi found out one way or the other about her licence. Ms Morriss stated that in her view Ms Lamb did not carry out her role as coordinator appropriately as when she took over the role it was apparent that many things had not been done correctly and she believed that Ms Lamb was unprofessional given her approaches to parents and the way staff talked about Ms Eszenyi. Ms Morriss stated that since the end of December 2003 there have been no breaches of the relevant regulations despite significant scrutiny by the Licensing Unit.

45 Under cross-examination Ms Morriss agreed that her job was different to that of Ms Lamb's position as she was a non contact director and was not responsible for directly dealing with children at the Centre.

Submissions

46 The applicant submits that the employees were terminated at the initiative of the employer and that the employees were unfairly terminated. The applicant maintains that Ms Eszenyi's actions fundamentally breached the employment relationship between the respondent and the employees and undermined the trust and confidence which should have remained between the respondent and the employees by repeatedly referring to the uncertainty of the employees' future and not giving them any guarantee of ongoing employment at the Centre. The applicant maintains that Ms Eszenyi deliberately misled the employees about the Centre continuing to operate and claimed that it was unusual for an employer to continually raise job uncertainty in the manner undertaken by Ms Eszenyi. The applicant relies on the authority in *Cargill Australia Limited and Other v The Federated Clerks' Union of Australia, Industrial Union of Workers, WA Branch* (1992) 72 WAIG 1495 in support of its contentions. The applicant also maintains that the employees were coerced to resign (*The Attorney General v Western Australian Prison Officers' Union of Workers* [1995] 75 WAIG 3166).

47 The applicant argues that Ms Eszenyi deliberately planned to get rid of the employees as the employees were given no confidence that their jobs at the Centre would continue beyond December 2003. This compares to the reassurance given to Ms Gatiss about her ongoing employment. The applicant argues that none of the employees would have left if Ms Eszenyi had not behaved in the way she did.

48 The applicant maintains that Ms Eszenyi was not a credible witness because her evidence was inconsistent and she openly admitted that she misled the Department about what had gone on at the Centre.

49 The applicant relies on the authority contained in *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 3635 when claiming compensation for loss.

50 The respondent maintains that Ms Eszenyi did not act in a calculated way to force the employees to resign. The employees assumed the Centre would close if the respondent's licence assessment failed, however, this did not eventuate. The employees jumped to their own conclusions and Ms Eszenyi did everything possible to keep the Centre operating.

51 On the issue of credibility the respondent maintains that Ms Eszenyi's evidence was direct and if there were discrepancies between her evidence and other witnesses then it may have been that the other parties misunderstood what she said as English is not her first language.

52 The respondent submits that Ms Eszenyi's letter to the Department dated 9 December 2003 was a response to concerns raised by the Department.

53 The employees applied for and obtained alternative positions prior to resigning which adds weight to the respondent's argument that the employees were not forced to resign. Furthermore Ms Lamb should take some responsibility for the problems that the respondent had at the Centre and the employees behaved inappropriately by making comments about Ms Eszenyi to parents.

54 As there was no specific event to trigger the employees' resignations the respondent argues that the employees resigned of their own accord. As the employees reached their own conclusion that the Centre was going to close, this does not amount to unconscionable conduct by the respondent. In the circumstances there was therefore no constructive dismissal of the employees.

Findings and Conclusions

Credibility

55 I listened carefully to each witness and closely observed them whilst giving evidence. In my view each of the employees gave evidence honestly and to the best of their recollection and in the main their evidence was not broken down during extensive cross-examination. I have a similar view about the evidence given by Ms Gatiss. I was particularly impressed with Ms Jones' evidence as in my view she was very clear and forthright about her discussion with Ms Eszenyi at the end of 2003 as confirmed in the letter she gave to Ms Jolly which was written soon after this discussion took place (Exhibit A1). I therefore accept her evidence as I found her to be a convincing and honest witness. Even though Ms Klatt was vague about dates I take no issue with her evidence as in my view she gave her evidence honestly and to the best of her recollection. I have some concerns about the evidence given by Ms Eszenyi. It is my view that Ms Eszenyi's evidence was unsatisfactory in parts given the way in which she answered a number of key questions put to her. I found Ms Eszenyi to be hesitant and unconvincing when commenting on her conversations with Ms Jones and Ms Klatt at the end of 2003 about the Centre not closing and it is my view that Ms Eszenyi was unconvincing when giving her reasons for including the warning given to Ms Lopresti in the letter dated 9 December 2003 that was sent to the Department. I found Ms Eszenyi's evidence about Ms Lamb's abilities not to be credible as Ms Eszenyi stated that she had little confidence in her abilities as a co-ordinator, yet in October 2003 she asked Ms Lamb to sit a test to become the respondent's licensee. It is also my view that even though English is not Ms Eszenyi's first language Ms Eszenyi was clear in her understanding of the questions asked of her and I had a clear understanding of Ms Eszenyi's responses to the questions put to her. I therefore find that Ms Eszenyi had no difficulty communicating effectively with the respondent's employees. Given my doubts about Ms Eszenyi's evidence, where the evidence given on behalf of the applicant and Ms Eszenyi conflicts I prefer the evidence given by the applicant's witnesses.

56 In relation to an unfair dismissal claim it is incumbent upon an employee, on the balance of probabilities, to demonstrate that he or she has been dismissed by the employer to attract the Commission's jurisdiction.

57 In this case there was no dispute that the employees resigned. A resignation can constitute a dismissal for the purposes of the Act but whether or not a particular resignation will do so depends upon the circumstance of each case. The relevant law to be applied in this matter was set out by Beech, SC in *Grant Raymond Lukies v AlintaGas Networks Pty Ltd* (2002) 82 WAIG 2217 at 2220:

> "The Industrial Relations Commission of South Australia in *Lucky "S" Fishing Pty Ltd v Jex* (1997) 75 IR 158 at 164 also considered the decision of the Court of Appeal of New Zealand [*Auckland Shop Employees' Union v Woolworth's (NZ) Ltd* (1985) 2 NZLR 372]. It noted that the Court of Appeal stated that there has been a modification of the test in

the *Western Excavating (ECC) Ltd v Sharp* case (1978) ICR 221 at 226 which stated that 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 Court of Appeal suggested that in constructive dismissal cases the relevant test is whether the conduct complained of is calculated or likely to seriously damage the relationship of confidence and trust between the parties and is such that the employee cannot be expected to put up with it."

58 Taking into account this authority I find that the employees were dismissed by the respondent as it is my view that the respondent acted in such a way towards the employees that constituted conduct that was calculated or was likely to seriously damage the relationship of confidence and trust between the parties such that the employees could not be expected to continue the employment relationship.

59 I make this decision based on the following findings. I find that after Ms Eszenyi became involved with the Centre she experienced difficulties gaining the licence required of her to operate the Centre as well as accreditation for the Centre from the Department and she had difficulties establishing a positive working relationship with the Centre's existing employees including the three employees the subject of this application. Even though I accept that Ms Eszenyi made efforts to build a good relationship with the Centre's employees and sought external advice, by mid 2003 Ms Eszenyi had become involved in a number of disputes with the applicant and employees at the Centre including wage underpayments, rostering, dispute resolution procedures, written warnings, staff meetings and overtime issues (see Exhibit A21). I find that Ms Eszenyi's relationship with Ms Lamb, Ms Jolly and Ms Lopresti in particular deteriorated as a result of these disputes as it was clear that in addition to negotiating backpay owing to all of the respondent's staff the applicant became involved in a wage underpayment issue affecting Ms Lamb, issues concerning Ms Lopresti's hours and warnings given to her and warnings given to Ms Jolly.

60 It is my view that towards the end of 2003 Ms Eszenyi went out of her way to create uncertainty in the minds of the employees about the Centre continuing to operate after 17 December 2003. I find that at a number of staff meetings during this period Ms Eszenyi told employees that she was having difficulties passing the licence test and gaining accreditation for the Centre and employees were advised that as a result the Centre may close. I also find that Eszenyi advised the Centre's staff during this period that she was contemplating closing the Centre either for a lengthy period of time or until the accreditation process was successful, or for a break covering several weeks over Christmas 2003. I find that the situation between Ms Eszenyi and the employees became critical after Ms Eszenyi advised the Centre's staff that she had failed to pass the licence test a second time and that as a result it was highly likely that the Centre would close. I accept the evidence of the employees and I find that the statements made by Ms Eszenyi about her failure to pass the accreditation process and the likelihood of the Centre closing in both the short and long term presented as a major concern to the employees as it was important that they had ongoing employment. I find that this uncertainty was exacerbated by Ms Eszenyi making no efforts to reassure the employees that their jobs were not at risk, even though the Centre was experiencing difficulties obtaining its accreditation, and that she was committed to keeping the Centre operating, in contrast to the reassurance given to Ms Gatiss. I find that after information was relayed to the employees about Ms Klatt's discussion with Ms Eszenyi to the effect that Ms Eszenyi was deliberately giving the employees the impression that the Centre would close to get rid of the employees and to replace them with employees of her own choosing, this convinced the employees that there was a limited future for them if they remained working with the respondent and further added to their view that their ongoing employment at the Centre was tenuous. In the circumstances I find that as a result of Ms Eszenyi's statements to the employees, the employees were left with no option but to seek out alternative employment.

61 In reaching this view I take into account Ms Jones' evidence that on 27 November 2003 Ms Eszenyi told Ms Jones that rumours about the Centre closing were untrue, that the Centre was not closing down nor had she any intention of closing the Centre and that she had let the employees believe that the Centre would be closing so that they would resign and she could replace them with her own staff. I also find that during this discussion Ms Eszenyi told Ms Jones that the employees were not good at their jobs and that she had already employed additional staff to take the employees' place. It is clear that Ms Eszenyi had staff available to replace the employees as a number of new employees were employed just prior to and soon after the employees left and furthermore that Ms Eszenyi referred to putting in place a dismissal process for staff who were 'unwilling to change unsatisfactory practices' in her correspondence to the Department on 9 December 2003 (Exhibit A23). I also take into account the letters written by Ms Lopresti and Ms Jolly confirming the reasons for their resignations, as they both refer to their uncertainty about ongoing employment with the respondent and their lack of trust in Ms Eszenyi given her comments that she was trying to give the employees the impression that the Centre was closing (Exhibits A13 and A18).

62 I therefore conclude on the evidence that Ms Eszenyi embarked on a deliberate campaign towards the end of 2003 to give the employees the impression that the Centre's closure was imminent thus giving the employees no option but to seek out alternative employment, which they did.

63 I find that as a result of Ms Eszenyi deliberately giving a false impression to the employees about their long term tenure at the Centre her actions breached the relationship of trust and confidence which should have existed between the employees and the respondent. In my view Ms Eszenyi's dishonesty towards the employees about the availability of long term employment for them demonstrated that the respondent no longer intended to be bound by its contractual relationship with the employees. In acting in this way it is my view that the respondent repudiated its contractual obligations to the employees. Given this significant breach of the contractual relationship between the employees and the respondent as a result of Ms Eszenyi's actions it is my view that the employees had the right to consider that the employment relationship with the respondent was effectively at an end as at November 2003. In the circumstances I find that when the employees resigned and sought out and gained employment elsewhere the employees were constructively dismissed.

64 As I have found that the employees were terminated I am required to assess whether in all of the circumstances the employees were unfairly terminated.

65 The test for determining whether a dismissal is unfair or not is well settled. The question is whether the employer acted harshly, unfairly or oppressively in dismissing the employees (*Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia, Hospital Service and Miscellaneous WA Branch* [1985] 65 WAIG 385). The onus is on the employee to establish that the dismissal was, in all the circumstances, unfair. Whether the right of the employer to terminate the employment has been exercised so harshly or oppressively or unfairly against the employee as to amount to an abuse of the right needs to be determined. A dismissal for a valid reason within the meaning of the Act may still be unfair if, for example, it is effected in a manner which is unfair. However, terminating an employment contract in a manner which is procedurally irregular may not of itself mean the dismissal is unfair (*Shire of Esperance v Mouritz (1991) 71 WAIG 891* and *Byrne v. Australian Airlines (1995) 61 IR 32).* In *Shire of Esperance v Mouritz* (op cit), Kennedy J observed that unfair procedures adopted by an employer when dismissing an employee are only one element that needs to be considered when determining whether a dismissal was harsh or unjust.

66 On the evidence I find that the employees were unfairly dismissed by the respondent. I have already found that Ms Eszenyi behaved dishonestly towards the employees by not telling them about the true nature of her intentions to keep the Centre operating and that Ms Eszenyi set about to deliberately give the employees the impression that the Centre would not continue operating after Christmas 2003 such that the employees were left with no option but to seek out alternative employment. I accept that each of the employees wanted to continue working with the respondent as they enjoyed their jobs and that each had built up a good rapport with both the children and parents at the Centre. I take into account that none of the employees were given formal warnings about their behaviour and performance, except for Ms Jolly who had been given a verbal warning towards the end of 2003, the status of which was in doubt when she was terminated by the respondent. Even though Ms Morriss made negative comments about Ms Lamb's abilities I note that Ms Morriss was not employed by the respondent until October 2003, and only then as a relief worker, therefore she would have had a limited knowledge of Ms Lamb's capabilities. I therefore find that as the respondent had no reason to terminate the employees and as the employees wanted to remain working with the respondent and should have been able to do so, the employees were unfairly dismissed by the respondent.

Compensation

67 Re-instatement or re-employment is not being sought by the employees and I am satisfied on the evidence that the working relationship between the employees and the respondent has broken down such that an order for re-instatement would be impracticable. I now turn to the question of compensation. I apply the principles set out in *Bogunovich v Bayside Western Australia Pty Ltd* (op cit) and *Tranchita v Wavemaster International Pty Ltd* (1999) 79 WAIG 1886. On the evidence, I am satisfied the employees took reasonable steps to mitigate their loss. Indeed, each employee secured alternative employment which commenced soon after they ceased employment with the respondent.

68 I find that the applicant has not demonstrated that the employees suffered any loss of income or any other loss requiring to be compensated, apart from a small loss of income for Ms Lamb. Each of the employees obtained alternative employment prior to resigning from the respondent. Ms Lamb resigned on 26 November 2003 giving two weeks' notice which ended on Wednesday 10 December 2003 and she commenced employment as a co-ordinator at a centre in Forrestfield on 15 December 2003. Ms Lamb was being paid $17.88 per hour at termination and as Ms Lamb started on $17.25 per hour in her new job until her rate increased to $18.83 per hour from 24 July 2004 she is therefore owed $766.08 (38 hours x $0.63 per hour x 32 weeks). I find that Ms Lamb is also owed two days' pay being $271.78 gross as compensation for the days in-between ceasing employment with the respondent and commencing in her new position (15.2 hours x $17.88 per hour). Ms Lopresti resigned on 24 November 2003 giving two weeks' notice ending on Friday 5 December 2003. Ms Eszenyi asked Ms Lopresti to leave on 28 November 2003 and agreed to pay Ms Lopresti the remaining notice due to her in lieu. At termination the respondent paid Ms Lopresti $13.33 per hour. As Ms Lopresti commenced employment at Balmain House Childcare Centre on Monday 8 December 2003 earning $14.08 per hour she has therefore suffered no loss of income. Ms Jolly resigned on 24 November 2003 giving two weeks' notice which ended on Friday 5 December 2003 and Ms Jolly commenced employment in a new position at another centre on 8 December 2003 earning $13.78 per hour. The respondent paid Ms Jolly either $11.54 or $13.50 per hour depending on the work she was doing. Ms Eszenyi asked Ms Jolly to leave on 28 November 2003 and agreed to pay Ms Jolly the outstanding notice due to her. Ms Jolly did not therefore suffer any loss. As only Ms Lamb has demonstrated that she has suffered a loss I will order that she be paid $1037.86 gross as compensation.

Injury

69 The notion of injury must be treated with some caution (*AWI Administration Services Pty Ltd v Andrew Birnie* (2001) 81 WAIG 2849). In *AWI Administration Services Pty Ltd v Birnie* (op cit) at 2862 Coleman CC and Smith C observed:

> "It is accepted that there is an element of distress associated with almost all employer initiated terminations of employment. For injury to be recognised by way of compensation and thereby fall outside the limits which can be taken to have normally been associated with a harsh, oppressive or unfair dismissal there needs to be evidence that loss of dignity, anxiety, humiliation, stress or nervous shock has been sustained. Injury embraces the actual harm done to an employee by the unfair dismissal. It comprehends 'all manner of wrongs' including being treated with callousness (*Capewell v Cadbury Schweppes Australia Limited* (1998) 78 WAIG 299)."

70 Further, there will be a degree of distress in most dismissal cases (see *Nicholas Richard Lynam v Lataga Pty Ltd* (2001) 81 WAIG 986).

71 As a result of the way in which the respondent handled the employees' terminations I find that each of them suffered injury over and above that which is normally associated with a dismissal. I find that Ms Eszenyi's actions towards the employees was callous and unwarranted and I accept that the employees were upset by their treatment and distressed about leaving a workplace to which they had an emotional commitment given the nature of the work they undertook. Further, I take into account the employees' evidence that they would have continued working with the respondent if not for the actions of Ms Eszenyi. In the circumstances it is my view that this warrants an award of $300.00 being made to each of the employees.

72 A Minute of Proposed Order will now issue.

2004 WAIRC 13575

ALLEGED UNFAIR DISMISSALS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	HAPPY FACE CHILD CARE CENTRE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 9 DECEMBER 2004
FILE NO/S	CR 269 OF 2003
CITATION NO.	2004 WAIRC 13575

Result Application alleging unfair dismissals upheld and some compensation ordered. Compensation for injury awarded.

Order

HAVING HEARD Mr M Swinbourn on behalf of the applicant and Mr A Pass 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 dismissals of Kylie Lamb, Paula Lopresti and Elizabeth Jolly by the respondent were unfair and that reinstatement is impracticable.

2 ORDERS that the respondent shall pay to Kylie Lamb the amount of $1,337.86 as compensation for her loss and injury within seven (7) days of the date of this order.

3 ORDERS that the respondent shall pay to Paula Lopresti the amount of $300.00 as compensation for injury within seven (7) days of the date of this order.

4 ORDERS that the respondent shall pay to Elizabeth Jolly the amount of $300.00 as compensation for injury within seven (7) days of the date of this order.

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

CONFERENCES—Notation of—

Parties		Commissioner/ Conference Number	Dates	Matter	Result
Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch	Ascot Inn	Harrison C CR 20/2004	N/A	Alleged unfair dismissal	Dismissed
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch	Austindo (WA) Pty Ltd	Gregor SC C 200/2004	28/10/04	Termination of union member	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch and The Construction, Forestry, Mining and Energy Union of Workers	Barclay Mowlem Construction Ltd	Gregor SC C 215/2004	12/11/04	Dispute regarding the observance of the Queens birthday	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch	BHP Billiton Iron Ore	Wood C C 144/2004	30/07/04	assessment of a union members duties	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch	Didasko Technologies Pty Ltd	Gregor SC C 227/2004	9/12/04	Dispute regarding termination of employment of union member	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch	Global Electrotech Pty Ltd	Gregor SC C 216/2004	15/11/04	Dispute regarding conditions of employment	Concluded

Parties		Commissioner/ Conference Number	Dates	Matter	Result
Doric Construction (Australia) Pty Ltd	The Construction, Forestry, Mining and Energy Union of Workers	Gregor SC C 208/2004	29/10/04, 2/11/04, 4/11/04, 9/11/04	Dispute regarding right of entry	Concluded
The Australian Workers' Union, West Australian Branch, Industrial Union of Workers	Dampier Salt Limited	Wood C C 115/2004	3/6/04, 25/6/04	Denial of shift work to union member	Concluded
The Australian Workers' Union, West Australian Branch, Industrial Union of Workers	NRW Pty Ltd	Gregor SC CR 149/2004	N/A	Alleged unfair dismissal	Discontinued
The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	BHP Billiton Iron Ore	Wood C C 178/2004	10/09/04	Removal of allowances	Concluded
The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	Harnischfeger of Australia Pty Ltd	Gregor SC C 197/2004	28/10/04	Dispute regarding the grievance procedure	Concluded
The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	Milne Agrigroup Pty Ltd	Gregor SC C 239/2004	3/12/04	Dispute regarding termination of employment of union member	Concluded
The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	RAC of WA (Inc)	Gregor SC C 232/2004	9/12/04	Resource allocation and rostering discussions brokendown	Concluded
The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	Town of Port hedland	Gregor SC C 194/2004	25/10/04	Dispute over non payment of tool allowance	Concluded
The Construction, Forestry, Mining and Energy Union of Workers	Australasian Piling Company and Piletech Western Australia Pty Ltd	Gregor SC C 219/2004	12/11/04	Site safety	Concluded
The Construction, Forestry, Mining and Energy Union of Workers	BHP Billiton Iron Ore Pty Ltd	Wood C C 238/2004	19/11/03	Dispute regarding working on Christmas day	Concluded
The Construction, Forestry, Mining and Energy Union of Workers	Doric Construction (Australia) Pty Ltd	Gregor SC C 209/2004	4/11/04	Dispute regarding the withdrawal of labour from worksite by the union	Concluded
The Construction, Forestry, Mining and Energy Union of Workers	MTA Demolitions Pty Ltd	Gregor SC C 160/2004	30/08/04	Unfair dismissal of union member	Referred
The Construction, Forestry, Mining and Energy Union of Workers	MTA Demolitions Pty Ltd	Gregor SC CR 160/2004	26/10/04	Unfair dismissal of union member	Concluded
The Construction, Forestry, Mining and Energy Union of Workers	Swan Health Service	Gregor SC C 191/2004	19/10/04	Conflict regarding worker entitlements	Concluded
The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, W.A. Branch	The Palcon Group Pty Ltd	Gregor SC C 237/2004	7/12/04	Dispute regarding employees signing AWA's	Concluded
Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers	CEO, Vincent Town Council	Kenner C C 132/2004	8/07/04	Removal of members contractual use of motor vehicle and regular overtime	Referred

Parties		Commissioner/ Conference Number	Dates	Matter	Result
Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers	CEO, Vincent Town Council	Kenner C CR 132/2004	8/07/04	Removal of members contractual use of motor vehicle and regular overtime	Discontinued
Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers	Chief Executive Officer, Kalgoorlie-Boulder City Council	Kenner C C 186/2004	18/10/04	Denied contract entitlement	Discontinued
Western Australian Police Union of Workers	The Hon. Attorney General C/- Department of Justice	Beech CC C 59/2004	25/03/04	application to be placed on the Transfer list	Concluded
Western Australian Prison Officers' Union of Workers	The Hon. Attorney General C/- Department of Justice	Beech CC CR 87/2004	N/A	Authorisation for Secondary Employment	Discontinued

CORRECTIONS—

2005 WAIRC 00002

DEPARTMENT OF EDUCATION AND TRAINING MINISTERIAL OFFICERS GENERAL AGREEMENT 2004

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES DEPARTMENT OF EDUCATION AND TRAINING AND CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT

CORAM COMMISSIONER J L HARRISON
PUBLIC SERVICE ARBITRATOR

DATE TUESDAY, 4 JANUARY 2005

FILE NO. PSAAG 19 OF 2004

CITATION NO. 2005 WAIRC 00002

Result Correction Order issued

Correction Order

WHEREAS an error occurred in the Order dated 23 December 2004 issued in application PSAAG 19 of 2004, 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 reference to "PSAAG 42 of 2002" in the Order dated 23 December 2004 be deleted and replaced with "PSAAG 46 of 2002".

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

PROCEDURAL DIRECTIONS AND ORDERS—

2004 WAIRC 13076

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID BRUCE GEBERT
	APPLICANT
	-v-
	GEBERT INDUSTRIES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 19 OCTOBER 2004
FILE NO.	APPL 188 OF 2004
CITATION NO.	2004 WAIRC 13076

Result	Direction issued
Representation	
Applicant	Ms H Hussey of counsel
Respondent	Mr W Halvorson

Direction

HAVING heard Ms H Hussey of counsel on behalf of the applicant and Mr W Halvorson 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 2 November 2004.
2. THAT inspection of documents shall be completed by 9 November 2004.
3. THAT the parties have liberty to apply on short notice.

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

2004 WAIRC 13593

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID BRUCE GEBERT
	APPLICANT
	-v-
	GEBERT INDUSTRIES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 29 NOVEMBER 2004
FILE NO.	APPL 188 OF 2004
CITATION NO.	2004 WAIRC 13593

Result	Order issued
Representation	
Applicant	Ms H Hussey of counsel
Respondent	Mr W Halvorson

Order

HAVING heard Ms H Hussey of counsel on behalf of the applicant and Mr W Halvorson 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 hearing date of 22 December 2004 be and is hereby vacated.
2. THAT the matter be listed for hearing for one day in Merredin.
3. THAT the respondent produce for inspection by the applicant the following documents or classes of documents by 13 December 2004:
   (a) All documents outlining ownership of all disputed goods as per police offence report no. 17010409559514 of 17 January 2004.
   (b) Accountant certified documents for the complete original "Sale of Business" between Stanza Nominees (E. A. Gebert) and the present co-owners including full asset lists and chattels as to the equipment purchased in the sale including any asset register with a full description of any asset.
   (c) Fully documented sales invoice information covering the selling period from 1 August 2003 to 30 January 2004 excluding customer contact details.

(d) Fully documented bank deposit information covering the period from 1 August 2003 to 31 January 2004.

4. THAT the parties have liberty to apply on short notice.

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

2004 WAIRC 12374

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FRANK SACCA
	APPLICANT
	-v-
	WORSLEY ALUMINA PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 16 AUGUST 2004
FILE NO/S	APPLICATION 416 OF 2004
CITATION NO.	2004 WAIRC 12374

Result	Direction issued
Representation	
Applicant	Mr G Stubbs of counsel
Respondent	Mr D Jones as agent

Direction

HAVING heard Mr G Stubbs 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 each party shall give an informal discovery by serving its list of documents by 30 August 2004.
2. THAT inspection of documents shall be completed by 6 September 2004.
3. THAT the parties have liberty to apply on short notice.

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

2004 WAIRC 13683

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DONALD PETER SHIRREN
	APPLICANT
	-v-
	E-SPAN SOLUTIONS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 16 DECEMBER 2004
FILE NO.	APPL 632 OF 2004
CITATION NO.	2004 WAIRC 13683

Result	Direction issued
Representation	
Applicant	Mr I R Gregory of Counsel
Respondent	Mr S Madsen of Counsel

Direction

The Commission, having heard Mr I Gregory of counsel on behalf of the applicant and Mr S Madsen of counsel on behalf of the respondent, and having determined that the following orders and directions were necessary and expedient for the just hearing and determination of the matter, it is ordered and directed as follows: -

THAT there be mutual discovery and inspection by the parties by 4 pm, Monday, 10 January 2005.

(Sgd.) S WOOD,
[L.S.] Commissioner.

2004 WAIRC 13743

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JAMES SILVESTER
	APPLICANT
	-v-
	WMC RESOURCES LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	23rd DECEMBER 2004
FILE NO/S	APPL 1422 OF 2004
CITATION NO.	2004 WAIRC 13743

Result Extension of Time Granted

Order

WHEREAS on 28th October 2004 James Silvester applied to the Commission for an order pursuant to the *Industrial Relations Act, 1979*; and

WHEREAS on 30th November 2004 WMC Resources Ltd (the Respondent) filed a Notice of Answer concerning the application being filed outside the 28 day lodgement time; and

WHEREAS on 14th December 2004 the Commission listed the matter to hear submissions from the parties regarding the application being filed out of time; and

WHEREAS after hearing the parties the Commission published its decision in the transcript of proceedings to grant the application for an extension of time and to refer the application proper to conciliation proceedings before a Deputy Registrar.

NOW THEREFORE having heard Mr D MacLean of Counsel who appeared on behalf of the Applicant and Mr R Gifford who appeared 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 for an extension of time in which to lodge the application be granted; and
2. THAT the matter will be delegated to a Deputy Registrar for a conciliation conference.

[L.S.]

(Sgd.) J F GREGOR,
Senior Commissioner.

2004 WAIRC 13548

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR GREGORY WAKEHAM ROSS
	APPLICANT
	-v-
	ROCOM PTY LTD ACN 008 919 462, BARBAGALLO INVESTMENTS TRUST ACN 78 181 648 205
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	TUESDAY, 7 DECEMBER 2004
FILE NO/S	APPL 1600 OF 2004
CITATION NO.	2004 WAIRC 13548

Result Shortened Time Granted

Order

WHEREAS on 6 December 2004 Gregory Wakeham Ross (the Applicant) has applied in Application 1600 of 2004 for orders pursuant to s.29 of the *Industrial Relations Act, 1979* against Rocom Pty Ltd and Others; and

WHEREAS on 6 December 2004 the Applicant has applied for an order for shortened time for the Respondent to file a response to Application 1600/04and that the matter be heard expeditiously; and

WHEREAS on 7 December 2004 the Commission, ex parte heard submissions from Mr J. Blackburn, of Counsel, on behalf of the Application; and

WHEREAS the nature of the submissions indicated that the Applicant was suffering financial hardship and the Commission decided to issue an order that the Applicant serve a copy of the application and this order on the Respondent forthwith and the Respondent file an answer to the claim within 7 days of today's date.

NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act, 1979* the Commission hereby orders:

1. THAT the Applicant serve a copy of the application 1600 of 2004 and this Order on the Respondent forthwith.
2. THAT the Respondent file an answer to the application within 7 days of today's date.

[L.S.]

(Sgd.) J F GREGOR,
Senior Commissioner.

ENTERPRISE BARGAINING AGREEMENT—Notation Of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
AB Tilbury Pty Ltd Enterprise Bargaining Agreement 2004-5 AG 261/2004	7/12/2004	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch	A.B. Tilbury Pty Ltd	Gregor SC	Agreement Registered
Acecrew Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 231/2004	13/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Acecrew Pty Ltd	Gregor SC	Agreement Registered
Acerange Holdings / CFMEUW Industrial Agreement 2002-2005 AG 254/2004	13/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Acerange Holdings Pty Ltd	Gregor SC	Agreement Registered
Action Tile & Maintenance / CFMEUW Industrial Agreement 2002-2005 AG 243/2004	10/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Action Tile And Maintenance Pty Ltd	Gregor SC	Agreement Registered
Alby's Roofing / CFMEUW Industrial Agreement 2002-2005 AG 244/2004	10/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Alby's Co Pty Ltd t/a Alby's Roofing	Gregor SC	Agreement Registered
All Cover Roofing / CFMEUW Industrial Agreement 2002-2005 AG 249/2004	10/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Regalflash Pty Ltd t/a All Cover Roofing	Gregor SC	Agreement Registered
All Fix Roofing / CFMEUW Industrial Agreement 2002-2005 AG 209/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Scott Paul Wells T/A All Fix Roofing	Gregor SC	Agreement Registered
Apollo Trading Co / CFMEUW Industrial Agreement 2002-2005 AG 246/2004	10/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Apollo Trading Co Pty Ltd	Gregor SC	Agreement Registered
Arrow Roof Tiling Services / CFMEUW Industrial Agreement 2002-2005 AG 245/2004	10/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Arrow Roof Tiling Services Pty Ltd	Gregor SC	Agreement Registered
Australian Red Cross Blood Service, Western Australia, AMA Medical Practitioners Industrial Agreement 2004 AG 260/2004	7/12/2004	The Western Australian Branch of the AustralianMedical Association Incorporated	Australian Red Cross Blood Service, WesternAustralia Incorporated	Scott C	Agreement Registered
Avro Holdings / CFMEUW Industrial Agreement 2002-2005 AG 251/2004	13/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Avro Holdings Pty Ltd	Gregor SC	Agreement Registered
Balfern Holdings / CFMEUW Industrial Agreement 2002-2005 AG 235/2004	10/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Balfern Holdings Pty Ltd	Gregor SC	Agreement Registered
Berri Ltd (Balcatta Plant) Enterprise Agreement 2004 AG 177/2004	11/11/2004	Berri Limited (ACN 008 077 889)	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Kenner C	Agreement Registered
Biokovo Paving / CFMEUW Industrial Agreement 2002-2005 AG 183/2004	29/11/2004	The Construction, Forestry, Mining and Energy Union of Workers	Biokovo Paving Pty Ltd	Gregor C	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Blue Brook / CFMEUW Industrial Agreement 2002-2005 AG 184/2004	29/11/2004	The Construction, Forestry, Mining and Energy Union of Workers	Blue Brook Pty Ltd	Gregor C	Agreement Registered
BlueScope Steel Myaree Service Centre Closure Agreement 2004/2007 AG 273/2004	16/12/2004	BlueScope Steel Limited	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch	Gregor SC	Agreement Registered
BOC Limited Perth Operations Centre (Canning Vale) Agreement (2004) AG 179/2004	15/12/2004	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch	B.O.C Limited	Gregor SC	Agreement Registered
Bushwest Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 210/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Bushwest Pty Ltd	Gregor SC	Agreement Registered
C Hill Roofing / CFMEUW Industrial Agreement 2002-2005 AG 241/2004	10/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	C Hill Roofing Pty Ltd	Gregor SC	Agreement Registered
Cerebral Palsy Association of Western Australia Ltd Salaried Staff Enterprise Agreement 2004 AG 265/2004	15/12/2004	Cerebral Palsy Association of Western Australia Ltd	Health Services Union of Western Australia (Union of Workers)	Scott C	Agreement Registered
Churches of Christ Homes and Community Services Incorporated (HSU) Enterprise Agreement 2004 AG 196/2004	13/12/2004	Health Services Union of Western Australia (Union of Workers)	Churches of Christ Homes and Community Services Incorporated	Scott C	Agreement Registered
Clerks (Public Authorities) - Western Australian Egg Marketing Board General Agreement 2004 PSAAG 21/2004	23/12/2004	Chief Executive Officer, Western Australian Egg Marketing Board	Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A. Clerical and Administrative Branch	Kenner C	Agreement Registered
Commentary Pty Ltd / CFMEUW Industrial Agreement 2002-2005 ag 226/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Commentary Pty Ltd	Gregor SC	Agreement Registered
Coriander Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 242/2004	10/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Coriander Pty Ltd	Gregor SC	Agreement Registered
Dalshore Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 218/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Dalshore Pty Ltd	Gregor SC	Agreement Registered
Department for Community Development (Family Resource Workers, Welfare Assistants and Parent Helpers) General Agreement 2004 PSAAG 22/2004	3/12/2004	The Department for Community Development, Civil Service Association of Western Australia Incorporated	(Not applicable)	Scott C	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Department of Education and Training Ministerial Officers General Agreement 2004 PSAAG 19/2004	23/12/2004	Department of Education and Training, Civil Service Association of Western Australia Incorporated	(Not applicable)	Harrison C	Agreement Registered
Devine Star Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 204/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Devine Star Pty Ltd	Gregor SC	Agreement Registered
Direct Engineering Services, Malaga, Sheet Metal Enterprise Bargaining Agreement 2003 AG 12/2004	22/11/2004	Direct Engineering Services Pty Ltd	The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	Gregor C	Agreement Registered
Dongara Cockburn Cement Enterprise Bargaining Agreement 2004 AG 188/2004	23/11/2004	Cockburn Cement	The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch, The Australian Workers' Union, West Australian Branch, Industrial Union of Work	Kenner C	Agreement Registered
Dowthwaite Holdings / CFMEUW Industrial Agreement 2002-2005 AG 253/2004	13/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Dowthwaite Holdings Pty Ltd	Gregor SC	Agreement Registered
DVR Roofing / CFMEUW Industrial Agreement 2002-2005 AG 240/2004	10/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	DVR Roofing Pty Ltd	Gregor SC	Agreement Registered
Electorate and Research Employees General Agreement 2004 PSAAG 18/2004	12/11/2004	Civil Service Association of Western Australia Incorporated, The Hon Speaker of the Legislative Assembly, The Hon President of the Legislative Council Parliament House	(Not applicable)	Scott C	Agreement Registered
Fleet Maintenance Services Certified Agreement 2004 AG 190/2004	20/12/2004	City of Wanneroo	The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	Gregor SC	Agreement Registered
FM Tiling / CFMEUW Industrial Agreement 2002-2005 AG 220/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	FM Tiling Pty Ltd T/A FM Tiling	Gregor SC	Agreement Registered
Forbes Jolly / CFMEUW Industrial Agreement 2002-2005 AG 207/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Forbes Arthur Jolly	Gregor SC	Agreement Registered
Gauche Holdings / CFMEUW Industrial Agreement 2002-2005 AG 222/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Gauche Holdings Pty Ltd	Gregor SC	Agreement Registered
Gecko Roof Tiling / CFMEUW Industrial Agreement 2002-2005 AG 216/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Gecko Roof Tiling Pty Ltd	Gregor SC	Agreement Registered
Graffiti Systems Australia / CFMEUW Industrial Agreement 2002-2005 AG 185/2004	29/11/2004	The Construction, Forestry, Mining and Energy Union of Workers	The Trustee for Robthor Unit Trust t/a Graffiti Systems Australia	Gregor C	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Gumptive Roof Tiling & Maintenance / CFMEUW Industrial Agreement 2002-2005 AG 256/2004	13/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Adam James Roby t/a Gumptive Rooftiling and Maintenance	Gregor SC	Agreement Registered
Hargreaves Roofing / CFMEUW Industrial Agreement 2002-2005 AG 247/2004	10/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Hargreaves Roofing Pty Ltd t/a Hargreaves Roofing	Gregor SC	Agreement Registered
Hart Roofing / CFMEUW Industrial Agreement 2002-2005 AG 219/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Christopher Norman Hart t/a Hart Roofing	Gregor SC	Agreement Registered
Henvest Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 205/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Henvest Pty Ltd atf the Hannah Trust	Gregor SC	Agreement Registered
HSU Galliers Private Hospital Enterprise Agreement 2004 AG 264/2004	9/12/2004	Health Services Union of Western Australia (Union of Workers)	Redray Enterprises Pty Ltd A.C.N. 080 649 565 trading as Galliers Private Hospital	Scott C	Agreement Registered
Hytech Fluid Connectors / CFMEUW Industrial Agreement 2002-2005 AG 233/2004	10/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Hytech Fluid Connectors Pty Ltd	Gregor SC	Agreement Registered
Inghams Poultry Processing (Osborne Park) Enterprise Agreement 2004 AG 169/2004	12/11/2004	Inghams Enterprises Pty Ltd (ABN 008 447 345)	The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	Kenner C	Agreement Registered
Interlec (WA) Pty Ltd Enterprise Bargaining Agreement 2004-5 AG 182/2004	29/11/2004	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engin & Elect Div, WA Branch	Interlec (WA) Pty Ltd	Gregor C	Agreement Registered
Intework Supported Employees Wages Agreement 2004 AG 195/2004	6/12/2004	Intework Incorporated	The Disabled Workers' Union of Western Australia	Scott C	Agreement Registered
Izzy's PSPC Supplies / CFMEUW Industrial Agreement 2002-2005 AG 238/2004	10/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Ismail Erkilic t/a Izzy's PSPC Supplies	Gregor SC	Agreement Registered
Jazzranch / CFMEUW Industrial Agreement 2002-2005 AG 203/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Jazzranch Pty Ltd	Gregor SC	Agreement Registered
Johnny Rockets and SDA Agreement 2003 AG 59/2004	N/A	The Shop, Distributive and Allied Employees' Association of Western Australia	Pedra Holding Pty Ltd Trading as Johnny Rockets	Beech CC	Discontinued
Josh Coffey Installers / CFMEUW Industrial Agreement 2002-2005 AG 186/2004	29/11/2004	The Construction, Forestry, Mining and Energy Union of Workers	Joshua Wray Coffey t/a Josh Coffey Installers	Gregor C	Agreement Registered
Junipar Park / CFMEUW Industrial Agreement 2002-2005 AG 228/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Junipar Park Pty Ltd	Gregor SC	Agreement Registered
Kebab Company Morley Galleria and SDA Agreement 2003 AG 63/2004	N/A	The Shop, Distributive and Allied Employees' Association of Western Australia	Portwell Pty Ltd Trading As The Kebab Company Morley Galleria	Beech CC	Discontinued

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Kingmont Holdings / CFMEUW Industrial Agreement 2002-2005 AG 257/2004	13/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Kingmont Holdings Pty Ltd	Gregor SC	Agreement Registered
Kirin Australia (MPO) Enterprise Agreement 2003-5 Appl 1378/2004	24/12/2004	Kirin Australia Pty Ltd	The Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia	Kenner C	Agreement Varied
KRM Pty Ltd t/a Kitec Electrical Services Enterprise Bargain Agreement 2004 AG 193/2004	29/11/2004	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engin & Elect Div, WA Branch	KRM Pty Ltd t/a Kitec Electrical Services	Gregor C	Agreement Registered
Longpre Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 212/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Longpre Pty Ltd	Gregor SC	Agreement Registered
Main Roofing / CFMEUW Industrial Agreement 2002-2005 AG 213/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Australian Tyre Wholesalers Pty Ltd T/A Main Roofing	Gregor SC	Agreement Registered
Mason Roofing / CFMEUW Industrial Agreement 2002-2005 AG 201/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	The Trustees for the Mason Family Trust t/a MasonRoofing	Gregor SC	Agreement Registered
McKrills Tiling / CFMEUW Industrial Agreement 2002-2005 AG 217/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	McKrills Tiling Pty Ltd T/A McKrills Tiling	Gregor SC	Agreement Registered
National Foods Milk Limited and Liquor, Hospitality and Miscellaneous Union, Western Australian State Industrial Agreement 2004 AG 181/2004	15/12/2004	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	National Foods Milk Limited	Kenner C	Agreement Registered
North Shoreline / CFMEUW Industrial Agreement 2002-2005 AG 211/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	North Shoreline Pty Ltd	Gregor SC	Agreement Registered
Powermont Roof Tiling / CFMEUW Industrial Agreement 2002-2005 AG 232/2004	10/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Powermont Pty Ltd t/a Powermont Roof Tiling	Gregor SC	Agreement Registered
Printing (Government) Agreement 2004 AG 259/2004	7/12/2004	Director General, Department of Agriculture, The Director General, The Department of Cultureand the Arts	The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	Gregor SC	Agreement Registered
Pulse and Luster and SDA Agreement 2003 AG 61/2004	N/A	The Shop, Distributive and Allied Employees' Association of Western Australia	Pulse Fashions Pty Ltd Trading as Pulse and Luster	Beech CC	Discontinued
Quartell Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 225/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Quartell Pty Ltd	Gregor SC	Agreement Registered
Reda Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 208/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Reda Pty Ltd	Gregor SC	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Shane Roof Tiling / CFMEUW Industrial Agreement 2002-2005 AG 255/2004	13/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	The Popelier Family Trust t/a Shane Roof Tiling Pty Ltd	Gregor SC	Agreement Registered
Smartt Bros Roofing / CFMEUW Industrial Agreement 2002-2005 AG 200/2004	8/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	David Smartt & Jason Smartt t/a Smartt BrosRoofing	Gregor SC	Agreement Registered
Smartt Roof Repairs / CFMEUW Industrial Agreement 2002-2005 AG 199/2004	8/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Smartt Roof Repairs Pty Ltd	Gregor SC	Agreement Registered
SMK Roofing / CFMEUW Industrial Agreement 2002-2005 AG 227/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	SMK Roofing Pty Ltd	Gregor SC	Agreement Registered
SMS Roof Maintenance / CFMEUW Industrial Agreement 2002-2005 AG 236/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Mount Austin Pty Ltd t/a SMS Roof Maintenance	Gregor SC	Agreement Registered
Social Trainers General Agreement 2004 PSAAG 20/2004	3/12/2004	Disability Services Commission, Civil Service Association of Western Australia Incorporated	(Not applicable)	Scott C	Agreement Registered
Southmore Holdings / CFMEUW Industrial Agreement 2002-2005 AG 202/2004	13/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Southmore Holdings Pty Ltd	Gregor SC	Agreement Registered
St John of God Health Care Subiaco (HSUA - Pharmacy) Agreement 2004 AG 197/2004	2/12/2004	St John of God Subiaco (a division of St John of God Health Care Inc)	Health Services Union of Western Australia (Union of Workers)	Scott C	Agreement Registered
Statewide Roof Tiling / CFMEUW Industrial Agreement 2002-2005 AG 234/2004	10/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Statewide Roof Tiling Pty Ltd	Gregor SC	Agreement Registered
Stratton Park News and Gifts and SDA Agreement 2003 AG 62/2004	N/A	The Shop, Distributive and Allied Employees' Association of Western Australia	Peter Bain and Elizabeth Bain Trading as Stratton Park News and Gifts	Beech CC	Discontinued
Sunhall Holdings / CFMEUW Industrial Agreement 2002-2005 AG 252/2004	13/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Sunhall Holdings Pty Ltd	Gregor SC	Agreement Registered
Superior Roof Restoration / CFMEUW Industrial Agreement 2002-2005 AG 237/2004	10/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Keirin Phillip Bourke t/a Superior Roof Restoration	Gregor SC	Agreement Registered
Taxon Holdings / CFMEUW Industrial Agreement 2002-2005 AG 230/2004	10/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Taxon Holdings Pty Ltd	Gregor SC	Agreement Registered
TDR Roofing / CFMEUW Industrial Agreement 2002-2005 AG 223/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	TDR Roofing Pty Ltd	Gregor SC	Agreement Registered
Transport Workers (Government) - Department of Culture and the Arts - Agreement 2004 AG 159/2004	19/11/2004	The Director General of the Department of Culture and Arts	Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	Scott C	Agreement Registered
Tubelok Constructions / CFMEUW Industrial Agreement 2002-2005 AG 187/2004	29/11/2004	The Construction, Forestry, Mining and Energy Union of Workers	Tubelok Constructions Pty Ltd	Gregor C	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Tudorgold Holdings / CFMEUW Industrial Agreement 2002-2005 AG 229/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Tudorgold Holdings Pty Ltd	Gregor SC	Agreement Registered
Two Dogs Roofing / CFMEUW Industrial Agreement 2002-2005 AG 198/2004	8/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Two Dogs Roofing Pty Ltd	Gregor SC	Agreement Registered
Two Rock Holdings / CFMEUW Industrial Agreement 2002-2005 AG 206/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Two Rock Holding Pty Ltd	Gregor SC	Agreement Registered
Uniting Church Homes, Health Services Union Enterprise Agreement 2004 AG 189/2004	10/12/2004	Health Services Union of Western Australia (Union of Workers)	Uniting Church Homes	Scott C	Agreement Registered
VisyPak Carton Systems In-Plant Team Bentley - WA Enterprise Agreement 2004 AG 174/2004	29/11/2004	Vispak Carton Systems	The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch	Gregor C	Agreement Registered
WA Roofing / CFMEUW Industrial Agreement 2002-2005 AG 215/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	WA Roofing Pty Ltd	Gregor SC	Agreement Registered
WA Shell Sands Pty Ltd (Enterprise Bargaining) Agreement November 2004 AG 191/2004	20/12/2004	The Australian Maritime Officers Union - Western Area Union of Employees	WA Shell Sands Pty Ltd, The Australian Workers' Union, West Australian Branch, Industrial Union of Workers	Wood C	Agreement Registered
Wayne Roofing / CFMEUW Industrial Agreement 2002-2005 AG 224/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Wayne Roofing Pty Ltd	Gregor SC	Agreement Registered
West Australian Newspapers Clerks (Enterprise Bargaining) Agreement 2004 AG 175/2004	11/11/2004	West Australian Newspapers Ltd	Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A. Clerical and Administrative Branch	Kenner C	Agreement Registered
Westcare Supported Employees Wages Agreement 2004 AG 176/2004	6/12/2004	Westcare Incorporated	The Disabled Workers' Union of Western Australia	Scott C	Agreement Registered
Western Australia Police Service Operation Tamar Allowance Agreement 2004 PSAAG 23/2004	14/12/2004	Commissioner of Police	Western Australian Police Union of Workers	Scott C	Agreement Registered
Western Australia Police Service Water Police Seagoing Allowance Agreement 2004 PSAAG 17/2004	1/12/2004	Commissioner of Police	Western Australian Police Union of Workers	Scott C	Agreement Registered
Williams Tiling Co / CFMEUW Industrial Agreement 2002-2005 AG 248/2004	10/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Williams Tiling Co Pty Ltd	Gregor SC	Agreement Registered
Wilroof Australia / CFMEUW Industrial Agreement 2002-2005 AG 239/2004	10/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Wilkinson Brothers Pty Ltd t/a Wilroof Australia	Gregor SC	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Windos Nominees / CFMEUW Industrial Agreement 2002-2005 AG 214/2004	9/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Windos Nominees Pty Ltd	Gregor SC	Agreement Registered
Woods Roof Tiling Services / CFMEUW Industrial Agreement 2002-2005 AG 250/2004	10/12/2004	The Construction, Forestry, Mining and Energy Union of Workers	Dale L & Lea Woods t/a Woods Roof Tiling Services	Gregor SC	Agreement Registered
Workpower Inc. Supported Employees Wages Agreement 2004 AG 194/2004	6/12/2004	Workpower Incorporated	The Disabled Workers' Union of Western Australia	Scott C	Agreement Registered
Wormald Service Enterprise Agreement - Perth AG 31/2004	7/12/2005	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch	Wormald (Service)	Harrison C	Agreement Registered
Wormald Systems Contracting Commercial Building Sector Enterprise Agreement 2003 AG 30/2004	7/12/2004	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch	Tyco Australia Pty Ltd trading as Wormald	Harrison C	Agreement Registered
Yieldwise / CFMEUW Industrial Agreement 2002-2005 AG 221/2004	9/12/2004	Bridging The Gap Rockingham Kwinana Inc	Paganelli Engineering Pty Ltd	Wood C	Agreement Registered

PUBLIC SERVICE APPEAL BOARD—

2004 WAIRC 13717

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES KURSTY SERINA BLACKWOOD

APPELLANT

-v-

ATTORNEY GENERAL

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
COMMISSIONER P E SCOTT – CHAIRMAN
MR C FLOATE – BOARD MEMBER
MR D HUSDELL – BOARD MEMBER

DATE TUESDAY, 21 DECEMBER 2004

FILE NO. PSAB 5 OF 2003

CITATION NO. 2004 WAIRC 13717

CatchWords Public Service Appeal Board – Appeal against decision to terminate employment – Appellant requested appeal not proceed until criminal proceedings concluded – Appellant no longer represented and not able to be contacted – Appeal dismissed for want of prosecution – *Industrial Relations Act 1979 (WA)* s 27(1), s 80I.

Result Appeal dismissed for want of prosecution

.Representation

Appellant No appearance

Respondent Mr B Hogan

Reasons for Decision

1 These are the unanimous reasons of the Public Service Appeal Board ("the Board").

2 This is an appeal to the Board filed by the appellant on 30 June 2003.

3 On 6 January 2004, as there had been no action taken by the appellant to prosecute the appeal some six months after the filing of the appeal, in accordance with the Commission's usual practice, the appeal was forwarded for allocation to the Board.

4 On 12 January 2004, at the direction of the Board, the Associate wrote to the appellant via her then agent, the Civil Service Association of Western Australia (Inc) ("the CSA") directing that she respond to issues associated with her failure to prosecute her appeal. On 5 March 2004, some seven weeks later, the appellant's agent wrote to the Board advising that the appellant was facing criminal charges which were due to be heard on 5 and 6 August 2004, that the outcome of the criminal proceedings were relevant to the appeal, and she sought that the appeal not proceed until the outcome of those proceedings on 5 and 6 August 2004 was known.

5 On 15 March 2004 at the direction of the Board, the Associate wrote to the respondent seeking the respondent's views as to that request to not proceed.

6 On 8 April 2004, the respondent consented to delaying proceedings until after the determination of the criminal proceedings and noted that "the Respondent reserves all its rights in this matter. In particular, if the Appeal were to be successful, the Respondent would vigorously oppose any order for back pay for the delay in hearing this matter is not of the Respondent's making."

7 On 14 April 2004, at the direction of the Board, the Associate wrote to the parties in the following terms, formal parts omitted:

> "The Public Service Appeal Board notes the correspondence of the parties regarding the progress of the matter.
>
> The Board agrees to the appeal not proceeding to hearing until criminal proceedings are determined. The Board understands from the appellant that the trial is set for 5 and 6 August 2004. Accordingly, the appeal will not proceed until after those dates.
>
> The appellant is to advise the Board of any changes to the trial dates should they arise.
>
> In the meantime, should you have any queries please do not hesitate to contact me on 9420 4484."

8 On 10 August 2004, the Associate contacted the appellant's agent to seek advice as to the status of the matter, as no advice had been received from the appellant. Mr John Dasey, an officer of the CSA advised the Associate that he had not been able to make contact with the appellant. He had written to her the previous day at her last known address and had asked her to contact him to advise of the outcome of the proceedings on 5 and 6 August 2004. He advised that if there was no response to that letter in a week, he intended to send a follow up letter saying that she must contact the CSA within 14 days or the CSA would advise the Board that it is unable to make contact with her and that it is possible that the Board may dismiss her appeal. Mr Dasey said that he would advise the Board in three weeks as to whether contact had been made by the appellant.

9 On 12 August 2004, Mr Dasey sent the following email to the Associate:

> "I have been contacted by Ms Blackwood who has advised me that her criminal trial has been adjourned until 20 October 2004. The CSA therefore requests the Public service (sic) Board further defre (sic) the hearing of her matter unyil (sic) the criminal trial is concluded."

10 The Board sought the respondent's views as to that request for a further delay in proceedings and the respondent advised on 20 August 2004, that it maintained its previous position including that if the appeal were successful it would oppose any order for back pay because the delay of the hearing of this matter was not of its making.

11 Accordingly, on 25 August 2004, at the direction of the Board, the Associate wrote to the appellant via her agent in the following terms, formal parts omitted:

> "The Public Service Appeal Board refers to the above appeal and the appellant's advice that the criminal proceedings have been adjourned.
>
> The Board agrees to defer any further action with respect to this appeal until criminal proceedings are determined. The Board understands from the appellant that the trial is set for 20 October 2004. Accordingly, the appeal will not proceed until after those dates. The appellant is to advise of the outcome of the trial as soon as it is known.
>
> The appellant is also to advise the Board of any changes to the trial date or other relevant circumstances should they arise.
>
> In the meantime, should you have any queries please do not hesitate to contact me on 9420 4484."

12 On 21 October 2004, the Associate spoke to an officer of the CSA who indicated that Mr Brendan Cusack was now handling the matter and that he would provide the Board with an update. On 27 October 2004, Mr Cusack advised the Associate that he had written to the appellant to ascertain when the date of the trial had been set or if in fact it was over. He was awaiting her response to that letter. He sought another week or two to enable contact from the appellant. A further two weeks was allowed taking the date to 11 November 2004. On that day, Mr Cusack advised that he had not received a response to his last letter and had difficulty communicating with the appellant. He advised the Associate that he intended to write a further letter requesting advice as to the outcome of her criminal proceedings. He therefore requested to be given two weeks before reporting back to the Board to allow the appellant to respond to him.

13 The respondent agreed to await a further two weeks to allow Mr Cusack to make contact with the appellant.

14 By letter dated 15 November 2004, at the direction of the Board, the Associate wrote to the appellant care of her agent in the following terms, formal parts omitted:

> "I refer to the above appeal to the Public Service Appeal Board.
>
> I note that in letters dated 14 April 2004 and 25 August 2004 the Board agreed to the appeal not proceeding to hearing until criminal proceedings have been determined. The appellant was directed to advise the Board of the outcome of the trial as soon as it is known, as well as of any changes to the trial date or other relevant circumstances that may arise. The Board has been advised that the hearing has been adjourned to next year.
>
> The Board has been advised by the appellant's agent that instructions are currently being sought from her, and has sought a further 2 weeks to enable this to occur and to report to the Board as to her intentions. The Board agrees to the appellant's agent's request and directs that the appellant advise the Board of the progress of the criminal proceedings and her intentions with respect to this appeal by **4.00pm, Friday 26 November 2004**.
>
> In the meantime, should you have any queries please do not hesitate to contact me on 9420 4484."

15 On 29 November 2004, Mr Cusack sent an email to the Associate in the following terms, formal parts omitted:

"I refer to your letter dated 15 November 2004.

I advise that despite writing three letters to the Appellant requesting that she contact the CSA, we have not had any response. In the absence of any instructions from the Appellant the CSA is unable to represent her in this matter.

Please accept this e-mail as advice that the CSA is no longer acting on behalf of the Appellant in PSAB 5 of 2003."

16 By 29 November 2004, the Board had heard nothing from the appellant. On 30 November 2004, a Notice of Hearing for the appellant to show cause why the appeal should not be dismissed, was sent to the appellant at an address provided by her former agent.

17 Whilst the CSA was no longer representing the appellant, on 13 December 2004, Mr Cusack sent an email to the Associate in which he advised, formal parts omitted:

"I have just had a telephone message from Kursty Blackwood. She advises that she is currently in New Zealand, but that she may be contacted through her mother, Theresa Rodney. Her telephone number is 9493 3939.

I thought that I should pass on this information to you."

18 According to the Board's directions, the Associate telephoned the appellant's mother, Ms Rodney, to advise her that the Notice of Hearing had been sent out on 30 November 2004 for a hearing the next day, 15 December 2004, for the appellant to show cause why her appeal should not be dismissed. Ms Rodney advised that she had been away from Perth and had only returned the previous day when she received letters from the CSA and the Notice of Hearing. She advised that the appellant may wish to pursue her appeal but is currently in New Zealand. The Associate informed Ms Rodney that the appeal was to go ahead the next morning and that it is for the appellant to show cause why the appeal should not be dismissed.

19 At the hearing at 9.00am on Wednesday, 15 December 2004, there was no appearance for the appellant to demonstrate why the appeal should not be dismissed.

20 The Board has made a number of attempts to ascertain from the appellant her intentions in respect of the appeal. The Board has initiated contact with the appellant through her then agent on a number of occasions. The appellant's former agent appears to have made diligent efforts to contact the appellant and to seek instructions from her but to no avail.

21 The onus rests with a party initiating proceedings to prosecute those proceedings diligently. Where the Board requires advice to be provided within given time frames for the purpose of the matter being dealt with expeditiously, it is not the role of the Board to continue to pursue parties to ascertain the status of matters. It is the responsibility of the appellant, as were the circumstances in this case. The appellant has not met the onus which falls to her and has not pursued this matter appropriately. Considerable time and effort has been expended to seek her advice both by the Board and by her former agent and she has failed to meet her obligations. In all circumstances of this case it is appropriate that the appeal be dismissed and the Board did so unanimously at the hearing on 15 December 2004.

2004 WAIRC 13665

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	KURSTY SERINA BLACKWOOD
	APPELLANT
	-v-
	ATTORNEY GENERAL
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER P E SCOTT - CHAIRMAN
	MR C FLOATE - BOARD MEMBER
	MR D HUSDELL - BOARD MEMBER
DATE	WEDNESDAY, 15 DECEMBER 2004
FILE NO/S	PSAB 5 OF 2003
CITATION NO.	2004 WAIRC 13665

Result Appeal dismissed

Order

THERE being no appearance on behalf of the appellant and having heard Mr B Hogan 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.

2005 WAIRC 00021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PREMILA LEVACI
	APPELLANT
	-v-
	DIRECTOR GENERAL, DISABILITY SERVICES COMMISSION
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER P E SCOTT – CHAIRMAN MR B HEWSON – BOARD MEMBER MR D HOUNSOME – BOARD MEMBER
DATE	TUESDAY, 11 JANUARY 2005005
FILE NO.	PSAB 9 OF 2003
CITATION NO.	2005 WAIRC 00021

CatchWords	Public Service Appeal Board - Appeal against decision to terminate employment - Dismissal occurred during extended period of probationary employment – Allegations of substandard performance – Whether confusion over standards expected. of appellant – Procedural fairness considered – Principles applied – Held performance substandard – Appeal dismissed – *Industrial Relations Act 1979 (WA)* s 80I – *Public Sector Management Act (WA)* s 79(1)
Result	Appeal dismissed
Representation	
Appellant	Ms S Thomas
Respondent	Mr R Bathurst of counsel

Reasons for Decision

1 These are the unanimous reasons for decision of the Public Service Appeal Board ("the Board").

2 The appellant appeals against the decision of the respondent to terminate her employment on 15 October 2003 for allegedly substandard performance. The appellant was appointed as the Information Co-ordinator, Level 5, of the Health Resource and Consultancy Team ("the Team") on 28 November 2002, subject to a 6 month probationary period. The appellant alleges that the respondent did not properly inform her of the performance standards expected of her, that there was a lack of clarity in her role and that there were difficulties being experienced within the Team. She denies that her performance was substandard during the initial probationary period. The probationary period was extended from 29 May 2003 to 29 August 2003, however, the appellant says that it was not extended until after she had been informed she had been made permanent and that this advice of permanency was later rescinded.

3 Following the extension of the probationary period, the respondent undertook an assessment of her performance and found it to be substandard. The appellant's employment was terminated after she was given an opportunity to advise her employer of her own views in that regard, which she did.

4 The Board has heard evidence from the appellant who also called evidence from Julie Robyn Lynch, who is the Health Services Training Officer in the Team, also at Level 5. There was also evidence from John MacDonald, Manager of the Health Resources and Consultancy Team, who was responsible for the establishment of the Team and its operation in its initial period, and who was instrumental in the establishment of the roles and responsibilities within the Team. Evidence was also given by Ron Chalmers, Director of Country Services for the respondent and by Denis Roderick Ryde Ramanah, Director of Corporate Business Services for the respondent.

5 It is clear from the evidence that the Disability Services Commission ("DSC") assists people with disabilities to become more integrated into the community; aims to educate the community about the needs of people with disabilities; provides a range of services including respite care, accommodation in group homes and special care hostels for people with disabilities; and it previously provided medical services through the Medical and Specialists Support Services through the employment of medical practitioners within the organisation.

6 The evidence indicates that a 2 year review and consultation process was undertaken of the provision of medical services in the different functions and the programmes that were provided by the DSC, including audiology, dietetics, medical and podiatry. The review found that these functions and programmes were inordinately expensive and no longer appropriate, and that it was more desirable and appropriate for people with disabilities to be referred to and utilise medical services within their own communities. A decision was made that the DSC would no longer have the same level of medical practitioners involved in the organisation.

7 As a means of the DSC assisting people with disabilities to obtain the services they needed, the Team, made up of 6 positions, was formed. The purpose of this team was to support people with disabilities in gaining access to medical and health services and to provide education to people with disabilities, their supporters and families, and the medical profession. This was an entirely new approach. The positions in the Team were very broadly described, the intention being that the positions and the Team would evolve according to the Team's experiences and feedback received from the users of the service they were to provide. Mr MacDonald said that the benefits for the incumbents of the positions within the Team were the capacity to develop the roles and to work closely together as a team.

8 The role of Information Co-ordinator was to respond to enquiries directly from people with disabilities and their families as well as from general practitioners about the sorts of services available, and to provide information as to where and how they could receive the services they needed. One of the primary responsibilities of the position was to develop and update the DSC's clinical information database. Mr MacDonald described that the respondent wanted the service to be evidence-based so that there would be a proper record of the enquiries to and responses from the Team to enable a proper analysis of trends, to refine the service and more clearly define the roles within the Team to achieve its purpose and function. Accordingly, the Information Co-ordinator's role was very important.

9 The role of Information Co-ordinator also required the incumbent to participate in the development and delivery of disability related education packages. This was to be by way of information brochures to be produced on a range of conditions and these brochures would be available through the DSC's website. The database was to be developed by the Information Co-ordinator.

10 The appellant gave evidence that she applied for three of the positions within the Team and was interviewed. She was offered the position of Information Co-ordinator although this was not her preferred position.

11 The appellant says that in respect of the issue of the development of databases, she did not have the capacity to actually create a database but could undertake the work of gathering and co-ordinating information to be included in the database. An information technology person would be necessary for the actual creation of the database within the information technology system. The appellant says that she never purported to be able to create a database.

12 Mr MacDonald gave evidence that he was a member of the panel which interviewed applicants for the positions within the Team. The appellant was most impressive in her interview in respect of her enthusiasm, confidence and, in particular, what the panel believed were her information technology skills. Mr MacDonald says that the panel was looking for someone proficient in that area and was very pleased to have found someone who could actually develop a database and who was so obviously familiar with information technology. He says that if the panel members had understood that the appellant was not capable of developing a database it would have changed its view of her suitability quite significantly. He said that during the interview, she gave examples of the work she had previously done. At the end of the interview the question of referees arose. He says that the appellant said that it would not be useful to contact her previous employer because there had been a fairly acrimonious parting, so no enquiries were made of her previous employer.

13 The appellant was appointed to the position of Information Co-ordinator, Level 5 and commenced on 28 November 2002 subject to satisfactory completion of the 6 month probationary period. The Board has heard a good deal of evidence about the appellant's work performance; meetings between the appellant and Mr MacDonald, both informal and formal; meetings of the Team; and discussions between the appellant and Dr Chalmers.

14 It is not our intention to go through each and every one of those issues and meetings in detail and to recite what had occurred but rather to cover in general terms what occurred from a distillation of the evidence. In doing so, we note that there is a good deal of conflict between the evidence of the appellant and other evidence, in particular, Mr MacDonald's. Where that conflict arises, we have no hesitation to preferring the other evidence to that to the appellant. We do so on the basis that we note that at first blush, the appellant's evidence seemed quite clear as to what had occurred in many circumstances. Upon those circumstances being discussed with her in detail, it is quite clear that she placed particular gloss on them which did not stand up to scrutiny. For example, in respect of a meeting with Mr MacDonald on 29 May 2003, the appellant said in evidence that she had not understood prior to the meeting that it was to do with her performance. She says that Mr MacDonald simply termed it "a meeting" and yet her evidence indicates quite clearly that when Mr MacDonald initially spoke to the appellant on 28 May 2003, he asked her to read a document in anticipation of the meeting the next morning. He gave her a copy of that document. She then sent him an email, the subject heading of which was "DSC Performance Appraisal Guide", in which she said:

> "Hi, John,
>
> The document you gave me to read late yesterday in preparation for today's performance appraisal for goals, targets and strategies is missing from my desk. Could you please provide me with another copy as I had only part read it before going home last night? Thank you in advance."
>
> (Exhibit R11)

15 It took some time before the appellant would accept, under cross examination, that it was obvious that the purpose of this meeting was to deal with performance appraisal and that she could not have been surprised about the purpose of the meeting.

16 In respect of the impression conveyed by the appellant in examination in chief, we were impressed by her grasp of detail, her composure, confidence and her recall of information. Yet a closer examination of her evidence reveals that this was not the reality. One of the particular matters in this case which is of significance is that during the interview for the position, Mr MacDonald and, according to him, the rest of the interview panel, was impressed by the appellant's capacity to develop a database and yet it is quite clear, and she finally conceded in her evidence, that she was not able to develop a database but rather could co-ordinate the information to be utilised in a database. There is a superficial attraction to her evidence which on closer examination is not sustained.

17 It is clear from the evidence that Mr MacDonald had a number of concerns about the appellant's performance. They included that she became overly involved in some enquiries, thereby reducing the time and opportunity to address other issues. Mr MacDonald provided advice and guidance himself, as well as through another member of staff, a clinical psychologist, to asses her technique and offer direction. The appellant did not see this as being intended to help her, and appears to have completely misread its purpose. In evidence, she said that the aim was for her to assist the clinical psychologist.

18 Another area of concern was the appellant's failure to meet deadlines in the production of the information brochures, and her failure to produce a satisfactory result in those she produced. For example, the brochure on "Down Syndrome" (Exhibit R9) contained information which would have been of no assistance to the intended users, but contained information which lacked any real purpose, and was quite insensitive to the intended users. The Spina Bifida brochure was supposed to deal with caring for 0-5 year olds, yet it set out some of the causes of spina bifida and preventative strategies and information about it causing a lack of sexual function in adults, neither of which was of use to those caring for those with spina bifida aged 0-5 years. (Exhibit R10)

19 The appellant was not able to produce anywhere near the number of brochures required, which she reluctantly accepted in cross examination.

20 A further area of concern was the failure to produce useful material to meet the requirements of the appellant's role. A number of documents she prepared for her employer contained much which was nonsensical. There was a poor use of language and a lack of clarity. Some of what she wrote simply was incomprehensible. During her evidence, the appellant also suggested that it was acceptable for her to provide written reports to employer or manager which were comprehensible only to herself.

21 Exhibits R2 and R3 also demonstrate the issue quite clearly, particularly the one page summary sent to Mr MacDonald on 2 May 2003. Mr MacDonald had requested a one page summary to assist him to understand her report (Exhibit R2) which contained schedules, diagrams and pie charts, much of which was hard to comprehend, with no explanation or analysis. Her summary included comments such as:

> **"Data or Information Collation**
>
> All service requests for Information or consultation is collated initially using 'HRCT Case Hx Informatics' proforma developed in January 2003. The information is then logged electronically DSC logged using MS Excel software to enable reporting

Information Discussion and Outcomes

In reference to Table 1 titled 'Disability Case Request Primary (Case) Profiles' the categories listed have been identified mainly, from information provided by the LAC, Family Member, Carer or Person with a Disability to the HRCT and DSC Case file access is minimal.

1. On the basis of the information requests, for the first quarter systems priority target categories are people with an Intellectual disability, Autism, Physical disability and Downs and other syndromes including Aspergus syndrome, in particular people with Intellectual Disabilities, Autism and Downs syndrome with behavioural changes and or Early Onset Alzheimer like Dementia. Significant underlying health issues for people with disabilities exacerbating their quality of life is through advice to LACs and Carers is being encouraged to be referred back to GPs and Specialist Mos. Evidence reference is Table 7 titled '... Referrals Back to The Community' with the corresponding MSC LAC request for follow up from HRCT was made as most of these issues were in the metropolitan region.
2. Equipment information (non-funding issues) referral to either ILC, Medi Hire or Motor Vehicle Hire Companies, identified a gap in service where neither organisations were able to provide a good outcome for transport or related equipment service provision or referral e.g. all terrain wheelchair adaptors or short term hire of motor vehicles for 1-2 wheelchair transportation. As this is a CAIB/CAEP the information is referred on to the two directorates.
3. Table 7 titled 'Sub Total HRCT Activity' the current high activity load for HRCT Information Coordinator is not sustainable. My suggestion is for a review of how the '1800' Freecall number is issued by in particular GP/Hospital Liaison and Training areas. Referrals of Individual but complex Medical related cases may not be readily accepted by these two areas as the response has been that they work at a 'systems' level or accessibility issues. Health Research information Web searches are being ably assisted by Dr Emma Glasson. Dr Jenny Hanna has been of invaluable assistance for Medical related information. When possible, Care Planning Coordination has kindly assisted Information Coordination for extra busy period although a management HRCT workload review is encouraged."

(Exhibit R3)

22 The appellant created a form entitled "HRCT Case HX Informatics" for the purpose of recording the information to be gathered, collated and analysed. During her evidence, the appellant was unable to explain the meaning of "HX Informatics". She also created another form called "Inquiry/Activity Informatics" which she used to record some quite irrelevant information apparently to boost the number of items she was recording. Some of them reported material which was totally irrelevant, for example reporting telephone or email communications dealing with whether lunch for a particular function had been delivered to the wrong address (Exhibit R8).

23 When the appellant prepared reports for Mr MacDonald, they ought to have been able to have been made sense of by the reader. This was not the case. The reports prepared by the appellant were nonsensical.

24 As to the issue of conflict within the Team, this was a new team. The whole concept was new. Members of the Team were finding their feet and developing their roles. It is not at all unusual in those circumstances for there to be some conflict within teams. The question though is whether the conflict was of a reasonable level, whether Mr MacDonald was the cause of the conflict or whether the appellant's own conduct was an issue.

25 There was evidence of some disputation or concern within the Team that the appellant had taken on a self appointed role of delegator to the rest of the Team. Mr MacDonald raised this with the appellant on 8 May 2003.

26 One of the most telling aspects of the evidence called by the appellant was that of Julie Robyn Lynch, Health Services Training Officer, Level 5 with the Team, and who was one of the appellant's colleagues. She gave evidence that there was conflict within the Team. She says that this was probably on account of each individual trying to work out his or her individual role and interacting with the other team members. The Team was initially concerned at a lack of planning and direction and had approached Mr MacDonald to clarify the direction of the Team. There was a concern that morale was low.

27 There was other evidence that by around May 2003, the members of the Team were concerned about a lack of co-ordination and planning, clarity of roles, and a lack of direction due to Mr MacDonald's absences from the workplace and the need for delegation to come from Mr MacDonald. On 9 May 2003, the issues were raised with Mr MacDonald, who was surprised by these concerns, believing that the Team ought to be self-managing. However, the evidence also demonstrates that after this initial period of uncertainty, the Team progressed and became more settled.

28 Ms Lynch has given evidence that the Team is now operating well since a strategic plan and an operational plan were put in place, having been drafted by Mr MacDonald and Dr Chalmers in 2003. Strong leadership was being shown by the manager who had been proactive in resolving most of the conflict within the Team. Ms Lynch gave evidence that the appellant expressed her frustration at meetings with Mr MacDonald being cancelled or rescheduled at the last minute. However, Ms Lynch says that the appellant did not work well in the Team and that she would not want her to return to the Team. The person who is now working as the Information Co-ordinator is working well in the Team. She says that she is not fully confident that the appellant would be able to work with any member of the Team if she were to return. She says that the conflict issues between the appellant and other members of the Team may not be able to be put aside to allow the Team to go forward.

29 Ms Lynch says that she has always found Mr MacDonald to be approachable. She says that Mr MacDonald did a performance development programme with her in about March or April 2003 and as far as she knew he did such plans with the entire Team.

30 Mr MacDonald says that a Performance Development Programme was established for all Team members in around March or April 2003, however, the appellant claimed that this did not occur for her. Mr MacDonald gave evidence that he met with each Team member for about half an hour to review what they had done in the preceding 3 months, and what they were intending to do in the next 3 months. Notes were made of these meetings, setting out the "Major Job Requirements (from the JDF and other documents)" with corresponding "Agreed Performance Indicators". Mr MacDonald says that the documents for all 6 of the Team members were sitting on top of his filing cabinet. At the hearing Mr MacDonald was unable to produce the document for the appellant. He insists that he had a meeting with her at which such a document was drawn up, yet she denies that there was such a meeting or such a document. We are inclined to believe that it is more probable than not that Mr MacDonald did meet with the appellant and established a Performance Development Programme with her and that it is unlikely that he did so with the other members of the Team but not with the appellant.

31 Mr MacDonald first reported his concerns regarding the appellant's performance to Dr Chalmers in March 2003, and this became a regular subject of discussion during their meetings. It was Dr Chalmers' decision to extend her probationary period, to "give (her) every opportunity to demonstrate that she could perform at the level that was required for the job" (transcript page 213).

32 At a meeting on 21 May 2003, the appellant recalls, and Minutes of the meeting (Exhibit A5) record, that Mr MacDonald announced that all members of the Team had completed their probationary periods and were now permanent. However, Mr MacDonald says that he had had several conversations and meetings with the appellant where he believed it ought to have been clear to her that she was not likely to be made permanent at that stage. He says that it would not have been appropriate to have dealt with her lack of permanency in the meeting as it was no one else's business. He believes she could not have had any reasonable expectation of permanency at that stage. The appellant's evidence is that Mr MacDonald told her the day after the meeting at her work station that he was retracting that advice as it required confirmation in writing from the Human Resources department.

33 By letter dated 19 June 2003, the appellant was formally advised that her probationary period had been extended from 29 May to 29 August 2003.

34 It is clear that during the period when the probation was extended, serious efforts were made to address the many issues Mr MacDonald had previously raised with the appellant. In June and July the appellant's performance was not improving and steps were taken to deal with the matter, firstly by seeking advice from human resources.

35 Mr MacDonald says that each time he raised an issue with the appellant, attempted to discuss matters previously raised, or attempted to find ways of improving her performance, she was unwilling to acknowledge any problems, obfuscated and avoided dealing with them. She would become tearful and deny that issues had previously been raised with her.

36 After being frustrated by a lack of success in having the appellant address the areas of dissatisfaction in her performance, Mr MacDonald referred the matter to Dr Chalmers. Following discussions with Dr Chalmers, Mr MacDonald set out his concerns regarding the appellant's performance in a memorandum dated 12 August 2003. Attached was a detailed schedule of performance related issues (Exhibit A14).

37 At a meeting on 20 August 2003 between the appellant, Dr Chalmers and Ms Sally Ingham, the Workforce Planning Consultant, Human Resources, a copy of Mr MacDonald's documentation of performance issues (Exhibit A14) was provided to the appellant and she was asked to consider it and prepare a written response. Dr Chalmers explained to the appellant that her responses would enable the respondent to consider her future employment. The appellant agreed to this process and prepared a response which included examples of her work. This document was provided to Dr Chalmers on 28 August 2003 (Exhibit A16).

38 On 29 August 2003, the appellant met with Dr Chalmers and Ms Ingham. Dr Chalmers advised the appellant that having thoroughly reviewed Mr MacDonald's and the appellant's documents, "he had concerns with (her) performance". He advised her that there would be a formal investigation into her performance, and that it would be appropriate for her to stay away from work on full pay while that occurred. The appellant agreed to remain away from work. A formal letter to the appellant from the Director General dated 29 August 2003 confirmed that an investigation would be conducted to determine whether or not her performance was sub-standard.

39 In October 2003, Mr Steve Young presented a report of his investigation into the appellant's alleged sub-standard performance (Exhibit A17). His conclusion was as follows:

> "…
>
> Therefore the test in this case is whether the employee has attained or sustained a standard that the employee would reasonably be expected to attain or sustain, whilst having regard to written documentation provided to the employee with respect to the level of performance and tasking required during the probationary period.
>
> This investigation process has confirmed that the employee's performance has been substandard but it has also confirmed that a formal performance development process did not commence until after the expiry of her initial six-month probationary period. This action is contrary to Commission requirements with respect to the performance of employees on probation.
>
> It is also evident that the selection panel responsible for making a recommendation to the employer in this case has not been thorough in its assessment of the employee against all the prescribed requirements of the Information Coordinator position.
>
> In addition, the effective operation of the HRCT took a number of months to evolve to the point where the function and tasks could be clearly defined for members of the team.
>
> Despite the deficiencies and circumstances associated with a formal performance development process during the employee's initial probationary period, it is evident that as a result of the three-month extension to her probationary employment that there essentially remained no change or development in the employee's overall work performance.
>
> It is noted that during this extension period the employee was provided with support services, clarification of job requirements and identification of areas where improvement in performance was required, and where regular monitoring and feedback was provided by her manager (sic)
>
> Therefore it remains that that the employee's performance has not attained the standards required in the Information Coordinator role, and as such it is concluded that her performance is substandard."
>
> (Exhibit A17 – pages 19 and 20)

40 The Director General accepted Mr Young's report, and the appellant's employment was terminated on 15 October 2003.

Conclusions

41 The role of the Board is to deal with the appeal and to bring the matters in dispute to finality. If there were any problems with the processes applied by the employer then it is the role of the Board to resolve the matter and bring it to finality, not merely to deal with the procedural defects and send the matter back to the employer to rectify (*Gudgeon and Black; Ex Parte Gudgeon* (1994) 14 WAR 158).

42 In this particular case, the appellant was on an extended probationary period. The Full Bench of the Commission has noted on a number of occasions the role of the probationary period (see *Hutchinson v Cable Sands (WA) Pty Ltd* 79 WAIG 951 and *East Kimberly Aboriginal Medical Service v ANF* 80 WAIG 3155). It is quite clear from those decisions that:

> "(a) The employer, throughout the period of probation, retains the right to see whether he/she wants the employee or not in his/her employment.
>
> (b) (i) The employer is entitled to consider the employee as if the employee was still at first interview with the following modifications in this case.
>
> (ii) There was an identifiable contract of employment for a period, indeed, a fixed term, including a period of probation of three months. This advances the matter beyond a notional first interview situation.

(c) Probation is an extension of the selection process, a period of learning and a time for attention, assessment and adjustment to standards of performance and conduct. (Inherent in that is that it is a time for teaching, training and counselling.)

(d) (i) However, a probationary employee knows that he/she is on trial and that he/she must establish his/her suitability for the post. The employer, on his side, must give the employee a proper opportunity to prove him/herself, but he/she reserves the right to determine the employment with appropriate notice provided he has reason for so doing …

(ii) Further, an employee on probation can expect to be counselled and informed that she/he is not meeting the required standards of performance, to be given reasonable training in this respect, and to be warned of the possible consequences of a failure to improve. Provided this is done, an employee who is on probation would have little cause to complain if a decision was taken during the course of or at the end of a probationary period to terminate the employment …

(e) (i) Consonant with those principles, a probationary employee is able to seek reinstatement, but an employer is entitled to terminate a probationary employee more easily, e.g length of service is not a factor generally, because probationary employment is for a finite period and, in that period, assessment, training and acquisition of skills and demonstration of ability can occur. In addition, any genuine question of compatibility between employer, employee and other employees can be assessed. (This is not a comprehensive inventory of such matters.)

(ii) However, probation is not a licence for harsh, oppressive, capricious, arbitrary or unfair treatment of a probationer …"

(*East Kimberly Aboriginal Medical Service v ANF* (supra))

43 One of the first things we note about this matter is that, with the benefit of hindsight, it is surprising that the appellant was appointed to the position in the first instance. This is for a number of reasons. Firstly, an examination of the appellant's "Statement Addressing Selection Criteria" (Exhibit R1), which formed part of her application for the position, raises some serious concerns about her ability to provide clear written communications. As an example, in addressing the essential criteria of "Demonstrated high-level knowledge in disability-related health issues", there is a jumble of description, a definition of "disability" according to the Disability Services Act 1993, a brief reference to the establishment of the Disability Services Commission, percentages of various disabilities, then the following statement:

> "Demonstrated skills and experience in survey, research and program implementation using data analysis for evidence support continued funding of programs – SCGH, Fremantle Hospital and Divisions of GPs)".

44 There then follows some further information about policies and the DSC's operations. It then notes:

> "My skills and experience in linking health services through database and registry development for clinical information services and liaising with multidisciplinary health professionals. Feedback to managers, board of directors, primary health care service providers and consumers for service providers – Ambulatory Care Reform project, Allied Health Education Intervention Project from Hospital to the Community – SCGH; Quality Use of Medicines projects for Antibiotic Resistance policy development, General Practice, Special interest community groups education and information sessions – 9 years.
>
> Issues currently being addressed include the increased need for services in the areas of:
>
> Accommodation tailored to the needs of disabled individuals.
>
> Respite and Family Care provision, for families and carers of the disabled.
>
> Access to professional and therapy service providers."

45 It is difficult to discern what the appellant is demonstrating by this part of the document. It is quite possible that a cursory examination would lead the reader to believe that the appellant was or had been involved in undertaking certain work, but a closer analysis shows that it does not actually say this, rather it is inferred. The last quoted paragraph might refer to the work being undertaken by the appellant. However, it might also be part of her recitation of her knowledge of what the DSC was doing as an organisation. Proper sentence construction, logical flow, and clarity are all missing.

46 The remainder of the document is written in the same style, eg "2. Demonstrated ability to liaise with health care providers and the general public" contains the following:

> "Assessing, attending and participating in professional meetings/workshops to advance the clinical business of the (Survey Research Centre). Skills contributed were a high level of liaison with some liaison with survey research field staff, Consumer Advocate, Director and Project Manager planning sessions, Health Departments and Epidemiologists in applications, implementation and reporting of research. Initiating project proposals including, planning and preliminary electronic medical literature research/critique."

47 In respect of the criteria of "Competency in a range of computer software packages including databases, word processors and spreadsheets," she included the following:

> "Demonstrated high level of literacy and skills in using, MS Office Professional suite including Word for word processing requirements. MS Excel for workbook / data graphics, MS Exchange; MS Outlook for mail. Ms (sic) Access Database development as Ambulatory Care programs Information repository. (10 years)"
>
> (Exhibit R1)

48 It is surprising that the selection panel was prepared to overlook the clearly poor standard of written communications demonstrated by the appellant's job application. This issue of poor written communications turned out to be a real problem in the performance of the job.

49 Secondly, the selection panel misinterpreted the appellant's information technology skills to conclude that she was able to develop a database in the way in which they anticipated.

50 Thirdly, no check was made with her previous employer from whom she had parted acrimoniously. It would appear no other reference checks were made.

51 The next matter of concern is that Mr MacDonald told the whole Team that their probationary period had been successfully concluded and that they were now permanent. He did so knowing that the appellant was not to be made permanent at that stage and her probationary period was to be extended. He did not tell her of her exclusion from the announcement he had made to the Team until the next day. Even if he believed that she should have been aware that he was not satisfied with her performance and had attempted to correct it, it was unfair to have dealt with the matter that way. However, that unfairness does not mean that the extension of the probationary period was wrong. On the contrary, it was entirely appropriate and gave the appellant a further opportunity to demonstrate a satisfactory level of performance once the difficulties of the Team settling into its task and the members into their respective roles had occurred.

52 It is also clear from the evidence that there was some confusion and lack of clarity as to the performance development or performance management process which was to have been undertaken with the appellant. Within the public sector, it is true that there are processes and procedures that are required to be applied. However, the purpose is not to meet the needs of the process or the procedure. The purpose is to achieve either a performance direction, plan, review or improvement. In the appellant's case, while there may have been some confusion about the paperwork and forms that were being utilised, there should have been no doubt in the appellant's mind after a period of time that, while she might have been in a new team where the roles were developing and she was learning the job and creating the job as it went, in fact she was being given guidance because her performance was not satisfactory. She must have been aware that she was not meeting the requirements of her employer. We find that Mr MacDonald took an approach of attempting to guide and direct her and then to correct her performance to achieve the purpose that was necessary including the assistance of other employees. However, it was clear that this was not able to be achieved.

53 We also note an issue associated with the efforts made by Mr MacDonald to deal with the appellant's performance. On 8 August 2003, the appellant made a complaint to the Director General that Mr MacDonald had bullied her. The Director General directed Mr Ramanah, the Director Corporate and Business Services, to investigate and report on that complaint. Mr Ramanah undertook an investigation in which he spoke with the appellant requesting that she provide him with the details of her allegation in writing. She did so. Mr Ramanah interviewed Mr MacDonald. He concluded that, while Mr MacDonald may have made a couple of inappropriate comments, he found no evidence of discrimination. He made his finding in those terms because, from speaking with the appellant, he formed the conclusion that her complaint contained an element of alleged racial discrimination. He found that of the two incidents cited by the appellant, there was no indication of bullying. The Director General accepted his report.

54 In the hearing of this matter, the appellant has also suggested that Mr MacDonald bullied her. We conclude from the evidence that at a meeting between himself and the appellant on Thursday, 29 May 2003, Mr MacDonald did not bully or attempt to intimidate the appellant by continuing the meeting without the minute-taker present. We accept his evidence that he took the action of asking the minute–taker to leave because he was concerned at the appellant being upset and decided he could not proceed with the meeting in the manner he had intended as it would not be helpful.

55 In this case, it is clear that the appellant's termination of employment was in the context of the probationary nature of the employment. We find that she was given a reasonable opportunity to demonstrate her capacity for the job. She was provided with direction and assistance to understand what was required of her. This included working with the respondent's clinical psychologist, Mr John Dockerill, to assist with the appellant's approach to her work, in particular dealing with telephone enquiries. Mr MacDonald met with her regularly to identify and discuss performance issues. He attempted to guide her in the production of reports to a satisfactory standard. She was not able to do so in that her productivity was clearly inadequate, some of her reports were quite incomprehensible and she was not performing as directed. The appellant's inability to write a comprehensible report was reinforced in her "Response to Performance – Related Issues and Observations" (Exhibit R13). The brochures which she prepared for Mr MacDonald were not of an acceptable standard in terms of either the information contained within them or the sensitivity necessary to meet the needs of the intended readers of these brochures. There were problems with the timeliness and efficiency of the appellant's work.

56 There was conflict associated with her relationships with the other members of the Team. Having noted this, we note that the Team generally was having a difficult time in coming to grips with its role and responsibilities. However, the appellant seems to have taken a particular role within that conflict which has meant that she would not be welcome back into the Team.

57 The respondent has undertaken a process of attempting at the lowest level to resolve the performance issues, by discussions between Mr MacDonald and the appellant. Mr MacDonald then referred his concerns to Dr Chalmers who advised him on how to proceed. The human resources services of the respondent were called in to aid both the appellant and Mr MacDonald. In the end, the appellant's performance was not satisfactory and from our observation of the standard of work produced by the appellant, it is clear that there was no prospect that she would reach the required standard even with considerable assistance and training. Further, there is no evidence that the required standard was unreasonable. It is necessary to bear in mind that this was not a junior position. It was a Level 5 position.

58 Section 79 of the Public Sector Management Act 1994 defines an employee's performance as substandard:

> "if and only if the employee does not, in the performance of the functions that he or she is required to perform, attain or sustain a standard that a person may reasonably be expected to attain or sustain in the performance of those functions".

59 Although the roles within the Team were expected to evolve, we find that the requirements of the appellant's position were made clear to her through the Job Description Form, various discussions and addresses, and meetings of the Team and between the appellant and Mr MacDonald. Even if the requirements of the role were not well developed at the appellant's commencement of employment, they were sufficiently clear by around March/April 2003. The appellant was unable to attain the reasonably required level of performance notwithstanding an extension of the probationary period. We find that her performance was substandard.

60 The respondent has given the appellant guidance, assistance to perform to the required standard, explanations as to the appropriate standard, and a number of opportunities to improve her work including the assistance provided by other employees of the employer. In the end it is quite clear that her performance was inadequate and substandard. Although there were some deficiencies in the process of dealing with the appellant's performance, the decision of the respondent was not unfair or unreasonable.

61 The appeal is dismissed.

2005 WAIRC 00022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PREMILA LEVACI
	APPELLANT
	-v-
	DIRECTOR GENERAL, DISABILITY SERVICES COMMISSION
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER P E SCOTT – CHAIRMAN MR B HEWSON – BOARD MEMBER MR D HOUNSOME – BOARD MEMBER
DATE	TUESDAY, 11 JANUARY 2005
FILE NO	PSAB 9 OF 2003
CITATION NO.	2005 WAIRC 00022

Result Appeal dismissed

Order

HAVING heard Ms S Thomas on behalf of the appellant and Mr R Bathurst of counsel on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred 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.

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 7 of 2002	Jennifer Anne Offer	Chief Executive Officer Curriculum Council of Western Australia	Harrison C.	Withdrawn by Leave	22/12/04
PSA 14 of 2003	Rosie Ang	Minister for Health in right of the Metropolitan Health Service	Scott C.	Dismissed	20/12/04
PSA 23 of 2003	Diana Walker	Minister for Health in right of the Metropolitan Health Service	Scott C.	Dismissed	15/12/04
PSA 24 of 2003	Melissa Barney	Minister for Health in right of the Metropolitan Health Service	Scott C.	Dismissed	15/12/04

AWARDS/AGREEMENTS—Application for—

2004 WAIRC 13622

THE AUSTRALIAN WORKERS UNION ROAD MAINTENANCE, MARKING AND TRAFFIC MANAGEMENT AWARD 2002

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	APPLICANT
	-v-
	ADVANCED TRAFFIC MANAGEMENT & OTHERS
	RESPONDENTS
CORAM	COMMISSIONER J H SMITH
DATE	FRIDAY, 10 DECEMBER 2004
FILE NO.	A 4 OF 2004
CITATION NO.	2004 WAIRC 13622

Catchwords	New Award - Relevant principles to be applied - Principle 11 - Statement of Principles - June 2004 - Award-free work - common rule award sought to apply to road maintenance, marking and traffic management industry - *Industrial Relations Act 1979* (WA) s 29A and s 36A
Result	Award made
Representation	
Applicant	Mr D McLane (as agent)
Respondents	No appearance
Intervener	Mr M Vallence (as agent) on behalf of Civil Contractors Federation

Reasons for Decision

1 This is an application to make a new award titled, The Australian Workers Union Road Maintenance, Marking and Traffic Management Award 2002 ("the Award"). The application to make the Award was filed on 6 April 2004, by The Australian Workers' Union, West Australian Branch, Industrial Union of Workers ("the Union"). The application seeks to make a common rule award to apply to employees in the State of Western Australia employed in any of the classifications in proposed Clause 4.3 Classification Structure in or connected with the listed industries or callings, who are engaged in traffic management duties for more than 50% of their time. The industries and callings are listed as: roads, freeways, causeways, aerodromes, drains, dams, weirs, bridges, overpasses, underpasses, channels, waterworks, pipe tracks, tunnels, water and sewerage works, conduits and all concrete work and preparation incidental thereto. Traffic management duties are defined to mean any of the classifications set out in Clause 4.3 of the Award. Clause 4.3 Classification Structure, provides for the classifications of trainee traffic controller, traffic controller, traffic controller team leader, construction employee grade 2, construction employee grade 3, construction employee grade 4, construction employee grade 5, construction employee grade 6, plant operator grade 1 and plant operator grade 2.

2 The application was served on five businesses. The Australian Mines and Metals Association (Inc), the Chamber of Commerce and Industry of Western Australia (Inc), the Minister for Consumer and Employment Protection and the Trades and Labour Council of Western Australia, were also served with a copy of the application.

3 Conferences were held in respect of this matter under s 32 of the Industrial Relations Act 1979 ("the Act") on 9 September 2004 and 15 September 2004. As a result of an issue raised at the conferences, the Union sought to amend Clause 1.3 Area & Scope of the Award. The amended Clause 1.3 and Clause 4.3 were then advertised in the Western Australian Industrial Gazette ((2004) 84 WAIG 3075). Pursuant to s 29A(1b) and (2) of the Act, amended Clause 1.3 and Clause 4.3 were also published in the required manner by publishing the clauses on the internet web site maintained by the Commission. Further, pursuant to s 29A(2)(a)(ii) of the Act, the Commission made a direction that businesses in the Yellow Pages telephone directory that advertise they are engaged in road maintenance, road marking and traffic management industry be served with a copy of the amended Clause 1.3, Clause 4.3 and a notice of hearing. In accordance with the direction, 76 businesses were served.

4 At the hearing there was no appearance on behalf of the employer parties to the application or any other employers who the Union seeks are sought to be bound by the terms of the Award by common rule. The only body that sought to appear in this matter was the Civil Contractors Federation ("the Federation"), which is an organisation of employers registered under the Workplace Relations Act 1996 (Cth). The Union consented to the Federation's application to seek leave to intervene. Consequently, the Commission granted the Federation leave to intervene. Mr Vallence, on behalf of the Federation, advised the Commission that the Federation supported the making of the Award.

5 The Union's submissions and evidence

6 The Union points out that pursuant to s 36A(1) of the Act, in any proceeding in which the Commission is considering the making of a new award that extends to employees to whom no award currently extends, the onus is on any party opposing the making of the new award to show it would not be in the public interest. The Union says that s 36A(1) applies to this matter and says as there is no opposition to the making of the Award to cover the road traffic management industry the Commission should make the Award.

7 The terms of the Award seek to put in place a minimum safety net for employees in the road traffic management industry. Apart from Federal regulation the industry is currently award-free in Western Australia. This has come about because of outsourcing of work by Main Roads Western Australia ("Main Roads"), over the past 10 years. Prior to the outsourcing of this work, the work was regulated by awards of this Commission. The principal contractors in the industry are regulated by Federal awards and instruments made under the *Workplace Relations Act*. Because main contractors are bound by Federal awards and instruments, the employees sought to be covered by the Award are often required to work alongside employees of principal contractors carrying out the same work at the same location on different terms and conditions.

8 The terms of the Award reflects the classifications found in the Australian Workers Union Construction and Maintenance Award 2002 ("the Federal Award"), which is an award made by the Australian Industrial Relations Commission. Further, the rates of pay sought in the Award reflect the rates found in the Federal Award.

9 In relation to rates and conditions that are to apply to major construction projects, clause 14.1.1 of the Award applies site agreement conditions. Where site agreement conditions provide for higher rates in pay and conditions than those contained in the Award the site agreement conditions will prevail to the exclusion of the provisions in the Award for the duration of the project. This provision is sought by the Union to provide fairness and equity to employees engaged in the same work under the same conditions.

10 The Union says that the making of the Award will not extend the constitutional coverage of the Union. Nor will it duplicate coverage of classifications found in other awards or create disparity amongst employees or lead to demarcation disputes. Further, it is contended that the making of the Award will not be detrimental to the economy of the State or employers or persons employed in the industry.

11 Mr Michael Baker, a Union organiser, testified that he has been employed as an organiser for approximately six years. In his role as organiser from time to time he deals with the road traffic management industry. Mr Baker says a number of employers in the industry have indicated to him that it is difficult to formulate tenders for work as there is no standard rate of pay which applies "across the board". Some employers have expressed the view to him that they would be happy for an award to apply generally across the industry so that all employers can tender for work from a common base or "level playing field". When

asked what benefits will the Award bring to employers and employees, Mr Baker said that the training modules proposed by the classification structure were absolutely necessary to the industry.

12 Mr McLane, on behalf of the Union, submitted that the terms of the Award comply with Principle 11 of the Statement of Principles (2004) 84 WAIG 1521 – June 2004. Principle 11 provides:

> "In the making of a new award, the main consideration shall be that the award meets the needs of the particular industry or enterprise whilst ensuring that employees' interests are also properly taken into account. Structural efficiency considerations shall apply in the making of such an award."

13 The Structural Efficiency Principle was set out in full by the Commission in Court Session in its State Wage Case decision given on 24 December 1993 (1993) 74 WAIG 198 at 200. The Structural Efficiency Principle provides a framework through which it is intended that parties to an award co-operate positively in a fundamental review of that award with a view to implementing measures to improve the efficiency of industry and provide employees with access to more varied, fulfilling and better paid jobs. The measures should include but not be limited to:

- establishing skill-related career paths which provide an incentive for employees to continue to participate in skill formation;
- eliminating impediments to multi-skilling and broadening the range of tasks which an employee may be required to perform;
- creating appropriate relativities between different categories of employees within the award and at enterprise level;
- ensuring that working patterns and arrangements enhance flexibility and the efficiency of the industry;
- including properly fixed minimum rates for classifications in awards relate appropriately to one another, with any amounts in excess of these properly fixed minimum rates being expressed as supplementary payments;
- updating and/or rationalising the list of respondents to awards; and
- addressing any cases where award provisions discriminate against sections of the workforce.
- examining both award and non-award matters to test whether work classifications and basic work patterns and arrangements are appropriate - the examination to include specific consideration of -
  - (i) the contract of employment including the employment of casual, part-time, temporary, fixed term and seasonal employees,
  - (ii) the arrangement of working hours,
  - (iii) the scope and incidence of the award;
- inserting facilitative provisions in relevant clauses of the award;
- establishing a consultative mechanism and procedures appropriate to their size, structure and needs for consultation and negotiation on matters affecting their efficiency and productivity;
- providing in awards, in order ensure increased efficiency and productivity at the enterprise level, while not limiting the rights of either an employer or union to arbitration, a process whereby consideration can be given to changes in award provisions; any agreement reached under this process would have to be formally ratified by the Commission and any disputed areas should be subject to conciliation and/or arbitration; and
- providing in an award a provision to the effect that an employer may direct an employee to carry out such duties as are within the limits of the employee's skill, competence and training.

14 The Union says that the Award complies with the Structural Efficiency Principle. In particular, together with the training that is required to be implemented under the proposed Award, the Classification Structure provides for a skilled related career path and provides incentives for employees to continue to participate in skills formation and allows for multi-skilling of work. Such arrangements will enhance flexibility and efficiency of the industry. The proposed rates of pay reflect the rates set out in the Federal Award, which are properly fixed minimum rates of pay, with classifications which are appropriate to one another. The Union says that whilst the Award does not provide for part-time work the terms of the Award does not prevent part-time employment in the industry. The Union also says that the terms of the Award provide appropriate consultative mechanisms and the ability for an employer to direct an employee to carry out such duties that are within the employee's skills, competency and training.

Submissions made by the Civil Contractors Federation

15 Mr Vallence, on behalf of the Federation informed the Commission that the Federation is the largest registered organisation operating in the civil construction industry in Western Australia. It is a national body and is registered as an organisation under the *Workplace Relations Act*. Until approximately 10 years ago the Federation was known as the Australian Earthmovers and Road Contractors Federation, which was also a registered organisation. The Federation has been at the forefront of maintaining industrial regulation in the industry. The Federation says that for at least the last 20 years, its members have been bound by various Federal awards including the Federal award the terms of which are substantially reflected in the Award. Mr Vallence informed the Commission that since Main Roads has contracted out a substantial amount of work, award regulation in the industry has decreased. Because of this members of the Federation who are bound by Federal awards compete with employers who are not bound by awards. By operations of law their competitors are only required to provide minimum terms and conditions to their employees pursuant to the requirements of the *Minimum Conditions of Employment Act 1993*. Accordingly, the Federation supports the Union's application and says that it is fair and just to provide employees and employers with certainty in relation to rights and entitlements through the operation of a common law award that provides a minimum safety net for employees in the industry.

Conclusion

16 Having heard the submissions made on behalf of the Union and the Federation, I reached the decision that the Award should be made in the terms sought by the Union as the terms of the Award comply with Principle 11 of the State Wage Case Principles. My reasons for reaching this decision are as follows. I am satisfied that:

(a) The terms of the proposed Award meets the needs of the industry. In particular, I am satisfied that it is appropriate that the safety net of conditions proposed in the Award are appropriate. In particular, I am satisfied that all employees in the industry should be afforded terms and conditions of employment, which are protected by an award safety net, whether that be by operation of the terms of the Award or by a Federal award or instrument.

(b) The terms of the Award properly take into account employees' interests. The making of the Award will provide an appropriate means of ensuring that employees that work alongside each other who carry out similar work will be afforded similar terms and conditions.

(c) Structural Efficiency Principle considerations are satisfied. In particular, I am satisfied that the Classification Structure set out in Clause 4.3 of the Award, establishes a skilled related career path, which provides an incentive for employees to continue to participate in skilled formation and enables multi-skilling.

(d) In adopting the wage structure of the Federal award this creates appropriate relativities between difference categories of employees within the Award and at the enterprise level.

(e) The working patterns contained within Clause 3 Hours of Work, provide for working patterns and arrangements that enhance the flexibility and efficiency of the industry. In particular, Clause 3.1 provides for arrangements to be reached between an employer and employees in relation to hours of work. In relation to construction work, pursuant to Clause 14.1.6 hours of work can be varied by an agreement between the employer and the Union. Further, leisure time of employees is protected under Clause 14.1.6.3. Clause 14.1.6.3 contains a provision which enables an employee to refuse to work overtime in certain circumstances where the working of such overtime would result in an employee working hours which are unreasonable, having regard to a number of matters.

(f) The terms of the Award contains properly fixed minimum rates for the classifications Award which relate appropriately to one another.

(g) There is no issue in relation to ensuring the list of respondents is up-to-date, as the Award applies to all employers, who employ employees in the classifications set out in Clause 4.3 and who are engaged on traffic management duties for more than 50% of their time at work. The Award will apply to all employees and employers in the State of Western Australia who come within the scope of Clause 1.3 from time to time. Accordingly, the terms of the Award will not rely upon up-dating the list of respondents to keep the scope of the award current.

(h) There are no provisions in the Award which discriminate against sections of the workforce. Although, the contract of employment provisions do not expressly provide for part-time work, there is nothing in the Award that would prohibit an employer from engaging an employee on a part-time basis.

(i) The classification structure in Clause 4.3 provides, in relation to trainee traffic controller and traffic controller, they are required to perform duties that are within their skills, training and experience. Having regard to the Structural Efficiency Principle it is my view that this requirement should apply to each of the classifications in Clause 4.3. Clause 4.3 has been amended accordingly.

(j) The Award has a clause providing for the minimum award wage.

2004 WAIRC 13525

THE AUSTRALIAN WORKERS UNION ROAD MAINTENANCE, MARKING AND TRAFFIC MANAGEMENT AWARD 2002

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	APPLICANT
	-v-
	ADVANCED TRAFFIC MANAGEMENT AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER J H SMITH
DATE	MONDAY, 6 DECEMBER 2004
FILE NO.	A 4 OF 2004
CITATION NO.	2004 WAIRC 13525

Result	New Award made
Representation	
Applicant	Mr D McLane (as agent for the Applicant)
Respondents	No appearance
Intervener	Mr M Vallence (as agent for the Civil Contractors Federation)

Order

Having heard Mr D McLane as agent on behalf of the Applicant and Mr M Vallence on behalf of the Civil Contractors Federation as intervener and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the Australian Workers Union Road Maintenance, Marking and Traffic Management Award 2002 be made in accordance with the following schedule and that such award shall have effect from the beginning of the first pay period commencing on or after 6 December 2004.

(Sgd.) J H SMITH,
Commissioner.

[L.S.]

SCHEDULE

1. AWARD STRUCTURE

1.1 TITLE

This Award shall be known as "The Australian Workers Union Road Maintenance, Marking and Traffic Management Award 2002".

1.2 ARRANGEMENT

1. AWARD STRUCTURE
1.1 TITLE
1.2 ARRANGEMENT
1.3 AREA & SCOPE
1.4 TERM
1.5 DEFINITIONS
1.6 PROHIBITION OF CONTRACTING OUT OF AWARD
2. CONTRACT OF EMPLOYMENT
2.1 CONTRACT OF SERVICE
2.2 REDUNDANCY
3. HOURS OF WORK
3.1 HOURS OF WORK – DAY EMPLOYEES
3.2 OVERTIME – DAY EMPLOYEES
3.3 CALL OUT – DAY EMPLOYEES
3.4 SHIFT WORK
3.5 REST PERIOD
3.6 MEAL BREAKS
4. RATES OF PAY
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4.2 WAGES
4.3 CLASSIFICATION STRUCTURE
4.4 SUPPORTED WAGE
4.5 PAYMENT OF WAGES
5. ALLOWANCES AND FACILITIES
5.1 LEADING HAND ALLOWANCE
5.2 INDUSTRY ALLOWANCE
5.3 SPECIAL RATES & PROVISIONS
5.4 REIMBURSEMENT OF EXPENSES
5.5 HIGHER DUTIES ALLOWANCE
5.6 CAMP STANDARDS
5.7 AMENITIES
5.8 MEAL MONEY
5.9 TRAVELLING ALLOWANCE
5.10 DISTANT WORK
5.11 FIRST AID ALLOWANCE
5.12 PROTECTIVE CLOTHING
5.13 CAR ALLOWANCE
5.14 LOCATION ALLOWANCES
5.15 CLOTHING AND SPECTACLES
5.16 INCLEMENT WEATHER
6. LEAVE
6.1 ANNUAL LEAVE
6.2 SICK LEAVE
6.3 CARER'S LEAVE
6.4 PUBLIC HOLIDAYS
6.5 BEREAVEMENT LEAVE
6.6 PARENTAL LEAVE
6.7 LONG SERVICE LEAVE
6.8 JURY SERVICE
6.9 INDUSTRIAL TRAINING LEAVE

7. DISPUTE RESOLUTION PROCEDURE
7.1 DISPUTE RESOLUTION PROCEDURE
8. SAFETY AND TRAINING
8.1 PROTECTIVE EQUIPMENT
8.2 FIRST AID KIT
9. REGISTERED ORGANISATION MATTERS
9.1 RIGHT OF ENTRY TO INVESTIGATE BREACHES
9.2 RIGHT OF ENTRY FOR DISCUSSIONS WITH EMPLOYEES
9.3 POSTING OF AWARD
10. KEEPING OF RECORDS
10.1 TIME & WAGES RECORD
10.2 INSPECTION OF RECORDS
11. SUPERANNUATION
11.1 SUPERANNUATION
12. ENTERPRISE BARGAINING
12.1 ENTERPRISE BARGAINING
12.2 LIBERTY TO APPLY
13. OTHER LAWS AFFECTING EMPLOYMENT
13.1 INDUSTRIAL RELATIONS ACT 1979
13.2 MINIMUM CONDITIONS OF EMPLOYMENT ACT 1979
13.3 WORKPLACE RELATIONS ACT 1996
13.4 SUPERANNUATION GUARANTEE (ADMINISTRATION) ACT 1992
13.5 OCCUPATIONAL SAFETY AND HEALTH ACT 1984
13.6 EQUAL OPPORTUNITY ACT 1984
14. MAJOR CONSTRUCTION PROJECTS
14.1 RATES AND CONDITIONS
15. WHERE TO GO FOR FURTHER INFORMATION
16. NAMED PARTIES
16.1 UNION PARTY TO THE AWARD
16.2 EMPLOYER PARTIES TO THE AWARD

1.3 AREA & SCOPE

This Award applies to:

1.3.1 Employees in the State of Western Australia employed in any of the classifications in Clause 4.3 – Classification Structure in or connected with the industries or callings, listed below, and who are engaged on traffic management duties for more than 50% of their time at work:

Roads, freeways, causeways, aerodromes, drains, dams, weirs, bridges, overpasses, underpasses, channels, waterworks, pipe tracks, tunnels, water and sewerage works, conduits, and all concrete work and preparation incidental thereto.

1.3.2 Employers of those employees.

1.4 TERM

This award shall operate from the first pay period commencing on or after 6 December 2004 and shall remain in force for a period of six months.

1.5 DEFINITIONS

"Commission" means Western Australian Industrial Relations Commission.

"C+Bus" means Construction & Building Industry Super Fund.

"Leading Hand" means an employee who is required to supervise or direct or be in charge of another employee or employees.

"RDO" means rostered day off.

"Traffic management duties" means any of the classifications in Clause 4.3.

"Union" means Australian Workers Union, West Australian Branch, Industrial Union of Workers.

1.6 PROHIBITION OF CONTRACTING OUT OF AWARD

All employees covered by the terms of this Award shall be paid not less than the wages prescribed by this Award and shall work in accordance with provisions not less advantageous to them than the provisions of this Award, notwithstanding anything that may be determined to the contrary by the employer, or by the employer in agreement with the employee.

2. CONTRACT OF EMPLOYMENT

2.1 CONTRACT OF SERVICE

2.1.1 A contract of service to which this award applies may be terminated in accordance with the provisions of this Clause but not otherwise.

2.1.2 Nothing in this Clause prevents any party to the contract giving a greater period of notice than is prescribed by this Clause or any party at any time giving notice in accordance with this Clause.

2.1.3 Nothing in this Clause affects an employer's right to dismiss an employee without notice for serious misconduct in which case wages shall be paid for the time worked up to the time of dismissal only.

2.1.4 A party to the contract of service may on any day give to the other party the appropriate period of notice of termination and where such notice is given at or before the commencement of the ordinary hours of duty of any day that day shall be included in the period of notice.

2.1.4.1 The contract of service terminates when the period of notice expires.

2.1.4.2 In lieu of giving the period of notice the contract shall be terminable by the payment or forfeiture, as the case may be, of ordinary wages for the period of notice which should have been given.

2.1.5 In the case of forfeiture by an employee, the employee shall forfeit entitlement to any monies owing to them under this award except to the extent that such monies exceed the employee's ordinary wages for the period of notice which should have been given.

2.1.6 Where an employee leaves the employment without giving or completing the period of notice under the contract the employee shall be deemed to have been terminated at the time at which the employee was last ready, willing and available for work during ordinary working hours under the contract and the provisions of 2.1.4 shall be deemed to have been complied with if the employee pays to the employer whether by forfeiture or otherwise, an amount equivalent to the ordinary wages for the period of notice which should have been given.

2.1.7 The period of notice referred to in this Clause is:

2.1.7.1 In the case of a casual employee, one hour;

2.1.7.2 An employee (other than a casual employee)

2.1.7.2.1	Period of Continuous Services	Period of Notice
	Not more than 1 year	At least 1 week
	More than 1 year but not more than 3 years	At least 2 weeks
	More than 3 years but not more than 5 years	At least 3 weeks
	5 years and over	At least 4 weeks

2.1.7.2.2 An employee who at the time of being given notice is over 45 years of age and who at the date of termination has completed two years' continuous service with the employer shall be entitled to one week's notice in addition to the notice prescribed in 2.1.7.2.1.

2.1.7.3 In the case of an employee who has been engaged for the major and substantial portion of their time on construction work and who has completed one month's service, the employer, in lieu of giving the period of notice of termination shall give notice to the employee on the day the contract of service is to end and pay the employee one week's ordinary wages.

2.1.7.4 Provided that where an employee having been offered and refused employment at another site with the same employer subsequently, within a fortnight of such refusal, applies to that employer for employment and is engaged to work at that other site, the one week's wages paid to the employee under this subparagraph shall be credited towards payment of any monies due in the employee's new employment.

2.1.8 Prior to engagement, an employee shall be notified by the employer or by the employer's representative whether the duration of their employment is expected to exceed one month and, if hired as a casual employee, they shall be advised:

2.1.8.1 The employment is casual; and

2.1.8.2 There is no entitlement to paid leave (except bereavement leave).

2.1.9 The employer shall be under no obligation to pay for any day not worked upon which the employee is required to be present for duty, except when such absence from work is due to illness and comes within the provisions of Clause 6.2 - Sick Leave or such absence is on account of paid leave to which the employee is entitled under the provisions of this award.

2.1.10 The employer is entitled to deduct payment for any day upon which an employee (including an apprentice) cannot be usefully employed because of a strike by the industrial union of employee's party to this award or by any other association or union.

2.1.11 The provisions of 2.1.10 also apply where an employee cannot be usefully employed through any cause which the employer could not reasonably have prevented but only if, and to the extent that, the employer and the Union so agree, or, in the event of disagreement, the Commission so determines.

2.1.12 Where the stoppage of work has resulted from a breakdown of the employer's machinery the Commission, in determining a dispute under 2.1.11, shall have regard for the duration of the stoppage and the endeavours made by the employer to repair the breakdown.

2.2 REDUNDANCY

2.2.1 Definition

"Redundancy" means a situation where an employee ceases to be employed by an employer, other than for reason of misconduct. "Redundant" has a corresponding meaning.

2.2.2 Redundancy Pay

A redundant employee shall receive redundancy/severance payments, calculated as follows, in respect of all continuous service (as defined in 2.2.4) with their employer:

PERIOD OF CONTINUOUS SERVICE WITH EMPLOYER	REDUNDANCY/SEVERANCE PAY
One year or more but less than two years	2.4 weeks pay plus, for all service in excess of one year, 1.75 hours pay per completed week of service up to a maximum of 4.8 weeks pay
Two years or more but less than three years	4.8 weeks pay plus, for all service in excess of two years, 1.6 hours pay per completed week of service up to a maximum of 7.0 weeks pay

PERIOD OF CONTINUOUS SERVICE WITH EMPLOYER	REDUNDANCY/SEVERANCE PAY
Three years or more but less than four years	7.0 weeks pay plus, for all service in excess of three years, 0.73 hours pay per completed week of service up to a maximum of 8.0 weeks pay
Four years or more	8.0 weeks pay

Provided that an employee employed for less than 12 months shall be entitled to a redundancy/severance payment of 1.75 hours per week of service if, and only if, redundancy is occasioned otherwise than by the employee.

2.2.3 **"Week's Pay**" means the ordinary time rate of pay at the time of termination for the employee concerned.

2.2.4 **"Continuous period of service"** shall mean the period of continuous service of an employee with the same employer.

2.2.5 If an employee dies with a period of eligible service which would have entitled that employee to redundancy pay, such redundancy pay entitlement shall be paid to the estate of the employee.

2.2.6 Any period of service as a casual shall not entitle an employee employed to accrue service in accordance with this clause.

2.2.7 Service as an apprentice will entitle an employee to accumulate credits towards the payment of a redundancy benefit in accordance with this clause if the employee completes an apprenticeship and remains in employment with that employer for a further 12 months.

2.2.8 An employer bound by this Award may utilise a fund to meet all or some of the liabilities created by this clause. Where an employer utilises such a fund:

2.2.8.1 Payments made by a fund designed to meet an employer's liabilities under this clause, to employees eligible for redundancy/severance pay shall be set off against the liability of the employer under this clause, and the employee shall receive the fund payment or the award benefit, whichever is the greater but not both; or

2.2.8.2 Where a fund, which has been established pursuant to an agreement between the Union and employers, does not make payments in accordance with this clause, contributions made by an employer on behalf of an employee to the fund shall, to the extent of those contributions, be set off against the liability of the employer under this clause, and payments to the employee shall be made in accordance with the rules of the fund or any agreement relating thereto and the employee shall receive the fund payment or the award benefit, whichever is the greater, but not both.

2.2.9 Employee Leaving During Notice

An employee whose employment is to be terminated in accordance with this clause may terminate their employment during the period of notice and if this occurs, shall be entitled to the provision of this clause as if the employee remains with the employer until expiry of such notice. Provided that in such circumstances, the employee shall not be entitled to payment in lieu of notice.

2.2.10 Transmission of Business

2.2.10.1 Where a business is, before or after the date of this award, transmitted from an employer (in this subclause called "the transmitter") to another employer (in this subclause called "the transmittee") and an employee who at the time of such transmission was an employee of the transmitter in that business becomes an employee of the transmittee:

2.2.10.1.1 The continuity of the employment of the employee shall be deemed not to have been broken by reason of such transmission;

2.2.10.1.2 The period of employment which the employee has had with the transmitter or any prior transmitter shall be deemed to be service of the employee with the transmittee.

2.2.10.2 In this subclause "business" includes trade, process, business or occupation and includes part of any such business and "transmission" includes transfer, conveyance, assignment or succession whether by agreement or operation of law and "transmitted" has a corresponding meaning.

2.2.11 Leave for Job Interview

2.2.11.1 During the period of notice of termination given by the employer, an employee is entitled to paid leave of up to eight hours during each week of notice for the purpose of seeking further employment. The eight hours need not be consecutive.

2.2.11.2 If an employee has been allowed paid leave for more than eight hours during the notice period for the purpose of seeking other employment, the employee shall, at the request of the employer, be required to produce proof of attendance at an interview or they shall not receive payment for the time absent. For this purpose a statutory declaration will be sufficient.

3. HOURS OF WORK

3.1 HOURS OF WORK – DAY EMPLOYEES

3.1.1 Ordinary Hours

Subject to the provisions of this clause, the ordinary hours of work for day employees shall be 38 per week and shall be worked between 7.00 a.m. and 6.00 p.m. Monday to Friday inclusive.

3.1.2 Rostered Day Off

The ordinary hours shall be worked within a four week cycle of nineteen working days each of eight hours and one rostered day off. Twenty-four minutes of each day worked during a cycle shall accrue as an entitlement to take the fourth Monday as a rostered day off which shall be paid for as though worked.

3.1.3 Alternative RDO

By agreement in writing between an employer and the employees an alternative working day in the cycle may be substituted for the fourth Monday as the rostered day off, and where such agreement is reached, all provisions of the award shall apply as if the substituted day were the prescribed fourth Monday.

3.1.4 Special Circumstances

Where special circumstances exist and where the Union and the employer agree that it is not practicable for the foregoing four week cycle to operate, agreement may be reached between the Union and the employer on such other method of arranging working hours so that the average ordinary hours worked in any one week do not exceed 38.

3.1.5 RDO Falling on Public Holiday

Where the fourth Monday or agreed rostered day off falls on a public holiday prescribed by the award, the next working day shall be taken in lieu of the rostered day off unless an alternative day in that four week cycle or the next is agreed in writing between the employer and employees.

3.1.6 Programming of RDO's

Before October each year the Union and employers will meet to programme the RDO's for the following year ensuring that they are aligned with the public holidays to the greatest extent practicable.

3.1.7 Banking of RDO's

By agreement between the employer and employee, up to five rostered days off may be accumulated by that employee in any one year (January to December) and taken later in the year in not more than two groups of days at a mutually agreed time or times.

Provided that by agreement between the employer and employee, up to six RDO's may be banked by that employee in any one year and taken later in the year at a mutually agreed time or times. Provided further, that the employer shall notify the Union Branch Secretary in writing of any such agreement and of any alterations thereto.

3.1.8 Paid Leave

Each day of paid leave taken and any public holiday occurring during any four week cycle shall be regarded as a day worked for accrual purposes.

3.1.9 Pro Rata Accrued Entitlements

An employee who has not worked or is not regarded by reason of 3.1.8 hereof as having worked a complete four week cycle shall receive pro rata accrued entitlements for each day worked or regarded as having been worked in that cycle. Such pro rata entitlements shall be payable for the rostered day off or, in the case of termination of employment, on such termination.

3.1.10 Work on a RDO

The rostered day off prescribed by this clause shall be taken as a paid day off. Provided that the day may be worked where that is required by the employer and such work is necessary to allow other employees to be employed productively or to carry out out-of-hours maintenance or because of unforeseen or emergency circumstances on a project. In such cases the employee shall, in addition to their accrued entitlements, be paid at overtime rates for all work performed on the rostered day off.

3.1.11 Early Start

Where it is agreed between the employer, the employees concerned and the Union, the working day may begin at 6.00 a.m. or at any other time between 6.00 a.m. and 7.00 a.m., and the ordinary hours shall then begin to run from the time so agreed, with a consequential adjustment to the meal cessation period.

Provided that by agreement between the employer, the employees concerned and the Union, the working day may begin at 5.00 a.m. during the period of 1 October to 31 March.

3.1.12 Work Up Time

Where special circumstances exist and a majority of employees desire to work more than eight ordinary hours on any day for the purpose of having a shorter working week, they may, subject to the consent of the employer and the consent of the Union, be permitted to do so without payment of overtime rates, provided the longer hours so worked do not exceed two on any one day and the total ordinary hours do not exceed 38 in any week. All such ordinary hours worked in excess of eight per day shall be aggregated for the purposes of the accrued entitlements prescribed by 3.1.2.

3.2 OVERTIME – DAY EMPLOYEES

3.2.1 Overtime Rate

Except as otherwise provided in this clause, all time worked by a day employee in excess of or outside the ordinary hours of work (inclusive of time worked for accrual purposes) shall be paid for at one and a half times the ordinary prescribed rate for the first two hours, and at double the ordinary prescribed rate for all time thereafter.

3.2.2 Computation of Overtime

For the purpose of computing overtime under this clause:

3.2.2.1 Each day's work shall stand alone;

3.2.2.2 **"Day"** shall mean all the time between the normal commencing time of one day and the normal commencing time of the next succeeding day;

3.2.2.3 **"Saturday"** shall mean all the time between midnight Friday and midnight Saturday;

3.2.2.4 **"Sunday"** shall mean all the time between midnight Saturday and midnight Sunday.

3.2.3 Saturday Work

3.2.3.1 Overtime worked prior to 12 noon on a Saturday shall be paid for at the rate of time and one half for the first two hours and double time thereafter.

3.2.3.2 All overtime worked after 12 noon on Saturday shall be paid for at the rate of double time.

3.2.3.3 All work performed on the Saturday following Good Friday shall be paid for at the rate of double time and a half.

3.2.3.4 An employee required to work prearranged overtime on a Saturday shall be afforded at least three hours work or shall be paid for three hours at the appropriate rate.

3.2.4 Sunday Work

3.2.4.1 All time worked on a Sunday shall be paid for at the rate of double time.

3.2.4.2 An employee required to work prearranged overtime on a Sunday shall be afforded at least four hours work or shall be paid for four hours at the rate of double time.

3.2.5 Transport after Overtime

When a day employee, after having worked overtime, finishes work at a time when reasonable means of transport are not available, the employer shall provide them with conveyance to their usual place of residence or to the nearest appropriate public transport.

3.3 CALL OUT – DAY EMPLOYEES

3.3.1 Mondays to Fridays

An employee called out to work after the expiration of their customary working time and after they have left work for the day on Monday to Friday shall be paid for a minimum of four hours work calculated at one and a half times the ordinary prescribed rate for each time they are so called out. Provided that the employee, if required to work for two hours or more, shall be paid for a minimum of four hours work calculated at one and a half times the ordinary prescribed rate for the first two hours and at double the ordinary prescribed rate thereafter.

3.3.2 Saturdays

An employee called out to work on a Saturday shall be paid for a minimum of three hours work calculated at one and a half times the ordinary prescribed rate for each time they are so called out. Provided that the employee if required to work for two hours or more, shall be paid for a minimum of three hours work calculated at one and a half times the ordinary prescribed rate for the first two hours and at double the ordinary prescribed rate thereafter.

3.3.3 Sundays

An employee called out to work on a Sunday shall, for the first call out, be paid for a minimum of three hours work at the rate of double time; and for each subsequent call out shall be paid at the rate of double time for the actual time worked.

3.3.4 Public Holidays

An employee called out to work on a public holiday shall, for the first call out, be paid for a minimum of three hours work at the rate of double time and a half; and for each subsequent call out shall be paid at the rate of double time and a half for the actual time worked.

3.4 SHIFT WORK

3.4.1 Definitions

3.4.1.1 For the purposes of this award:

"Shift work" means any system of work in which operations are being continued by the employment of a group of employees upon work on which another group had been engaged prior thereto.

"Day shift" means any shift starting on or after 6.00 a.m. and before 10.00 a.m.

"**Afternoon shift"** means any shift starting at or after 10.00 a.m. and before 8.00 p.m.

"Night shift" means any shift starting at or after 8.00 p.m. and before 6.00 a.m.

"Rostered shift" means a shift of which the employee concerned has had at least 48 hours notice.

3.4.2 Roster

3.4.2.1 Shifts shall be worked according to a roster which shall:

3.4.2.2 Provide for rotation of shifts unless all the employees concerned agree otherwise;

3.4.2.3 Provide for not more than eight shifts to be worked in any nine consecutive days;

3.4.2.4 Specify the commencing and finishing times of each shift.

3.4.3 Ordinary Hours

3.4.3.1 The ordinary hours of work for shift employees shall not exceed an average of 38 per week over a cycle of two, three or four weeks.

3.4.3.2 A shift shall consist of not more than eight consecutive hours inclusive of a crib time of 30 minutes which shall be counted as time worked.

3.4.4 Rostered Off Shift

Twenty-four (24) minutes of each eight hour shift worked during a shift cycle shall accrue as an entitlement to take a rostered off shift after each 19 shifts worked. The rostered off shift shall be paid for as though worked.

3.4.5 Paid Leave

Each day of paid leave taken and any public holiday occurring during any shift cycle shall be regarded as a shift worked for accrual purposes.

3.4.6 Pro Rata Accrued Entitlements

A shift employee who has not worked or is not regarded by reason of 3.4.5 as having worked a complete shift cycle shall receive pro rata accrued entitlements for each shift worked or regarded as having been worked in that cycle. Such pro rata entitlements shall be payable for the rostered off shift or, in the case of termination of employment, on such termination.

3.4.7 Taking Of Rostered Off Shifts

The employer and employees concerned shall agree in writing upon arrangements for the taking of rostered off shifts or for their accumulation. Such accumulation shall be limited to not more than five shifts before they are taken as rostered off shifts. When rostered off shifts are taken they shall be regarded as shifts worked for accrual purposes in the particular shift cycle in which they are taken.

3.4.8 Work on a Rostered Off Shift

The rostered off shift prescribed by this clause shall be taken as a paid shift off. Provided that where an employer for emergency reasons requires an employee to work on their rostered off shift the employee shall, in addition to their accrued entitlements, be paid at overtime rates for all work performed on the rostered off shift.

3.4.9 Overtime

All time worked by a shift employee in excess of or outside the ordinary hours (inclusive of time worked for accrual purposes), or on a shift other than a rostered shift, shall be paid for at the rate of double time. Provided that this shall not apply when the overtime is worked by arrangements between the employees themselves or for the purpose of effecting the customary rotation of shifts.

3.4.10 Shift Allowances

A shift employee whilst on afternoon or night shift other than on a Saturday, Sunday or holiday shall be paid for such shift 20% more than their ordinary rate.

3.4.11 Saturdays

Employees working shifts between midnight on Friday and midnight on Saturday shall be paid at the minimum rate of time and a half for ordinary hours of work inclusive of time worked for accrual purposes as prescribed in 3.4.4.

3.4.12 Sundays and Holidays

Subject to this clause the provisions of Clause 10.1 – Time & Wages Record of this award shall apply to shift employees. Where shifts commence between 11.00 p.m. and midnight on a Sunday or holiday, the time so worked before midnight shall not entitle the employee to the Sunday or holiday rate; provided that the time worked by an employee on a shift commencing before midnight on the day preceding a Sunday or holiday and extending into a Sunday or holiday shall be regarded as time worked on such Sunday or holiday. Where shifts fall partly on a Sunday or a holiday that shift the major portion of which falls on a Sunday or a holiday shall be regarded as the Sunday or holiday shift.

3.4.13 Five Successive Shifts

Shift employees who work on any afternoon or night shift which does not continue for at least five successive afternoons or nights shall be paid at the rate of time and a half for all ordinary time occurring during such shift.

3.4.14 Permanent Night Shift

An employee who:

3.4.14.1 During a period of engagement on shift, works night shift only; or

3.4.14.2 Remains on a night shift for a longer period than four successive weeks; or

3.4.14.3 Works on a night shift which does not rotate or alternate with another shift or with day work so as to give the employee at least 1/3 of their working time off night shift in each cycle;

shall during such engagement, period or cycle be paid 30% more their ordinary rate for all time worked during ordinary working hours on such night shift.

3.4.15 Call Outs

A shift employee called out to work after the expiration of their customary working time and after they have left work for the shift, or is called out to work on a day on which they are rostered off, shall be paid for a minimum of three hours work calculated at double the ordinary prescribed rate for each time the employee is so called out. Provided that if called out on a public holiday payment shall be calculated at the rate prescribed in 3.3.4 of Clause 3.3 – Call Outs – Day Employees of this award.

3.4.16 Transport After Overtime, Etc.

When a shift employee, after having worked overtime or a shift for which they have not been regularly rostered, finishes work at a time when reasonable means of transport are not available, the employer shall provide the shift employee with conveyance to their usual place of residence or to the nearest appropriate public transport.

3.5 REST PERIOD

3.5.1 When overtime work is necessary it shall, wherever reasonably practicable, be so arranged that employees have at least ten consecutive hours off duty between the work of successive days.

3.5.2 An employee who works so much overtime between the termination of their ordinary work on one day and the commencement of their ordinary work on the next day so that they have not had at least ten consecutive hours off duty between those times shall, subject to this clause, be released after completion of such overtime until they have had ten consecutive hours off duty without loss of pay for ordinary working time occurring during such absence. If, on the instructions of their employer, such an employee resumes or continues work without having had such ten consecutive hours off duty they shall be paid at double rates until they are released from duty for such period and the employee shall then be entitled to be absent until they have had ten consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

3.5.3 The provisions of this clause shall apply in the case of shift employees as if eight hours were substituted for ten hours when overtime is worked:

3.5.3.1 For the purpose of changing shift rosters; or

3.5.3.2 Where a shift employee does not report for duty and a day employee or shift employee is required to replace such shift employee; or

3.5.3.3 Where a shift is worked by arrangement between the employees themselves.

3.6 MEAL BREAKS

3.6.1 Meal Breaks - Day Employees

On each day Monday to Friday there shall be a cessation of work of not less than 45 minutes duration between 12.00 noon and 1.00 p.m. for day employees to take a meal break. Provided that, by agreement between the employer and the employees and the Union, the meal break may be shortened to not less than 30 minutes with a consequential adjustment to the daily time of cessation of work.

3.6.2 Meal Breaks - Shift Employees

At no later than five hours after the commencement of each shift there shall be a cessation of work of 30 minutes duration to allow shift employees to take a meal break which shall be counted as time worked.

3.6.3 Delayed Meal Breaks

An employee who is required to defer a meal break prescribed by 3.6.1 and 3.6.2 shall, for the duration of such deferment, be paid at single time in addition to the appropriate rate.

3.6.4 Overtime Crib Breaks

3.6.4.1 An employee working overtime shall be allowed a crib time of twenty minutes without deduction of pay after each four hours of overtime worked if the employee continues work after such crib time.

3.6.4.2 Unless the period of overtime is less than one and a half hours an employee before starting overtime after working ordinary hours inclusive of time worked for accrual purposes in Clauses 3.2 – Overtime Day Employees and 3.3 - Call Outs – Day Employees of this award shall be allowed a meal break of twenty minutes which shall be paid for at ordinary rates.

3.6.4.3 An employer and employee may agree to any variation of these provisions to meet the circumstances of the work in hand provided that the employer shall not be required to make payment in respect of any time allowed in excess of twenty minutes.

3.6.5 Weekend Crib Breaks

3.6.5.1 An employee working overtime on a Saturday, or working on a Sunday, shall be allowed a paid crib time of twenty minutes after four hours work, to be paid for at the ordinary rate of pay but this provision shall not prevent any arrangements being made for the taking of a 30 minute meal period, the time in addition to the paid 20 minutes being without pay.

3.6.5.2 In the event of an employee being required to work in excess of a further four hours, such employee shall be allowed to take a paid crib time of 30 minutes which shall be paid at the ordinary rate of pay.

3.6.6 Tea Breaks

3.6.6.1 Two tea breaks of 7.5 minutes duration shall be allowed to employees without deduction of pay on each day or shift.

3.6.6.2 The times for taking such tea breaks shall be set by agreement between the employer and employees concerned.

3.6.7 Extension of Breaks

The duration of any break prescribed by this Clause may be extended by agreement between the employer and employees concerned. Provided that the employer shall not be required to pay for any such extension.

4. RATES OF PAY

4.1 MINIMUM ADULT AWARD WAGE

4.1.1 No adult employee shall be paid less than the Minimum Adult Award Wage unless otherwise provided by this clause.

4.1.2 The Minimum Adult Award Wage for full time adult employees is $467.40 per week payable on and from 4th June 2004.

4.1.3 The Minimum Adult Award Wage of $467.40 per week is deemed to include all arbitrated safety net adjustments from State Wage Case decisions.

4.1.4 Unless otherwise provided in this clause adults employed as casuals, part time employees or pieceworkers or employees who are remunerated wholly on the basis of payment by result shall not be paid less than pro rata the Minimum Adult Award Wage according to the hours worked.

4.1.5 Juniors shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision to the Minimum Adult Award Wage of $467.40 per week.

4.1.6 The Minimum Adult Award Wage shall not apply to apprentices, employees engaged on traineeships or Jobskill placements or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate.

4.1.7 Liberty to apply is reserved in relation to any special categories of employees not included here or otherwise in relation to the application of the Minimum Adult Award Wage.

4.1.8 Subject to this clause the Minimum Adult Award Wage shall -

4.1.8.1 Apply to all work in ordinary hours.

4.1.8.2 Apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave and for all purposes of this award.

4.1.9 Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for adult employee's payable under the 2004 State Wage Case Decision. Any increase arising from the insertion of the minimum adult award wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the minimum adult award wage.

4.1.10 Adult Apprentices

4.1.10.1 Notwithstanding the provisions of this clause, an apprentice, 21 years of age or over, shall not be paid less than $406.70 per week.

4.1.10.2 The rate paid in 4.1.10.1 above is payable on superannuation and during any period of paid leave prescribed by this Award.

4.1.10.3 Where in an Award an additional rate is expressed as a percentage, fraction, multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this Award for the actual year of apprenticeship.

4.1.10.4 Nothing in this subclause shall operate to reduce the rate of pay fixed by the award for an adult apprentice in force immediately prior to 5 June 2003.

4.2 WAGES

4.2.1 Actual Weekly Rate

The actual weekly rate shall be calculated by multiplying the sum of the appropriate amounts prescribed in 4.2.2 and Clause 5.14 – Location Allowances by 52 over 50.4 (52/50.4) rounded to the nearest ten cents, and by adding to that subtotal the Special Allowance prescribed in 4.2.3. Other allowances to be included in the wage rate are under Part 5 – Allowances and Facilities of this Award.

4.2.2 The following shall be the minimum rate of wages payable to employees under this award from the beginning of the first pay period commencing on or after 6 December 2004.

Classification	Weekly Rate $	Hourly Rate $
Trainee Traffic Controller – First 3 months probation	525.54	13.83
Traffic Controller	570.00	15.00
Traffic Controller Team Leader	592.04	15.58
Construction Employee Grade 2	529.20	13.93
Construction Employee Grade 3	540.80	14.23
Construction Employee Grade 4	556.40	14.64
Construction Employee Grade 5	568.60	14.96
Construction Employee Grade 6	574.10	15.11
Plant Operator Grade 1	536.00	14.11
Plant Operator Grade 2	563.30	14.82

4.2.3 Special Allowance

In addition to the base rate specified in 4.2.2 employees shall be paid for all purposes of the award a special allowance of **$7.70** per week and such allowance shall not be altered as a consequence of wage indexation decisions.

4.2.4 Casual Employees

Casual employees shall be paid at the actual weekly rate plus 25% loading.

4.3 CLASSIFICATION STRUCTURE

4.3.1 Trainee Traffic Controller

Reports to Traffic Controller or Team Leader

Duties and Responsibilities:

- To learn to direct and control traffic as per Australian Standard 1742.3.

  (as per Traffic Management for Works on Roads: Code of Practice – available on Main Roads Western Australia website at www.mainroads.wa.gov.au go to "Traffic"> "Roadworks").
- To perform other duties as required within skills, training and experience.
- Undergo a training and probationary period of three months.

Experience and Qualifications

To attend and pass:

4.3.1.1 A Traffic Controller Course.

4.3.1.2 A Road Work Safety and Signage Course.

4.3.2 Traffic Controller

Reports to Traffic Controller Team Leader

Duties and Responsibilities:

- To direct and control traffic as per Australian Standard 1742.3.

  (as per Traffic Management for Works on Roads: Code of Practice – available on Main Roads Western Australia website at www.mainroads.wa.gov.au go to "Traffic"> "Roadworks").
- To perform other duties as required within skills, training and experience.

Experience and Qualifications

A person who has attended and passed:

4.3.2.1 A Traffic Controller Course.

4.3.2.2 A Road Work Safety and Signage Course.

Promotional Criteria

Promotion to Traffic Controller Team Leader will depend on the employer requirements for Team Leaders based on the work on hand and individual project needs. Usually, but not always, each crew has Team Leader and once a Controller is appointed as (in-charge) Team Leader they keep the classification and the rate of pay.

4.3.3 Traffic Controller Team Leader

Reports to Supervisor

Duties and Responsibilities:

- To supervise and ensure employees in the crew are carrying out work as required.
- To liaise with client employer representatives on site and put Traffic Management in place as required.
- To make sure personnel are correctly attired.
- To provide relief to the crew as required.
- To perform other duties as required within their skill, experience and training.
- To be responsible for employer equipment.

Experience and Qualifications

A qualified Traffic Controller is an employee who has attended and passed:

4.3.3.1 A Traffic Controller Course.

4.3.3.2 A Road Work Safety and Signage Course.

4.3.3.3 Holds a current and valid Drivers License, loss of license may result in demotion to Traffic Controller.

4.3.4 Construction Employee Grade 2 includes the following classifications:

Bitumen Employee – an employee heating, preparing, cutting, carrying, laying, using on woodwork or handling asphalt, bitumen, tar or emulsion or material coated with any one thereof.

Chainperson

Concrete Cutting or Drilling Machine Operator

Concrete Floater – an employee engaged in concrete or cement work and using a wooden or rubber screeder or mechanical trowel or a wooden float or engaged in bagging off or broom finishing or patching.

Concrete Formwork Stripper

Concrete Gang Employee

Concrete Gun or Pump Operator

Crane Chaser/Crane Hand/Gantry Hand

Kerb and Gutter Layer

Pick or Shovel Person

Steel Erector

Tradesperson's Labourer

4.3.5 Construction Employee Grade 3 includes the following classifications:

Concrete Finisher – an employee, other than a Concrete Floater, engaged in the hand finishing of concrete or cement work not being a finish in marble, mosaic or terrazzo

Power Driven Portable Saw Operator

Scaffolder – an employee engaged in the work of erecting or altering or dismantling scaffolding of all types

Spotter

Steel Fixer (including Tack Welder)

Storeperson

Tool Sharpener – an employee who sharpens and repairs any tools or drills which are heated to be sharpened.

Wall Builder – an employee cutting and facing stone and placing stone in position and who is responsible for line and direction.

4.3.6 Construction Employee Grade 4 includes the following classifications:

Crane Driver's Assistant or Dogger

Drainer

Form Setter

Drilling Machine Operator – up to and including 155mm diameter

Paver (including segmental paving)

Pipe Layer (any kind of pipes)

Renderer in Pipes, Tunnels or Covered Drains – an employee who applies by hand a continuous coat of cement mortar to a brick, masonry or set concrete surface and finishes it to a true and smooth surface by means of a trowel or float

Rigger

4.3.7 Construction Employee Grade 5 includes the following classifications:

Drilling Machine Operator – over 155mm to 230mm diameter

4.3.8 Construction Employee Grade 6 includes the following classifications:

Drilling Machine Operator – over 230mm diameter

Tunnel Boring Machine Operator

Tunnel Excavating Machine Operator

4.3.9 Plant Operator Grade 1 includes the following classifications:

Bitumen Sprayer

Concrete Finisher, Powered

Concrete Spreader, Powered

Hand Sprayer, Lance Type

Vibrating Roller Operator (under 4 tonnes)

4.3.10 Plant Operator Grade 2 includes the following classifications:

Bitumen Sprayer – Driver

Concrete Paver

Roadmarker Operator

Roller Operator (8 tonnes and above)

Vibrating Roller Operator (4 tonnes and above)

4.3.11 Where an employee has the appropriate skills training and experience they maybe utilised:

across all classifications with no reduction in remuneration; and

to perform other duties as required within their skills, training and experience.

4.4 SUPPORTED WAGE

4.4.1 This clause defines the conditions which will apply to employees who because of the effects of a disability are eligible for a supported wage under the terms of this Award. In the context of this clause, the following definitions will apply:

4.4.1.1 **"Supported Wage System"** means the Commonwealth Government system to promote employment for people who cannot work at full Award wages because of a disability as documented in "[Supported Wages System: Guidelines and Assessment Process]".

4.4.1.2 **"Accredited Assessor"** means a person accredited by the management unit established by the Commonwealth under the Supported Wage System to perform assessments of an individual's productive capacity within the Supported Wage System.

4.4.1.3 **"Disability Support Pension"** means the Commonwealth pension scheme to provide income security for persons with a disability as provided under the *Social Security Act 1991*, as amended from time to time, or any successor to that scheme.

4.4.1.4 **"Assessment instrument"** means the form provided for under the Supported Wage System that records the assessment of the productive capacity of the person to be employed under the Supported Wage System.

4.4.2 Eligibility Criteria

Employees covered by this clause will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this Award, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a Disability Support Pension. (The clause does not apply to any existing employee who has a claim against the employer that is subject to the provisions of workers' compensation legislation or any provision of this Award relating to the rehabilitation of employees who are injured in the course of their current employment).

The clause also does not apply to employers in respect of their facility, programme, undertaking, services or the like which receives funding under the *Disability Services Act 1986* and fulfils the dual role of service provider and sheltered employer to people with disabilities who are in receipt of or are eligible for a disability support pension, except with respect to an organisation which has received recognition under s10 or s12A of the Act, or if a part has received recognition, that part.

4.4.3 Supported Wage Rates

Employees to whom this clause applies shall be paid the applicable percentage of the minimum rate of pay prescribed by this Award for the class of work which the person is performing according to the following schedule:

Assessed Capacity (subclause 4.4.4)	% of Prescribed Award Rate
10%*	10%
20%	20%
30%	30%
40%	40%
50%	50%
60%	60%
70%	70%
80%	80%
90%	90%

(Provided that the minimum amount payable shall be not less than $60.00 per week).

* Where a person's assessed capacity is 10%, they shall receive a high degree of assistance and support.

4.4.4 Assessment of Capacity

For the purpose of establishing the percentage of the Award rate to be paid to an employee under this Award, the productive capacity of the employee will be assessed in accordance with the Supported Wage System and documented in an assessment instrument by either:

4.4.4.1 The employer and the union in consultation with the employee or, if desired by any of these; or

4.4.4.2 The employer and an accredited Assessor from a panel agreed by the parties to the Award and the employee.

4.4.5 Lodgement of Assessment Instrument

4.4.5.1 All assessment instruments under the conditions of this clause, including the appropriate percentage of the Award wage to be paid to the employee, shall be lodged by the employer with the Registrar of the Commission.

4.4.5.2 All assessment instruments shall be agreed and signed by the parties to the assessment, provided that where a union which is party to the Award, is not a party to the assessment, it shall be referred by the Registrar to the union by certified mail and shall take effect unless an objection is notified to the Registrar within 10 working days.

4.4.6 Review of Assessment

The assessment of the applicable percentage should be subject to annual review or earlier on the basis of a reasonable request for such a review. The process of review shall be in accordance with the procedures for assessing capacity under the Supported Wage System.

4.4.7 Other Terms and Conditions of Employment

Where an assessment has been made, the applicable percentage shall apply to the wage rate only. Employees covered by the provisions of the clause will be entitled to the same terms and conditions of employment as all other employees covered by this Award paid on a pro-rata basis.

4.4.8 Workplace Adjustment

An employer wishing to employ a person under the provisions of this clause shall take reasonable steps to make changes in the workplace to enhance the employee's capacity to do the job. Changes may involve re-design of job duties, working time arrangements and work organisation in consultation with other employees in the area.

4.4.9 Trial Period

4.4.9.1 In order for an adequate assessment of the employee's capacity to be made, an employer may employ a person under the provisions of this clause for a trial period not exceeding 12 weeks, except that in some cases additional work adjustment time (not exceeding 4 weeks) may be needed.

4.4.9.2 During the trial period the assessment of capacity shall be undertaken and the proposed wage rate for a continuing employment relationship shall be determined.

4.4.9.3 The minimum amount payable to the employee during the trial period shall be no less than such amount as is stipulated by statutory regulation from time to time.

4.4.9.4 Work trials should include induction or training as appropriate to the job being trialed.

4.4.9.5 Where the employer and employee wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment shall be entered into based on the outcome of assessment under 4.4.4 of this clause.

4.5 PAYMENT OF WAGES

4.5.1 Employees shall be paid their wages in cash, or where agreement is reached between the employer and the employee, payment of wages may be made by cheque or electronic funds transfer.

4.5.2 Employees shall be paid their wages in working hours.

4.5.2.1 Wages shall be paid during ordinary working hours of work on Thursday of each week.

4.5.2.2 An employee kept waiting for his wages on payday after the cessation of work shall be paid at overtime rates calculated to the next quarter hour for all such time he is kept waiting.

4.5.2.3 In any week on which a holiday falls on a Thursday or Friday, wages shall be paid on the preceding Wednesday.

4.5.2.4 Nothing shall prevent any alternative mutual arrangement between an employer and an employee.

4.5.2.5 The employer shall not keep more than two days wages in hand.

4.5.3 Termination of Employment

An employee who lawfully leaves their employment or is dismissed for reasons other than misconduct shall be paid all monies due to them at the termination of their service with the employer.

When it is not practical for an employer to pay any monies due at the time of termination to an employee dismissed for misconduct the employer shall within two working days of the termination forward any such monies due by registered post to the employee at their last known address or such other address as may be nominated by the employee. Provided that if the money is not posted within that time than any time spent waiting beyond the two working days shall be paid for at ordinary rates, such payment to be at the rate of eight hours per day up to one week, at the expiry of which time the right to waiting time shall cease.

4.5.4 Wage Particulars

Particulars of details of payment to each employee shall be included on the envelope including the payment, or in a statement handed to the employee at the time payment is made and shall contain the following information:

4.5.4.1 Name.

4.5.4.2 Classification.

4.5.4.3 Date of payment.

4.5.4.4 Period covered by such payment.

4.5.4.5 The amount of wages paid for work at ordinary rates.

4.5.4.6 The number of hours paid at overtime rates and the amount paid therefore.

4.5.4.7 The amount of allowances or special rates paid and the nature thereof.

4.5.4.8 The gross amount of wages and allowances paid.

4.5.4.9 The amount of each deduction made and the nature thereof.

4.5.4.10 The net amount of wages and allowances paid.

4.5.4.11 Any annual holiday payments.

5. ALLOWANCES AND FACILITIES

5.1 LEADING HAND ALLOWANCE

A person specifically appointed to be a leading hand (as defined) shall be paid at the rate of the undermentioned amounts above the rates of the highest classification supervised, or their own rate, whichever is the highest in accordance with the number of persons in their charge:

		Rate Per Week
		$
5.1.1	In charge of not more than one person	13.00
5.1.2	In charge of two and not more than five persons	28.70
5.1.3	In charge of six and not more than ten persons	36.60
5.1.4	In charge of more than ten persons	48.80

5.2 INDUSTRY ALLOWANCE

An employee engaged on any of the work covered by this award shall be paid an allowance of **$20.40** a week to compensate for the following disabilities of the industry, namely, being subject to:

5.2.1 Climatic conditions when working in the open on all types of work or on a multi-storey construction prior to it being enclosed;

5.2.2 Dust blowing in the wind on construction sites;

5.2.3 Sloppy or muddy conditions associated with the initial stages of construction;

5.2.4 Dirty conditions caused by use of form oil or green timber;

5.2.5 Drippings from newly poured concrete;

5.2.6 The disability of working on all types of scaffold other than a single plank or a bosun's chair; and

5.2.7 The lack of usual amenities associated with factory work.

5.3 SPECIAL RATES & PROVISIONS

5.3.1 Carrying Fuels, Oils and Greases

An employee required by the employer to carry any fuels, oils and/or bulk greases in the employee's own vehicle for use in the employer's plant shall be paid **$7.70** per day in addition to any amount payable elsewhere in this award for each day the employee is so required by the employer to carry such materials.

5.3.2 Confined Spaces

An employee required to work in a place the dimensions or nature of which necessitate working in a cramped position or without sufficient ventilation shall be paid an additional **$0.57** per hour or part thereof.

5.3.3 Cutting Stone

An employee engaged at cutting stone, blocks or bricks by power saw shall be paid an additional **$0.57** per hour or part thereof.

5.3.4 Fumes

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

5.3.5 Height Allowance

5.3.5.1 An employee working on a bridge, chimney stack, spire, radio or television mast or tower, shaft, tower or similar structure, where the construction exceeds 15 meters in height shall be paid for all work above 15 meters **$0.46** per hour, with **$0.46** per hour additional for all work above each 15 meters.

5.3.5.2 Provided that height allowance shall not be payable to an employee working on a bridge deck after permanent installation of the bridge parapets has been completed.

5.3.5.3 An employee working on a structure (e.g. a water or sewerage treatment plant, pumping station, power house, smelter potroom, ore treatment plant, mineral processing plant, cement mill, or pulp mill) where the construction exceeds 15 meters in height shall be paid the allowance prescribed in 5.3.5.1.

5.3.6 Hot Bitumen Work

An employee handling hot bitumen or asphalt shall be paid **$0.57** per hour extra.

5.3.7 Powdered Lime Dust

5.3.7.1 Employees exposed for any period greater than one hour in any shift to powdered lime dust from the spreading or mixing of powdered lime used in the stabilisation of road making material shall be supplied with the following protective clothing:

Overalls

Wide vision goggles

Respirator

Boots

Gloves

5.3.7.2 In addition, the employer shall maintain at or near the work site or other place where such lime is being used, adequate facilities to enable any employee whose skin is contaminated with lime either directly or through their ordinary clothing to wash the affected area. A supply of barrier cream and hand cleanser shall be provided for the use of any employee required to handle powdered lime.

5.3.7.3 Employees engaged in carrying out lime work shall be obliged to wear the protective clothing supplied by the employer.

5.3.7.4 Each employee exposed to powdered lime dust whilst engaged in spreading or mixing powdered lime shall, during the time they are so exposed, be paid **$0.46** per hour in addition to all other rates payable in this award.

5.3.8 Sand Blasting

An employee required to use a sand blasting machine shall be paid an allowance of **$0.57** per hour or part of an hour whilst so engaged.

5.3.9 Special Work

A driver operating a tractor fitted with a blade and using such blade in breaking trail in heavy sidling country shall be paid an additional allowance of **6 cents** per hour for each day or part of a day when so occupied.

5.3.10 Toxic Substances

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

5.3.10.2 Employees using such materials will be provided with and shall use all safeguards as are required by this award and the appropriate government authority or in the absence of such requirement such safeguards as are defined by a competent authority or person chosen by the union and the employer.

5.3.10.3 Employees using toxic substances or materials of a like nature shall be paid **$0.57** per hour or part thereof extra. Employees working in close proximity to employees so engaged shall be paid **$0.46** per hour or part thereof extra.

5.3.10.4 For the purpose of this subclause toxic substances shall include epoxy based materials and all materials which include or require the addition of a catalyst hardener and reactive additives or two pack catalyst system shall be deemed to be materials of a like nature.

5.3.11 Wet Work

Employees working in any place where water is continually dripping on the employee so that clothing and boots become wet, or where there is water underfoot, shall be paid **$0.46** per hour whilst so engaged.

5.4 REIMBURSEMENT OF EXPENSES

5.4.1 Qualification

An employee shall be entitled to the provisions of this clause when employed on a job or construction work at such a distance from their usual place of residence that they cannot reasonably return to that place each night, subject to the following conditions:

5.4.1.1 The employee is maintaining a separate place of residence to which it is not reasonable to expect them to return each night; and

5.4.1.2 The employee, on being requested by the employer, informs the employer, at the time of engagement, that they maintain a separate place of residence from the address recorded on the job application.

5.4.1.3 Subject to 5.4.2, an employee shall be regarded as bound by the statement of their address and no entitlement shall exist if they wilfully and without duress make a false statement in relation to the above.

5.4.2 Employee's Address

5.4.2.1 The employer shall obtain and the applicant shall provide the employer with a statement in writing of the employee's usual place of residence at the time the employee is engaged and no subsequent change of address shall entitle an employee to the provisions of this clause unless the employer agrees.

Provided that documentary proof of address such as a long service leave registration card or driver's license may be accepted by an employer as proof of the employee's usual place of residence on engagement in lieu of the statement in writing referred to in this paragraph.

5.4.2.2 The employee shall inform the employer in writing of any subsequent change in their usual place of residence.

5.4.2.3 The address of the employee's usual place of residence and not the place of engagement shall determine the application of this clause.

5.4.3 Entitlement

Where an employee qualifies under 5.4.3.1 the employer shall either:

5.4.3.1 Provide the employee with reasonable board and lodging; or

5.4.3.2 Pay an allowance of **$335.60** per week of seven days but such allowance shall not be wages. In the case of broken parts of the week occurring at the beginning or the ending of the employment on a distant job the allowance shall be **$48.00** per day.

5.4.3.3 Provided that the foregoing allowances shall be increased if the employee satisfies the employer that he reasonably incurred a greater outlay than that prescribed. In the event of disagreement the matter may be referred to the Commission for determination; or

5.4.3.4 In circumstances prescribed in 5.4.7 provide camp accommodation and messing constructed and maintained in accordance with Clause 5.6 – Camp Standards of this award.

"Reasonable board and lodging" shall mean lodging in a well kept establishment with three adequate meals each day, adequate furnishings, good bedding, good floor coverings, good lighting and heating and with hot and cold running water, in a single room.

5.4.4 Travelling Expenses

An employee who is sent by the employer or selected or engaged by an employer or agent to go to a job which qualifies them to the provision of this Clause shall not be entitled to any of the allowances prescribed by Clause 5.9 – Travelling Allowance of this Award for the period occupied in travelling from their usual place of residence to the distant job, but in lieu thereof shall be paid:

5.4.4.1 Forward Journey

5.4.4.1.1 For the time spent in so travelling, at ordinary rates up to a maximum of eight hours per day for each day of travel (to be calculated as the time taken by rail or the usual travelling facilities).

5.4.4.1.2 For the amount of a fare on the most common method of public transport to the job (bus; economy air; second class rail with sleeping berths if necessary, which may require a first class rail fare), and any excess payment due to transporting the employee's gear if such is incurred.

5.4.4.1.3 For each meal incurred while travelling at the rate prescribed by Clause 5.8 - Meal Money of this Award. Provided that such rate shall be increased if the employee satisfies the employer that they reasonably incurred an expenditure greater than the rate prescribed by Clause 5.8 – Meal Money.

Provided that the employer may deduct the cost of the forward journey fare from an employee who terminates or discontinues their employment within two weeks of commencing on the job and who does not forthwith return to their place of engagement.

5.4.4.2 Return Journey

An employee shall, for the return journey, receive the same time, fares and meal payments as provided in 5.4.4.1.

Provided that the above return journey payments shall not be paid if the employee terminates or discontinues their employment within two months of commencing on the job or prior to the job completion if the work is for less than two months), or if they are dismissed for incompetence within one working week of commencing on the job, or is dismissed for misconduct.

5.4.4.3 Departure point

For the purposes of this clause, travelling time shall be calculated as the time taken for the journey from the central or regional rail, bus or air terminal nearest the employee's usual place of residence to the locality of the work.

5.4.5 Daily Fares Allowance

An employee engaged on a job which qualifies them to the provisions of this Clause and who is required to reside elsewhere than on the site (or adjacent to the site and supplied with transport) shall be paid the allowance prescribed by Clause 5.9 – Travelling Allowance of this award.

5.4.6 Weekend Return Home

5.4.6.1 An employee who works as required during the ordinary hours of work on the working day before and the working day after a weekend and who returns to their usual place of residence for the weekend and who notifies the employer or their representative, no later than Tuesday of each week, of the employee's intention to return to their usual place of residence at the weekend, shall be paid an allowance of **$28.45** for each occasion.

5.4.6.2 Paragraph 5.4.6.1 shall not apply to an employee who is receiving the payment prescribed in 5.4.5 in lieu of board and lodging being provided by the employer or who is receiving a camping allowance as prescribed in 5.4.7.

5.4.6.3 When an employee returns to their usual place of residence for a weekend or part of a weekend and does not absent themselves from the job for any of the ordinary working hours, no reduction of the allowance prescribed in 5.4.6.2 shall be made.

5.4.7 Construction Camps

5.4.7.1 Camp Accommodation

Where an employee is engaged on the construction of projects which are located in areas where suitable board and lodging as defined in 5.4.3 is not available, or where the size of the workforce is in excess of the available accommodation or where continuous concrete pour requirements of the project or the working of shifts necessitate camp accommodation and where, because of these circumstances, it is necessary to house the employees in a camp, such camp shall be constructed and maintained in accordance with Clause 5.6 – Camp Standards of this Award.

5.4.7.2 Camping Allowance

An employee living in a construction camp where free messing is not provided shall receive a camping allowance of **$135.00** for every complete week they are available for work. If required to be in a camp for less than a complete week they shall be paid **$19.25** per day including any Saturday or Sunday if the employee is in camp and available for work on the working days immediately preceding and succeeding each Saturday and Sunday. If an employee is absent without the employer's approval on any day, the allowance shall not be payable for that day and if such unauthorised absence occurs on the working day immediately preceding or succeeding a Saturday or Sunday, the allowance shall not be payable for the Saturday and Sunday.

5.4.7.3 Camp Meal Charges

Where a charge is made for meals in a construction camp, such charge shall be fixed by agreement between the parties.

5.4.8 Rest and Recreation

5.4.8.1 Bus and Rail Travel

An employee, who proceeds to a job which qualifies them to the provisions of this clause, may, after six weeks continuous service thereon and thereafter at six week periods of continuous service thereon, return to their usual place of residence at the weekend. If the employee does so, they shall be paid the amount of a bus or return railway fare to the bus or railway station nearest their usual place of residence on the payday which

immediately follows the date on which the employee returns to the job; provided no delay not agreed to by the employer takes place in connection with the employee's commencement of work on the morning of the working day following the weekend.

5.4.8.2 Air Travel

Notwithstanding any other provisions contained in 5.4.8.1 and in lieu of such provisions, the following conditions shall apply to an employee who qualifies under 5.4.1 and where such construction work is located in any area to which air transport is the only practicable means of travel, an employee may return home after six weeks continuous service in Western Australia, and shall in such circumstances be entitled to two days leave with pay in addition to the weekend.

Thereafter the employee may return to their usual place of residence after each further period of eight weeks continuous service on site and shall, on each occasion, be entitled to two days leave of which one day shall be paid leave.

Payment for leave and reimbursement for any economy air fare paid by the employee shall be made at the completion of the first pay period commencing after the date of return to the job.

5.4.8.3 Variable Return Home

In special circumstances, and by agreement with the employer, the return to the usual place of residence entitlements may be granted earlier or taken later than the prescribed date of accrual without alteration to the employee's accrual entitlements.

5.4.8.4 Non-Payment in Lieu

Payment of fares and leave with pay as provided for in this subclause shall not be made unless the rest and recreation leave is taken by the employee.

5.4.9 Alternative Paid Day off Procedure

If the employer and the employee so agree in writing, the paid rostered day off as prescribed of this award may be taken, and paid for, in conjunction with the additional rest and recreation leave as prescribed in 5.4.8, or at the end of the project, or on termination whichever comes first.

5.4.10 Termination

An employee shall be entitled to notice of termination in sufficient time to arrange suitable transport at termination or shall be paid as if employed up to the end of the ordinary working day before transport is available.

5.5 HIGHER DUTIES ALLOWANCE

5.5.1 An employee engaged for a total of more than two hours on any day or shift on duties carrying a higher rate than their usual classification shall be paid the higher rate for the entire day or shift.

5.5.2 An employee engaged for two hours or less on any day or on shift duties carrying a higher rate than their ordinary classification shall be paid the higher rate for the time worked.

5.6 CAMP STANDARDS

5.6.1 Construction camps shall comply with the following standards:

5.6.1.1 The camp shall provide for accommodation in single rooms, of dimensions not less than 14 cubic meters per person and shall have a timber, aluminum or similar floor with floor covering provided. Each room shall be furnished with reasonable sleeping accommodation including a mattress, pillow and blankets together with a table or reasonable substitute therefore, a seat and a wardrobe for each person.

5.6.1.2 Each room shall be fitted with a door and moveable window of reasonable dimensions fitted with a gauze screen. Each room shall be ceiled and lined. Good artificial lighting shall be provided in each room.

5.6.1.3 Except where corridor type barracks are provided a verandah shall be constructed in front of each room. Where reasonably required, provisions shall be made for the heating of rooms or cooling by fan.

5.6.1.4 Provisions shall be made in the camp for reasonable washing facilities including hot and cold showers. Reasonable provision shall be made for the washing of clothes. Toilets shall be adequate and sewered where possible, situated within reasonable distance from the living quarters, access to which shall be by properly lighted paths.

5.6.1.5 Provisions shall be made for the effluent from the kitchen, laundry and showers to be carried away in closed pipes and dispersed in such a way as to avoid any risk to health. In any such camp messing shall be made available by the employer with provisions for a choice of meals.

5.6.2 Where construction camp accommodation is not provided and the employer provides caravan accommodation the employer and the union shall confer as to reasonable standards for such accommodation. In the absence of agreement being reached the matter shall be referred to the Commission.

5.7 AMENITIES

5.7.1 Suitable Alternative Facilities

On mobile or short term work the requirements of this clause shall be satisfied where suitable alternative facilities such as public amenities are available for use by employees within reasonable proximity to the place of work.

5.7.2 Meal, Clothing and Shelter Facilities

Provision of Facilities

5.7.2.1 At any work site the employer shall ensure that facilities are provided for shelter from inclement weather, changing, protection of clothing and eating of meals. Attention should be given at the planning stage to the location of facilities so as to ensure minimum disruption to the operations of the site.

5.7.2.2 These facilities shall not be used for storage of materials or for any purpose other than that described.

5.7.2.3 Enclosure for the facilities shall be of sound construction, weatherproof, and shall have:

5.7.2.3.1 A floor above ground level, or be situated and constructed so as to prevent flooding;

5.7.2.3.2 A lined ceiling and walls;

5.7.2.3.3 Adequate ventilation and lighting;

5.7.2.3.4 Sufficient windows fitted with fly screens; and

5.7.2.3.5 Washable vinyl floor surfaces.

5.7.3 Dining Facilities

5.7.3.1 Adequate facilities for taking meals, including sufficient tables and chairs and facilities for warming food shall be provided.

5.7.3.2 Facilities shall also be provided for an adequate supply of boiling water at meal times and rest periods.

5.7.3.3 Separate vermin proof containers shall be provided for the storage of food and rubbish.

5.7.4 Drinking Water

5.7.4.1 A supply of drinking water shall be available at the workplace. The water shall be cool, clean and drinkable. The facility shall be separate from sanitary and hand washing facilities.

5.7.4.2 Where a connection to a water supply is not possible, supply may be provided by other means such as a flask, cooled drink dispenser or waterbag. The most appropriate method should be selected.

5.7.4.3 Drinking points shall be placed where they will service most people requiring them. The employer shall provide additional drinking points near hot or strenuous work stations, such as exposed form work decks.

5.7.4.4 Drinking water should be readily accessible to any employee working on the site.

5.7.5 Other Facilities

Where the employee is required to change clothes and wear special protective clothing to work with toxic or dangerous substances, an appropriate facility for decontamination, separate from other sanitary and washing accommodation should be provided. In these cases change room facilities should be duplicated, and storage provided for protective clothing in one room and for personal clothing in the other. Protective clothing and personal clothing should not come into contact with each other or be stored in the same facilities. Protective clothing and work clothing which has become wet by the process of decontamination should be stored in a separate, well-ventilated area.

5.7.6 Cleanliness

5.7.6.1 The employer shall ensure that the workplace is maintained in a clean condition.

5.7.6.2 Regular cleaning shall be undertaken to ensure that:

5.7.6.2.1 Refuse and waste is removed at least daily from floors, stairways and passageways;

5.7.6.2.2 The floors of dining rooms and dining areas are cleaned daily and washed and disinfected at least once a week, and dining tables are wiped down after each meal period;

5.7.6.2.3 Change rooms are cleaned at least once each day and washed down and disinfected at least once a week; and

5.7.6.2.4 Any showers, sanitary and washing accommodation are sanitised each day they are used.

5.8 MEAL MONEY

An employee who is required to work in excess of one and a half hours overtime after working ordinary hours shall be paid a meal allowance of **$9.60**, or shall, at the option of the employer, be provided with a suitable meal.

5.9 TRAVELLING ALLOWANCE

5.9.1 An employee who, on any day, or from day to day is required to work at a job away from their accustomed workshop or depot shall, at the direction of their employer, present themselves for work at such job at the usual starting time.

5.9.1.1 An employee to whom 5.9.1 applies shall be paid at ordinary rates for time spent in travelling between their home and the job and shall be reimbursed for any fares incurred in such travelling, but only to the extent that the time so spent and the fares so incurred exceed the time normally spent and the fares normally incurred in travelling between their home and accustomed workshop or depot.

5.9.1.2 An employee who with the approval of their employer uses their own means of transport for travelling to or from outside jobs shall be paid the amount of excess fares and travelling time which the employee would have incurred in using public transport unless the employee has an arrangement with their employer for a regular allowance.

5.9.2 An employee to whom 5.9.1 does not apply and who is engaged on construction work shall be paid an allowance in accordance with the provisions of this subclause to compensate for travel patterns and costs peculiar to the industry, which include mobility requirements of employees, and the nature of employment in the construction work covered by this award:

5.9.2.1 On jobs measured by radius from the General Post Office, Perth situated within the area of:

		Per Day **$**
5.9.2.1.1	Up to and including 50 kilometer radius	14.00
	OR	
5.9.2.1.2	Over 50 kilometers up to and including 60 kilometer radius	17.40
	OR	
5.9.2.1.3	Over 60 kilometers up to and including 75 kilometer radius	26.70
	OR	

		Per Day $
5.9.2.1.4	Over 75 kilometers up to and including 90 kilometer radius	37.80
	OR	
5.9.2.1.5	Over 90 kilometers up to and including 105 kilometer radius	49.00

5.9.2.2 In respect of work carried out from an employer's depot situated more than 60 kilometers by radius from the General Post Office Perth, the main Post Office in the Town in which such depot is situated is substituted as the centre for the purpose of determining the allowance to be paid to an employee.

5.9.2.3 Where transport to and from the job is provided by the employer from and to their depot or such other place more convenient to the employee as is mutually agreed upon between the employer and the employee, half the above rates shall be paid. Provided that the conveyance used for such transport is equipped with suitable seating and weatherproof covering.

5.9.3 For travelling during working hours from and to the employer's place of business or from one job to another, an employee shall be paid by the employer at ordinary rates. The employer shall pay all fares and reasonable expenses in connection with such travelling.

5.9.4 The provisions of this Clause do not apply to an employee to whom Clause 5.10 - Distant Work is applicable.

5.10 DISTANT WORK

5.10.1 Where an employee is engaged or selected or advised by an employer to proceed to construction work at such a distance that the employee cannot return to their home each night, the employer shall provide the employee with suitable board and lodging or shall pay the expenses reasonably incurred by the employee for board and lodging.

5.10.2 The provisions of 5.10.1 do not apply with respect to any period during which the employee is absent from work without reasonable excuse and in such a case, where the board and lodging is supplied by the employer, the employer may deduct from monies owing or which may become owing to the employee, an amount equivalent to the value of that board and lodging for the period of the absence.

5.10.3 Subject to the provisions of 5.10.5:

5.10.3.1 The employer shall pay all reasonable expenses including fares, transport of tools, meals and if necessary, suitable overnight accommodation incurred by an employee or person engaged who is directed by their employer to proceed to the locality of the site and who complies with such direction.

5.10.3.2 The employee shall be paid at ordinary rate of payment for the time up to a maximum of eight hours in any one day incurred in travelling pursuant to the employer's direction.

5.10.4 Where an employee who, after one month of employment with an employer, leaves their employment, or whose employment is terminated by their employer "except for incompetency, within one working week of the employee commencing work on the job or for misconduct" and in either instance subject to the provisions of Clause 2.1 – Contract of Service of this award returns to the place from whence the employee first proceeded to the locality, or to a place less distant than or equidistant to the place whence the employee first proceeded, the employer shall pay all expenses:

5.10.4.1 Including fares, transport of tools, meals and, if necessary, suitable overnight accommodation incurred by the employee in so returning.

5.10.4.2 In addition to the expenses for the return journey prescribed by 5.10.4, an employee whose employment is terminated by their employer "except for incompetency, within one working week of the employee commencing work on the job or for misconduct" shall be paid in accordance with 5.10.3.2 for the time so spent travelling.

5.10.4.3 Provided that the employer shall in no case be liable to pay a greater amount under 5.10.4 or 5.10.4.2 than they would have paid if the employee had returned to the locality from which they first proceeded to the job.

5.10.5 On construction work north of the 26th parallel of South Latitude the following provisions apply:

5.10.5.1 The employer may deduct the amount of the forward fare from the employee's first or later wages but the amount so deducted shall be refunded to the employee if they continue to work for three months, or, if the work ceases sooner, for so long as the work continues.

5.10.5.2 If the employee continues to work for the employer for at least six months, the employer shall, on termination of the employee's engagement, pay the fare of the employee back from the place of work to the place of engagement if the employee so desires.

5.10.6 An employee to whom the provisions of 5.10.1 apply shall be paid an allowance of **$26.80** for any weekend that they return to their home from the job but only if:

5.10.6.1 The employee advises the employer or their agent of their intention no later than the Tuesday immediately preceding the weekend in which the employee so returns;

5.10.6.2 The employee is not required for work during that weekend;

5.10.6.3 The employee returns to the job on the first working day following the weekend; and

5.10.6.4 The employer does not provide or offer to provide suitable transport.

5.10.7 Notwithstanding any other provisions contained in this Clause and in lieu of any such provisions the following conditions shall apply to an employee who is engaged or selected or advised by an employer to proceed to construction work at such a distance that they cannot return to their home each night and where such construction work is located north of the 26th parallel of South Latitude or east of the 120 meridian of longitude, or in any other area to which air transport is the only practicable means of travel.

5.10.7.1 An employee may return to their home or to Perth or any other place at a weekend to be mutually agreed upon between the employee and the employer:

5.10.7.1.1 After four continuous months service with their employer; and in addition to the weekend the employee shall be entitled to two days leave on ordinary pay subject to the provisions of 5.10.7.2 and

5.10.7.1.2 After each further period of four months continuous service with their employer; and in addition to the weekend, the employee shall be entitled to two days leave, one of which days shall be on ordinary pay subject to the provisions of 5.10.7.2.

5.10.7.2 Where an employee returns home or to Perth or any other place in accordance with the provisions of this subclause and returns to the job and commences work at the time arranged with their employer, on the first working day for that employee immediately following the period of leave referred to in 5.10.7.1, that employee shall be paid at the completion of the first pay period commencing on or after the day upon which the employee returns to work from the leave taken pursuant to 5.10.7.1, the ordinary pay for that period of leave and the actual cost of air fares incurred in travelling home or to Perth or to any other place and to the job and which in no case shall exceed the cost of an economy airfare from the job to Perth and return.

5.10.7.3 The entitlement to leave and travelling accruing to an employee pursuant to 5.10.7.1 may be availed of as soon as reasonably practicable after it becomes due and if it is not availed of within one month after it so becomes due the entitlement shall lapse.

5.10.8 Anytime in respect of which an employee is absent from work except time for which they are entitled to claim paid leave shall not count for determining the employee's rights to travel and leave under the provisions of 5.10.7.

5.10.9 Where an employee, supplied with the board and lodging by their employer, is required to live more than 800 meters from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of **$11.85** per day provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

5.10.10 The provisions of 5.10.1, 5.10.2, 5.10.3, 5.10.6, 5.10.7, 5.10.8 and 5.10.9 shall be deemed to apply to an employee who is in the regular employment of an employer and who is sent by their employer to distant work (whether construction work or not) but the provisions of 5.10.4 do not apply to such an employee.

5.11 FIRST AID ALLOWANCE

An employee holding a Senior First Aid Certificate, or, an equivalent or better first aid qualification, appointed by the employer to perform first aid duties shall be paid **$1.96** per day in addition to their ordinary rate.

5.12 PROTECTIVE CLOTHING

5.12.1 The employer shall provide free of charge any waterproof protective clothing required by an employee for particular tasks they may be performing. Items such as gloves, overalls, basil aprons, etc., shall be provided to employees using toxic substances, bitumen, tar, green timber, second-hand timber, bricks, etc.

5.12.2 The employer shall provide on the job adequate detergents and solvents for the removal of excessive dirt, bitumen, emulsions, paint and similar substances from the employee's person and the cost of such detergents or solvents shall be borne by the employer.

5.12.3 Employees engaged on road work and/or railway work where traffic is not excluded by the use of continuous barriers or fences shall be provided with a light coat or jacket with high visibility red markings so as to enhance visibility in daylight against the road or rail background.

5.12.4 Protective clothing provided pursuant to this clause shall remain the property of the employer and shall be fumigated before being transferred from one employee to another and shall be in a clean and hygienic state when issued.

5.13 CAR ALLOWANCE

Where an employee is required and authorised to use their own motor vehicle in the course of their duties the employee shall be paid an allowance of **63.64 cents** per kilometer travelled. Notwithstanding anything contained in this Clause the employer and the employee may make any other arrangement as to car allowance not less favourable to the employee.

5.14 LOCATION ALLOWANCES

5.14.1 Subject to the provisions of this Clause, in addition to the rates prescribed in the wages clause of this award, an employee shall be paid the following weekly allowances when employed in the towns described hereunder. Provided that where the wages are prescribed as fortnightly rates of pay, these allowances shall be shown as fortnightly allowances.

TOWN	PER WEEK
Agnew	$17.00
Argyle	$44.70
Balladonia	$17.10
Barrow Island	$29.10
Boulder	$7.10
Broome	$27.20
Bullfinch	$8.00
Carnarvon	$13.90
Cockatoo Island	$29.90
Coolgardie	$7.10
Cue	$17.40
Dampier	$23.60
Denham	$13.90
Derby	$28.30
Esperance	$5.10
Eucla	$19.00
Exmouth	$24.60
Fitzroy Crossing	$34.20
Goldsworthy	$15.20

TOWN	PER WEEK
Halls Creek	$39.20
Kalbarri	$5.90
Kalgoorlie	$7.10
Kambalda	$7.10
Karratha	$28.10
Koolan Island	$29.90
Koolyanobbing	$8.00
Kununurra	$44.70
Laverton	$17.30
Learmonth	$24.60
Leinster	$17.00
Leonora	$17.30
Madura	$18.10
Marble Bar	$42.90
Meekatharra	$15.00
Mount Magnet	$18.60
Mundrabilla	$18.60
Newman	$16.30
Norseman	$14.70
Nullagine	$42.80
Onslow	$29.10
Pannawonica	$22.00
Paraburdoo	$21.90
Port Hedland	$23.50
Ravensthorpe	$9.00
Roebourne	$32.30
Sandstone	$17.00
Shark Bay	$13.90
Shay Gap	$15.20
Southern Cross	$8.00
Telfer	$39.70
Teutonic Bore	$17.00
Tom Price	$21.90
Whim Creek	$27.90
Wickham	$27.10
Wiluna	$17.30
Wittenoom	$38.00
Wyndham	$42.10

5.14.2 Except as provided in 5.14.3, an employee who has:

5.14.2.1 A dependent shall be paid double the allowance described in 5.14.1.

5.14.2.2 A partial dependent shall be paid the allowance prescribed in 5.14.1 plus the difference between that rate and the amount such partial dependent is receiving by way of a district or location allowance.

5.14.3 Where an employee

5.14.3.1 Is provided with board and lodging by their employer, free of charge; or

5.14.3.2 Is provided with an allowance in lieu of board and lodging by virtue of the Award or an Order or Agreement made pursuant to the Act,

such employee shall be paid 66⅔ per cent of the allowances prescribed in 5.14.1.

5.14.4 Subject to 5.14.2, junior employees, casual employees, part time employees, apprentices receiving less than adult rate and employees employed for less than a full week shall receive that proportion of the location allowance as equates with the proportion that their wage for ordinary hours that week is to the adult rate for the work performed.

5.14.5 Where an employee is on annual leave or receives payment in lieu of annual leave they shall be paid for the period of such leave the location allowance to which he/she would ordinarily be entitled.

5.14.6 Where an employee is on long service leave or other approved leave with pay (other than annual leave) they shall only be paid location allowance for the period of such leave they remains in the location in which they are employed.

5.14.7 For the purposes of this clause:

5.14.7.1 **"Dependent"** shall mean:

5.14.7.1.1 A spouse or de-facto partner; or

5.14.7.1.2 A child where there is no spouse or de facto partner;

who does not receive a location allowance or who, if in receipt of a salary or wage package, receives no consideration for which the location allowance is payable pursuant to the provisions of this clause.

5.14.7.2 **"Partial Dependant"** shall mean a "dependant" as prescribed in 5.14.7.1 who receives a location allowance which is less than the location allowance prescribed in 5.14.1 or who, if in receipt of a salary or wage package, receives less than a full consideration for which the location allowance is payable pursuant to the provisions of this clause.

5.14.8 Where an employee is employed in a town or location not specified in this clause the allowance payable for the purpose of 5.14.1 shall be such amount as may be agreed between Australian Mines and Metals Association, the Chamber of Commence and Industry of Western Australian and the Trades and Labor Council of Western Australia or, failing such agreement, as may be determined by the Commission.

5.14.9 Subject to the making of a General Order pursuant to s.50 of the Act, that part of each location allowance representing prices shall be varied from the beginning of the first pay period commencing on or after the 1st day in July of each year in accordance with the annual percentage change in the Consumer Price Index (excluding housing), for Perth measured to the end of the immediately preceding March quarter, the calculation to be taken to the nearest ten cents.

5.15 CLOTHING AND SPECTACLES

5.15.1 An employee whose clothes, spectacles or hearing aids have been accidentally spoilt by acid, sulphur or other deleterious substances, shall be paid such amount to cover the loss thereby suffered by him as may be agreed upon between the employee and employer.

5.15.2 An employee shall be reimbursed by the employer to a maximum of **$1,110.00** for loss of clothes by fire or breaking and entering whilst securely stored at the employer's direction in a room or building on the employer's premises, job or workshop or in a lock-up.

5.15.3 Where safety glasses are to be worn at the direction of the employer such glasses shall be provided free of charge to each employee and where it is necessary for optically prescribed glasses to be hardened, the cost of such hardening shall be met by the employer.

5.15.4 Where an employee during the course of employment suffers loss or damage to their spectacles by cause for which they are not solely responsible they shall be compensated by the employer to the extent of the loss or damage sustained. This subclause shall not apply when an employee is entitled to workers'' compensation in respect to the damage.

5.16 INCLEMENT WEATHER

5.16.1 **"Inclement weather"** shall mean the existence of rain or abnormal climatic conditions (whether they be those of hail, snow, cold, high wind, severe dust storm, extreme high temperature for the locality concerned, or the like, or any combination thereof) by virtue of which it is either not reasonable or not safe for employees exposed thereto to continue working whilst the same prevail.

5.16.2 For the purposes of this clause weather shall not be regarded as inclement unless it is mutually agreed between the employer and employees concerned.

5.16.3 Except as provided in 5.16.5 and 5.14.6, no employee shall be required to work exposed to inclement weather conditions. For the purposes of this subclause, an employee operating machinery fitted with a functional weatherproof cab shall not be deemed to be exposed to inclement weather.

5.16.4 There shall be no deduction of wages for any working time lost due to inclement weather.

5.16.5 Completion of Concrete Pours and Emergency Work.

5.16.5.1 Except as provided in this subclause an employee shall not be required to work in the rain.

5.16.5.2 Employees shall not be required to start a concrete pour in inclement weather.

5.16.5.3 Where a concrete pour has been commenced prior to the commencement of a period of inclement weather employees may be required to complete such concrete pour to a practical stage and for such work shall be paid at the rate of double time calculated to the next hour, and in the case of wet weather shall be provided with adequate wet weather gear.

5.16.5.4 If the employee's clothes become wet as a result of working in the rain during a concrete pour the employee shall, unless a change of dry working clothes is available, be allowed to go home without loss of pay.

5.16.5.5 The provisions of 5.16.5.3 shall also apply in the case of emergency work where the employees concerned and their job representative agree that the work is of an emergency nature and can start and/or proceed.

5.16.6 Where it is necessary and safe for a spotter to work during a period of inclement weather thereby enabling mobile plant to continue operating, such spotter shall be entitled to the provisions of 5.16.5.3.

6. LEAVE

6.1 ANNUAL LEAVE

6.1.1 Period of Leave

6.1.1.1 Subject to the provisions of 6.1.2, 6.1.4 and 6.1.5, a period of the hours ordinarily required to be worked in a four week period up to 152 hours, exclusive of any public holidays occurring during the period, shall be given and taken as leave annually to all employees, other than casual employees. Annual leave is accrued on a weekly basis.

6.1.1.2 In addition to leave prescribed in 6.1.1.1 above, seven day shift employees who are rostered to work regularly on Saturdays, Sundays and Public Holidays shall be allowed an additional one week of leave.

6.1.1.3 Provided that where a rostered day off, as prescribed in Clauses 3.2 - Overtime – Day Employees and 3.3 - Call Out – Day Employees of this award, falls during the period annual leave is taken, payment of accrued entitlements for such day shall be made in addition to annual leave payments prescribed in 6.1.7.

6.1.2 Method of Taking Leave

6.1.2.1 Either four consecutive weeks, or two separate periods of not less than one week in all cases exclusive of any public holidays occurring therein, shall be given and taken within six months from the date when the right to annual leave accrued. Provided that by agreement between the employer and the employee concerned, annual leave may be taken in three separate periods of not less than seven consecutive days.

6.1.2.2 Where an employee requests that leave be allowed in one continuous period such request shall not be unreasonably refused. In the event of lack of agreement between the parties the matter shall be referred to the Commission for decision.

6.1.2.3 In the circumstances where a public holiday falls within one day of a weekend or another public holiday the provision of 6.1.2.1 may be altered by agreement between the employer and a majority of employees affected under this award to provide that a day of annual leave entitlement may be granted on the day between the said public holidays and/or weekend if an employee, or employer, requests it.

6.1.2.4 Where annual leave is proposed to be given and taken in two periods, one of which is to be in conjunction with the Christmas and New Year holidays, representatives of the employers and employees, parties to this award, shall meet not later than 31 July in each year in order to fix the commencing and finishing dates for the following Christmas/New Year period of leave. Where no agreement can be reached between the representatives the matter shall be referred to the Commission for determination.

6.1.2.5 Where an employer and employee have not agreed when the employee is to take their annual leave, the employee, on giving two weeks notice of the period of intended leave, is not to be refused taking at any time suitable to them, any period of annual leave, the entitlement to which accrued more than 12 months before that time.

6.1.3 Leave Allowed Before Due Date

6.1.3.1 An employer may allow an employee to take their annual leave prior to the employee's right thereto. In such circumstances the qualifying period of further annual leave shall not commence until the expiration of 12 months in respect of which the leave so allowed is taken.

6.1.3.2 Where an employer has allowed an employee to take annual leave pursuant to 6.1.3.1 and the employee's services are terminated (by whatsoever cause) prior to the employee completing the 12 months continuous service for which leave was allowed in advance, the employer may for each complete week of the 12 months not served by the employee, deduct from whatever remuneration is payable upon the termination of the employment 3.17 hours of the amount of wages paid on account of the annual leave.

6.1.3.3 Notwithstanding anything contained in this subclause an employee who has worked for 12 months in the industry with a number of different employers without taking annual leave, shall be entitled to take annual leave and be paid 3.17 hours of an ordinary week's wages in respect of each completed 38 hours of continuous service with the current employer.

6.1.4 Proportionate Leave on Termination

Where an employee has given five working days or more continuous service, inclusive of any day off as prescribed by Clauses 3.2 - Overtime – Day Employees and 3.3 - Callouts – Day Employees of this award (excluding overtime), and the employee either leaves the employment or the employment is terminated by the employer the employee shall be paid 3.17 hours in respect of each completed five working days of continuous service with the current employer for which leave has not been granted or paid for in accordance with this award.

6.1.5 Broken Service

Where an employee breaks their continuity of service by an absence from work for any reason other than a reason set out in 6.1.6, the amount of leave to which they would have been entitled under 6.1.1 shall be reduced by 3.17 hours for each week or part thereof during which any such absence occurs and the amount of payment in lieu of leave to which they would have been entitled under 6.1.4 shall be reduced by 3.17 hours for each week or part thereof during which any such absence occurs.

Provided, however, that no reduction shall be made in respect of any absence unless the employer informs the employee in writing of their intention so to do within 14 days of the termination of the absence.

6.1.6 Calculation of Continuous Service

6.1.6.1 For the purposes of this clause service shall be deemed to be continuous notwithstanding an employee's absence from work for any of the following reasons:

6.1.6.2 Illness or accident up to a maximum of four weeks after the expiration of paid sick leave;

6.1.6.3 Bereavement leave;

6.1.6.4 Carer's leave;

6.1.6.5 Jury service;

6.1.6.6 Injury received during the course of employment and up to a maximum of 26 weeks for which workers' compensation has been received;

6.1.6.7 Where called up for military service for up to three months in any qualifying period;

6.1.6.8 Long service leave;

6.1.6.9 Any reason satisfactory to the employer or in the event of dispute satisfactory to the Commission. Provided that the reason shall not be deemed satisfactory unless the employee has informed the employer within 24 hours of the normal commencing time or as soon as practicable thereafter of the reason for the absence and probable duration thereof.

6.1.7 Leave payment

6.1.7.1 Payment for Period of Leave

Each employee, before going on leave, shall be paid in advance the wages which would ordinarily accrue to them during the currency of the leave.

6.1.7.2 Annual Leave Loading

In addition to the payment prescribed in 6.1.7.1 a day employee shall receive, during a period of annual leave, a loading of 17.5 per cent calculated on the rates, loadings and allowances prescribed in this award if applicable, together with any overaward payment for the ordinary hours of work per week.

6.1.7.3 Shift Employees

6.1.7.3.1 An employee who would have worked on shift work had they not been on annual leave shall be paid an additional loading of 17.5 per cent calculated in accordance with the provisions of 6.1.7.2. Provided that where the employee would have received shift loadings prescribed by Clause 3.3 – Call Out – Day Employees of this award, had they not been on leave during the relevant period and such loadings would have entitled them to a greater amount than the loading of 17.5 per cent then the shift loadings shall be added to the ordinary rate of wage prescribed in lieu of the 17.5 per cent loading.

6.1.7.3.2 Provided further that if the shift loadings would have entitled the employee to a lesser amount than the loading of 17.5 per cent then such percentage shall be added to the rate of wage prescribed in lieu of shift loadings.

6.1.7.3.3 The loadings prescribed above shall also apply to proportionate leave on lawful termination of employment.

6.1.8 Service under Previous Award

For the purposes of calculating annual leave the service of the employee prior to the operative date of this award shall be taken into account but an employee shall not be entitled to leave (or payment in lieu thereof) for any period in respect of which leave (or payment in lieu thereof) has been allowed or made under any previous award.

6.1.9 Annual Close Down

Notwithstanding anything contained in this Award an employer giving any leave in conjunction with the Christmas/New Year holidays may, either:

6.1.9.1 Stand down without pay during the period of leave any employee who has not yet qualified under 6.1.1; or

6.1.9.2 Stand down for the period of leave any employee who has not qualified under 6.1.1 and pay them (up to the period of the leave then given) at a rate of 3.17 hours of an ordinary week's wages in respect of each week of continuous service (excluding overtime).

Provided that where an employer decides to close down the establishment at the Christmas/New Year period for the purpose of giving the whole of the annual leave due to all, or the majority of the employees then qualified for such leave, at least two months notice of the intention so to do shall be given to the employees.

6.1.10 Commencement of Leave - Distant Jobs

If an employee is still engaged on a distant job when annual leave is granted and the employee returns by the first reasonable means of transport to the place of engagement, or if employed prior to going to country work the place regarded as the employer's headquarters, annual leave shall commence on the first full working day following the employee's return to such place of engagement or headquarters as the case may be.

6.2 SICK LEAVE

6.2.1 An employee who is unable to attend or remain at their place of employment during the ordinary hours of work by reason of personal ill health or injury shall be entitled to payment during such absence in accordance with the following provisions.

6.2.2 An employee is entitled to payment pursuant to this Clause for the number of hours ordinarily worked in a two week period, up to 76 hours per annum accrued pro rata on a weekly basis.

6.2.3 If in the first or successive years of service with the employer an employee is absent on the grounds of personal ill health or injury for a period longer than their entitlement to paid sick leave, payment may be adjusted at the end of that year of service, or at the time the employee's services terminate, if before the end of that year of service, to the extent that the employee has become entitled to further paid sick leave during that year of service.

6.2.4 Unused portions of paid sick leave shall accumulate from year to year.

6.2.5 An employee shall as soon as reasonably practicable advise the employer of their inability to attend for work, the nature of their illness or injury and the estimated duration of the absence.

6.2.6 An employee claiming entitlement under this Clause must provide to the employer evidence that would satisfy a reasonable person of the entitlement.

6.2.7 This Clause shall not apply where an employee is entitled to compensation under the Workers Compensation and *Rehabilitation Act 1981* nor to employees whose injury or illness is the result of the employee's own serious and wilful misconduct or gross and wilful neglect.

6.2.8 Where an employee is ill during the period of annual leave and produces at the time or as soon thereafter medical evidence to the satisfaction of the employer that the employee was as a result of the employee's illness, confined to their place of residence or a hospital for a period of seven days, the employee may with the consent of the employer, be granted at a time convenient to the employer additional leave equivalent to the period during which the employee was so confined.

6.2.9 If an employee is terminated by the employer and is re-engaged by the same employer within a period of six months, then the employee's unclaimed balance of sick leave shall continue from the date of re-engagement.

6.3 CARER'S LEAVE

6.3.1 Use of Sick Leave

6.3.1.1 An employee with responsibilities in relation to either members of their immediate family or members of their household who need their care and support shall be entitled to use, in accordance with this subclause, any sick leave entitlement for absences to provide care and support for such persons when they are ill or injured. Such leave shall not exceed five (5) days in any calendar year and is not cumulative.

6.3.1.2 The employee is to provide evidence to the employer that would satisfy a reasonable person of the entitlement.

6.3.1.3 The entitlement to use sick leave is subject to:

6.3.1.3.1 The employee being responsible for the care of the person concerned; and

6.3.1.3.2 The person concerned being either a member of the employee's family or a member of the employee's household.

6.3.1.3.3 The term "member of the employee's family" means any of the following persons:

6.3.1.3.3.1 The employee's spouse or de facto partner;

6.3.1.3.3.2 A child for whom the employee has parental responsibility as defined by the *Family Court Act 1997*;

6.3.1.3.3.3 An adult child of the employee;

6.3.1.3.3.4 A parent, sibling or grandparent of the employee.

6.3.1.4 The employee shall, wherever practicable, give the employer notice prior to the absence of the intention to take leave, the name of the person requiring care and their relationship to the employee, the reasons for taking such leave and the estimated length of absence. If it is not practicable for the employee to give prior notice of absence, the employee shall notify the employer by telephone of such absence at the first opportunity on the day of absence.

6.3.2 Use of Unpaid Leave

An employee may elect, with the consent of the employer, to take unpaid leave for the purpose of providing care to a family member who is ill or injured.

6.4 PUBLIC HOLIDAYS

6.4.1 An employee, other than a shift employee, shall be allowed 10 public holidays per annum without loss of pay. Where employees including shift employees are required to work, payment of double time and a half for all time worked.

6.4.2 An employer shall not require normal work to be performed on Christmas Day (December 25) and Boxing Day (December 26) other than those continuous shift employees required for a holding position for a continuous process and those required to bring about the resumption of normal work. Any employee required to work Christmas Day shall be paid three times the employee's ordinary hourly rate for any time so worked.

6.4.3 For the purposes of this award public holidays shall be the following: New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Labour Day, Foundation Day, Birthday of the Sovereign, Christmas Day, Boxing Day. Provided that when a public holiday falls on a Saturday, Sunday or day observed as an RDO then the next normal working day shall be observed as the public holiday.

6.5 BEREAVEMENT LEAVE

6.5.1 All employees on the death of their:

6.5.1.1 Spouse or de facto partner.

6.5.1.2 Child, step child or child-in-law.

6.5.1.3 Parent, step parent or parent-in-law.

6.5.1.4 Sibling, step sibling or sibling-in-law.

6.5.1.5 Grandparent or step grandparent.

6.5.1.6 Any person, who immediately before that person's death, lived with the employee as a member of the employee's family

is entitled to paid bereavement leave of up to three days exclusive of travel for distant work employees, which do not have to be consecutive.

6.5.2 Evidence of entitlement to bereavement leave that would satisfy a reasonable person is to be furnished to the employer by the employee if so requested.

6.5.3 Bereavement leave is not to be taken during a period of any other kind of leave.

6.6 PARENTAL LEAVE

6.6.1 Basic Entitlements

6.6.1.1 An employee, other than a casual employee, and their spouse are entitled to unpaid parental leave totalling 52 weeks in respect of:

6.6.1.1.1 The birth of a child; or

6.6.1.1.2 The placement of a child with the view to the adoption of the child by the employee.

6.6.1.2 To obtain parental leave, an employee must satisfy the following basic requirements:

6.6.1.2.1 The employee has, before the expected date of birth or placement, completed at least 12 months continuous service with the employer;

6.6.1.2.2 The employee has given the employer at least ten weeks written notice of their intention to take the leave, unless due to circumstances it is impractical or unreasonable to do so;

6.6.1.2.3 Complied with 6.6.1.3.

6.6.1.3 Except for a period of one week at the time of the birth or placement, an employee and their partner must take parental leave at different times.

6.6.1.4 The entitlement to parental leave is reduced by any period of parental leave taken by the employee's spouse in relation to the same child, except for the period of one week's leave referred to in 6.6.1.3.

6.6.1.5 An employee may take other leave (for example, annual leave) in conjunction with parental leave, but this will reduce the amount of parental leave they may take in accordance with 6.6.6.

6.6.1.6 An employee who takes parental leave is, in most circumstances, entitled to return to the position which they held before the leave was taken.

6.6.1.7 The absence of an employee on parental leave shall not break the continuity of service of an employee but shall not be taken into account in calculating the period of service for any purpose in terms of this award.

6.6.2 Definitions

''Adoption'' in relation to a child, is a reference to a child who:

6.6.2.1 Is not the natural child or the step-child of the employee or the employee's spouse;

6.6.2.2 Is less than 5 years of age;

6.6.2.3 Has not lived continuously with the employee for six months or longer.

''Employee'' includes a part-time employee, but not a casual or seasonal employee;

''Continuous service'' means service (other than as a casual or seasonal employee) under an unbroken contract of employment, and includes a period of leave, or a period of absence, authorised:

6.6.2.4 By the employer; or

6.6.2.5 By an award or order of a court or tribunal or a workplace agreement certified by such a body; or

6.6.2.6 By a contract of employment.

''Expected date of birth'' means the day certified by a medical practitioner to be the day on which the medical practitioner expects the employee or the employee's spouse, as the case may be, to give birth to a child.

''Medical certificate'' means a certificate signed by a registered medical practitioner.

''Placement'' means the placement, by an adoption agency, of a child with an employee for adoption.

''Spouse'' includes a de facto partner.

6.6.3 Notice Requirements

The written notice required in 6.6.1.2.2 shall include:

6.6.3.1 A specification of the first and last days of the period of leave, provided that a female employee who has given notice of her intention to take parental leave, other than for adoption, is to start the leave six weeks before the expected date of birth unless in respect of any period closer to the expected date of birth a medical practitioner has certified that the employee is fit to work;

6.6.3.2 In the case where parental leave is taken for the birth of a child, the employee must give to the employer:

6.6.3.2.1 A medical certificate that states that the employee or the employee's spouse is pregnant and specifies the estimated date of birth;

6.6.3.2.2 A statutory declaration that:

6.6.3.2.2.1 Supports the particulars notified;

6.6.3.2.2.2 The employee will be the child's primary care-giver throughout the period of parental leave; and

6.6.3.2.2.3 That the employee will not engage in any conduct inconsistent with their contract of employment while on parental leave.

6.6.3.3 In the case where parental leave is taken for the adoption of a child, the employee must give to the employer:

6.6.3.3.1 A statement from the adoption agency of the proposed date of placement of the child; and

6.6.3.3.2 A statutory declaration that:

6.6.3.3.2.1 The child will be at the proposed date of the placement, or was, at the date of the placement, as the case requires, under the age of 5 years; and

6.6.3.3.2.2 Is not a child or step-child of the employee or the employee's spouse; and

6.6.3.3.2.3 Will not have, at the proposed date of the placement, or had not, at the date of the placement, as the case requires, previously lived with the employee for a continuous period of 6 months or more.

6.6.3.3.2.4 The employee will be the child's primary care-giver throughout the period of parental leave.

6.6.3.3.2.5 Will not engage in any conduct inconsistent with the employee's contract of employment while on adoption leave.

6.6.3.4 An employee who has given notice of their intention to take parental leave is to notify the employer, in the form of a statutory declaration, of particulars of any period of parental leave taken or to be taken by the employee's spouse in relation to the same child.

6.6.3.5 An employee who is taking parental leave is to notify the employer of any change to the date on which the employee wishes to start or finish the leave.

6.6.3.6 The starting and finishing dates of a period of parental leave is, subject to this subclause, to be agreed between the employer and employee.

6.6.4 Transfer to Safe Job

6.6.4.1 Where, in the opinion of a registered medical practitioner, illness or risks arising out of the pregnancy or hazards connected with the work assigned to the employee make it inadvisable for the employee to continue at her present work, the employee shall, if the employer deems it practicable, be transferred to a safe job at the rate and on the conditions attaching to that job until the commencement of the parental leave.

6.6.4.2 Where the transfer to a safe job is not practicable, the employee may, or the employer may require the employee to, take leave for such period as is certified necessary by a registered medical practitioner. Such leave shall be treated as parental leave for purposes of this section.

6.6.5 Special Parental Leave

6.6.5.1 Where an employee is not yet on parental leave and her pregnancy terminates after 28 weeks other than by the birth of a living child, the employee shall be entitled to:

6.6.5.1.1 Such period of unpaid leave as a registered medical practitioner certifies as necessary before her return to work; and/or

6.6.5.1.2 For illness other than the normal consequences of confinement, paid sick leave to which she is entitled and which a registered medical practitioner certifies as necessary for her return to work.

6.6.5.2 The aggregate of parental leave, special parental leave and sick leave shall not exceed the period of leave granted under 6.6.6.

6.6.6 Period of Entitlement

An employee, who qualifies for parental leave under this subclause, is entitled to a period of 52 weeks unpaid leave, less the total of:

6.6.6.1 Each period of unpaid leave, or paid sick leave, other than parental leave, that the employer has already granted to the employee in respect of the same pregnancy; and

6.6.6.2 Each period of annual leave, or long service leave, that the employee has applied for instead of, or in conjunction with, parental leave in respect of the pregnancy; and

6.6.6.3 Each period of special parental leave; and

6.6.6.4 Each period of parental leave taken by the employee's spouse and specified in 6.6.3.4.

6.6.7 Effect on Parental Leave of Failure to Complete 12 months Continuous Service

If parental leave has been granted on the basis that it is reasonable to expect that the employee will complete a period of at least 12 months continuous service with the employer on a particular day, the employer may cancel the leave if the employee does not complete such a period on that day.

6.6.8 Effect on Parental Leave in Certain Circumstances

6.6.8.1 This subclause applies if an employer has granted parental leave to an employee and:

6.6.8.1.1 The pregnancy terminates otherwise than by the birth of a living child; or

6.6.8.1.2 The employee gives birth to a living child but the child later dies; or

6.6.8.1.3 The adoption of a child does not take place; or

6.6.8.1.4 The adoption of a child takes place but does not continue.

6.6.8.2 The employer may cancel the parental leave at any time before it begins.

6.6.8.3 If the parental leave has begun, the employee may notify the employer in writing that they wish to return to work.

6.6.8.4 If the employee does so, the employer must notify them in writing of the day on which they are to return to work. That day must be within four weeks after the employer received the notice under 6.6.3.

6.6.8.5 If the parental leave has begun, the employer may notify the employee in writing that they must return to work on a specified day that is not less than four weeks after the notice is given.

6.6.8.6 If the employee returns to work, the employer must cancel the rest of the parental leave.

6.6.9 Effect on Parental Leave if Employee Ceases to be Primary Caretaker of Child

6.6.9.1 This subclause applies if:

6.6.9.1.1 For a substantial period beginning on or after the beginning of an employee's parental leave, the employee is not the child's primary care-giver; and

6.6.9.1.2 Having regard to the length of that period and to any other relevant circumstances, it is reasonable to expect that the employee will not again become the child's primary care-giver within a reasonable period.

6.6.9.2 The employer may notify the employee in writing that they must return to work on a specified day that is not less than four weeks after the notice is given.

6.6.9.3 If the employee returns to work, the employer must cancel the rest of the leave.

6.6.10 Return to Work After Parental Leave

6.6.10.1 This subclause applies when an employee returns to work after a period of parental leave.

6.6.10.2 The employer must employ the employee in the position they held immediately before starting parental leave, provided that in the case of a female employee:

6.6.10.2.1 If she was transferred to a safe job because of her pregnancy, the position shall be the one immediately before the transfer; or

6.6.10.2.2 If she began working part-time because of the pregnancy, the position shall be the one immediately before she so began.

6.6.10.3 If that position no longer exists but the employee is qualified for, and can perform the duties of, other positions in the employer's employment, the employer must employ the employee in whichever of those positions is nearest in status and remuneration to the position referred to in 6.6.10.2.

6.6.11 Replacement Employee

An employer must not employ a person:

6.6.11.1 To replace an employee while they are on parental leave; or

6.6.11.2 To replace an employee who, while another employee is on parental leave, is to perform the duties of the position held by the other employee;

Unless the employer has informed the person:

6.6.11.3 That their employment is only temporary; and

6.6.11.4 About the rights of the employee who is on parental leave.

6.6.12 Termination of Employment

6.6.12.1 An employee on parental leave may terminate their employment at any time during the period of leave by notice given in accordance with this award.

6.6.12.2 An employer shall not terminate the employment of an employee on the grounds of her pregnancy or of their absence on parental leave, but otherwise the rights of the employer in relation to termination of employment are not hereby affected.

6.6.13 Part-time Work

6.6.13.1 This subclause only applies where the employer and employee have reached agreement that an employee may work part-time under the circumstances and according to the conditions contained in this subclause.

6.6.13.2 With the agreement of the employer:

6.6.13.2.1 An employee may work part-time in one or more periods at any time from the date of birth of their child until its second birthday or, in relation to adoption, from the date of placement of the child until the second anniversary of the placement.

6.6.13.2.2 A female employee may work part-time in one or more periods while she is pregnant where part-time work is, because of the pregnancy, necessary or desirable.

6.6.13.3 An employee, who has had at least 12 months continuous employment with an employer immediately before commencing part-time work under this subclause, has at the expiration of the period of such part-time employment the right to return to their former position.

6.6.13.4 Subject to the provisions of this subclause part-time employment shall be in accordance with the provisions of this award which shall apply pro-rata.

6.6.13.5 Before commencing a period of part-time employment under this subclause the employee and the employer shall agree:

6.6.13.5.1 That the employee may work part-time;

6.6.13.5.2 Upon the hours to be worked by the employee, the days upon which they will be worked and commencing times for the work;

6.6.13.5.3 Upon the classification applying to the work to be performed; and

6.6.13.5.4 Upon the period of part-time employment.

6.6.13.6 The terms of the agreement referred to in 6.6.13.4 may be varied by consent.

6.6.13.7 The terms of this agreement or any variation to it shall be reduced to writing and retained by the employer. A copy of the agreement and any variation to it shall be provided to the employee by the employer.

6.6.13.8 The employment of a part-time employee under this subclause, may be terminated in accordance with the provisions of this award but may not be terminated by the employer because the employee has exercised or proposes to exercise any rights arising under this subclause or has enjoyed or proposes to enjoy any benefits arising under this subclause.

6.6.13.8.1 Any termination entitlements payable to an employee whose employment is terminated while working part-time under this subclause, or while working full-time after transferring from part-time work under this subclause, shall be calculated by reference to the full-time rate of pay at the time of termination and by regarding all service as a full-time employee as qualifying for a termination entitlement based on the period of full-time employment and all service as a part-time employment on a pro rata basis.

6.6.13.9 An employer may request, but not require, an employee working part-time under this subclause to work outside or in excess of the employee's ordinary hours of duty provided for in accordance with 6.6.13.5.

6.6.13.10 The work to be performed part-time need not be the work performed by the employee in his or her former position but shall be worked otherwise performed under this award.

6.7 LONG SERVICE LEAVE

6.7.1 Employees covered by this Award shall be entitled to Long Service Leave in accordance with the *Long Service Leave General Order* of the *Western Australian Industrial Relations Commission*, that is published in Part 1 (January) of each year of the *Western Australian Industrial Gazette.*

6.7.2 Employees working in the Construction Industry are bound by the provisions of the *Construction Industry Portable Long Service Leave Act 1985.*

6.8 JURY SERVICE

6.8.1 Any employee required to serve on a jury shall as soon as possible after being summoned to serve, notify the employer. The summons to serve must be produced when making an application to obtain this leave.

6.8.2 Any employee required to serve on a jury shall be granted by the employer leave of absence without loss of pay, but only for such a period as is required to enable the employee to carry out their duties as a juror.

6.8.3 An employee granted leave of absence on full pay as prescribed in 6.8.2 is not entitled to retain any juror's fees, but shall pay all fees received to the employer.

6.9 INDUSTRIAL TRAINING LEAVE

An accredited Shop Steward who has been selected or nominated by the union to attend a Industrial Training Course, shall be released from duty for a maximum of two days in any one year with payment of ordinary wages as prescribed by this award, provided that:

6.9.1 The Union shall notify the employer in writing in reasonable time of such request to attend the course and the employee can be released from duty.

6.9.2 This clause shall not apply to any employer of less than five employees subject to this award.

7. DISPUTE RESOLUTION PROCEDURE

7.1 DISPUTE RESOLUTION PROCEDURE

7.1.1 It is the intention of the parties to this award that individual establishments should develop their own internal procedures for the avoidance of and resolution of industrial disputes.

The objectives of the procedure shall be to promote the resolution of disputes by measures based on consultation, co-operation and discussion and to avoid interruption to the performance of work and the consequential loss of production and wages. This procedure shall apply to all disputes including any questions, disputes or difficulties arising under this award.

7.1.2 In the absence of an enterprise specific procedure, the following shall apply:

7.1.2.1 At all stages in the dispute resolution procedure, and to allow for the peaceful resolution of issues, the parties shall commit to the avoidance of industrial action in any form, and for work to continue uninterrupted whilst the process of dispute resolution occurs.

7.1.2.2 Depending on the issues involved, the size and function of the enterprise, and the union membership of the employees concerned, a procedure involving four stages of discussion shall apply. These are:

7.1.2.2.1 Discussion between the employee/s concerned and the immediate supervisor.

7.1.2.2.2 Discussion involving the employee/s concerned, the shop steward and the employer representative.

7.1.2.2.3 Discussions involving representatives of the State Branch of the Union and employer representatives.

7.1.2.2.4 Discussions involving senior union officials and senior management representatives.

7.1.2.3 There shall be a commitment by the parties to achieve adherence to this procedure. This should be facilitated by the earliest possible advice by one party to the other of any issue or problem which may give rise to a grievance or dispute.

7.1.2.4 The procedure shall incorporate a requirement to document all relevant facts where requested by either of the parties.

7.1.2.5 Sensible time limits shall be allowed for the completion of the various stages of the procedure.

7.1.2.6 Where the process of discussion does not resolve the matter, the parties shall refer the matter to the Commission for resolution in accordance with the *Industrial Relations Act, 1979*.

8. SAFETY AND TRAINING

8.1 PROTECTIVE EQUIPMENT

8.1.1 The employer will provide all protective clothing including the following:

8.1.1.1 Safety Boots;

8.1.1.2 Where necessary, gloves, wet weather gear, safety glasses, ear protection and helmets, masks, goggles and safety gear for live work and such other safety gear as may be required;

8.1.2 The employer shall also provide any special tools that may be required at a particular work location.

8.2 FIRST AID KIT

8.2.1 A first aid kit, such as is required by the law of the State in which the work is being performed, or, if there is no relevant State law, as set out hereunder, shall be provided and maintained by the employer on each job.

8.2.2 Provided that in the case where employees subject to this award are operating plant unaccompanied, at a distance of more than one kilometer from an established camp or depot or from the centre of operation of the gang to which they are attached, suitable first aid kits shall be provided for the operator of each machine.

8.2.3 In Western Australia north of the 26th parallel, first aid outfits shall, in addition to the requirements provided for in 8.2.1 or 8.2.2, contain items specified by the Royal Flying Doctor Service Authority recommendations for first aid outfit requirements for those areas. This provision shall not apply in areas to which the R.F.D.S. does not extend.

9. REGISTERED ORGANISATION MATTERS

9.1 RIGHT OF ENTRY TO INVESTIGATE BREACHES

9.1.1 An authorised representative of an organisation may enter, during working hours, any premises where relevant employees work, for the purpose of investigating any suspected breach of the *Industrial Relations Act 1979*, the *Minimum Conditions of Employment Act 1993*, the *Occupational Safety and Health Act 1984*, the *Mines Safety and Inspection Act 1994* or an award, order, industrial agreement or employer-employee agreement that applies to any such employee.

9.1.2 **"Authorised representative"** in this clause has the same meaning as in 9.2.2 of Clause 9.2 – Right of Entry for Discussions with Employees.

9.1.3 For the purpose of investigating any breach, the authorised representative may:

9.1.3.1 Subject to 9.1.5, require the employer to produce for the representative's inspection, during working hours at the employer's premises or at any mutually convenient time and place, any employment records of employees or other documents, other than workplace agreements or employer-employee agreements, kept by the employer that are related to the suspected breach;

9.1.3.2 Make copies of the entries in the employment records or documents related to the suspected breach; and

9.1.3.3 During working hours, inspect or view any work, material, machinery, or appliance that is relevant to the suspected breach.

9.1.4 The employer is not required to produce an employment record of an employee if the employee is a party to an employer-employee agreement and has made a written request to the employer that the record not be available for inspection by an authorized representative.

9.1.5 An authorised representative is not allowed to enter premises where relevant employees work for the purposes of investigating a suspected breach of an employer-employee agreement to which a relevant employee is a party unless the authorized representative is authorised in writing by that relevant employee to carry out the investigation.

9.1.6 An authorised representative is not entitled to require the production of employment records or other documents unless, before exercising the power, the authorised representative has given the employer concerned:

9.1.6.1 If the records or other documents are kept on the employers premises, at least 24 hours written notice; or

9.1.6.2 If the records or other documents are kept elsewhere, at least 48 hours written notice.

9.1.7 An authorised representative shall, upon request of the occupier of the premises, show their authority before entering the premises.

9.2 RIGHT OF ENTRY FOR DISCUSSIONS WITH EMPLOYEES

9.2.1 An authorised representative of an organisation may enter, during working hours, any premises where relevant employees work, for the purpose of holding discussions at the premises with any relevant employees who wish to participate in those discussions.

9.2.2 An **"authorised representative"** means a person who holds an authority in force under Part II Division 2G of the *Industrial Relations Act 1979* (as amended).

9.2.3 A **"relevant employee"** means an employee who is a member of an organisation or who is eligible to become a member of the organisation.

9.2.4 The authorised representative shall give at least 24 hours notice to the employer.

9.2.5 Notwithstanding 9.2.4, the Union may apply to waive the requirement to give the employer concerned notice of an intended exercise of a power if the Commission is satisfied that to give such notice would defeat the purpose for which the power is intended to be exercised.

9.3 POSTING OF AWARD

9.3.1 The employer shall ensure that a copy of the Award is posted in all Crib rooms at work locations where employees are engaged to perform labour.

9.3.2 All employees will be provided with a copy of the Award on engagement in a form agreed with the employee. Where agreement is not reached a hard copy shall be provided.

10. KEEPING OF RECORDS

10.1 TIME & WAGES RECORD

10.1.1 Each employer shall keep employment records containing:

10.1.1.1 The employee's name, and if the employee is under 21 years of age, their date of birth.

10.1.1.2 Any industrial instrument that applies.

10.1.1.3 The date on which the employee commenced employment with the employer.

10.1.1.4 For each day –

10.1.1.4.1 The time at which the employee started and finished work;

10.1.1.4.2 The period or periods for which the employee was paid;

10.1.1.4.3 Details of work breaks, including meal breaks.

10.1.1.5 For each pay period –

10.1.1.5.1 The employee's designation;

10.1.1.5.2 The gross and net amounts paid to the employee under the industrial agreement;

10.1.1.5.3 All deductions and reasons for them.

10.1.1.6 All leave taken by the employee, whether paid, partly paid or unpaid.

10.1.1.7 The information necessary for the calculation of the entitlement to, and payment for long service leave under the *Construction Industry Portable Long Service Leave Act 1985* or an industrial instrument.

10.1.2 **"Industrial Instrument"** means:

10.1.2.1 This Award;

10.1.2.2 An Order of the Western Australian Industrial Relations Commission; and

10.1.2.3 An Industrial Agreement.

10.1.3 An employer must ensure that records are kept in accordance with the *Industrial Relations (General) Regulations 1997*.

10.2 INSPECTION OF RECORDS

10.2.1 The employer shall on the written request by a relevant person:

10.2.1.1 Produce to the person the employment records relating to the employee;

10.2.1.2 Let the person inspect the employment records;

10.2.1.3 Let the relevant person enter the premises of the employer for the purpose of inspecting the records; and

10.2.1.4 Let the relevant person take copies of or extracts from the records.

10.2.2 A "relevant person" means:

10.2.2.1 The employee concerned;

10.2.2.2 If the employee is a represented person, their representative;

10.2.2.3 A person authorised in writing by the employee; and

10.2.2.4 An officer referred to in s 93 of the *Industrial Relations Act 1979* authorised in writing by the Registrar.

10.2.3 An employer shall comply with a written request under 10.2.1not later than:

10.2.3.1 At the end of the next pay period after the request is received; or

10.2.3.2 The seventh day after the day on which the request was made to the employer.

11. SUPERANNUATION

11.1 SUPERANNUATION

11.1.1 An employer shall pay contributions in accordance with the Superannuation Legislation on behalf of each eligible employee to an Approved Fund or scheme chosen in accordance with 11.1.3.

11.1.2 Definitions:

"Approved Fund" means a superannuation fund or scheme that is a complying superannuation fund or scheme within the meaning of the Superannuation Legislation and to which, under the governing rules of the fund or scheme, contributions may be made by or in respect of the employee permitted to nominate a fund or scheme.

"Eligible employee" means an employee who is entitled to receive employer superannuation contributions in accordance with the Superannuation Legislation.

"Ordinary time earnings" shall mean the salary, wage or other remuneration regularly received by the employee in respect of the time worked in ordinary hours and shall include shift work penalties, payments which are made for the purpose of Location Allowances or any other rate paid for all purposes of the award to which the employee is entitled for ordinary hours of work.

Provided that **"ordinary time earnings"** shall not include any payment which is for vehicle allowances, fares or travelling time allowances (including payments made for travelling related to distant work), commission or bonus.

"Relevant Fund" means an Approved Fund nominated by the employee, which is able to accept contributions from the employer.

"Superannuation Legislation" means the Federal legislation as varied from time to time, governing the superannuation rights and obligations of the parties, which includes 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*.

11.1.3 Employer Contributions:

11.1.3.1 An employer shall contribute the percentage of ordinary time earnings as required by the Superannuation Legislation per eligible employee into one of the following approved fund:

11.1.3.1.1 Westscheme;

11.1.3.1.2 C+ Bus: or

11.1.3.1.3 Any Relevant Fund which is nominated by the employee.

11.1.3.2 Employer contributions shall be paid on a monthly basis for each week of service that the eligible employee completes with the employer.

11.1.3.3 No contributions shall be made for periods of unpaid leave, or unauthorised absences in excess of 38 ordinary hours or for periods of employees' compensation in excess of 52 weeks.

No contributions shall be made in respect of annual leave paid out on termination or any other payments on terminations.

11.1.4 Employees may nominate a Relevant Fund or scheme into which the contributions by an employer on behalf of the employee will be made.

11.1.4.1 The employer shall notify the employee of the entitlement to nominate an Approved Fund or scheme as a Relevant Fund as soon as practicable.

11.1.4.2 The employee and employer shall be bound by the nomination of the employee unless the employee and employer agree to change the Relevant Fund or scheme to which contributions are to be made.

The employer shall not unreasonably refuse to agree to a change of Relevant Fund or scheme requested by an employee.

The employer is required to make contributions to an Approved Fund or scheme nominated by the employer until the employee nominates a Relevant Fund or scheme.

12. ENTERPRISE BARGAINING

12.1 ENTERPRISE BARGAINING

12.2 LIBERTY TO APPLY

13. OTHER LAWS AFFECTING EMPLOYMENT

13.1 INDUSTRIAL RELATIONS ACT 1979

WA Legislation- A to Z Browse.url

www.wairc.wa.gov.au or link to

13.2 MINIMUM CONDITIONS OF EMPLOYMENT ACT 1979

WA Legislation- A to Z Browse.url

www.slp.wa.gov.au or link

13.3 WORKPLACE RELATIONS ACT 1996

www.airc.gov.au or link to http://www.airc.gov.au/procedures/wra/wra.html

13.4 SUPERANNUATION GUARANTEE (ADMINISTRATION) ACT 1992

ATO Legal Database - Browse database.url

www.austlii.edu.au/au/legis/cth/consol_act/sga1992430/ or link to

13.5 OCCUPATIONAL SAFETY AND HEALTH ACT 1984

WA Legislation- A to Z Browse.url

www.safetyline.wa.gov.au or link to

13.6 EQUAL OPPORTUNITY ACT 1984

WA Legislation- A to Z Browse.url

www.oeeo.wa.gov.au or link to

14. MAJOR CONSTRUCTION PROJECTS

14.1 RATES AND CONDITIONS

This clause shall apply to all employees of the employer whilst they are performing work on any Civil, Commercial or Industrial project where the project value is more than $2.0 million and where there is any inconsistency between any of the provisions of this award and this clause, this clause shall apply.

14.1.1 Project Agreements

Provided that where the employer commences work on a project where a site agreement exists to which the employer is contractually obligated or where a site agreement exists between the union and the employer or their agent that provides for higher rates of pay and conditions, the conditions contained in any such site agreement will take precedence over this clause for the duration of the project.

14.1.2 Relationship to Parent Award

This clause is supplementary to and is to be interpreted wholly in conjunction with the Australian Workers Union Construction and Maintenance Award 2002 (hereinafter called "the Federal Award"). The terms and conditions of the Federal Award as at 1st June 1998 are expressly preserved by this clause as if the same was set out in full herein and shall be binding. All allowances not included in this clause shall be paid in accordance with the Federal award as varied.

14.1.3 Labour Hire

Labour Hire companies shall only be engaged following agreement with the Union.

14.1.4 Site Allowances:

New Projects Western Australia

Project Value Millions of Dollars			Site Allowance Dollars Per Hour
2.0m	–	5.5m	1.65
5.5m	–	13.6m	1.85
13.6m	–	27.3m	2.05
27.3m	–	54.5m	2.40
54.5m	–	109.0m	2.85
109.0m	–	163.5m	2.95
163.5m	–	217.9m	3.05
217.9m	–	326.9m	3.15

For projects above $326.9 million, there shall be an increment of 10 cents per additional $100m or part thereof.

14.1.4.1 The Rates shall be reviewed on 1 July each year taking account of the Consumer Price Index movement and the economic circumstances prevailing in the industry at that time.

14.1.4.2 The Site Allowance shall be adjusted up or down to the nearest 5 cents, and Project value to the nearest $100,000.

14.1.4.3 No allowance shall be claimed on any project, regardless of its location, where the project value is below $2.0 million.

14.1.5 Fares and Travelling Allowance

14.1.5.1 Where transport is not supplied by the employer and in lieu of the basic daily excess fares and travel pattern allowance, a payment per day shall be made for each day worked. This payment shall in no way limit or be construed as a payment in substitution for any other entitlement of the Federal award.

Payments shall be as follows:

6/12/04	$23.40 per day
1/3/05	$24.55 per day

14.1.6 Hours of Work, Rostered Days off and Protection of Leisure Time

14.1.6.1 Hours of Work

14.1.6.1.1 The ordinary hours of work under this clause shall notionally be 36 per week, worked between the spread of hours of 6.00 am and 6.00 pm, Monday to Friday, in accordance with Clause 3.1 – Hours of Work – Day Employees of this award.

14.1.6.1.2 To allow for the more flexible use of workforce and equipment over the available daylight hours, the ordinary daily hours may be worked between the hours of 6.00 am and 6.00 pm.

The arrangements for alteration of start and finish times will be agreed by the employer and the Union to enable later starts in winter and earlier starts during some months of summer and during expected periods of inclement weather.

In the case of special circumstances arising, the employer may seek negotiations with the union concerning further variation of the hours of work provisions on a specific project or process.

14.1.6.2 Overtime

Overtime will be worked in accordance with the provisions of the Federal Award.

Such overtime will be calculated by applying the divisor of 1/36th to the employee's weekly rate as prescribed herein.

14.1.6.3 Leisure Time Protected

Excessive overtime will not be worked by employees.

To this end the general standard of weekly hours will usually not be more than 56 per week (Monday to Saturday), provided that the aforesaid 'usual weekly hours' may, by agreement between the Union and the employer (such agreement to not be unreasonably withheld), be exceeded from time to time to meet the needs of the project, or a specific task on a project. In the absence of agreement at the site level, the matter will be subject to urgent and early review by senior management, and the Union Secretary/s or deputy, with a view to ensuring compliance with the intentions of this provision.

14.1.6.3.1 The employer is not restricted as to the setting of daily hours within the 56 hour standard;

14.1.6.3.2 It is acknowledged that additional hours are necessary for particular personnel (e.g. [without limiting the foregoing] crane crews; peggies; first aiders; hoist drivers; site security personnel), and such situations are not affected or restricted by this provision, as they are agreed to be a normal necessity of the industry;

14.1.6.3.3 If time is lost on a project due to any reason including (without limiting the foregoing) Inclement Weather, then such time may be made up by the scheduling of additional overtime up to the 56 hour standard;

14.1.6.3.4 If 56 hours is intended to be exceeded, the matter is to be subject to agreement by the Union and the employer to make themselves available for such a purpose. Agreement will not be unreasonably withheld.

Nothing in this clause shall be read as to imply that payment as for 56 hours is guaranteed, and nothing in this clause shall diminish the right of the employer to schedule a lesser weekly program of hours.

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

14.1.6.3.5 Any risk to employee health and safety;

14.1.6.3.6 The employee's personal circumstances including any family responsibilities;

14.1.6.3.7 The needs of the workplace or enterprise;

14.1.6.3.8 The notice (if any) given by the employer of the overtime and by the employee of their intention to refuse it; and

14.1.6.3.9 Any other relevant matter.

14.1.6.4 Work Cycles & Rostered Days Off

The ordinary working hours shall be worked in a 10-day/2-week cycle, Monday to Friday inclusive, with eight hours worked for each of nine days, and with 0.8 of an hour on each of those days accruing towards the tenth day, which shall be taken as a paid day off. The tenth day of the cycle shall be known as the Rostered Day Off (hereinafter called 'RDO'). Payment on such an RDO shall include the daily 'Fares & Travelling Allowance' (Clause 5.9– Travelling Allowance of this award), and any applicable Site Allowance as prescribed.

Provided that twenty-six RDO's shall be accrued by an employee in each twelve months continuous service**.**

14.1.6.5 Each day of paid leave taken and any holiday (as prescribed in Clause 6.4 – Public Holidays of this Award), occurring during any cycle of two weeks shall be regarded as a day worked for accrual purposes.

14.1.6.6 Upon commencement of employment, employees who have not worked, or who have not worked a complete ten day/two week cycle, shall receive pro-rata accrual entitlements for the first RDO or group of RDO's falling after their commencement of employment. Thereafter, for the duration of employment with that employer, RDO's will be paid in full as they occur.

Upon termination of employment, an adjustment will be made to ensure that the full RDO entitlement, and no more, have been provided. This means that employees then having received more RDO's than they were entitled to will have the relevant amount removed from final termination payments, and employees who have received less than their full RDO entitlement will have the outstanding amount added to final termination payments.

14.1.6.7 RDO Schedule

14.1.6.7.1 The Schedule of RDO's to be observed each year will generally be in accordance with the site.

14.1.6.7.2 Overtime will not be scheduled on any Fixed Long Weekend as agreed in the Working Day Calendar. This does not limit the right to schedule overtime on such weekends in the case of an emergency.

14.1.6.7.3 Where necessary the employer may, with the agreement of a majority of the employees, allocate work for some or all of the employees workforce to be done on a scheduled RDO provided that:

14.1.6.7.3.1 Where such agreement is reached, the Union is to be notified in writing by the employer at least seven (7) days prior to the scheduled RDO;

14.1.6.7.3.2 Such work shall be paid for at ordinary time rates of pay;

14.1.6.7.3.3 The untaken RDO will be re-scheduled to another day falling within four weeks of the originally scheduled day;

14.1.6.7.3.4 The re-scheduled RDO's shall be taken on a day or days adjacent to a weekend or in conjunction with annual leave, or as otherwise agreed by the worker and employers.

14.1.6.7.4 Provided that the scheduled RDO or any substituted day may be worked where it is required by the employer and such work is necessary to allow other employees to be employed productively or to carry out out-of-hours maintenance or because of unforeseen delays to a particular project or a section of it or for other reasons arising from unforeseen or emergency circumstances on a project in which case, in addition to accrued entitlements, the employee shall be paid penalty rates and provisions as prescribed for Sunday work in the Award.

14.1.6.8 Agreement on Alternate RDO's

14.1.6.8.1 Where an employer and a majority of that employers' employees at an enterprise or job site agree, another day may be substituted for the scheduled RDO.

14.1.6.8.2 The union shall be consulted concerning such substitution, such consultation will take place at least five working days prior to the change being implemented.

14.1.6.8.3 Where there is a dispute in relation to an alternate RDO, the matter may be determined in accordance with Clause 7.1 – Dispute Resolution Procedure of this Award.

14.1.6.9 Agreement on Banking of RDO's

14.1.6.9.1 Where an employer and an employee agree up to five RDO's may be accrued for the purpose of creating a bank to be drawn upon by the employee at times mutually agreed. Details of such banked RDO's shall be entered on to each employee's employment records. Consultation with the union will take place at least five days prior to introduction of the agreement to bank RDO's.

14.1.6.9.2 Where there is a dispute in relation to the operation of this subclause, the matter may be determined in accordance with Clause 7.1 – Dispute Resolution Procedure of this Award.

14.1.7 Redundancy

As per Clause 2.2– Redundancy of this Award.

14.1.8 Superannuation

All superannuation contributions shall be paid monthly as required by the trust deed. If contributions are to be made to C+Bus the employer will sign, a variation to the C+BUS trust deed to reflect this obligation.

Where an employee wishes to have their pay salary sacrificed for additional superannuation, the employer will comply with the employee's request without unreasonable delay. All entitlements and benefits contained in this agreement will be calculated on the pre-salary sacrifice pay rate.

15. WHERE TO GO FOR FURTHER INFORMATION

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers, "Wellington Fair", Cnr. Wellington & Lord Streets, EAST PERTH 6004

Telephone	:	(08) 9221 1686
e-mail:	:	administrator@awuwa.asn.au
Facsimile	:	(08) 9221 1706 www.awuwa.asn.au
Toll Free	:	1800 810 723

Western Australian Industrial Relations Commission, Level 16, 111 St. George's Terrace, PERTH 6000

Telephone	:	(08) 9420 4444
e-mail:	:	webmaster@wairc.wa.gov.au
Facsimile	:	(08) 9420 4500 www.wairc.wa.gov.au
Toll Free	:	1800 624 263

Department of Consumer & Employment Protection, 219 St. George's Terrace, PERTH 6000

Telephone	:	(08) 9282 0777
e-mail:	:	online@docep.wa.gov.au
Facsimile	:	(08) 9282 0850 www.docep.wa.gov.au

Department of Consumer & Employment Protection, Labour Relations, 3rd Floor, Dumas House, 2 Havelock Street, WEST PERTH 6005

Telephone	:	(08) 9222 7700
email:	:	labourrelations@docep.wa.gov.au
Facsimile	:	(08) 9222 7777
Wageline	:	1300 655 266

Federal Award – Australian Workers Union Construction and Maintenance Award 2002

www.wagenet.gov.au Option Two [*click Go*]; type in "Search For" box ***AW815828*** or

control click on www.airc.gov.au/documents/current_awards/current_awards.html and type in "Award ID" box ***AW815828***

16. NAMED PARTIES

16.1 UNION PARTY TO THE AWARD

The Australian Workers' Union West Australian Branch
Industrial Union of Workers
"Wellington Fair"
Cnr. Wellington & Lord Streets
EAST PERTH 6004

16.2 EMPLOYER PARTIES TO THE AWARD

Advanced Traffic Management
164 Great Eastern Highway
MIDLAND 6056

Albany Traffic Control
20 Middleton Road
MIDDLETON 6330

Peel Line Marking Services
89 Cooranga Road
MANDURAH 6210

Roadwise Traffic Control
21 Wilber Street
ROSSMOYNE 6104

WA Road Projects
22-24 Eva Street
MADDINGTON 6109

2004 WAIRC 13533

AWU LABOUR HIRE INDUSTRY AWARD 2004

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	APPLICANT
	-v-
	ADECCO AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER J H SMITH
DATE	TUESDAY, 7 DECEMBER 2004
FILE NO.	A 5 OF 2004
CITATION NO.	2004 WAIRC 13533

Catchwords	Application for new award – labour hire industry – whether in the public interest the terms of the proposed award should be made. Application dismissed – *Industrial Relations Act 1979* (WA) s 36A
Result	Application dismissed
Representation	
Applicant	Mr D McLane (as agent)
Respondents	Mr P Watson (as agent on behalf of Adecco and Others) and Mr M Borlase (as agent on behalf of Carey Mining and Others)
Intervener	Mr D Schapper (of counsel on behalf of The Construction, Forestry, Mining and Energy Union of Workers)

Reasons for Decision

1 This is an application by The Australian Workers' Union, West Australian Branch, Industrial Union of Workers ("the union") for the making of the AWU Labour Hire Industry Award 2004 ("the proposed award"). The proposed award seeks to cover the employment of employees employed in the labour hire industry whose terms and conditions of employment are award-free. It is conceded, however, by the union that the terms of the proposed award are also intended to apply to the terms and conditions of employees who are presently covered by other awards of this Commission.

2 The union, in its application, sets out the following grounds for making the proposed award:

(i) The labour hire industry is currently an award-free area within the State of Western Australia.

(ii) The industry provides employees to a diverse industry group ranging from unskilled labour through to tertiary qualified employees.

(iii) These employees are quite often required to work alongside employees of the principal companies on exactly the same work but on considerably different wages and conditions.

(iv) The proposed award seeks to put in place a minimum safety net award for employees in the labour hire industry.

(v) The proposed award also seeks to put in place an award that recognises the principles of fairness and equity for employees engaged on the same work, in the same conditions.

(vi) The proposed award meets the requirements of Principle 11, New Awards of the State Wage Principles.

3 The question whether the proposed award would not be in the public interest was heard and determined as a preliminary issue.

4 The union says that in determining whether an award should issue in the public interest, as a preliminary issue, the Commission should only have regard to clauses 1.3, l.5 and 4.3 of the proposed award, as the terms and conditions sought in the other provisions of the proposed award are yet to be subject to conciliation or, if necessary, arbitration. Clause 1.3 provides:

"1.3 – Area and Scope

This award applies throughout the State of Western Australia to all employers operating in the Labour Hire Industry employing any employees (being a person who is a party to a contract of service with the agency or organisation) to do work for another person, even though the employee is working for the other person under an arrangement between the agency or organisation and the other person eligible for membership of the Australian Workers Union, West Australian Branch Industrial Union of Workers employed in the classifications in Clause 4.3 – Classification and Structure and Definitions. Excluding employees substantially employed as an engine driver, crane driver, power house operator or boiler attendant."

5 Clause 1.5 provides:

"1.5 – Application of Other Awards

This award shall apply except to the extent that the site on which the Labour Hire contractor has provided labour is covered by an Enterprise Award and/or Site Industrial Agreement, where the terms and conditions are superior to this Award, then that Enterprise Award or Agreement shall apply in lieu of this Award."

6 Clause 4.3 provides:

"4.3 – Classification Structure

(1) **EMPLOYEE LEVEL I**

(Relativity - 78%)

An Employee Level I is an employee undertaking up to 38 hours induction training which may include information on the enterprise, conditions of employment, introduction to supervisors and fellow employees, training and career path opportunities, plant lay-out, work and documentation procedures, occupational health and safety, equal employment opportunities and quality control/assurance.

An employee at this level performs routine duties essentially of a manual nature and to the level of their training -

(a) Performs general labouring and cleaning duties;

(b) Exercises minimal judgement;

(c) Works under direct supervision; or

(d) Is undertaking structured training so as to enable the employee to work at Level 2.

(2) **EMPLOYEE LEVEL 2**

(Relativity 82%)

An Employee Level 2 who has completed up to three months training so as to enable the employee to perform work within the scope of this level.

At this level an employee performs work above and beyond the skills of an employee at Level 1 and to the level of the employee's training:-

(a) Works under direct supervision either individually or in a team environment;

(b) Understands and undertakes basic quality control/assurance procedures including the ability to recognise basic quality deviations and faults;

(c) Understands and utilises basic statistical process control procedures.

Indicative of the tasks which an employee at this level may perform are the following:

(d) Repetitive work on automatic, semi-automatic or single purpose machines or equipment;

(e) Assembles components using basic written, spoken and/or diagrammatic instructions in an assembly environment;

(f) Basic soldering or butt and spot welding skills or cutting scrap with oxy-acetylene blow pipe;

(g) Uses selected hand tools;

(h) Cleans boilers;

(i) Maintains simple records;

(j) Uses hand trolleys and pallet trucks;

(k) Assists in the provision of on the job training in conjunction with tradespersons and supervisor/trainers.

(3) **EMPLOYEE LEVEL 3**

(Relativity - 87.4%)

An Employee Level 3 has completed training to enable the employee to perform work within the scope of this level.

At this level an employee performs work above and beyond the skills of an employee at Level 2 and to the level of the employee's training.

(a) Is responsible for the quality of the employee's own work, subject to routine supervision;

(b) Works under routine supervision either individually or in a team environment;

(c) Exercises discretion within the employee's level of skills and training.

Indicative of the tasks which an employee at this level may perform are the following:

(d) Operates flexibly between assembly stations;

(e) Operates machinery and equipment which requires exercising skills and knowledge beyond that of an employee at Level 2;

(f) Non-trade skills;

(g) Receiving, despatching, distributing, sorting, checking, packing (other than repetitive packing in a standard container or containers in which such goods are ordinarily sold), documenting and recording of goods, materials and components;

(h) Basic inventory control in the context of a production process;

(i) Basic keyboard skills;

(j) Advanced soldering techniques;

(k) Boiler attendant;

(l) Operation of mobile equipment including forklifts, hand trolleys, pallet trucks, overhead cranes and winch operation;

(m) Assists one or more tradespersons.

(4) **EMPLOYEE LEVEL 4**

(Relativity - 92.4%)

An Employee Level 4 who has completed training to enable the employee to perform work within the scope of this level.

At this level an employee performs work above and beyond the skills of an employee at C 12 and to the level of the employee's training:

(a) Works from complex instructions and procedures;

(b) Assists in the provision of on the job training to a limited degree;

(c) Co-ordinates work in a team environment or works individually under general supervision;

(d) Is responsible for assuring the quality of the employee's own work.

Indicative of the tasks which an employee at this level may perform are the following:

(e) Machine setting, loading and operation;

(f) Rigging (certificated);

(g) Inventory and store control, including;

(i) Licensed operation of all appropriate materials handling equipment;

(ii) Use of tools and equipment within the scope of (basic non-trades) maintenance;

(iii) Computer operation at a level higher than that of an employee at level 3;

(h) Utility in a catering operation employed on connection with mining operations;

(i) Intermediate keyboard skills;

(j) Basic quality checks on the work of others;

(k) Is licensed and certified for forklift,

(l) Has a knowledge of the employer's operations as it relates to production processes;

(m) Lubricates production machinery equipment;

(n) Assists in the provision of on the job training in conjunction with tradespersons and supervisor/trainers.

(5) **EMPLOYEE LEVEL 5**

(Relativity 100%)

An Employee Level 5 holds a Trade Certificate -

As a Cook/Chef

Timber Trades /Furniture trades

Horticultural Trades/ Greenkeeper or

Any recognised trade qualification or

National competency standards certificate 3 or equivalent

and is able to exercise the skills and knowledge of that trade.

An Employee Level 5 works above and beyond an employee at Level 4 and to the level of the employee's training;

(a) Understands and applies quality control techniques;

(b) Exercises good interpersonal and communications skills;

(c) Exercises keyboard skills at a level higher than level 4;

(d) Exercises discretion within the scope of this grade;

(e) Performs work under limited supervision either individually or in a team environment;

(f) Operates all lifting equipment incidental to the employee's work;

(g) Performs non-trade tasks incidental to the employee's work;

(h) Performs work which while primarily involving the skills of the employee's trade is incidental or peripheral to the primary task and facilitates the completion of the whole task. Such incidental or peripheral work would not require additional formal technical training;

(i) Is able to inspect products and/or materials for conformity with established operational standards.

(6) **PRODUCTION EMPLOYEE**

A Production Systems employee, while still being primarily engaged in engineering/production work applies the skills acquired through the successful completion of 24 modules towards an Engineering Production Certificate in the production, distribution or stores functions according to the needs of the enterprise.

A Production employee works above and beyond an employee at Level 4 and to the level of the employee's training:

(a) Understands and applies quality control techniques;

(b) Exercises good interpersonal communications skills;

(c) Exercises discretion within the scope of this grade;

(d) Exercises keyboard skills at a level higher than Level 4;

(e) Performs work under general supervision either individually or in a team environment;

(f) Is able to inspect products and/or materials for conformity with established operational standards.

Indicative of the tasks which an employee at this level may perform are as follows:

(g) Approves and passes first off samples and maintains quality of product;

(h) Works from production drawings, prints or plans;

(i) Operates, sets up and adjusts all production machinery in a plant including production process welding to the extent of training;

(j) Can perform a range of engineering maintenance functions including;

(i) Removal of equipment fastenings including use of destructive cutting equipment;

(ii) Lubrication of production equipment;

(iii) Running adjustments to production equipment;

(k) Operates all lifting equipment;

(l) Basic production scheduling and materials handling within the scope of the production process or directly related functions within raw materials/finished goods locations in conjunction with technicians;

(m) Understands and applies computer techniques relating to production process operations;

(n) First class engine driver's certificate;

(o) Has high level stores and inventory responsibility beyond the requirements of an employee at Level 4;

(p) Assists in the provision of on the job training in conjunction with tradespersons and trainers;

(q) Has a sound knowledge of the employers operations as it relates to the production process.

(r) Includes Plant Operating skills below:

(i) Operator Crawler tractor without power operated attachments above Class M10 up to and including Class M30;

(ii) Operator Crawler tractor with power operated attachments above Class M5 and up to and including Class M15;

(iii) Operator Grader power operated, below 35 kW net engine power;

(iv) Operator Excavator up to and including 0.5 cubic metres;

(v) Operator Trenching machine ladder type, depth greater than 1.5 metres up to 2.4 metres and width above 300 mm up to 450 mm and bucket wheel trencher with equivalent capacity in cubic metres per hour;

(vi) Operator Pneumatic tyred tractor with power operated attachments above 60 kW up to and including 150 kW net engine power;

(vii) Operator Self-powered Scraper up to and including ten cubic metres struck capacity;

(viii) Operator rear and bottom dump above fifteen cubic metres struck capacity up to and including 30 cubic metres struck capacity;

(ix) Operator Pneumatic Tyred Tractor without power operated attachments above 150 kW up to and including 500 kW net engine power;

(x) Operator Crawler Loader above 5000 kg mass up to and including 15000 kg mass (see 12.2.3(d));

(xi) Operator Pneumatic Tyred Loader above 30 kW up to and including 105 kW net engine power;

(xii) Operator Roadroller, powered, over 25 tonnes;

(xiii) Operator special track laying fixing or levelling machine (employed on railway construction in Western Australia).

(7) **EMPLOYEE LEVEL 6**

(Relativity - 105%)

A Tradesperson Level 6 is an employee who has completed the training requirement including appropriate on the job training:

Three appropriate modules in addition to the training requirements of Level 5.

and where practical the modules should be identified in the Enterprise Training Programme.

An Employee Level 6 works above and beyond an Employee Level 5 and to the level of the employee's training:

(a) Exercises the skills attained through satisfactory completion of the training prescribed for this classification;

(b) Exercises discretion within the scope of this grade;

(c) Works under general supervision either individually or in a team environment;

(d) Understands and implement quality control techniques;

(e) Provides trade guidance and assistance as part of a work team;

(f) Exercises trade skills relevant to specific requirements of the enterprise at a level higher than Engineering Tradesperson Level I.

(g) Includes Plant Operating skills below:

(i) Operator Excavator above 2.2 cubic metres struck bucket capacity up to and including 5.5 cubic metres struck bucket capacity;

(ii) Operator Grader power operated above 75 kW up to and including 190 kW net engine power;

(iii) Operator Pneumatic tyred loader above 200 kW up to and including 500 kW net engine power;

(iv) Operator Crawler tractor with power operated attachments above Class M30 up to and including 60000 kg mass;

(v) Operator Crawler loader above 30000 kg mass up to and including 60000 kg mass (see 12.2.3(d));

(vi) Operator rear and bottom dump above 60 cubic metres struck capacity up to and including 120 cubic metres struck capacity;

(vii) Operator Self-powered scraper above twenty cubic metres struck capacity up to and including 50 cubic metres struck capacity.

(8) **EMPLOYEE LEVEL 7**

(Relativity - 110%)

An Employee Level 7 means a

Head Cook/ Chef; or

Senior Greenkeeper (means a greenkeeper in charge)

An Employee Level 7 works above and beyond an Employee Level 6 and to the level of the employee's training:

(a) Exercises the skills attained through satisfactory completion of the training prescribed for this classification;

(b) Provides trade guidance and assistance as part of a work team;

(c) Assists in the provision of training in conjunction with supervisors and trainers;

(d) Understands and implements quality control techniques;

(e) Works under limited supervision either individually or in a team environment.

(9) **EMPLOYEE LEVEL 8**

(Relativity - 115%)

An Employee Level 8 means a tradesperson who has completed the following training requirement including appropriate on the job training:

Three appropriate modules which are qualitatively higher than and in addition to the training requirements of Level 7 employee.

and where practical the modules should be identified in the Enterprise Training Programme.

An Employee Level 8 works above and beyond an Employee Level 7 and to the level of the employee's training:

(a) Exercises the skills attained through satisfactory completion of the training prescribed for this classification;

(b) Is able to provide trade guidance and assistance as part of a work team;

(c) Provides training in conjunction with supervisors and trainers;

(d) Understands and implements quality control techniques;

(e) Works under limited supervision either individually or in a team environment.

The following tasks are indicative of what an employee at this level may perform subject to the employee having appropriate Trade and Post Trade Training to enable the particular tasks to be performed;

(f) Works on machines or equipment which utilise complex mechanical, hydraulic and/or pneumatic circuitry and controls or a combination thereof;

(g) Works on machinery or equipment which utilises complex electrical/electronic circuitry and controls;

(h) Works on instruments which make up a complex control system which utilises some combination of electrical, electronic, mechanical or fluid power principles;

(i) Applies advanced computer numerical control techniques in machining or cutting or welding or fabrication;

(j) Exercises intermediate CAD/CAM skills in the performance of routine modifications to programmes.

(k) Works on complex or intricate interconnected electrical circuits at a level above C 8;

(l) Works on complex radio/communication equipment.

(10) **EMPLOYEE LEVEL 9**

(Relativity - 125%)

An Employee Level 9 means an employee who has completed (including appropriate on the job training):

12 modules of an Advanced Certificate;

Or 12 modules of an Associate Diploma;

Or equivalent accredited training;

and where practical the modules should be identified in the Enterprise Training Programme.

An Employee Level 9 works above and beyond an Employee Level 8 and to the level of the employee's training:

(a) Undertakes quality control and work organisation at a level higher than Level 8;

(b) Provides trade guidance and assistance as part of a work team;

(c) Assists in the training of employees in conjunction with supervisors/trainers;

(d) Performs maintenance planning and predictive maintenance work other than in technical fields;

(e) Works under limited supervision either individually or in a team environment;

(f) Prepares reports of a technical nature on specific tasks or assignments as directed;

(g) Exercises broad discretion within the scope of this level.

The following are indicative of tasks which an employee at this level may perform subject to the employee having the appropriate Trade and Post Trade Training to enable the particular tasks to be performed;

(h) Works on combinations of machines or equipment which utilises complex electronic, mechanical and fluid power principles;

(i) Work on instruments which make up a complex control system which utilise some combination of electrical, electronic, mechanical or fluid power principles and electronic circuitry containing complex analogue and/or digital control systems utilising integrated circuitry;

(j) Application of computer integrated manufacturing techniques involving a higher level of computer operating and programming skills than for Level 8;

(k) Work on various forms of machinery and equipment which are electronically controlled by complex digital and/or analogue control systems using integrated circuitry.

(11) **EMPLOYEE LEVEL 10**

(Relativity - 130%)

An Employee Level 10 means an employee who has completed (including appropriate on the job training):

An Advanced Certificate; or

15 modules of an Associate Diploma; or

Equivalent accredited training.

and where practical the modules should be identified in the Enterprise Training Programme.

An Employee Level 10 work above and beyond an Employee Level 9 and to the level of the employee's training:

(a) Provides technical guidance or advice within the scope of this level;

(b) Prepares reports of a technical nature on specific tasks or assignments as directed or within the scope of discretion at this level;

(c) Has an overall knowledge and understanding of the operating principle of the systems and equipment on which the tradesperson is required to carry out their task;

(d) Assists in the provision of on the job training in conjunction with supervisors and trainers.

The following are indicative of the tasks an employee at this level may perform, subject to the employee having the appropriate Trade and Post Trade Training to enable the particular tasks to be performed:

(e) Through a systems approach is able to exercise high level diagnostic skills on complex forms of machinery, equipment and instruments which utilise some combination of electrical, electronic, mechanical or fluid power principles;

(f) Wets up, commissions, maintains and operates sophisticated maintenance, production and test equipment and/or systems involving the application of computer operating skills at a higher level than level 9;

(g) Works on various forms of machinery and equipment electronically controlled by complex digital and/or analogue control systems using integrated circuitry;

(h) Works on complex electronics or instruments or communications equipment or control systems which utilise electronic principles and electronic circuitry containing complex analogue and/or digital control systems using integrated circuitry;

(i) Includes such tasks as a Para Medical officers/ Nurse;

(j) Any employee who holds an Associate diploma or equivalent qualification within the National Skills Accreditation Standards."

The Union's Evidence and Contentions

7 The union makes the application for the proposed award to issue because no award of this Commission specifically applies to employees engaged in the labour hire industry. It is common ground that the labour hire industry plays an important role in the economy of Western Australia and it brings flexibility to many industries. It is agreed that the size of the labour hire industry has grown expediently in the last few years and continues to grow. The union argues as this area of employment grows the number of employees whose terms and conditions of employment are not covered by awards of this Commission is also growing. Consequently, it is argued a safety net award should be put in place to protect the terms and conditions of employment of labour hire employees who are eligible to become members of the union. The union says it is plain from the terms of the proposed award that the award is only sought as a safety net and is intended to only apply in the absence of more advantageous conditions through the operation of a site-specific award or agreement. The proposed award is sought to cover diverse industries and occupations from unskilled labour to tertiary qualified employees.

8 The union says that in general the labour hire industry is comprised of reputable employers and that many of the reputable labour hire agencies pay wages in excess of the rates sought in the proposed award. However, there is a small number of "sharks and cowboys" who create problems for the reputable employers and for the union. In particular, it is contended by the union that in award-free areas the "sharks and cowboys" obtain work by offering to clients the hire of employees at rates of pay which are lower than award rates of pay which are paid to employees of the client carrying out the same or similar work. The union also says it seeks the making of the proposed award to establish a "level playing field" in the industry. The union says the proposed award addresses inequity of employees carrying out the same work and receiving different rates of pay.

9 The union says that pursuant to s 36A(1) of the *Industrial Relations Act 1979* ("the Act") the onus is on the parties opposing the making of the proposed award to show that it is not in the public interest for an award to be made. Further, it says that clause 1.3 of the proposed award restricts the coverage of the proposed award to employers in the labour hire industry employing employees who are eligible for membership of the union. Consequently, the making of the proposed award will not extend the constitutional coverage of the union. It is also argued on behalf of the union that the making of the proposed award will not create disparity amongst employees, or lead to demarcation disputes. It also says that the making of the proposed award will not be detrimental to the economy of the State, or to persons employed directly in the labour hire industry. Nor will it create conflict or confusion with Federal forms of regulation, or create uncertainty and lack of clarity as to whether the proposed award or Federal instruments apply. Finally, it is argued that the making of the proposed award will not remove flexibilities in the labour hire industry.

10 The union called one witness to give evidence in support of its case. Mr Glen William Anderton is a Vice President of the union. He has been employed by the union for a total of twelve years. In 1996 he left the union and was re-employed in 2002. In 1996 he was requested by Transfield to set up a labour hire agency. That labour hire agency was called Readiskill. He was the manager of the blue collar section of that agency. After 18 months he set up a business of his own called Dynamic Personnel and was the managing director of that company. However, he was unsuccessful in that business and as a result entered into an arrangement with Labour Ready, now called Ready Workforce, to take over his clients. He worked for Labour Ready until he was re-employed by the union in 2002. Mr Anderton said the reason why his company was unsuccessful was because his tenders for work were often undercut by unscrupulous labour hire agencies. Mr Anderton said that his tenders for work were based on State and Federal award rates and conditions that applied in the client's industry but other companies submitted tenders based on rates less than the rates Mr Anderton used. When Mr Anderton was employed in the labour hire industry there was about 120 labour hire companies in Western Australia. He says that the number of companies who currently conduct business in the industry would far exceed that number.

11 Mr Anderton says that most reputable companies in the labour hire industry provide their employees with conditions and rates of pay set out in State and Federal awards and agreements which apply to employees of the client on the client's site. In his capacity as a union official and organiser Mr Anderton acts for employees engaged in the labour hire industry. He says he has been approached by a number of labour hire companies to "seek some sort of regulatory conditions" to provide for a level playing field in the labour hire industry. He often receives queries from members asking about their pay and in answering their queries he has to ascertain whether the member's employment is covered by an award or whether their terms and conditions are award-free. From time to time he has had complaints from members of the union that they have been paid lesser rates of pay than employees of the client companies, when they carry out the same or similar work as the client's employees.

12 Mr Anderton says that if the proposed award is made by the Commission, it would make the union's job easier as there would be one award that applies to the labour hire industry. He also says the proposed award would provide fairness for the employees in the industry and to the employers, as all employers would be required in tendering for work to take into account the same base rates of pay and conditions.

13 When cross-examined Mr Anderton agreed that many labour hire employees work for different labour hire employers and are paid different rates of pay when working for different labour hire employers at the same client sites. He also agreed that it is not uncommon for labour hire employees to register with different labour hire companies. It was put to Mr Anderton that if the terms of the proposed award are made by the Commission that there would be a cost impact upon the labour hire industry. Mr Anderton disagreed with this proposition. However, he conceded that the employees at the "bottom end" of the scale of the industry would receive an increase in wages whereas employees whose conditions can be regarded at the "top end of the scale" would not be affected by the terms of the proposed award.

14 Mr Anderton says that the majority of employees in the labour hire industry are extended the same terms and conditions at a site as the employees of the client of the labour hire company. Further, he agreed the proposed award that the union seeks will only directly affect a small number of employees in the labour hire industry.

15 Mr Anderton agreed when cross-examined, that if the proposed award is made by the Commission, that a labour hire employer may not be able to supply labour to a client if the client requires the employees to work different patterns of work than the work patterns required by the proposed award. He said, however, that this can be overcome as the terms of the proposed award provide for flexibility in patterns of work as the labour hire employer and employee can agree to alter the work patterns provided for in the proposed award.

Submissions and Evidence Adduced on behalf of Adecco and others represented by Fisher Cartwright Berriman

16 Mr Watson stated, on behalf of the labour hire employers he represents, that the proposed award sought by the union should not be made for the following reasons:

1. It is not in the Public Interest for an Award to be made which is not within the objects of section 6(a), 6(ad), 6(af), (ag), (b), (c), (ca) of the *Industrial Relations Act 1979*.
2. It is not in the Public Interest for the Commission to make an Award that is contrary to Principle 11, New Awards as appears in the "*Statement of Principle – June 2004*". Paragraph (a) provides that:

   In the making of a new award, the main consideration shall be that the award meets the needs of the particular industry or enterprise while ensuring that employees' interests are also properly taken into account. Structural efficiency considerations shall apply in the making of such an award.
3. It is not in the Public Interest for an Award to be made which would create uncertainty as to which provisions should apply where awards already exist that may apply to employers and employees, sought to be covered by this application. Labour hire employees work for hosts that in turn operate in a variety of industries, covered by State common rule awards that may apply to those industries. Some may also be parties to Federal awards and primacy is accorded under *The Workplace Relations Act 1996.*
4. It is not in the Public Interest for an Award to be made which would create dual award and agreement coverage. As a number of Labour hire companies operate under federal Certified Agreements and state Agreements, a new Award will create dual award/agreement coverage if those awards/agreements apply to labour hire employees as a matter of legal entitlement because they work within the area or scope clauses of those awards/agreements, and within classifications prescribed in those awards/agreements. This would create confusion and uncertainty over which award/agreement to apply.
5. It is not in the Public Interest for an Award to be granted to a Union that does not have constitutional coverage over the classifications sought to be covered in the Award, or the industry in which the Award is to apply.
6. It is not in the Public Interest for an Award to issue which seeks to duplicate coverage of classification sought to be covered by other unions or in awards that may already apply to employers against whom this application is directed.
7. It is not in the Public Interest for an Award to be made which as a consequence may cause demarcation disputation and industrial disruption to occur. It has been recognised by this Commission that such a situation is undesirable in the public interest: see *Dampier Salt (Operations) Pty Ltd v AWU* no. 1359 of 1990, Gregor, C.
8. It is not in the Public Interest to create an Award that would have the effect of creating uncertainty, disparity and confusion between employees doing similar work in identical locations.
9. It is not in the Public Interest for an Award to be made which would have the effect of restructuring the operations of the industry and increasing costs. This would be detrimental to the Economy of Western Australia as a whole as well as persons employed directly in the industry.
10. It is not in the Public Interest for an Award to be made which would create confusion between federal forms of regulation and the proposed award.
11. It is not in the Public Interest for an Award to be made which would remove any of the advantages and flexibilities as to work life balance, lifestyle choices, family responsibilities and other flexibilities currently enjoyed by employees within the labour hire industry. Labour hire employees can elect whether to accept an engagement or not and are able to pick and choose their work, and whom they work for and when. By comparison employees of a host company don't have the right to reject work offered to them by their employer.
12. It is not in the Public Interest for an Award to be made where there has been no demonstrated industrial disputation over terms and conditions of employment offered in the industry.

17 Dr Richard Leigh Curtain gave evidence on behalf of the employers represented by Mr Watson. Dr Curtain gave his evidence-in-chief in a written statement of evidence in which he stated that he is currently the principal of Curtain Consulting, a position he has held since around October 1993. Curtain Consulting is a consultancy that specialises in public policy and research, particularly in the area of skill formation, labour markets and workplace change. He holds a Bachelor of Arts from La Trobe University (majoring in Sociology), a Master of the Arts (majoring in Sociology) from the State University of New Jersey, United States of America and a PhD from the Australian National University in Geography.

18 Dr Curtain reviewed the Amended Schedule B filed in the Commission on 16 July, 2004 and was asked to provide a statement by the members of the Recruiting & Consulting Services Association ('RCSA'), involved in this matter to report on the results of a survey of employment services companies in Australia, undertaken by the RCSA ('RCSA survey') in February and March 2004 and also to provide a perspective on the employment services industry in Australia.

19 Dr Curtain has worked as a researcher, policy analyst and consultant for more than 30 years. Analysis of labour markets and unemployment was a focus of his doctoral thesis at The Australian National University in 1980, his subsequent research activities as a Postdoctoral Fellow in the Institute of Advanced Studies at The Australian National University in 1983 and with the Commonwealth Government's Bureau of Labour Market Research as a Principal Project Officer from 1984 to 1986. In 1990 – 1991, he worked as an Associate Professor in the National Key Centre in Industrial Relations, Graduate School of Management, Monash University. From around 1994, his main focus of research and policy analysis activities has been on identifying and proposing ways to address the obstacles young people on leaving full time education face in getting access to decent work. In March 2004, he completed a three-year term as a member of the Education and Training Statistics Advisory Group of the Australian Bureau of Statistics. For each of 1999, 2000, 2001 and 2003 he undertook research for and prepared a report analysing labour market statistics in relation to young people using official statistics from the Australian Bureau of Statistics' Labour Force Survey and data from the Paris-based Organisation for Economic Cooperation and Development (OECD). The reports were commissioned by the Sydney-based Dusseldorp Skills Forum. In December 1996, he published a report to the Australian National Training Authority titled *Meeting the Training Needs of Flexible Workers*.

20 In relation to defining temporary or on-hired workers, Dr Curtain testified in his written statement of evidence that there is a growing body of academic research from Europe and the USA into the emergence of the temporary employment services market and its role in the operation of the labour market more generally. He referred to Neugart and Storrie (2002) who define a 'temporary agency worker' as employed by the temporary work agency and, by means of a commercial contract, is hired out to perform work assignments at a client firm. This definition, he says is used in the context of describing the nature of a temporary agency worker in European Union economies and is analogous to the definition of a temporary or on-hired employee in Australia. Dr Curtain says it is important to state that in Australia, there appears to be little statistical research on the firms who employ or otherwise engage people and then on-hire them to client organisations. He is aware of the ABS

publications *Employment Services, Australia* 1998-99 and 2001-02, but says that other than this statistical profile there is little published statistical research on the nature and extent of the employment services sector in Australia.

21 Dr Curtain says employment services as an industry or service sector has grown significantly between 1998-99 and 2001-02 [ABS 2003 (8558.0)]. Total income generated by employment services organisations increased by 31 per cent over these 3 years. At the same time, the total number of organisations providing employment services increased by 29 per cent. This growth in employment services has taken place during a period of good economic and employment growth in the Australian economy. Dr Curtain points out that the ABS estimates that 290,115 employees were on-hired through agencies in the year to June 2002. This represents 3.1 per cent of total employment at that time. When considering this figure he says it is important to assess how the proportion of the workforce that is on-hired compares with the situation in other countries' labour markets and economies. Australia's economy is an open one operating in a highly competitive world. The flexible production systems and supporting labour market strategies adopted by Australia's trade exposed firms are shaped by the nature of the competitive conditions within which these firms operate.

22 Dr Curtain prepared Table 1 below which presents data comparing the size of Australia's on-hired workforce with the size of that workforce in the European Union and the USA for the years 1999-2000. The Australian data in Table 1 refers to a survey conducted in June 1999. The European data refer to 1999 and the US data refer to 2000. The comparison shows that Australia is not alone in having employment services providers account for a significant proportion of total employment. In every member State of the European Union, except Greece where it is illegal, temporary agency work has at least doubled during the 1990s, and in Scandinavia, Spain, Italy and Austria, it has increased at least five-fold. By the end of the decade it accounted for 1.3 percent of the stock of employment in the EU (Storrie 2002). He says the United States has also seen more than a doubling of agency employment in the 1990s, from 1.2 percent to 2.6 percent (Houseman et al 2001).

17. Table 1

Proportion of employment gained through employment services agencies, EU 1999, USA, 2000 and Australia 1999

Country	Per cent of total employment	Country	Per cent of total employment
Netherlands	4.0	Spain	0.8
Luxembourg	3.5	Sweden	0.8
France	2.7	Austria	0.7
USA	2.6	Denmark	0.7
UK	2.1	Germany	0.7
Australia	1.8**	Finland	0.6
Belgium	1.6	Ireland	0.6
EU	1.4	Italy	0.2
Portugal	1.0	Greece	0.0

Sources: Storrie, D, 2002, Temporary Agency Work in the European Union, European Foundation for the Improvement of Living and Working Conditions, Dublin, Table 3, p 28; Houseman, S., A. Kalleberg, and B. Erickcek, 2001,'The role of temporary help agencies in tight labor markets,' Upjohn Institute Staff Working Paper No. 01-73 cited in Neugart, M and Storrie, D; 2002, 'Temporary work agencies and equilibrium unemployment' Program for the Study of Germany and Europe Working Paper No. 02.6; Center for European Studies, Harvard University. Australian Data refer to June 1999 and are from ABS, Forms of Employment, November 2001, Cat. 6359, and Labour Force Australia, Total Employed Nov 2001; Cat 6203.0.

23 Dr Curtain says recent published research provides insights into the reasons for the recent growth in the use of employment services agencies and on-hired workers in both European and United States economies. In the United States of America ('USA'), the employment services industry grew at a rate of 11.2 per cent annually in the period 1979-1995. During this period, the extension to employees of protections against the common law doctrine of 'employment at will' in 46 of the States in the period 1979 to 1995 has causally affected the growth of the employment services sector in that same period, perhaps by as much as 20 per cent of that growth. Employers have responded to the increase in externally imposed termination costs (imposed by the spread of protections against the 'employment at will' doctrine), by outsourcing positions requiring the least firm-specific skills and not those with the highest expected termination costs (Autor 2000). Dr Curtain contends, however, this factor is likely to be much less important in continental European labour markets where job protection legislation has long been a feature of employment arrangements. An alternative explanation for the growth in employment services industry in these labour markets, more applicable to these countries, has been suggested in terms of the facilitative, intermediary role of employment services companies in the labour market (Neugart and Storrie 2002). He suggests that the use of employment services agencies has grown in Europe because of the efficiencies they offer in placing workers in client firms. Economies of scale are achieved with an employment services agency managing key aspects of the employment relationship such as recruitment and undertaking some functions of a personnel department, and in turn the client firm achieves efficiencies and lower costs due to better matching of people to what is required.

24 Dr Curtain says in the Australian context, a good example of the intermediary role performed by employment services providers is the role of group training companies. The particular labour market efficiency they provide is to give apprentices and trainees access to workplace-based training without imposing the burden on individual employers of providing up to a four-year employment contract for learning employees. The group training company remains the employer of the apprentice or trainee and arranges work placements with client employers for an all-up fee. In this way, the risk of not having ongoing employment for the apprentice or trainee is spread across a sector or a region rather than borne by a single enterprise.

25 Dr Curtain says employment services firms, according to Neugart and Storrie (2002), can play a valuable macro economic role as intermediaries by processing the large amount of information available to those both offering and seeking jobs (such as internet and newspaper advertising).

26 Dr Curtain says it has been suggested that there are three main options for regulating employment services (Neugart and Storrie 2002). These are;

(a) regulating the sector in which the client organisation seeking to use a employment services agency is located;

(b) regulating the assignment; or

(c) regulating the contractual relationship between the on-hired worker and the employment services agency.

27 Dr Curtain says the first option can vary in how the regulatory function is set up. The function could be performed by the employment services industry itself setting up a voluntary code of practice relevant to a particular industry supported by a monitoring and reporting process by an independent third party. Another option is to the use of an official registration process and government-supervised monitoring process. At the extreme, this option could include the banning of agency work in particular industries. He says the second option is to regulate the assignment at the client firm. This could consist of placing restrictions on the duration of the assignment or on the reasons for using employment services. The third option is to focus on the nature of the relationship between the worker and the employment services agency. This can refer to whether the on-hired worker is an employee of the agency or engaged under some other form of contractual arrangement.

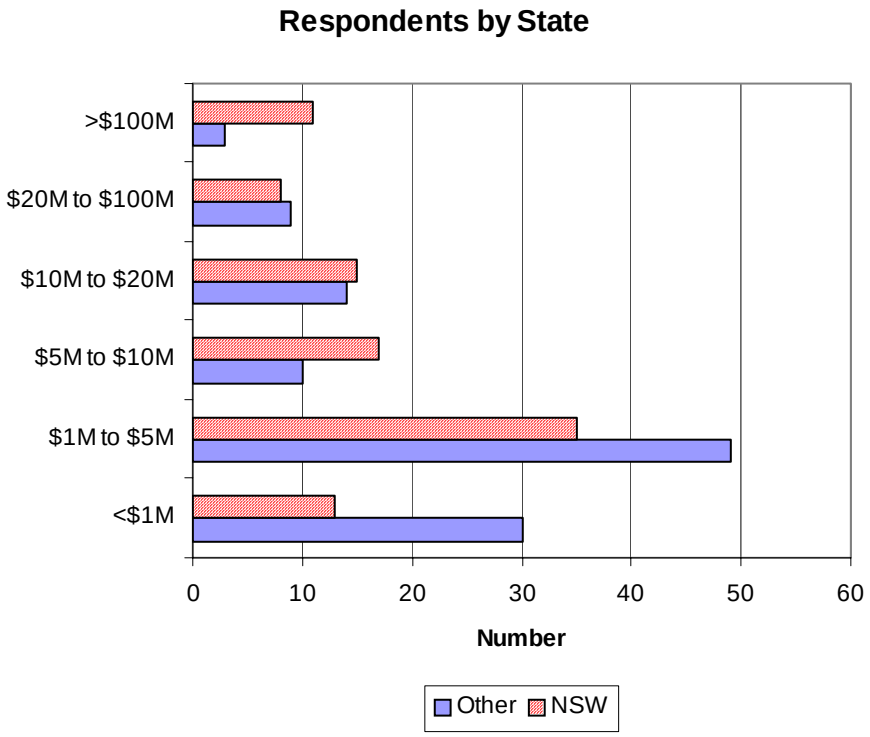
28 Dr Curtain says that most continental European countries, in particular France, Belgium, Italy, Spain and Portugal, have detailed regulations regarding labour hire for both the sector and the assignment. On the other hand, UK, Ireland, Sweden, Finland and Denmark have practically no regulation of the sector or assignment (Storrie 2002). According to Neugart and Storrie (2002), the trend in Europe is moving away from the regulation of the assignment and sector towards focusing on the quality of the employment relationship for the worker at the agency. In Scandinavia, after a radical deregulation of labourhiring arrangements in the mid-1990s, the focus shifted to ensuring that the on-hired worker has an employment contract with the employment services agency. The Dutch legislation of the late 1990s removed practically all regulation of the assignment and the sector but clarified that the agency worker did have an employment contract at the agency, which with time gives increased employment protection. After 18 months with a single user enterprise or 36 months with various enterprises, on-hired employees are entitled to an open-ended contract (that is, permanent employment) with the employment services agency (Storrie 2002, p 25). Dr Curtain contends there are the interests of four parties to consider: the employment services organisations, the workers engaged by the employment services organisations, the client organisations making use of on-hired workers and the permanent workforce of the client organisation. He says the focus of this statement from this point on is primarily but not exclusively on two of these parties: the employment services organisations and the workers they engage.

29 Dr Curtain reviewed an RCSA Survey which presents data from responses by employment placement services in Australia. In that survey employment placement services are defined as on-hired employee services, individual sub-contracting and/or recruitment services. He says this survey is not intended to be representative of the entire employment services industry in Australia but only as representative of RCSA members as only RCSA members were asked to complete the survey. Some 210 RCSA members responded to the survey, which represents a 13 per cent response rate. Dr Curtain contends that this response rate means that the survey results are not representative of all RCSA members, the number of respondents to the survey is sufficient to provide meaningful statistical information.

30 On 18 March 2004 Dr Curtain was provided with the results of the RCSA Survey by Mr Brent Taylor, Chief Researcher of the Values Bank Research Centre. For the purposes of the RCSA Survey, a "casual employee" was defined as a person who is paid a loading as a part of their ordinary wage rate.

31 Also for the purposes of the RCSA Survey, an on-hired employee was defined as a person employed by an employment services organisation whether on a full-time, part-time, casual or other basis, who is then on-hired to a client organisation to perform work or services for that client.

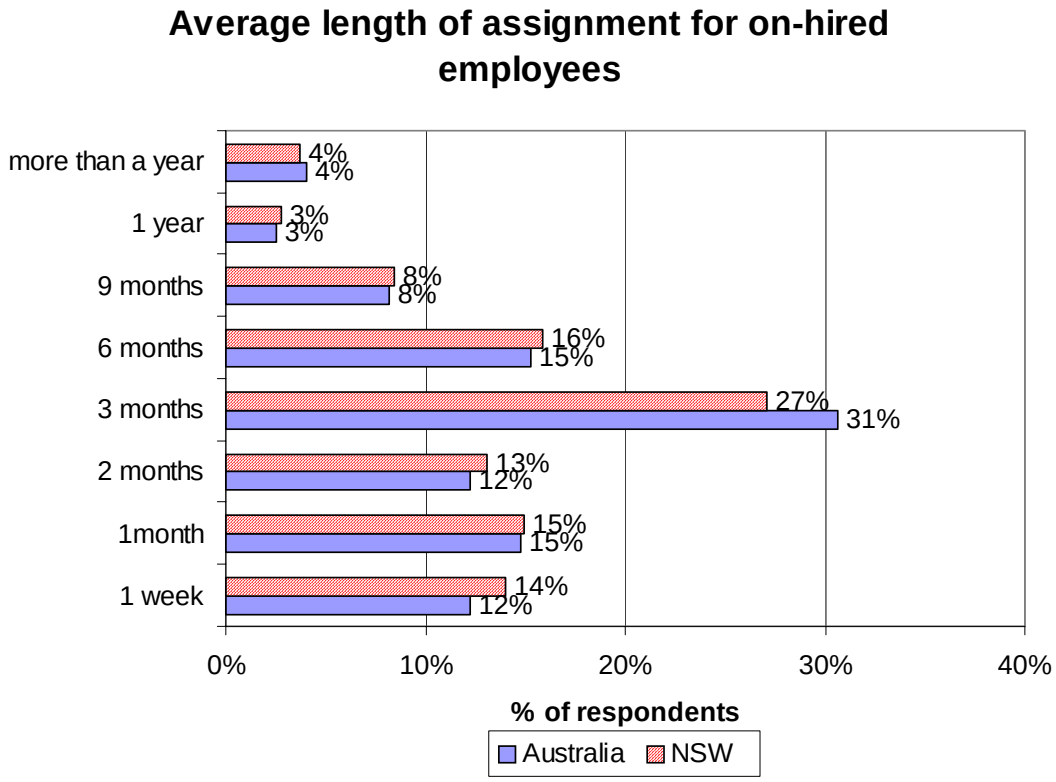
32 Dr Curtain says employment services activities are an important component of most employment services organisations surveyed. On average, over half of an employment services firm's revenue (53 per cent) is obtained from on-hired employee services, just over a third of revenue (35 per cent) comes from recruitment services, 15 per cent comes from contracting services and 5 per cent comes from employment consulting services. For the employment services firms surveyed, labour costs account for on average two-thirds of total costs. The average number of on-hired employees is 334. The average number of contractors is 66 and the average number of direct employees is 56. The demand for employment services for all occupations and types of employees is increasing or stable. Most in demand are: professional/technical on-hired placements, 'other' white collar permanent placements, professional/technical permanent placements, 'other' white collar on-hired placements, blue collar on-hired placements and professional/technical individual subcontractor placements. Most employment services organisations are small employers [ABS 2003 (8558.0)]. Some 59 per cent of employment services organisations had four or fewer persons directly employed, generating an average income of $524,600 per person directly employed. Another 20 per cent of organisations had direct employment of 5 to 9 persons. Only 1 per cent of all organisations had direct employment of 100 or more persons, generating an average of $308,100 per person directly employed. Dr Curtain provided the following table prepared using information from the RSCA survey:



Source: RCSA Secure Employment Test Case Survey, March 2004, Question 2.

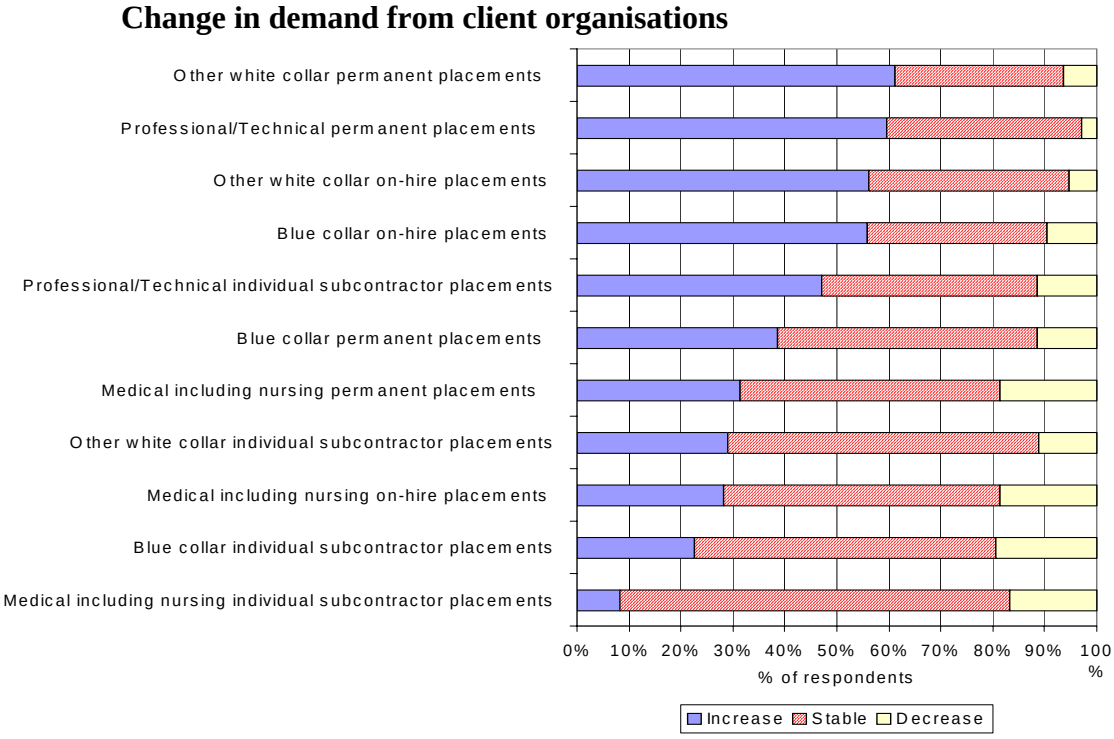
33 Dr Curtain contends the vast majority of those placed by employment services organisations (91 per cent) are themselves employees of the employment services organisation with the remainder being subcontractors. All blue collar employees and most white collar employees are covered by conventional employment arrangements, varying from State and Federal industrial awards, to State enterprise agreements and Federal certified agreements or Australian workplace agreements. In terms of employment arrangements for on-hired employees, the firms surveyed have on average 70 per cent or more of their on-hiredemployees employed as casuals. In terms of the number of hours worked, on-hired employees employed as permanents are more likely to work full time (on average 81 per cent work full-time). On-hired employees who are employed as casuals are less likely to work full-time (on average 62 per cent work full time).

34 Dr Curtain is of the opinion that the RCSA survey shows most of the assignments on-hired employees undertake are short-term. On-hired employees of the firms surveyed have an average assignment of 4 months. The most common assignment period is 3 months. However, 30 per cent of on-hired employees work on an assignment for 6 months or more. However, only 15 per cent work on an assignment for 9 months or more. Dr Curtain provided the following table prepared from information from the RCSA survey.



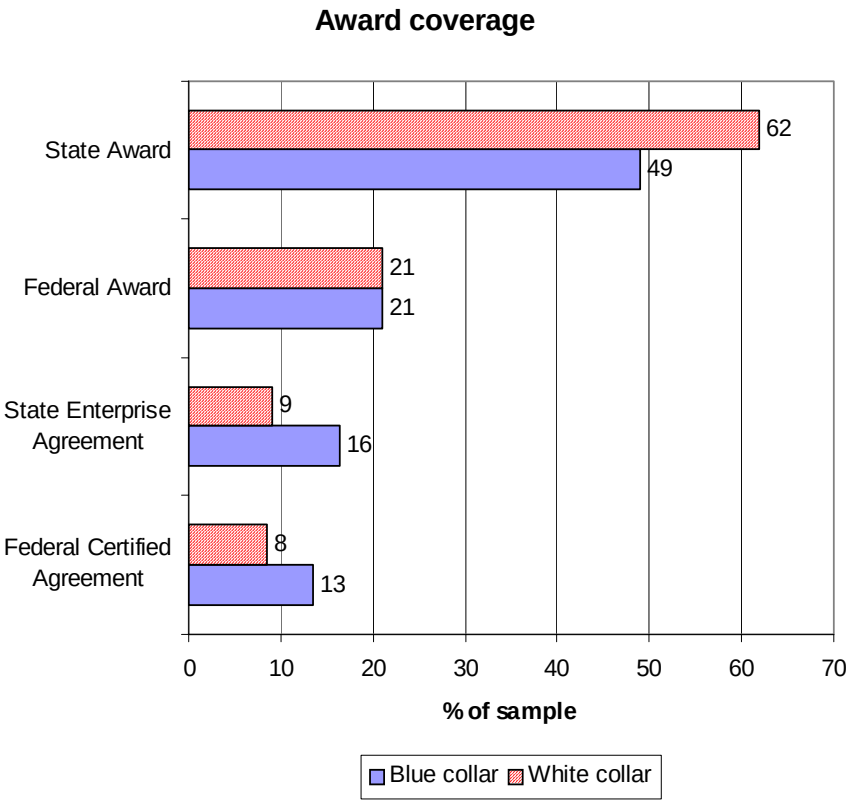
Source: RCSA Secure Employment Test Case Survey, March 2004, Question 8.

35 Dr Curtain says the RCSA survey shows that more on-hired employees employed with permanent status worked 35 hours or more (81 per cent) compared with casual on-hired employees (61 per cent). The changing level of demand experienced by the firms surveyed for different occupational groups in order of increasing demand is shown in the chart below. For all occupations and types of employees demand is increasing or stable. Most in demand are: professional/technical on-hired placements, 'other' white collar permanent placements, professional/technical permanent placements, 'other' white collar on-hired placements, blue collar on-hired placements and professional/technical individual subcontractor placements. Dr Curtain provided the following table prepared from information from the RCSA survey:



Source: RCSA Secure Employment Test Case Survey, March 2004, Question 13.

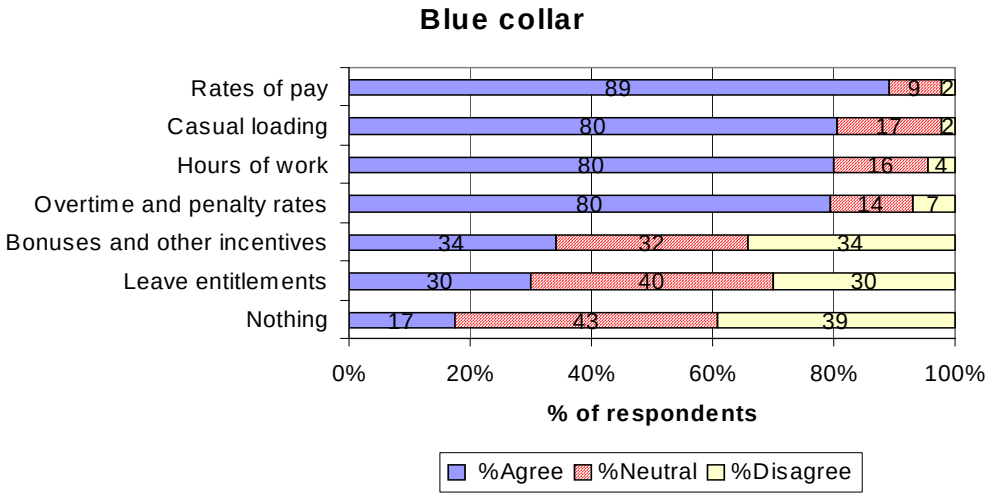
36 Dr Curtain sets out the award coverage of on-hired employees in the following chart prepared from information from the RCSA survey. He says half of the blue collar and 62 per cent of the white collar on-hired employees are covered by State Awards. A fifth (21 per cent) of both blue collar and white collar employees are covered by Federal awards.



37 Dr Curtain says other useful information about the inferred preferences of on-hired casual employees is presented above. He says responding firms believe that over half of their on-hired employees (56 per cent) have other options in terms of being registered with another organisation. Just less than half of on-hired employees are believed to be placed with another client at the conclusion of their current assignment (46 per cent). A quarter of on-hired employees are believed to move from temporary to a permanent placement with the client. A fifth of on-hired employees (22 per cent) are believed to work with more than one client organisation over a week or other regular working cycle. RCSA respondents in NSW (the only firms asked this question) indicated that on average 78 per cent of their blue collar and 79 per cent of white collar on-hire employees receive the same or better rates of pay as those paid by client organisations. These results suggest that in most cases involving RCSA members, labour hire employees are not paid lower rates of pay than the existing workforce of the client organisation.

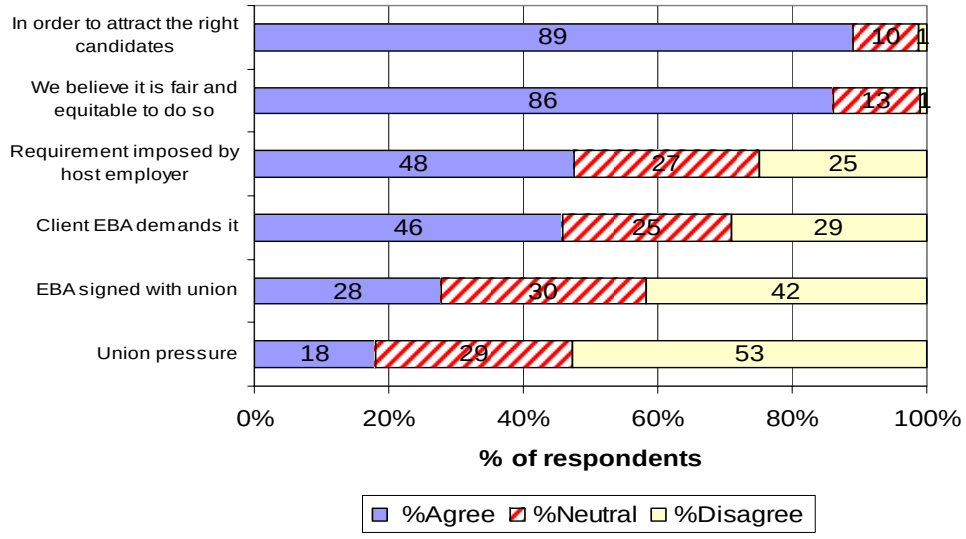
38 RCSA respondents in NSW were asked to nominate which aspect of a client's terms and conditions do they typically match or better for on-hired employees. For blue collar employees, 80 per cent or more believe they offer equivalent or better conditions in relation to rates of pay, casual loading, hours of work, overtime and penalty rates. The same pattern applied to the pay and conditions of white collar on-hired employees. However, in relation to bonuses and other incentives as well as leave entitlements, only a third or less believe that they typically match clients' terms and conditions in these areas. Dr Curtain provided the following chart, prepared from information from the RCSA survey:

Client's terms and conditions typically matched



39 Dr Curtain is of the opinion that costing cutting in terms of pay and conditions is not major factor in the labour hire arrangements of the NSW RCSA members surveyed. He says the most important reasons given by RCSA members for matching pay and other employment conditions of a client organisation are market related. The main reasons given are 'to attract the right candidates' (89 per cent agreed with this statement) or 'We believe it is fair and equitable to do so' (86 per cent agreed). Somewhat less important are formal requirements such as contract or other condition imposed by host employer (48 per cent agreed) or a client's EBA demands it (46 per cent). Union pressure or a union negotiated EBA are the least important reasons given (18 and 28 per cent agreed respectively). Dr Curtain provided the following table, prepared from information from the RCSA survey:

Reasons for matching rates of pay or other employment conditions



40 Dr Curtain concluded that this analysis initially highlighted the valuable macro economic role employment services firms play as intermediaries in the labour market. He says this role makes it easier for enterprises to take on new employees and for disadvantaged job seekers. He also says the employment services agencies play a valuable macro economic role by overcoming skill shortages. This is done by matching jobs with available skills in a highly cost efficient way. For many enterprises, the value gained from employment services is not to lower costs through paying lower wages. The value to the enterprise may be more to do with lowering the costs and the risks associated with an in-house selection and recruitment function. For many enterprises, a reversible selection and recruitment function offered by an employment services agency reduces the risk associated with hiring new employees, these risks including potential termination costs and litigation such as unfair dismissal claims, and other risks such as not hiring the candidate who is the best match for the job. Temporary work for many is a valuable entry point to paid work, particularly for those in some way disadvantaged compared with others in the labour market. This disadvantage can apply in terms age (too young or too old), low levels of education attainment or the possession of skills in low demand or more likely, a combination of these traits. Employment services arrangements managed through an intermediary can potentially offer more support and safeguards than other forms of temporary work.

41 When Dr Curtain was cross-examined about the total number of companies who participated in the RCSA Survey, he said that there are approximately 1600 members of RCSA and that 13% of those members responded to the survey questions. He said that although he does not know what proportion of Western Australia labour hire employers responded in relation to the proportion of responses received from other labour hire industry employers in other states, he says it was his view that the

responses received to the survey questions would be equally applicable to Western Australia as in other States. Further, it is his view that the conclusions reached by him would also apply in Western Australia. He says that the 13% response was adequate and whilst the response cannot be said to be a representative result of the views of the members of RCSA, the percentage of the responses received is enough to say that they are indicative of traits in the industry, rather than definitive. He also said that there was a 31% response by RCSA members who operate in New South Wales.

42 Dr Curtain conceded that if you surveyed employees of labour hire employers in the labour hire industry the results of the survey produced could be different as some of the results are based on the summary impressions of one person who responded on behalf of the members of the RCSA who participated in the survey. Dr Curtain also conceded that he made no independent examination of the award coverage of labour hire industries in Australia. When pressed, he said he was unable to say that some "policy changes" should not be made to give security to those employed by labour hire agencies in Australia.

Evidence and Submissions made on behalf of Carey Mining and Others Represented by the Chamber of Commerce and Industry of Western Australia (Inc)

43 Mr Borlase, on behalf of Carey Mining and other employers he represents made the following submissions why the proposed award should not be made in the public interest:

1. It is not in the public interest for an award to be made contrary to the First Award Principle as enunciated in the General Order dated 3 June 2004 – Application 570 of 2004.
2. It is not in the public interest for an award to be granted to a union which does not have constitutional coverage over classifications sought to be covered in the Award or employers in the industry the Award is sort to apply to.
3. It is not in the public interest for an award to issue which seeks to duplicate coverage of classifications sought to be covered by other unions or in awards that may already apply to employers against whom this application is directed.
4. It is not in the public interest to grant an award in this industry which as a consequence may result in demarcation disputes and industrial disruption.
5. It is not in the public interest to grant an award that would create disparity between employees doing similar work in identical locations.
6. It is not in the public interest to grant an award which would have the effect of restructuring the operations of the industry and increasing costs. This would be detrimental to the economy of Western Australia as a whole as well as persons employed directly in the industry.
7. It is not in the public interest to grant an award which would create conflict and confusion between existing Federal forms of regulation and the proposed Award.
8. It is not in the public interest to grant an award that would create uncertainty and lack of clarity as to which provisions should apply where awards already exist that may apply to employers and employees sought be covered by this application.
9. It is against the public interest to grant an award that would have a significant negative economic impact on the industry and WA economy.
10. It is not in the public interest to grant an award that would remove many of the advantages and flexibilities enjoyed by persons employed in the industry.
11. It is not in the public interest to grant an award where there has been no demonstrated industrial disputation over terms and conditions of employment offered in the industry.

44 In support of the employers' contentions, Mr Borlase tendered into evidence a number of documents, including a report of the *Labour Hire Task Force – Final Report of New South Wales.*

45 In 2000 a Labour Hire Task Force was established by the New South Wales (NSW) government. The terms of reference charged the Task Force with the responsibility of examining the non-standard working arrangements surrounding the labour hire industry. Arising out of the terms of reference the Task Force were asked to examine the desirability of facilitating an industrial agreement specifically for the labour hire industry or applying their prevailing conditions of the host employer to labour hire workers. They were also asked to consider options which ensure the rights of workers of the labour hire firm and workers employed by the host company, to organise and bargain effectively. The Chair of the Task Force was the former President of the Australian Council of Trade Unions, Ms Jennie George. The Task Force membership was comprised of senior representatives of:

Labor Council of NSW (LCNSW)	Australian Business Limited (ABL)
Australian Workers' Union (AWU)	Australian Industry Group (AIG)
Electrical Trades Union (ETU)	Recruitment and Consulting Services Association (RCSA)
Australian Liquor, Hospitality and Miscellaneous Workers Union (LHMU)	Master Builders' Association (MBA)
Construction, Forestry, Mining and Energy Union (CFMEU)	Employers' Federation of NSW (EF)

46 Because of the diversity of views of the members of the Task Force, no recommendation was made by the Task Force on the issue of the desirability of facilitating industrial instruments specifically for the labour hire industry or applying the prevailing conditions of the host employer to labour hire workers.

47 Throughout the report, the Task Force made a number of observations in relation to the structure and function of the labour hire industry in NSW. Mr Borlase contends on behalf of the employers that he represents that the findings and observations made by the Task Force in their final report can be applied to the Western Australian labour hire industry.

48 In Chapter 2, under the heading "*The Nature, Extent and Growth of Labour Hire*" at pages 15 to 17 of the final report, the Task Force makes the following observations:

> "Labour hire is not a new phenomenon. It has been part of economic activity since at least the early 1950's. Its primary function was to provide supplementary labour during peak periods in an organisation's business cycle. However it has experienced rapid growth over the past decade. The number of labour hire companies in operation in NSW has increased significantly, as have the number of employees engaged by them.

Possible reasons underpinning the growth of labour hire

Adecco and AIG attribute the growth to various factors including:

- Corporate restructuring to concentrate on core business
- Increased flexibility to meet work fluctuations
- Greater competitive pressures as a result of globalisation
- Outsourcing of functions in the private and public sectors
- Extended hours of operation
- Fast changing technology
- Growth of new industries eg call centres, information technology
- Flexibility for workers to choose where and when they work.

The trade union movement also attributes the growth of labour hire principally for cost factors, and notes that the main way of achieving cost reductions is by reducing employment related costs such as wages and conditions.

(a) Flexibility

The submissions and presentations indicate that the biggest attraction of labour hire arrangements to employers is flexibility.

Labour hire allows businesses to access a large supply of suitable labour to meet peaks and troughs of production, to outsource for specialist skills that may be required from time to time, to cover staff on leave and provides the opportunity to assess individuals before offering permanent employment.

A large number of workers enjoy the flexibility and variety that temporary work provides. For example temporary work can provide a means to returning to the workforce after an absence, or a way of combining work with family responsibilities or lifestyle choices by choosing to only work certain hours or days. RCSA estimates that 20% of labour hire workers work on a short-term basis to supplement income but are unable to commit to full time employment.

…

(b) Risk management

Another attraction of labour hire is it allows business to devolve to risk associated with direct employment.

Small business is particularly interested in devolving the risk associated with unfair dismissal. Both Mr John Buchanan and ABL make the point that most employers do not try to "rip off" their workers or engage in negative cost cutting.

…

(c) Employment opportunities

Labour hire provides employment opportunities to the structurally unemployed for whom regular employment is not available. This provides individuals with the opportunity to gain work experience, new skills and eventually secure permanent work. RCSA estimates that 55% of labour hire workers look to temporary labour hire arrangements as a bridge to full time employment.

…

(d) Cost factors

The trade union movement attributes the growth of labour hire primarily to cost factors, and notes that business can achieve cost reductions by reducing, or in some cases deliberately avoiding, the obligations that arise out of the traditional employment relationship. That is, some opportunistic labour hire companies undercut basic standards to obtain a commercial advantage.

The unions' view is that cost savings are achieved by:

- Increase in precarious employment and diminished job security.
- Failure to pay prevailing award or agreement rates.
- Standing down employees without pay between jobs during low workload periods.
- Payment of cash for overtime.
- Treating employees as subcontractors and paying employees as casuals.
- Transfer of training costs.

which all fall disproportionately on the worker and the community.

A substantial saving is also achieved through the use of labour hire employees in the area of on-costs such as workers' compensation premiums, leave, training, pay roll tax, administration termination costs.

(e) Other motivating factors

Other motivations for business using labour hire include:

- time factors eg immediate access to labour;
- reduced administrative costs such as payroll, superannuation, and
- improved cash flow (labour hire invoices are subject to the credit cycle
- whereas wage payments are weekly or fortnightly) ;
- the expertise and reach of labour hire companies when sourcing
- potential workers;
- an industrial strategy by employers to reduce union presence in the workplace or to introduce change outside of the established processes of consultation and negotiation. The ACTU states that the replacement of permanent employees with labour hire employees is often seen as a means through which a more insecure, compliant and more affordable workforce can be achieved or indeed used to replace an existing workforce.15 However, large labour hire companies state that they recognise the rights of workers to join or not join a union."

(*Labour Hire Task Force - Final Report pages 15, 16, and 17*)

49 In relation to the average length of labour hire arrangements, the Labour Hire Task Force states:

> "RCSA estimates that 25% of labour hire workers work for more than 2 years in a labour hire arrangement, typically independent contractors in the professional markets.
>
> RCSA states that the average length of a labour hire assignment is six weeks.
>
> The AMWU contends that in the manufacturing industry the trend is for labour hire workers to be placed for increasingly lengthy periods. Based on statistics of periods of casual employment by Manpower and Skilled Engineering workers, AMWU contends that although there is a concentration of numbers of casual employees for short periods of less than 1 month, 41% of casual labour hire workers are engaged for longer than 3 months. AMWU draws on figures from a KPMG survey of labour hire companies in the manufacturing industry to illustrate that whilst the predominant type of labour hire placement is of short term duration of less than 3 weeks, 80% of total contract hours are in placements of 1 month or more.
>
> ACTU contends that employment through a labour hire firm is no longer almost exclusively temporary or short term. Employment via labour hire firms can be both long and short term and extends to all industries within the public and private sectors. Over ten per cent of those employed by labour hire firms have been placed with the one client employer for more than two years."

(*Labour Hire Task Force - Final Report page 24*)

50 As to the extent of coverage of labour hire employees by Federal and State awards, on pages 27 and 28 of the Labour Hire Task Force report the Task Force observed:

> "Skilled Engineering state that their current numbers reflect a 30:70% ratio of Federal to State coverage for award employees and over 90% of their NSW employees are protected by a formal industrial instrument.
>
> Many of Manpower's workers work in industries bound by Federal awards. In NSW the split of Federal versus State award application is approximately 30:70.
>
> Kelly Services estimate that 95% of their temporary staff are employed under either a Federal or State industrial instrument with the majority paid above award minimum rates. Part of the remaining 5% are paid under client rate arrangements due to the circumstances of the assignment or client.
>
> A survey by AIG of 6 major Labour Hire companies covering some 18,275 employees indicates that 47.5% of employees fall into the Federal jurisdiction and 45.4% in the NSW jurisdiction."

(*Labour Hire Task Force - Final Report pages 27 and 28*)

51 Mr Borlase also referred to a research paper released by the Economics, Commerce and Industrial Relations Group of the Australian Parliament. The research paper was written by Steve O'Neill and published on 8 March 2004. The paper is titled "*Labour Hire: Issues and Responses*" (*Research Paper No. 9 2003-04; www.aph.gov.au/library*). At page 2 of the paper Mr O'Neill states:

> "The most recent Australian Bureau of Statistics data on number employed through labour hire arrangements suggests that 290,100 employees were 'on-hired' through agencies in June 2002 and 162,000 workers were paid by labour hire firms in November 2001 (almost doubling from 84,300 some three years earlier). The Australian Council of Trade Unions (ACTU) estimates that one in five workplaces uses labour hire, while in the largest workplaces (by employment) more than half use labour hire agencies. While reasons for the growth of labour hire vary, it appears that companies will turn to employment services after their own company's internal personnel management or human resource management functions have been reduced or contracted out.
>
> The Bureau of Statistics estimates that the value of the employment services industry in 2001-2 was $10.2 billion, although it notes that the industry generated a 30 per cent increase in income over the three years 1998-99 to 2001-02. The growth of this industry has generated concerns for Labor governments in particular, as unions have put political and industrial demands on governments to curb the use of labour hire. Also, the recent debate over the casualisation of the workforce is one manifestation of the growth of labour hire."

52 Mr Borlase says that it is commonly accepted that as a rough rule of thumb the Australian economy is valued at $800 billion and Western Australia contributes 10% or $80 billion to the national economy. Consequently Mr Borlase says that if then 10% rule is applied to the ABS data then it can be said that in 2001-02 25,720 people were employed in the labour hire industry in Western Australia. It is conceded, however, that not all labour hire employees were employed in classifications which are covered by the union's constitutional coverage.

53 Mr Borlase referred to page 21 of the Task Force report in which a KPMG survey of 200 labour hire companies in NSW, Victoria, Queensland and Western Australia showed that labour hire workers represent:

12% of the mining industry;

19% of the manufacturing industry;

19% of the construction industry;

6% of the wholesale/retail industry;

9% of the transport industry;

5% of Government administration; and

5% of the communications industry.

54 Mr Borlase says that these figures in respect of Western Australia alone may not be correct as the Western Australian economy has a much smaller manufacturing industry than New South Wales or Victoria and Western Australia and Queensland have a much larger mining industry than a manufacturing industry.

55 In Chapter 3 under the heading "*Best Practice and Adverse Aspects of Labour Hire*" at pages 32, 33, 34 and 35, the Task Force states as follows:

> "(a) Best practice
>
> Examples of best practice by reputable labour hire companies include:
>
> - Adherence to high standards of ethics probity and corporate governance under strict codes of professional conduct through membership of the RCSA.
> - Adherence to all legislation including workers compensation, occupational health and safety, anti-discrimination, equal employment opportunity, taxation, superannuation and industrial legislation. These responsibilities require labour hire companies to :

- effect workers compensation insurance with appropriate industry classifications;
- ensure that the work environment is safe and free from harassment;
- determine the existence of adequate supervision and directions provided at the client workplace;
- deduct income tax and provide group certificates;
- ensure that the employee has the requisite training, qualifications, skills and competence to perform the assignment; and
- comply with all conditions and make payments in accordance with the relevant industry award or industrial agreement.

…

- A survey of over 200 of its employees by Skilled Engineering found that the most advantageous aspects of labour hire work were: (1) variety of Work (2) Job Flexibility (3) Availability of Work (4) Employee Flexibility (5) Health and Safety standards (6) Ongoing Work Opportunities (7) Access to Representation (8) Access to Training (9) Wages and Conditions (10) Security of Income (11) Employee Morale.

…

(b) Non-compliance or worst practice

The Skilled Engineering survey of employee views (refer previous page) found that the least advantageous aspects of labour hire work were employee morale, security of income, wages and conditions and access to training and representation. However, Skilled notes that it does not subscribe to the position that working for a labour hire company reduces job security.

…

Whilst submissions to the Task Force suggest that the "top end" of labour hire companies are reputable, some at the "bottom end" are not.

The RCSA states that some labour hire companies ("sunrise labour hire companies") are intentionally trying to contract out of their obligations and social taxes and acknowledges that the low barriers to entry for new labour hire companies allow non-association members to avoid adherence to high standards of ethics, probity and corporate governance, with impunity.

…

- A number of case studies by the AMWU, which focus on the inappropriate conduct of some labour hire agencies such as:
  - Agencies breaching contracts with host enterprises where it has been agreed that any labour hire worker at the enterprise will be paid the same rate as workers directly engaged at the enterprise under an enterprise agreement;
  - Agencies failing to comply with the provisions of the relevant award eg not paying casual loadings or paying rates based on an inappropriate award classification;
  - Agencies breaching legislative requirements eg utilising false or bogus ATO employment declarations, breaches of maximum employee numbers allowed by workers compensations policies."

(*Labour Hire Task Force - Final Report pages 32, 33 and 34*)

56 In Chapter 5 – Term of Reference – Employment Relationship, the Task Force notes, at page 45, that:

"The Honourable Dr J Macken notes that the labour hire worker may be in some doubt as to:

- who is the real employer;
- what award or agreement rate of pay and working conditions he or she can claim; and
- continuity of employment for purposes of leave as some engagements may be as an employee and others as a contractor.

…

There is no doubt that labour hire use has shifted significantly from what was once 'top up/supplementary' labour to an alternate stream of 'employment' with the potential, or actual, exploitation of workers (largely known as 'dependent contractors') who perform employee-like functions.

Professor Ron McCallum has identified the need to move the boundary of industrial law once again but questions the level of regulation that is required. He notes that it is important not to create a 'straight jacket' for business but that regulation should 'follow the contours' of developments.

Professor McCallum suggests a multi-faceted approach, which might include clarifying the definitions of employer and employee in the *Industrial Relations Act 1996*, jointly or independently of each other, adopting a deeming approach, with the consent of the parties, and developing a Code of Practice."

(*Labour Hire Task Force - Final Report pages 45 and 46*)

57 In Chapter 8 – in relation to Site Rates and Conditions, the Task Force sets out the views of the persons they received submissions from and views of members of the Task Force. At page 71 they observe:

"The Task Force was asked to examine the desirability of facilitating industrial instruments specifically for the labour hire industry, or of applying the prevailing conditions of the host employer to labour hire workers.

…

Site rates and conditions

Submission views

A range of views were expressed on this issue but the debate focussed on site rates of pay.

The Labor Co-operative suggests that the law should be amended to make obligatory the payment of the same wages and working conditions to workers sent from labour hire firms to client/host companies as the client/host company's employees, even when such workers may not be directly employed by the client. The right to redundancy payments should also be addressed by legislative enactment.

Adecco states that site rates should apply wherever possible, where it is not possible, the appropriate award or agreement binding on the labour hire company will be applied.

The ACTU's position is that as a minimum, award conditions paid to labour hire employees should be no less than those applying to the host employer. Competition should be based on efficiency not reduced terms and conditions of employment.

…

Kelly Services states that to enforce host site rates for each labour assignment is unnecessary, administratively burdensome and beyond the ability of payroll systems to facilitate. The complexities of pay site rates and conditions should be recognised, particularly in the context of existing awards providing adequate coverage.

Another labour hire company, the Macquarie Business Centre states that labour hire workers should not be supplied on the same pay and conditions as permanent employees because labour hire staff are usually paid more than permanent employees to compensate them for the type of employment they are engaged in.

…

Portability of entitlements

The ACTU's view is that the nature of the labour hire industry is such that the rationale that applied to the instigation of portable long service leave within the building and construction industry is equally if not more applicable to the labour hire industry.

The ACTU recommends a joint union, employer and government working party be established to further investigate such a scheme and notes that in the manufacturing sector of the industry an employee entitlement protection scheme has been established. ACTU believes that the Manusafe Benefits Trust is an ideal vehicle to ensure appropriate payments made to employees within the labour hire industry are protected.

AMWU recommends legislation to create portability of employment entitlements with the labour hire function, specifically long service leave and redundancy, based on the construction industry model. The AMWU believes that a similar scheme must be set up to institutionalise the employment rights of labour hire workers. For example, the nature of labour hire engagements is that long service leave will never be accrued. However workers may remain as labour hire workers for significant periods of time."

(*Labour Hire Task Force - Final Report pages 72 and 73*)

58 At page 74 of their report, the Task Force considered the option of development of industry specific awards/agreements to apply solely to a labour hire workforce and proposed employers and noted at pages 74 and 75 that there was no consensus on any recommendations concerning site rates of pay. At page 75 they observed:

"Labor Council proposes an amendment to the *Industrial Relations Act 1996* to require a labour hire company to pay the rates of pay according to the classification of work at the host organisation performed by a labour hire worker, working alongside the host's existing workforce.

Labor Council also notes that such rates are generally well above minimum award rates. Labour hire workers working in outsourced areas of operation eg contract maintenance should be subject to the award or enterprise agreement, which applies to the company which performs the contract.

MBA advises it does not support legislative change and states that labour hire companies should be respondent to the same awards, agreements and other conditions in the industry in which they operate.

AIG, RCSA and ABL support no change on the basis that current arrangements are satisfactory for labour hire companies and workers to make their own arrangements with regard to the employment relationship. The award safety net provides the minimum legal requirements and workers and employers are free to bargain above the minimum rates and conditions.

While the Task Force was not able to reach consensus on any Recommendations concerning site rates of pay, the Minister's attention is drawn to the view of unions that payment of host company rates of pay for labour hire workers performing the same work alongside host company employees promotes fair and equitable outcomes, consistent with the objects of the *Industrial Relations Act 1996*."

(*Labour Hire Task Force - Final Report page 75*)

59 Mr Borlase, on behalf of the employers he represents, also tendered the submission to the Labour Hire Task Force which was made by the Australian Industry Group ("AIG"). At page 1 of the submission, AIG made the following observations about the recent rapid growth in the industry:

"Whilst the labour hire industry has been established for a long time in Australia, it has grown rapidly in recent years. The reasons for the growth include:-

- corporate restructuring to concentrate on core business
- increased flexibility to meet work fluctuations
- greater competitive pressures as a result of globalisation
- outsourcing in private and public sectors
- extended hours of operation
- fast changing technology
- trend for companies to concentrate on core business
- growth in new industries.

The trade union movement traditionally has been opposed to the concept of labour hire as we understand for the following reasons:-

- the belief that labour hire takes away full time employment
- labour hire employees are in precarious employment
- labour hire employees receive low benefits, and are not protected by industrial instruments
- inadequate treatment in respect of OH&S Workers Compensation and Rehabilitation
- lack of training

Our submission suggests in response to those concerns that in the most part there is either evidence that refutes those concerns or alternatively that there is a lack of evidence that either validates or refutes the concern.

Whilst we believe that the performance of the labour hire industry in the areas of human resources practices is superior to that of industry generally, it is accepted that there are some areas that can be improved."

(*Submission to Labour Hire Task Force – AIG*)

60 AIG in their submission referred to a survey conducted by the AIG which was a survey of six large companies which covered 18,275 employees. AIG submitted that a sample of what occurs in those large companies gives a good snapshot of what is occurring in those companies. AIG acknowledged that what occurs in small companies may be different but they have no data upon which to rely for small companies. They noted that their survey of the six large companies indicated that 96.9% of the industry comprises casual employees and that blue collar employment comprises 49.1% of the labour hire industry. They said that the industry is dominated by the larger companies, who are good corporate citizens, reputable, responsible and professional. They did, however, acknowledge there is a need for improvement in some areas of the labour hire industry.

61 At page 3 of the AIG report, AIG said that the labour hire industry in Australia is valued at $8-10 billion annually. They then went on to submit:

"There are four layers of companies within the industry. In the top layer there are 7 - 8 large companies who have the dominant share of the market. Some of these are large global organisations. There is a second layer of companies that are medium size which are a combination of Australian owned and international companies. The third layer of labour hire companies are either niche businesses which cater for a specific industry (eg. information technology) or small labour hire companies that cover a range of industries. The fourth layer comprises organisations whose core business is in a separate industry and who hire out either frequently or infrequently their own labour to other organisations.

Ai Group is the predominant employer association that provides industrial relations advice and other services to the industry in all states. The Ai Group membership represents a cross section of the 4 layers of the industry referred to above. Ai Group has a substantial membership in the labour hire industry and as such is a core sector to the organisation."

(*Submission to Labour Hire Task Force – AIG*)

62 AIG said at page 4 of their submission that trade unions have traditionally opposed labour hire and their grounds for doing so include a perception that labour hire employees receive lower benefits and are not protected by industrial instruments.

63 At pages 6 to 7 under the heading "Industrial Regulation", AIG submitted:

"A reasonable person who had only a limited knowledge of the industry could be excused from believing that as a result of anecdotal evidence and media articles that labour hire employees were not afforded the same protection of industrial regulation that normal employees enjoy.

The Ai Group survey indicates that 93.2% of employees are covered by a federal or state industrial instrument. Of the 6.8% not covered we have no data on what occupations are covered but we believe that these would be primarily professional categories eg. Information Technology, HR Specialists who may in any event not be covered by an award.

Interestingly only 17.6% of employees have their employment regulated by a federal award only. 47.5% of employees fall into the federal jurisdiction and 45.4% in the NSW jurisdiction. 32.8% of employees are covered by some form of collective enterprise agreement and 56.2% are covered by award only. Whilst in theory this latter group may receive only the protection of the award safety net, in practice given the high prevalence of over award payments and particularly given the high frequency of the observance of client rates, our conclusion is that there would be a very small percentage covered by the award safety net conditions only.

In terms of award coverage, most if not all, of the Ai Group membership are bound by a Federal award because they are either named in their own right or alternatively are bound by the federal awards to which Ai Group is a respondent. Adecco indicate that this is the case in their evidence in the "Metal Casual Case" where Mr Hartig states:

> 'Adecco is a respondent to many Federal awards by virtue of its membership of the Australian Industry Group. Further Adecco is a named respondent to some Federal Awards (for example the Transport Industry Award).'

Ai Group is a party to some 85 Federal industry awards and therefore any of our members (labour hire or otherwise) if they are operating in the specified industry are bound by the Federal award.

In NSW where our members are not covered by a Federal award then a common rule NSW State award would apply.

Where the terms of award are applied without the existence of a certified agreement it is common practice to pay over award payments. The evidence of Skilled Engineering in the Metals Casual Case was that of 1739 employees, under Metal & Engineering & Associated Industries Award 1998 in classifications C14-C8 where 18 (1%) were paid the award rate and 1721 (99%) received over award payments. Similarly, at Manpower 73.5% received over award payments. The lower figure being due to a lower number of trades people.

Whilst it is appreciated this is only two examples the point we make is that by virtue of the company being bound by an award does not mean that they are not paying rates of pay or benefits in excess of the prescribed provisions.

In addition to the safety net protection afforded by Federal or State awards it can be recognised that a substantial number of employees are covered by a Federal or State enterprise agreement. As such, these employees have benefits (presumably) in excess of those provided by the safety net."

(*Submission to Labour Hire Task Force – AIG*)

64 At page 8, AIG submitted that the opportunity exists for unions and employers to reach enterprise agreements with labour hire companies. They contended a layer of complexity to this industry is the practice of either paying site rates or applying the terms of the clients industrial instrument which has the effect of providing a higher benefit to labour hire employees than under the labour hire company agreement. They said that this comes about by:

a. the policy of the labour hire company
b. a request or instruction by the client
c. insistence by the union(s) on site
d. market factors.

In relation to the application of this practice across the industry, AIG submitted at page 9:

"Compulsory payment of site rates would create a ludicrous proposition in some circumstances. For example, a secretary goes on leave for a week and is replaced by a labour hire casual. The labour hire secretary may earn more (apart from the

casual loading) because of market factors. On the other hand, the labour hire secretary may earn less. This could be because the skills required for the 2 week period may not be the same as that possessed by the permanent secretary.

…

It is our view that labour hire employees are afforded the same safety net protection that is afforded to other employees. This being the case it is not logical to suggest that there is a need to create NSW Labour Hire industry specific awards. Such a move would be strongly resisted by Ai Group.

If this view is not accepted, then there is a view that many labour hire companies would avoid this form of additional regulation by opting out of the NSW system in favour of the Federal jurisdiction. Ai Group would not wish to see that outcome eventualise."

(*Submission to Labour Hire Task Force – AIG*)

65 Mr Borlase conceded on behalf of the employers he represents that the coverage of labour hire employees by federal and state instruments in NSW is much higher than in Western Australia. He said that his enquiries of AIG revealed that the reason why there is a higher incidence of coverage of state awards in NSW is that, generally, the area and scope clauses of awards in NSW apply to particular classifications of employees who conduct work at a particular industry rather than confining the area and scope to the activities of a particular business or respondent. This is to be contrasted with the industrial coverage in Western Australia, where there are a mixture of common rule awards which range from the type found in NSW to awards where coverage is confined to industries or the activities of named respondents or to those employers who are in the same industry as named respondents to an award.

66 Mr Borlase also tendered a working paper by Dr Richard Hall, which was published in April 2002 entitled "*Labour Hire in Australia: Motivation, Dynamics and Prospects*". In his paper, Dr Hall poses the question to be considered in the paper is whether the consequence of labour hire results in substandard pay and conditions and inadequate protection for workers. At page 8 he states:

"… labour hire has grown in Australia partly because it offers some employers the opportunity to lower labour costs by substituting labour hire workers for in-house, direct employees. If this is a prime motivation, and if the consequence is substandard pay and conditions and inadequate protections for workers, then quite dramatic policy action is probably in order. However, lower labour costs might not be the major motivation for employers using labour hire and the union evidence referred to above might be misrepresenting the real circumstance for most labour hire workers and clients. In order to investigate in greater depth the extent and character of the labour hire problem, the evidence concerning employer motivations for choosing labour hire is considered."

(Labour Hire in Australia: Motivation, Dynamics & Prospects – Dr Richard Hall)

67 Dr Hall then notes that there are a number of motivations for employers choosing labour hire which include:

a. Capacity outsourcing
b. Specialisation subcontracting
c. Cost reduction
d. Contract out industrial relations problems
e. Stimulate organisational change.

68 Dr Hall reviewed the NSW Task Force Report and the employer motivations identified in that report, and considered a survey of approximately 400 employer members of Australian Business Limited in which regard was had to the employers' motivation for labour hire. At page 10 of his paper he sets out the results of that survey and says:

"It must be recalled that respondents were here encouraged to think about all the 'outsourcing' type strategies they use – strict outsourcing and 'turnkey project management' right through to the occasional use of individual labour hire workers. Therefore these results should be interpreted with some caution in reaching conclusions about the motivations for labour hire as distinct from outsourcing. Nevertheless, the data appear to confirm that cost effectiveness is a very important consideration and perceived advantage for many employers. While cost effectiveness was seen as the single most important advantage of those offered, flexibility in coping with peaks and troughs in demand and access to a greater range of skills might together be taken to constitute the flexibility motivation; and over 40% mentioned one or other of these advantages as the most significant. As might be expected control is not seen to be an advantage of outsourcing. Interestingly, very few respondents identified lessening of union influence as an advantage to outsourcing."

69 Dr Hall concludes that:

"While there is a case for minimising the proliferation of jobs that are flexible (at the call of the employer rather than the employee) it might be possible to achieve significant improvement to the vulnerability, exposure and disadvantage for many workers through regulation of flexible labour and protection of the conditions for those flexible labour hire workers."

(Labour Hire in Australia: Motivation, Dynamics & Prospects – Dr Richard Hall)

70 Mr Borlase provided to the Commission a copy of the Area and Scope clauses of the following awards:

Golf Link and Bowling Green Employees Award 1993

Landscape Gardening Industry Award

Mineral Sands Industry Award 1991

Wineries Award 1969

Pest Control Industry Award 1982

Farm Employees Award 1985

Building Trades (Goldmining Industry) Award

Mineral Sands Mining and Processing Industry Award 1981

The Horticultural (Nursery) Industry Award

AWU Gold (Mining and Processing) Award 1993

Building Trades (Construction) Award 1987

Breadcarters' (Metropolitan) Award

Breadcarters (Country) Award 1976

Hotel and Tavern Workers' Award 1978

Restaurant, Tearoom & Catering Workers' Award 1979

Quarry Workers' Award 1969

Plastic Manufacturing Award 1977

Paint and Varnish Makers' Award No. 22 of 1957

71 Mr Borlase contends that some of these State awards already apply to employees engaged in the labour hire industry. Some of these are awards to which the union is a party. Mr Borlase says this is not a comprehensive list of all awards that apply to the labour hire industry but some quite clearly do, such as the Golf Link and Bowling Green Employees Award 1993. Clause 3 of that award provides:

> "This award shall operate over the whole of the State of Western Australia and shall apply to employees eligible for membership in the applicant union and who are engaged in the formations and maintenance of Golf Links and Bowling Greens and of all gardens and lawns in connection therewith; provided that this award shall not apply to employees employed by Municipalities or Local Governing Authorities."

The applicant union referred to in clause 3 is the Applicant in this matter.

72 Mr Borlase, however, concedes that the Building Trades (Goldmining Industry) Award is unlikely to be construed to apply to the labour hire industry. Clause 3 of that award provides:

> "This award shall apply to employers in the goldmining industry carried on by the respondents in respect of workers employed in the classifications set out in subclause (3) of Clause 9. – Wages, and apprentices in the trades for which apprenticeship is provided"

Mr Borlase also makes a similar concession to the Mineral Sands Mining and Processing Industry Award, The Horticultural (Nursery) Industry Award, the AWU Gold (Mining and Processing) Award and the Building Trades (Construction) Award.

73 Mr Borlase says on behalf of the employers he represents that the union is seeking in this proposed award to cover employees whose employment is already covered by State awards of this Commission. This has two consequences. Firstly, it alters the burden of proof under s 36A of the Act in that s 36A only shifts the burden of proof to the party opposing the making of a new award, in the case of award-free work. As the proposed award is intended to cover both award-free work and work that is covered by awards of this Commission, s 36A(1) does not apply. Secondly, the burden of proof that the award should be made in the public interest rests on the union and not on the Respondents to the application.

74 It is contended that if the proposed award is made in the form sought by the union then as a later instrument of this Commission it would override some common rule awards.

75 It is also argued that whilst proposed clause 1.5 clearly does not seek to oust any common rule award, there are a number of difficulties with proposed clause 1.5. First of all, it is said the operation of clause 1.5 is not confined to registered industrial agreements. As such, ascertaining what agreements apply to a site may create uncertainty for labour hire employers. Further, it is apparent from the way clause 1.5 is drafted that it seeks to bind labour hire employers to the provisions of federal awards and federal certified agreements, when the labour hire employers are not parties to those federal awards or certified agreements. It is also argued there may be some conditions in a site award which apply to the client's employees that may not be capable of being applied to employees of the labour hire industry. For example, if a site award provides for an in-house funded superannuation scheme, where by the rules of the trust provide the membership of the fund is only open to the employees of the client company, labour hire employees would not be able to join that fund.

76 It is also argued that if clause 1.5 is made by this Commission a labour hire firm would have to carry out a "no disadvantage test" of the terms of the proposed award against the terms of an enterprise award and/or site agreement. It is contended that such a task would be administratively crippling to a labour hire firm. Also it is asked how is it proposed that a labour hire employee is to determine whether the terms and conditions of an enterprise award and/or site agreement are any more superior to the terms of the proposed award. As there is no independent body to assess this, the labour hire employee may not definitively be able to answer that question until such time as an issue is raised and litigated in the Industrial Magistrate's Court. In all the circumstances, it is contended that a clause 1.5 would effectively destroy the ability of the labour hire industry to operate.

77 It is also contended that if the proposed award is made disparity will be created between the working conditions of employees of clients whose employees are covered by other awards of this Commission and employees of the labour hire companies who are engaged to work alongside the client employees. Mr Borlase provided to the Commission a list of 38 awards of the Commission that cover the classifications of labourer and general labouring, 55 awards that cover general cleaning, 11 awards that cover manufacturing process workers, 72 awards that cover storemen, 45 awards that cover packing, 31 awards that cover boiler attendants, 15 awards that cover trades assistants, 60 awards that cover forklift driving, 20 awards that cover rigging, 35 awards that cover cooks and chefs, 13 awards that cover timber trades, 7 awards that cover furniture trades, 7 awards that cover horticultural trades, 1 award that covers a greenkeeper, 9 awards that cover engine drivers, 22 awards that cover crane drivers, 3 awards that cover earth moving and 13 awards that cover nurses. The employers he represents say, that if a client of a labour hire business is obliged to pay their employees say, for example, under the Winery Award 1969 and the labour hire employer is required to offer work with that client in accordance with the terms and conditions of the proposed award, then the terms and conditions of a labour hire employee would be different conditions. Further, the labour hire employees could be entitled to better conditions than apply to the client's employees.

78 Mr Borlase says the amount sought in proposed clause 5.5 (travel allowance) reflects standard payments made in the construction industry but not in the wine industry or many of the industries that the proposed award seeks to cover. Also it is said that proposed clause 6.2 which requires a labour hire employer to provide income protection insurance is another example of a condition which does not currently apply in the wine industry or many other industries to which the proposed award will apply if made by this Commission.

79 It is also contended on behalf of the employers represented by Mr Borlase, that if the proposed award is made and if the evidence of Mr Anderton is accepted, that is 80% of labour hire companies pay their labour hire employees what the client pays, then the making of the proposed award which provides something less or different than what the client pays, would undercut this industry practice. It is also argued that the proposed award provides for standard terms and conditions which, if imposed on labour hire firms, would make it difficult for them to place their employees with client companies who work under different terms and conditions.

80 These employers contend that the provision of a written statement of particulars of employment prior to commencement of employment as proposed by clause 2.5 is impracticable as the nature of the industry is that labour hire employees are supplied in a relatively short period of time. Further, if the union's contention is correct that the terms of the proposed award are to

operate to the extent of any inconsistency with existing awards of the Commission, this would have the effect that in part common rule awards would not have scope to operate, which would also create difficulties for labour hire employers and create disparity between the conditions of the labour hire employees and the employees of the client company. It is contended that what is sought by the union would provide opportunities for disputation to occur.

81 It is also contended that the terms of the proposed award raises the possibility of demarcation disputes with other unions who have constitutional coverage, which overlap with constitutional coverage of the union. It is contended that the union has overlapping coverage with The Automotive Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch, The Australian Nursing Federation, Industrial Union of Workers Perth, the Communication, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch, the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch, The Shop, Distributive and Allied Employees' Association of Western Australia and The Construction, Forestry, Mining and Energy Union of Workers ("the CFMEU"). It is conceded, however, by Mr Borlase that there has been an agreement reached with the CFMEU and the union in relation to some classifications which may remove the potential for demarcation disputes with that union, but the same cannot be said about other classifications and other unions.

82 It is said that the proposed award seeks to cover such a broad range of classifications and a broad range of industries across the economies of Western Australia, which could give rise to disputation over coverage as to who should have awards in what circumstances. It is contended that the making of an award that has the potential to create demarcation disputes is contrary to object 6(e) of the Act. Object 6(e) provides the principal objects of this Act are:-

> "to encourage the formation of representative organisations of employers and employees and their registration under this Act and to discourage, so far as practicable, overlapping of eligibility for membership of such organisations."

83 It is also contended that there are a number of clauses in the proposed award that restrict the operation of the labour hire industry. In particular, there appears to be a restriction in clause 2.2 to limit casual employment to a period of less than six months, which is contrary to the evidence which shows that there is a percentage of placements which go beyond nine months to one year. There is also a limitation sought on fixed term employment of six months in proposed clause 6.3, which is very restrictive. It is said that the casual loading of 25% sought in clause 2.2 is above most industry standards. It is said the proposed redundancy clause (clause 2.5), is in fact a severance payment clause. Further, the requirement in proposed clause 2.5 for discussions to be held before a person is terminated would require discussions with the union every day because of the high turnover of employees in the labour hire industry. It is said this would impose an impossible burden on the industry. It is also pointed out that the redundancy payment sought in proposed clause 2.5 are amounts beyond benchmark awards of the State Commission such as the Metal Trades (General) Award 1966 and the Transport Workers (General) Award No 10 of 1961. It is said that given the evidence establishes the length of assignment of employees is very short and that 56% of employees who finish with a labour hire employer are employed by another employer, that over half the placements would attract a redundancy payment because of the wide definition of redundancy, as proposed clause 2.5 defines redundancy to mean a situation where an employee ceases to be employed by an employer, respondent to this award, other than for reasons of misconduct or refusal of duty.

84 It is also said that proposed clause 3.1 – Hours of Work – would create restrictive limits on the hours of work to eight hours per day whereas in some industries to which this proposed award could apply, such as the mining industry, it is well known that twelve hour days are worked. Although clause 3.1 proposes that an agreement can be reached between an employer and an employee to work different hours of work if an agreement cannot be reached Mr Anderton's evidence establishes it would be difficult to make arrangements with the client to provide employees to fit in with the client's method of production.

85 It is also argued that the union does not have constitutional coverage over the breadth of labour hire industry sought to be covered by the union. Rule 4 of the union rules provides:

"4 - MEMBERSHIP

The Union shall consist of an unlimited number of workers employed or usually employed in any of the following industries or callings:-

(a) Pastoral, Agricultural, Horticultural, Viticultural, Fruit growing, the growing of Flax, Guayule, Tobacco, Sugar, Rice, Cotton, and of Safflower and other oil seeds, Afforestation and Silviculture (including the harvesting and/or processing and/or packing of any products of the aforesaid industries), the production of firewood, dairying and rabbit trapping, the handling and/or storage of grain for milling and/or export, including domestic and other work performed at agricultural research stations and farms and agricultural schools and colleges.

(b) Road making and road maintenance, other than in the building industry, and the construction, maintenance, conduct and operations of railways (but excluding the conduct and operations of railways by the Western Australian Government Railways Commission), bridges, water and sewerage works.

(c) Metalliferous mining and the production of minerals (including the harvesting of salt, dredging and sluicing work), the transport, storage, loading and unloading, other than the loading and unloading of ships South of the 26th parallel of latitude, of minerals, metals and ores, the production and supplying of electric current, mechanical engineering, the smelting, reducing and refining of ores and metals including the charcoal iron and steel industry) and the supplying of firewood for mines.

(d) Stone quarrying, crushing and screening.

(e) Surveying of land.

(f) Fish trawling, cleaning and canning, net making, and all general labour in connection therewith.

(g) Boring for water.

(h) Destruction of noxious weeds and vegetation, or the treatment of the products thereof and the eradication of pests and vermin.

(i) Manufacturing of cement and cement and fibrolite and fibre (other than glass fibre) cement articles.

(j) Formation and maintenance of golf links, bowling greens, tennis courts, and of all gardens, lawns and greens in connection therewith.

(k) Rubber working, the manufacturing of tyres and tubes, including the tyre retreading industry.

(l) Service Station attendants, other than tradesmen and clerical workers, lubritorium attendants and vehicle service attendants, other than tradesmen, in motor vehicle sales establishments. Workers other than tradesmen and clerical workers in rust prevention, cleaning and paint protection of motor vehicles.

(m) Manufacture of sealing devices for bottles or jars, and the manufacture of badges and emblems (other than those made out of textile materials).

(n) The clearing of land for cultivation, sub-division for settlement and formation of aerodromes and parking areas.

(o) The laying of oil, gas, or steam pipe lines and the installation of electric power lines.

(i) Work at immigration reception centres.

PROVIDED THAT all persons who have been appointed as officers or employees of the Union shall be entitled also to become and remain members of the Union during their continuance in office or employment; PROVIDED further that no person who is or is eligible to be a member of –

Eastern Goldfields Municipal and Road Board Labourers' Union of Workers;

Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth;

The West Australian Timber Industry Industrial Union of Workers, South West Land Division;

The Western Australian Government Tramways, Motor Omnibus and River Ferries Employees' Union of Workers, Perth;

The Builders Labourers' Union of Workers of Perth, Western Australia;

Westralian Brickyard, Pottery, Porcelain and Roof Tile Fixers Employees' Union of Workers, Perth;

as constituted on the 19th day of August, 1947; or any other Union registered under the provisions of "Industrial Arbitration Act, 1912-1941" (as reprinted) at the date of registration of this Union shall be eligible for or admitted to Membership of the Union, but as from 7th day of March, 1979, the limitation herein imposed by virtue of the registration of the Sugar Refining Employees' Industrial Union of Workers, Fremantle, W.A., at the date of registration of this union shall no longer apply.

(p) The catching and the treatment of whales and the by-products therefrom, (excepting Masters, Mates and Marine Engineers).

(q) Foremen employed in the sleeper cutting and/or saw milling industry (but excluding foremen not exclusively employed as such, and tradesmen foremen), and further excluding that portion of the State of Western Australia comprised within a radius of fourteen (14) miles of the General Post Office, Perth.

(r) The construction, maintenance and/or demolition of floating docks, graving docks, slipways, bridges, viaducts, causeways, wharves, jetties, breakwaters, moles, retaining walls, and all sheds, and buildings, on or about floating docks, graving docks, slipways, wharves and jetties, and the dredging of harbours, rivers and passages. Provided that workers who are employed in the following vocations shall not be eligible for membership: Fitters, Coppersmiths, Turners, Pattern makers, Tool and Gauge makers, Scalemakers and adjusters, Blacksmiths, Shipsmiths, Toolsmiths, Angle-iron Smiths, Springmakers, Millwrights, Oxyacetylene and Electric Welders and Cutters, Locksmiths, Mechanical and Scientific Instrument Makers, Motor Mechanics, Motor Cycle Mechanics, Aircraft Mechanics, Die Sinkers, Milling Machinists, Press Tool Makers, Drilling Machinists and the assistants to all the foregoing tradesmen, Carpenters, Painters, Bricklayers, Rubble Wallers, Plasterers, Stone Masons, Plumbers and Sheet Metal Workers, Moulders, Coremakers, Shipwrights, Masters, Mates, Marine Engineers, Clerks and Watchmen, Electrical Workers (except such as are covered by paragraph "o" hereof). Provided further that no person who is eligible to be a member of the "Coastal and E.G. Government Water, Sewerage and Drainage Employees' Industrial Union of Workers" as constituted on the 4th day of July, 1952, shall be admitted to membership of the Union.

(s) (i) Boring for oil, refining, treating, processing, packing, pumping, and all work whatsoever in or in connection with the boring for oil, refining, treating, processing, packing and pumping of oil, and the manufacture (including the extraction) of the by-products of oil, when such manufacture (including extraction) is incidental to and consequent upon the refining of oil carried on by a company whose principal business is oil refining; Provided that workers who are employed in the following vocations shall not be eligible for membership: Fitters, Coppersmiths, Turners, Patternmakers, Tool and Gauge makers, Scalemakers and adjusters, Blacksmiths, Shipsmiths, Toolsmiths, Angle-Iron Smiths, Springmakers, Millwrights, Oxy-acetylene and Electric Welders and Cutters, Locksmiths, Mechanical and Scientific Instrument Makers, Motor Mechanics, Motor Cycle Mechanics, Aircraft Mechanics, Die Sinkers, Press Tool Makers, Milling Machinists, Bolt and Nut Machinists, Drilling Machinists in the Engineering Industry, and the assistants to all the foregoing tradesmen; Carpenters, Painters, Bricklayers, Rubble Wallers, Plasterers, StoneMasons, Plumbers and Sheet Metal Workers, Moulders, Coremakers, Masters, Mates, Marine Engineers, Clerks, Watchmen, Cleaners, Electrical Workers (except such as are covered by paragraph "o" hereof), Builders' Labourers employed to assist building tradesmen on the construction of buildings.

(ii) Boring for natural gas and the production, distribution, treatment and storage of natural gas, and all work in connection with the boring for natural gas and the production, distribution, treatment and storage of natural gas: Provided that, no person, who immediately prior to the 23rd of March, 1966, was not eligible for membership of the Union and who is or is eligible to be a member of -

The Federated Engine Drivers and Firemen's Union of Workers of Western Australia.

The Collie Federated Engine Drivers and Firemen's Union of Western Australia.

Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch.

Municipal Councils, Road Boards and Local Government Employees' Association of Workers, Western Australia.

Municipal Road Boards, Parks and Race Course Employees' Union of Workers, Perth - Western Australia.

Federated Moulders (Metals) Union of Workers, Perth.

Australasian Society of Engineers' Industrial Union of Workers, Perth, W.A.

Australasian Society of Engineers' Industrial Union of Workers, Fremantle.

The Australasian Society of Engineers, Collie River District, Industrial Union of Workers.

Australasian Society of Engineers' Industrial Union of Workers, Goldfields No. 1 Branch.

Australasian Society of Engineers' Industrial Union of Workers, Midland Junction Branch.

The Association of Architects, Engineers, Surveyors, and Draughtsmen of Australia, Union of Workers, Western Australian Division.

The Boilermakers Society of Australia, Union of Workers, Coastal Districts, W.A.

Electrical Trades Union of Workers of Australia (Western Australian Branch), Perth.

Federated Ship Painters and Dockers' Union of Australia (West Australian Branch) Union of Workers.

The Seamen's Union of Western Australia Industrial Union of Workers, Fremantle.

Building Trades Association of Unions of Western Australia (Association of Workers).

The West Australian Gas Works Industrial Union of Workers.

Amalgamated Engineering Union of Workers, Perth Branch.

Amalgamated Engineering Union of Workers, Kalgoorlie Branch.

as constituted on the 23rd of March, 1966, shall be eligible for or admitted to membership of the Union.

(t) Iron and Steel Rolling, and all work in or in connection with iron and steel rolling (including all persons engaged in the following locality: "All that area of land and the waters of Cockburn Sound contained within boundaries starting from the intersection of the South-Eastern side of Rockingham Road (Road No. 695) and the North-Eastern side of Ocean Street and extending West to the low-water mark of the said sound and onwards for a distance of one (1) mile; thence North to a point situated in prolongation Westerly of the Northern side of Russell Road (Road No. 678); thence Easterly along that prolongation to the low-water mark of Cockburn Sound and onwards for a distance of three (3) miles; thence South to a point situate East of the starting point) and thence West to the starting point loading and discharging material or matter of any kind used in or in connection with iron and steel rolling".

PROVIDED THAT workers who are employed in the following vocations shall not be eligible for membership: Fitters, Coppersmiths, Turners, Patternmakers, Tool and Gauge makers, Scalemakers and adjusters, Blacksmiths, Shipsmiths, Toolsmiths, Angle-Iron Smiths, Springmakers, Millwrights, Oxy-acetylene and Electrical Welders and Cutters, Locksmiths, Mechanical and Scientific Instrument Makers, Motor Mechanics, Motor Cycle Mechanics, Aircraft Mechanics, Die Sinkers, Press Toolmakers, Milling Machinists, Bolt and Nut Machinists, Drilling Machinists, and the assistants to all the foregoing tradesmen: Carpenters, Painters, Bricklayers, Rubble Wallers, Plasterers, Stone Masons, Plumbers and Sheet Metal Workers, Moulders, Coremakers, Clerks, Watchmen, Cleaners, Electrical Workers (except such as are covered by paragraph "o" hereof), Builders' Labourers employed to assist building tradesmen on construction of buildings.

No Person employed in any of the industries or callings mentioned in paragraphs "p" to "t" hereof (both inclusive) and who by reason of such employment is eligible to be a member of any Union affiliated with the Federated Engine Drivers and Firemen's Association (Western Australian Branch) Association of Workers on the 11th August, 1952, shall be eligible to be a member of this Union.

(u) All work in or in connection with Stevedoring operations in that portion of the State of Western Australia North of the 26th parallel of latitude.

(v) All workers (other than journeymen, apprentices, and workers employed or usually employed in or in connection with the construction, repair, demolition or removal of any building) employed in or in connection with the construction of foundations for machinery or plant.

(w) In or in connection with the extraction from wood of a base for tanning compound. Provided that, no person who is eligible to be a member of any other Union (other than persons eligible for membership in the Wood Extract Industrial Union of Workers, South West Land Division, W.A.) registered under the provisions of the Industrial Arbitration Act, 1912-1952 on the 3rd day of May, 1955, shall be eligible for membership of this Union in the industry referred to in this paragraph.

(x) All workers engaged in or in connection with the Manufacture of articles of asbestos, of articles which are a compound of asbestos and one or more other materials the processing of such articles of asbestos or asbestos compounds into finished products.

(y) The manufacture or preparation of bitumen emulsion, asphalt emulsion, bitumen or asphalt preparation, hot mixed asphalt, cold paved asphalt, and mastic asphalt or similar materials.

(z) The production or manufacture of aluminium for use as a raw material in the manufacture of articles.

Provided that workers who are employed in the following vocations shall not be eligible for membership: Fitters, Coppersmiths, Turners, Patternmakers, Tool and Gauge makers, Scalemakers and adjusters, Blacksmiths, Boilermakers and Steel Constructional Tradesmen, Shipsmiths, Toolsmiths, Angle-Iron Smiths, Spring Makers, Millwrights, Oxyacetylene and Electrical Welders and Cutters, Locksmiths, Mechanical and Scientific Instrument Makers, Motor Mechanics, Motor Cycle Mechanics, Aircraft Mechanics, Die Sinkers, Press Tool Makers, Machinists, Bolt and Nut Machinists, Drilling Machinists, Riggers, Laggers, and the assistants to all the foregoing tradesmen: Carpenters, Painters, Bricklayers, Rubble Wallers, Plasterers, Stonemasons, Plumbers and Sheet Metal Workers, Moulders, Coremakers, Clerks, Watchmen, Cleaners, Electrical Workers (except such as are covered by paragraph "o" hereof), Builders' Labourers employed to assist building tradesmen on construction of buildings.

No Person, who is eligible under subclauses (y) and (z) to be a member of any Union affiliated with the Federated Engine Drivers and Firemen's Association (Western Australian Branch) Association of Workers on the 11th April, 1963, shall be eligible to be a member of this Union.

Notwithstanding anything contained in the foregoing, drivers and/or loaders and/or operators and/or washers of all mechanically propelled or animal-drawn vehicles or implements or machines and their assistants, stablemen and yardmen, employed in or in connection with the cartage, conveyance, movement or transportation of persons, goods, merchandise, wares, implements, machines, vehicles, live-stock, material or matter of any kind shall not be eligible for membership in this Union, except such persons who are employed –

(a) in farming, mining (other than coal mining), or pastoral industries; or

(b) in or in connection with –

(i) agriculture, forestry, land clearing, water conservation or irrigation;

(ii) construction and/or maintenance of railways, roads or bridges; or

(iii) stevedoring operations,

by any Government department or public statutory body established by or under a law of the State to carry out all or any functions of such a department or by any port authority; or

(c) in supplying of firewood for gold mines; or

(d) as fork lift operators in the asbestos cement or fibre (other than glass fibre) cement, industry; or

(e) as fork lift operators in the sugar refinery industry.

A person shall not be a member of the Union who is not a worker within the meaning of the Industrial Arbitration Act, 1912-66 and any subsequent amendment thereof except in the capacity of an honorary member or a member who or whose personal representative is entitled to some financial benefit or financial assistance under the rules of the Union."

86 It is said that Rule 4 makes it clear that the union rule only has coverage of a number of industries or workers employed in particular industries or callings. Where Rule 4 sets out particular callings it is conceded that the union would have coverage but not in relation to industries, as the labour hire industry is not expressly referred to. For example, it is argued that although labour hire employees may perform work in the pastoral industry they are not employed in the pastoral industry, as they are employed in the labour hire industry.

87 Because clause 1.3, in part, defines the area and scope of the proposed award to employees who are eligible to be members of the union it is also argued that because of the notable number of exclusions in Rule 4 and because Rule 4 was made over sixty years ago, that it is almost impossible for a labour hire company to determine exactly who the proposed award is to apply to. It is also argued that attempts to cover nurses, cooks, chefs and tradespeople are generally beyond the constitutional coverage of the union. Given that the proposed classifications in clause 4.3 are extremely broad and cover a whole range of industries, it is very difficult for a labour hire employer to determine whether an employee would be covered by the union rules without researching the history of the rules. It is said that the labour hire industry would have to become an expert in the constitutional rules of the union. Further, if the award is made in the form proposed by the union a labour hire employer will have to determine whether other common rule awards are excluded from operating on the basis of inconsistency with the terms of the proposed award or whether there are any applicable enterprise specific State, Federal awards or registered or unregistered or certified industrial instruments which contain superior terms to the terms of the proposed award. It is said such an obligation would impose an unworkable and crippling administration burden on the industry.

88 Mr Borlase distinguishes the terms of the proposed award to the position in New South Wales, where there is a level playing field established by common rule awards as labour hire companies in NSW are bound by the same common rule awards as their clients. Consequently, labour hire companies in NSW generally operate within the same restraints and systems of work as their clients.

89 Mr Borlase contends that the terms of the proposed award will have a significant economic impact. He says that if the 10% rule can be relied upon it can be assumed that the value of the Western Australian economy in the labour hire industry is approximately $1 billion per annum. Given that 50% of the labour hire industry works in the blue collar area, the effect of the terms of this proposed award if made by the Commission is likely to be very significant.

90 Mr Borlase says that the redundancy/severance payments clause would add 7.6% increase to the labour hire industry's costs. He calculates this amount by having regard to a proposed 2.92 hours per week payment for each week of service. He points out an additional 5% in respect of casual rates of pay is being sought. As to the daily travel allowance sought by the union, if it is accepted that this allowance is not applicable across the vast majority of client industries, it is contended that proposed allowance would add a minimum of 2.3% increase when it is calculated as a percentage of the tradesmen's rate of pay. As to the income protection allowance, Mr Borlase says that payment of a non-contributory sickness and accident scheme is in the vicinity of 1.8%. When regard is had to all of these figures, it is contended the total amount of increase in cost to the labour hire industry would be 16.85% which is a significant amount, representing an increase of some $84,250,000 per annum to a half a billion dollar industry.

91 Accordingly, for the reasons set out above the employers who Mr Borlase represents, argue that irrespective of where the burden lies of proving whether the proposed award should be made in the public interest, it is clear that the public interest demands that the terms of the award proposed by the union should not be made.

92 After Mr Borlase completed his submissions, Mr Watson advised the Commission that the submissions made on behalf of the clients represented by Mr Borlase were adopted by his clients.

93 At the invitation of the Commission the parties were invited to address issues raised by the Full Bench in *The Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia v Kirin Australia Pty Ltd* (2002) 82 WAIG 412 ("the Kirin case"). In written submissions made on behalf of the clients Mr Borlase represents, Mr Borlase advised the Commission that having regard to the matters raised in the Kirin case that the proposed award sought by the union in this matter must proceed through the application of Principle 10 of the State Wage Principles. Principle 10 provides:

"An application or reference for a variation in wages or conditions above or below the safety net will be referred to the Chief Commissioner for him to determine whether the matter should be dealt with by a Commission in Court Session or by a single Commissioner."

94 It is argued that Principle 10 is invoked as there are a number of awards of this Commission that already apply to employers in the labour hire industry and that a range of the claims contained in the proposed award would, if made, constitute a variation in wages and conditions above the safety net contained in the existing awards.

95 It is argued in written submissions that insofar as clause 1.5 of the proposed award seeks to extend the coverage to employees who are already covered by an existing award what is sought becomes in effect a de facto extension of an existing award to award-free work, and where work is already regulated by awards the requirements of Principles 10 and 11 are invoked. Accordingly, it is argued that the application should be dealt with pursuant to the requirements of Principles 10 and 11.

Conclusion

96 Insofar as the terms of the proposed award seek to extend to employees to whom an award currently extends, I do not accept that s 36A of the Act applies in this matter.

97 I accept Mr Anderton's evidence that where employers are not bound by an award some employees of labour hire employers work under terms and conditions which are less than the terms and conditions afforded to employees of clients of the labour hire company. His evidence in respect of this issue is supported by the material contained in the NSW Labour Hire Task Force Final Report.

98 There is no evidence that in NSW a high percentage of award coverage of labour hire employees has hindered the growth or flexibility of labour hire in that State. However, I am not satisfied that it is in the public interest to make the proposed award in the form sought by clauses 1.3, 1.5 or 4.3. Accordingly, I will dismiss the application. The reasons why I have reached this view are as follows.

99 In relation to clause 1.3, it is my view that if an award was to be made to cover employees of labour hire employers eligible to be members of the union, the award should not extend to employees whose terms and conditions are already covered by awards of this Commission. The union has not adduced any convincing evidence to support the making an award to oust, in whole or in part, the coverage of any existing award of this Commission. If this was the only basis on which I have concluded the proposed award should not be made, I would allow the union leave to amend the application. However, in my view clauses 1.3, 1.5 and 4.3 of the proposed award require substantial amendment.

100 I agree with the submission made by Mr Borlase that when clauses 1.3 and 4.3 are read together the scope of the terms of the proposed award is too difficult to ascertain with certainty. This is substantially because the constitutional rule of the union has largely been unamended for many decades. Because proposed clause 4.3 contains broad ranging and loosely defined classifications, and Rule 4 of the union's rules covers a diverse range of industries and callings, with exclusions which are not apparent on first perusal without extensive research, the scope of the proposed award is not readily ascertainable to the reader. Given that it is accepted that the use of labour hire employees is common across a wide and diverse range of industries, if an award is made to cover areas of employment which come within the union's constitutional coverage, these industries and/or callings should in my view be clearly specified.

101 As to clause 1.5, I agree that the terms of this proposed clause are too uncertain so as to render such a clause inappropriate for a safety net condition. The burden of imposing a "no disadvantage test" on labour hire employees is in my view onerous. There is no guidance contained in proposed clause 1.5 for a labour hire employer to ascertain the basis on which it could be properly concluded that the terms and conditions of a site award or industrial agreement are superior. However, I am of the view that the evidence and submissions set out above support the conclusion that if an award was to be made to cover award-free labour hire employees, where those employees are required to work alongside employees of the client of a labour hire employer, it would be appropriate for the award to contain a clause that the conditions of employment and patterns of work of such employees should be, so far as practicable, substantially the same. Whether the union wishes to make another application for an award to cover award-free areas of the labour hire industry is a matter for them to consider.

102 Although I do not find it necessary to make any findings in respect of the remaining clauses sought by the union in the proposed award, I am of the view that given that the proposed award seeks to cover diverse occupations and callings across a broad range of industries, that if a new application is made consideration should be given as to whether different terms and conditions should apply to different industries.

103 I do not accept the argument that the union does not have constitutional coverage to seek a labour hire industry award to cover work by labour hire employees who work within the industries specified in Rule 4 of the union rules. In *HSOA v Minister for Health* 61 WAIG 616 at 618 (IAC) Brinsden J set out the approach to be applied in interpreting union rules:-

> "Generally speaking the correct approach to the interpretation of a union rule is to interpret it in the same manner as any otherr [sic] document. It must be remembered however that union rules are not necessarily drafted by skilled draftsmen. It is therefore necessary I think in construing a union rule not to place too literal adherence to the strict technical meaning of words but to view the matter broadly in an endeavour to give it a meaning consistent with the intention of the draftsman of the rule. This approach has been endorsed in relation to awards: see *Geo A. Bond & Co. Ltd. (In Liq) v. McKenzie* (1929) A.R. 499 at 503-04 referred to in Federal Industrial Law by Mills and Sorrell 5th Ed. at p.522. I also said much the same thing in the unreported decision of *Bradley v. The Homes of Peace* 1005/1978, judgement delivered 21st December, 1978 at p.13-14."

104 In *J & J H Moora trading as AAA Cleaning Service v Hospital Employees' Industrial Union of Workers WA* (1977) 57 WAIG 1679 the Industrial Appeal Court was called upon to determine whether cleaners employed in government hospitals who were employed by contractors were "employed in all public hospitals". The Court held the employees who were employed by contractors were employed in the industry of public hospitals and were covered by the scope clause of the Hospital Workers (Government) Award No. 21 of 1966. In that case Wickham J observed at 1680:-

> "The ambiguity of the phrase 'employed in' followed by words which describe both a place and an undertaking, is apparent. The term might denote a worker who works for the occasion in a particular place. In the Hospital Award examples are found in the definitions of Laundress, Laundry Hand and Storeman in Clause 5. On the other hand, it might be descriptive of the contract of service, as well as denoting the place of work, examples are found in Clause 12, e.g. 12(1) 'when a worker is engaged for service in a hospital or place ...'. In this sense the scope of the award embraces workers employed to work in and working in any public hospital. In my opinion, for the following reasons, the latter construction is correct."
>
> (See also *Delron Cleaning Pty Ltd t/as Delron Hospitality Management v The Australian Rail, Train and Bus Industry Union of Employees, West Australian Branch* (2004) 84 WAIG 2527)

105 Consequently it is my view that if labour hire employees are engaged to work in an industry specified in Rule 4 of the union's rules by undertaking specific work in the industry specified in Rule 4, that those employees can be said to be "employed in" those industries within the meaning of Rule 4.

106 As I have decided to dismiss the application I do not find it necessary to make any observations in respect of the other arguments and contentions raised on behalf of the Respondents. In particular, I do not find it necessary to deal with the argument that the terms of the proposed award raises a potential for demarcation disputes. I note, however, that the CFMEU was the only employee organisation who sought to intervene in this matter. After negotiations between the CFMEU and the union and following amendments to proposed clauses 1.3 and 4.3, the CFMEU withdrew from the proceedings.

2004 WAIRC 13534

AWU LABOUR HIRE INDUSTRY AWARD 2004

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	APPLICANT
	-v-
	ADECCO AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER J H SMITH
DATE	TUESDAY, 7 DECEMBER 2004
FILE NO.	A 5 OF 2004
CITATION NO.	2004 WAIRC 13534

Result	Dismissed
Representation	
Applicant	Mr D McLane (as agent)
Respondents	Mr P Watson (as agent on behalf of Adecco and Others) and Mr M Borlase (as agent on behalf of Carey Mining and Others)
Intervener	Mr D Schapper (of counsel on behalf of The Construction, Forestry, Mining and Energy Union of Workers)

Order

HAVING heard Mr D McLane as agent on behalf of the Applicant, Mr P Watson as agent and Mr M Borlase as agent on behalf of Respondents and Mr D Schapper of counsel on behalf of the Intervener, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby:–

ORDERS that this application be, and is hereby dismissed.

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

2004 WAIRC 13760

KIRIN AUSTRALIA (MPO) ENTERPRISE AGREEMENT 2003-5 VARIATION

WESTERN AUSTRALIAN INDUSTRIAL RLATIONS COMMISSION

PARTIES	KIRIN AUSTRALIA PTY LTD
	APPLICANT
	-v-
	THE BREWERIES AND BOTTLEYARDS EMPLOYEES' INDUSTRIAL UNION OF WORKERS OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 24 DECEMBER 2004
FILE NO/S	APPL 1378 OF 2004
CITATION NO.	2004 WAIRC 13760

Result	Industrial agreement registered
Representation	
Applicant	Ms A Casellas of counsel and with her Mr S Heathcote of counsel
Respondent	Mr R Murphy

Order

HAVING heard Ms A Casellas of counsel and with her Mr S Heathcote of counsel on behalf of the applicant and Mr R Murphy on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders by consent:

THAT the Kirin Australia (MPO) Enterprise Agreement 2003-5 Variation as filed in the Commission on 21 October 2004 in the terms of the following schedule be and is hereby registered as an industrial agreement.

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

SCHEDULE

1. **TITLE**

This Agreement shall be known as the "Kirin Australia (MPO) Enterprise Agreement 2003-5 Variation" ("**Agreement**").

2. **AREA AND SCOPE**

2.1 This Agreement applies to the Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia ("**the Union**") and Kirin Australia Pty Ltd ("**Kirin**") in respect of Malt Production Operators employed in Kirin's malting operations in Western Australia.

2.2 This Agreement amends the Kirin Australia (MPO) Enterprise Agreement 2003-5.

3. **PARTIES**

The parties to this Agreement are:

- Kirin Australia Pty Ltd of 47 McDowell Street, Welshpool; and
- the Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia of Unit 11, 64 Bannister Road, Canning Vale.

4. **DATE AND PERIOD OF OPERATION**

This Agreement shall have effect from the date on which the Western Australian Industrial Relations Commission approves it and shall expire on 31 December 2005.

5. **SCHEDULE OF AMENDMENTS**

5.1 Clause 8. OVERTIME shall be deleted and the following clause 8 shall be inserted.

"8. OVERTIME

8.1 Overtime is all work performed beyond the employee's rostered hours of duty on any day or beyond 76 hours in any fortnightly pay cycle.

8.2 Without prejudice to any other right that Kirin may otherwise have, Kirin may require an employee to work up to 8 hours overtime during any fortnightly pay cycle, provided that such overtime is rostered in accordance with the terms of Schedule A "Extended Hours Roster".

8.3 Notwithstanding clause 8.2, Kirin and an employee may agree that an employee may work more than 8 hours overtime in a fortnightly pay cycle.

8.4 All work performed in excess of 76 hours in any fortnightly pay cycle shall be paid for at the rate of time and a half for the first two hours and double time thereafter provided that overtime worked on a Saturday, Sunday or Public Holiday shall be paid at double time."

5.2 The following clause shall be inserted immediately after clause 12.4.

"12.5 From 19 July 2004, Kirin may operate an "Extended Hours Roster" in accordance with Schedule A, comprising 4 working patterns (A, B, C, and D) operating over a 4-week cycle where:

a) patterns A and B require the employees to work seven 12-hour shifts Monday to Sunday in each fortnightly pay cycle. Each shift consists of 10.857 hours of ordinary time and 1.143 hours of overtime.;

b) pattern C requires the employees to work eight 8-hour shifts and one 12-hour shift from Monday to Friday inclusive in each fortnightly pay cycle;

c) pattern D is the relief shift. Employees engaged on pattern D may be re-assigned to patterns A, B or C to cover absences caused by planned absences such as annual leave, and long service leave, or to cover unplanned absences such as sick leave. Kirin will give 7 days notice of the requirement for an employee to cover a planned leave absence. Kirin will give as much notice as is practicable of the requirement to cover an unplanned absence.

12.7 The Extended Hours Roster, described in Schedule A, may be varied by agreement between the parties.

5.3 Insert Schedule A - Extended Hours Roster

Schedule A. Extended Hours Roster

<Hours worked each day>

Employee		Mon	Tue	Wed	Thu	Fri	Sat	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Sun
1	A	12	12				12	12	12			12	12			12	12				12	12	12			12	12		
2	A	12	12				12	12	12			12	12			12	12				12	12	12			12	12		
3	B			12	12	12				12	12			12	12			12	12	12				12	12			12	12
4	B			12	12	12				12	12			12	12			12	12	12				12	12			12	12
5	C		8	12	8	8			8	8	8	8	8				8	12	8	8			8	8	8	8	8		
6	C	8	8	8	8	8				8	12	8	8			8	8	8	8	8				8	12	8	8		
7	D	Hours may be rostered as for position A, B or C																											
8	D	Hours may be rostered as for position A, B or C																											

Variations to the above work patterns may occur as follows:

1 The 12 hour day in positions C may be rostered on any day Monday to Friday

2 The non work day for position C may be rostered on a Monday or Friday.

3 Hours worked each day and days worked in position C may be varied by agreement between the Company and the Employee/s concerned.

The provisions set out above are agreed between Kirin Australia Pty Ltd and the Breweries and Bottleyards Employees' Industrial Union of Western Australia.

……..

Fumihiko (Mick) Yokoyama
Managing Director
Kirin Australia Pty Ltd

……..

Ron Murphy
Secretary
BBEIU of WA

……..

President
BBEIU of WA