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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2004 WAIRC 13765

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE DIRECTOR GENERAL OF THE DEPARTMENT OF JUSTICE **APPELLANT**
	-and-
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INC) **RESPONDENT**
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY COMMISSIONER J F GREGOR COMMISSIONER S J KENNER
DELIVERED	FRIDAY, 24 DECEMBER 2004
FILE NO.	FBA 32 OF 2004
CITATION NO.	2004 WAIRC 13765

Catchwords	Industrial Law (WA) – Appeal against a decision of the Public Service Arbitrator – Paid sick leave entitlement – Over-utilisation of sick leave entitlement – Jurisdiction – Industrial matter - Industrial nature – No work no pay – Appeal upheld and decision at first instance varied - *Industrial Relations Act* 1979 (as amended), s6, s7, s7(a), (b), (c), (ca)(i), (d), (e), (f), (g), (h), s26(1)(c), s44(9), s49D, s80E(1), Division 3 Part II – *Industrial Relations (General) Regulations* 1997, Regulation 4 – *Public Sector Management Act* 1994, s7 – *Property Law Act* 1969, s125.
Decision	Appeal upheld and the decision at first instance varied.
Appearances	
Appellant	Mr D J Matthews (of Counsel), by leave, and with him Ms V Jabr (of Counsel), by leave
Respondent	Mr M Amati, as agent

Reasons for Decision

THE PRESIDENT:

INTRODUCTION

1 The appellant employer brings this appeal against the decision of the Commission, constituted by the Public Service Arbitrator, made on 19 August 2004 in PSACR 21 of 2004. The appeal is against the whole of the decision. The appeal is brought under s49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*").

2 The decision appealed against, constituted by an order, formal parts omitted, is as follows:-

> "That Mr Gilbert Dinnie be hereby deemed to have been on paid on sick leave for the 22.1 days prior to his return to work on 5 May 2003."

GROUNDS OF APPEAL

3 It is against that decision that the appellant employer now appeals on the following grounds:-

"1. The Commissioner erred in law in finding that the Commission had jurisdiction to enquire into and deal with the matter.

PARTICULARS

1.1 The Commissioner erred in his characterisation of the matter as "the over-utilisation by an employee of his or her sick leave entitlement" or "the issues between the parties about the situation now faced by Mr Dinnie resulting from the Respondent seeking to recoup the excess leave entitlement".

1.2 The matter was properly characterised as the recovery of money paid out of the Consolidated Fund without proper authorisation.

1.3 The recovery of such a payment is not an industrial matter.

2. Further, and in the alternative, the Commissioner, having found that there was jurisdiction to enquire into and deal with the matter, erred in not dismissing the matter on the basis that further proceedings were not necessary or desirable in the public interest pursuant to section 27(1)(a)(ii) *Industrial Relations Act* 1979.

PARTICULARS

2.1 The Commissioner acted upon a wrong principle, namely that the right of the State to recover payments made out of the Consolidated Fund without proper authorisation was merely a consideration to be taken into account in the exercise of a discretion related to fairness, whereas the correct principle is that the State is entitled and obliged to recover such payments.

2.2 The Commissioner allowed extraneous or irrelevant matters to guide or affect him, namely:

2.2.1 delays on the part of the Department in maintaining its employment records;

2.2.2 that the Department was in breach of two employment statutes;

2.2.3 that Mr Dinnie acted in good faith, and most appropriately and properly and that the overpayment was not attributable to any representation he had made;

2.2.4 section 125 *Property Law Act* 1969;

2.2.5 the amount of the overpayment; and

2.2.6 the size of the risk of unauthorised expenditure on a potentially grand scale.

3. The Commissioner erred in law in making an order that had the effect that the Respondent was paid for not rendering service.

PARTICULARS

3.1 Mr Dinnie was neither working nor accessing a leave entitlement during the period to which the order of the Commission relates. The order of the Commission offends the principle of "no work, no pay"."

(Particular 2.2 was acknowledged by Counsel for the appellant as having fallen away because it was not addressed.)

BACKGROUND

4 The abovenamed respondent, an organisation of employees (hereinafter referred to as "the CSA"), brought a claim on behalf of Mr Gilbert Dinnie, an employee of the appellant, and presumably a member of the CSA. Mr Dinnie was ill with meningitis between 26 September 2002 and 2 May 2003 and was paid sick leave. He was paid 22.1 sick leave days more than his then current entitlement to sick leave. In other words, he had no entitlement to the amount of 22.1 sick leave days paid at that rate. He was credited with this leave by the error of an employee of the appellant. The appellant has required him to reimburse this amount, either by deducting the amount from his annual leave, by his repaying the cash equivalent or by his not accessing any further sick leave entitlements until his pro rata credits accumulate to cover the over utilisation. The amount is $4,858.50. Mr Dinnie objected to being required to repay the monies and refused to do so or to enter into any other arrangement for the repayment. The nature of the order sought in the matter, indeed, was an order which would effectively bar the employer from taking action to recover the monies overpaid.

5 The details of the matter were that, during the seven months of an illness, Mr Dinnie contacted Mr Palm, an employee in the appellant's personnel area, every three to four weeks to obtain advice on how many sick days were remaining to him. He told Mr Palm that, if his health permitted, he wished to avoid having to use any of his annual leave entitlements. He regularly submitted medical certificates and was advised in writing by Ms King, Acting Team Coordinator, Personnel Services, of the receipt of the certificates and his sick leave application forms.

6 On 1 April 2003, Ms King advised Mr Dinnie that a sick leave application was received from him for the period 30 January 2003 to 16 April 2003. However, this application had not been "processed" until 1 September 2003, some five months after its receipt. According to Ms King, Mr Dinnie's final sick leave application for the period 17 April 2003 to 2 May 2003 had been received in Personnel Services on 10 June 2003. Mr Dinnie was told by Mr Palm on 1 April 2003 that he had 27 sick leave credits remaining.

7 At this time, his illness had reached a plateau and his doctor was allowing him to determine when he felt well enough to return to work. On Mr Palm's advice, Mr Dinnie made the decision that he had to attempt to return to work on 5 May 2003, which would leave him with approximately eight days of sick leave credit which he could use if he needed to. Mr Dinnie said that, if he had been told that he had run out of sick leave entitlements, he would have attempted to return to work earlier, rather than have to use his annual leave. Therefore, he returned to work on 5 May 2003.

8 Between 17 June 2003 and 15 June 2004, Mr Dinnie made contact with the appellant regarding the correct calculation of any outstanding entitlements. He discovered that he had an amount of leave which had been deducted from his annual leave credits to cover the shortfall in his sick leave entitlements. When he questioned this, the leave credits were restored to him. Mr Dinnie at all times thought that he had done nothing wrong in dealing with the matter. Indeed, he thought that he had done what was right in raising it with his employer.

9 On 15 June 2004, the appellant advised Mr Dinnie that he had "over utilised" his sick leave by 22.1 days. The order which the appellant sought was an order that Mr Dinnie not be penalised for an over utilisation of sick leave entitlements with respect to the period of his illness, when he was not entitled to sick leave. The total period was 26 September 2002 to 2 May 2003. It was submitted on behalf of the CSA that the appellant was obliged by s7 of the *Public Sector Management Act* 1994

(hereinafter referred to as "*the PSM Act*") to maintain proper standards at all times in the creation, management, maintenance and retention of records.

10 The nature of the matter was this, to put it shortly. Mr Dinnie was mistakenly told by an employee of the appellant that he had sick leave entitlements which it is not disputed he did not have. He was paid as if he did have those entitlements. The appellant wanted the money back because it claimed that it is an overpayment and a void payment. The amount paid was $4,858.50. The appellant wished to take action in the Local Court at Perth to recover the monies. As a result, upon application of the CSA, the Arbitrator ordered that Mr Dinnie be deemed to have been paid on sick leave for the 22.1 days prior to his return to work on 5 May 2003.

11 The appellant objected to the claim that the monies should be refunded by Mr Dinnie or deducted from his remuneration by the respondent employer.

12 By s49D(2)(f) of *the Act*, an employer must ensure that details are recorded of all leave taken by an employee, whether paid, partly paid or unpaid. Regulation 4 of the *Industrial Relations (General) Regulations* 1997 states that an employer is to ensure that the employment records of the employer are kept in a manner which enables compliance with s49D of *the Act* to be readily ascertained.

13 It is to be noted that the appellant submitted at first instance that, although the money had been properly paid to Mr Dinnie and was related to the employment relationship between them, Mr Dinnie's present obligation to pay the money back to the appellant and his ability to pursue it by legal action were not "industrial matters". Therefore there was no jurisdiction in the Public Service Arbitrator to inquire into and deal with it. It was submitted that the proper forum for resolution of this matter was the Perth Local Court.

FINDINGS AT FIRST INSTANCE

14 The Public Service Arbitrator made findings as to jurisdiction and in relation to the merits.

15 The Public Service Arbitrator found as follows:-

(a) That the Public Service Arbitrator has the jurisdiction to inquire into and deal with any industrial matter relating to a government officer and that Mr Dinnie was and is a government officer.

(b) Pursuant to s44(9) of *the Act*, the Public Service Arbitrator can hear and determine the question, dispute or disagreement presently before her/him and it must be a question, dispute or disagreement "in relation to" an "industrial matter".

(c) That the over utilisation of an employee of his or her sick leave entitlement, which was the question at issue here, is a matter which relates to or pertains to leave of absence, as that is referred to in the definition of "industrial matter". Therefore, the question, dispute or disagreement to be heard and determined under s44(9) of *the Act* is an "industrial matter", as defined.

(d) The words "in relation to" used in the definition of "industrial matter" in s7 of *the Act* should not be read down.

(e) That it is a consideration which the Public Service Arbitrator is obliged by s26(1)(c) of *the Act* to take into account, namely the importance to the State of recovering public monies.

(f) However, the Arbitrator also found that he should take into account the following:-

i. That the circumstances leading to the present situation arose from delays in the respondent maintaining its employment records, which delays were in contravention of s49D of *the Act* and s7 of *the PSM Act*.

ii. That the fact that the respondent was in breach of two employment statutes was a material factor which makes it more difficult for the Director to justify his position.

iii. That the position in which the respondent found itself was caused by its own lack of compliance with the law.

iv. Mr Dinnie comes to the Public Service Arbitrator with clean hands and throughout his period of illness regularly made contact with the respondent's officers for the express purposes of monitoring his sick leave entitlements.

v. That Mr Dinnie acted in good faith and most appropriately and properly.

(g) The circumstances giving rise to the matter are not in any sense attributable to Mr Dinnie making a representation that he was entitled to the sick leave he was paid.

(h) That, by s125 of the *Property Law Act* 1969, the receipt by Mr Dinnie at the time of the payment during the entire period of his absence was "in good faith" and his remaining absent accordingly in reliance upon the information given to him by the respondent is a relevant consideration.

(i) That section, s125, also obliges the Public Service Arbitrator to have regard to all possible implications in respect of the parties, other than the union or Mr Dinnie, to that payment.

(j) The *Property Law Act* 1969 was a relevant consideration.

(k) That the union had made out its claim and the appropriate order was that Mr Dinnie be deemed to have been on paid sick leave for the 22.1 days prior to his return to work on 2 May 2003.

16 There were three issues which were raised on this appeal.

17 The first was that the Arbitrator had no jurisdiction to hear and determine this matter because it was not an "industrial matter", as defined in s7 of *the Act*. There is no doubt that the Commission, constituted by a Public Service Arbitrator, as was the case here, has jurisdiction to hear and determine an "industrial matter" and that was not in dispute before the Full Bench.

DID THE COMMISSION HAVE JURISDICTION?

18 The first question raised on appeal was whether the matter at first instance was a matter within the jurisdiction of the Commission. The Commission, constituted by the Public Service Arbitrator, has jurisdiction conferred by s80E(1) of *the Act*, subject to Division 3 Part II, to enquire into and deal with any industrial matter relating to a Government officer, a group of Government officers or Government officers generally. The Commission was taken to *Association of Drafting, Supervisory and Technical Employees, WA Branch v Building Management Authority* (1992) 72 WAIG 2162 (FB) ("the BMA case"), a decision of the Full Bench of this Commission. That case is authority for the proposition that, where an employee claims to be entitled to an amount from his employer to which he is not entitled, then such claim is not an "industrial matter". That is

because the true nature of an amount paid to which the employee was not entitled where lack of entitlement is not a matter in dispute is not an "industrial matter" in that:-

(a) It does not relate to the right of an employee as an employee if she/he is not entitled to it under her/his contract of employment.

(b) It relates to the right of the employer, but not in relation to the contract merely as a person who alleged that the employee will unjustly enrich her/himself by mistake.

(c) It certainly does not relate to the duties of employers or employees.

(d) It is not a matter which relates to the wages, salaries, allowances or other remuneration of employees because it is not remuneration, it is not part of the salary, and it is not part of the allowance (see definition in s7(a) of *the Act*).

(e) It does not relate to any other matters on what was put before us as defined in s7(b), (c) or (d) of *the Act* of the definition of "industrial matter", or s7(e), (f), (g) or (h).

(f) In particular, it does not relate to the work, rights or duties of employers or the work, rights or duties of employees.

19 That is borne out by the order sought at first instance which was an order that Mr Dinnie not be penalised for any over utilisation of sick leave for the period of his extended illness. "Penalised", as I understood it, meant to be exposed to an action to recover the amount of sick leave paid to him, and to which he was not entitled, from him.

20 Further, that differs from the situation where the question is whether the entitlement of the employee to be paid an amount under a contract is in issue.

21 That was a case in which there was an overpayment by a Government employer to an employee in an attempt by the employer to recover the amount and an attempt by the employee to prevent that. The Arbitrator was wrong to distinguish that case and not to regard himself as bound by it. That is because, too, for the purposes of this conclusion, the matter is properly characterised in accordance with the BMA case's characterisation.

22 Assistance can also be derived, too, from *Robe River Iron Associates v The Metal and Engineering Workers Union, Western Australian Branch* (1995) 75 WAIG 2478 (IAC) ("the Robe River case"). The Industrial Appeal Court held in that case that the employer's attempts to claim damages against for negligence at work, an employee was not "an industrial matter". In that case, as it was held, "the common law duty owed which arose out of the employer and employee's legal and factual proximity which just happened" (see per Murray J and also see the dicta of Scott J) and the matter was not an "industrial matter".

23 This was such a matter and therefore is, on the definition of "industrial matter" in s7 of *the Act*, not an industrial matter, at least before that definition was amended.

24 I would also add that, even the addition of the words "or pertains to" in the 2002 amendments are not sufficient to render this an "industrial matter" (see the discussion of the amendment in *CFMEU v Sanwell Pty Ltd and Another* (2004) 84 WAIG 727 (FB) and also *Hanssen Pty Ltd v CFMEU* (2004) 84 WAIG 694 (FB)). The matter, properly characterised, was a matter affecting, relating or pertaining to none of the matters referred to in the first six lines of the definition of "industrial matter" and in any of the paragraphs of the definition, except perhaps (ca) and (i).

25 It is necessary, however, to consider whether, having regard to the amendments to the definition of "industrial matter" in s7, this matter was an "industrial matter". The only provision which might extend the definition of industrial matter is paragraph (i), as amended, which now reads as follows:-

> "(i) any matter, whether falling within the preceding part of this interpretation or not, where —
>
> (i) an organisation of employees and an employer agree that it is desirable for the matter to be dealt with as if it were an industrial matter; and
>
> (ii) the Commission is of the opinion that the objects of this Act would be furthered if the matter were dealt with as an industrial matter;"

26 That provision was considered in *CFMEU v Sanwell Pty Ltd and Another* (FB) (op cit). Part (i) of the definition expressly in its own terms includes a matter which does not fall within the preceding part of the definition. Thus, for the reasons expressed in *CFMEU v Sanwell Pty Ltd and Another* (FB) (op cit), and for that reason, a matter does not have to have the character prescribed by the earlier parts of the definition to be an "industrial matter", as defined.

27 For the purposes of considering the definition of "industrial matter" generally, it was submitted on behalf of the appellant that, definition notwithstanding, the amendments to the definition applied by the *Labour Relations Reform Bill* of 2002, nonetheless, to be an industrial matter the matter must have a direct relationship to the employment relationship and not an indirect or incidental relationship. Thus, if the matter has no industrial content or is only incidentally related to the employment relationship, then it will not be an industrial matter. Further, so the submission went, this like the Robe River case, was a case which related to a common law duty of care owed by the employee which arose because of the legal and factual proximity and just happened in the case to arise factually out of the work in which the employee was engaged. In this case, the matter arose because there was a common law right to recover a debt, so that submission went.

28 It might actually be better expressed as an action to recover monies had and received. However, so the submission went, it had nothing to do with the employment relationship, that is, the attempt to recover "the debt" had nothing to do with the employment relationship. In my opinion, an industrial matter, least in one case does not have to relate to an employment relationship and that is where "employee" is, as defined, a person whose usual status is that of employee. Further, it is the case, in my opinion, that where the "industrial matter" fits the definition in paragraph (ca) of the definition of "industrial matter", and also (d), (e), (f) and (g), there is no requirement for an employment relationship or for the matter to relate to one directly or indirectly. None of those definitions, with the exception of (ca), is apposite here. The question here is, however, whether this matter was and is:-

> "any matter affecting or relating or pertaining to:-
>
> (i) any matter whether falling within the preceding part of this interpretation or not, where -
>
> (i) an organisation of employees and an employer agree that it is desirable for the matter to be dealt with as if it were an industrial matter; and
>
> (ii) the Commission is of the opinion that the objects of this Act would be furthered if the matter were dealt with as an industrial matter;
>
> and also includes any matter of an industrial nature the subject of industrial dispute or the subject of a situation that may give rise to an industrial dispute…."

29 Then there are listed certain matters expressly excluded from element (i) of the definition. It is of course clear that a matter is, by virtue of paragraph (i), an "industrial matter" even if it does not otherwise constitute an industrial matter within any part of the definition of "industrial matter" in s7 of *the Act*. In particular, for the purposes of paragraph (i) of definition of "industrial matter" upon this appeal, this matter is and was an "industrial matter" only if it is and was a matter of an industrial nature, the subject of an industrial dispute or the subject of a situation that might give rise to an industrial dispute.

30 The Arbitrator did not accept the characterisation of this matter by the appellant (the respondent at first instance) as a dispute about an alleged overpayment. The Arbitrator did not accept that the matter could be narrowly characterised as the action which the respondent must properly take to recover the money which had been overpaid. Thus, it could not be said to be an "industrial matter" because it did not relate to the work, rights and duties of an employee. In my opinion, however characterised, for the reasons which I have expressed above, the matter was not an "industrial matter" because there was, as admitted, no right to the payments and never was.

31 The Arbitrator specifically held that the right to sue in the Local Court was not a part of the matter before the Arbitrator and it clearly was not. Indeed, he held that the matter before the Arbitrator was a claim that there be an order that Mr Dinnie not be penalised for "over utilisation" of his sick leave. The Arbitrator did not refer to *CFMEU v Sanwell Pty Ltd and Another* (FB) (op cit) or *Hanssen Pty Ltd v CFMEU* (FB) (op cit) in his consideration of the definition of "industrial matter".

32 The Arbitrator held correctly that an "industrial matter" includes a matter of an industrial nature. The Arbitrator held, too, that the issue of the amount of sick leave available to Mr Dinnie and his utilisation of it and the payment in excess of his entitlements by the respondent for his entire period of absence were matters of an industrial nature, within the meaning of the definition of "industrial matter". A matter is a matter of industrial nature if it can have about it industrial character. That is, of course, consistent with the definition of "industry" which includes various definitions, whether or not apart from this *Act*, it is or is considered to be industry or of an industrial nature. Matters of an industrial nature probably are best not defined with and cannot be defined with exactness. Suffice it to say that a matter of an industrial nature has a quality about it of the industrial, and it pertains to industries, as defined, employers, employees and the nature and quality of the industry, and it is not necessary at all for there to be any employment relationship in existence. Nor is it necessary that any element in any other part of s7 of *the Act* applies to the matter.

33 Most specifically, there is not required to be any direct relationship, as required by the authorities, before the amendments of 2002 were enacted. The words of an "industrial nature" are a clear recognition that now there is not required to be an employment relationship provided that there is a dispute, the matter is one of an industrial nature and/or there is a situation likely to give rise to a dispute. In this case, there was clearly a dispute. It is to be noted that the words "industrial nature" are to be interpreted according to their popular meaning and as they would be understood by the person in the street. Thus, if, as he did, Mr Dinnie, an employee, sought that he be not penalised in a matter where he had been overpaid through no fault of his own by his employer; and there was an issue between them as to whether he should pay or whether he should not pay the monies back; and whether that was fair or unfair; and whether there was an obligation or no obligation; that matter was clearly a matter of an "industrial nature", for the reasons which I have expressed above.

34 That Mr Dinnie was to be sued was correctly characterised as not part of the industrial matter because it is not of an industrial nature, quite clearly. The enforcement of rights in another court is not part of an "industrial matter", on any definition of that term.

35 Next, in my opinion, this was a matter properly characterised as being a matter affecting, relating or pertaining to the relationship between employers and employees which it self-evidently was (see definition (ca)). The term "industrial matter" must be interpreted liberally and generously and so as to provide a platform to carry out the objects of *the Act* (s6) rather than not. In particular, the approach of interpretation requiring a Commission as a sort of jurisprudential rodent, taking bites around cheese definition of "industrial matter", is entirely wrong.

36 For all of those reasons, the Arbitrator correctly held that the Commission had jurisdiction to hear and determine the matter.

37 This matter was clearly a matter of an industrial nature which was the subject of an industrial dispute, which industrial dispute was to be heard and determined by the Public Service Arbitrator.

THE MERITS

38 The second attack on the decision in the grounds of appeal was on the merits of the decision and, in particular, it was alleged that the exercise of the discretion at first instance had miscarried. Thus, it was necessary for the appellant to establish that the exercise of the discretion at first instance, in accordance with the principles laid down in *House v The King* [1936] 55 CLR 499, had miscarried.

39 Next, the Arbitrator considered that the law was a relevant consideration in reaching which he did at first instance. The Arbitrator in fact erred in his duty to apply the law as he was required to do (see *Director General, Department of Justice v Civil Service Association of WA Inc* (2003) 83 WAIG 908 (FB) (paragraphs 59 and 60) and see *Qantas Airways Ltd v Gubbins and Others* [1992] 28 NSWLR 26).

40 The law is expressed in *Attorney General v Gray* (1977) 1 NSWR 406 (CANSW) ("Gray's case") per Hutley, Glass and Samuels JJA in which Their Honours cited the long standing Privy Council authority of *Auckland Harbour Board v The King* [1924] AC 318 at pages 326-327. The principle appears as follows:-

> "….. any payment out of the consolidated fund made without Parliamentary authority is simply illegal and ultra vires, and may be recovered by the Government if it can, as here, be traced."

41 Gray's case was a case of overpayment in excess of salary to a public servant. At page 409, Hutley J said:-

> "Where a determination has been made as to the salary which is fairly appropriate to the work to be performed, that is the only salary which may be paid for that work. There is no capacity in any servant of the Crown to make an offer capable of acceptance so as to bind the Crown, or accept an offer made to the Crown. Any such arrangement is, qua the Crown, void, and provides no basis for the disbursement of the moneys appropriated by Parliament."

42 This is such a case and the government had a duty to recover the monies because they were paid out of the consolidated fund without parliamentary authority and the payment was illegal and ultra vires. It was not a relevant consideration.

43 It is quite clear that there is an absolute right, and I might suggest a duty, in a Government employer to recover monies paid out of the consolidated fund without authority and no estoppel can operate against such an employer in respect of those monies paid out without authority. The Arbitrator was bound to consider that principle and to apply it as the law (see *Director General, Department of Justice v The Civil Service Association of Western Australia Inc* (FB) (op cit) ("Bowles case") (paragraphs 59 and 60)). A principle of law, on the authority of Bowles case, and in any event, is not a consideration or not to be taken into account.

44 The question of the application of s125 of the *Property Law Act* 1969 was not considered and again was said to be a relevant consideration and that is an error. The crux of this matter was this, as a matter of merit. The employer paid monies to which he was not entitled, albeit by error, to Mr Dinnie as an employee. He, although not entitled to the monies paid to him by error, retains them and refuses to refund the monies or otherwise make arrangements to repay them. Under the principle in Gray's case (op cit), the payment was made entirely without authority by the employer from the consolidated fund and was therefore required to be recovered. It was made without authority because there was no obligation to pay it under the contract of service or any award or agreement to Mr Dinnie, nor was it asserted that the contrary was the case.

45 The appellant had a duty to recover the monies as a matter of law and principle (see Gray's case (op cit). The CSA's member had a duty to repay the monies to which he had no entitlement. As a matter of law, that is where the matter begins and ends. Nothing was unfair about the pursuit of proper principle and the discharge of the duty of the employer in this case. There is nothing which is contrary to equity, good conscience or the substantial merits of the case in so doing. As to questions of s26(1)(a) and (c) of *the Act*, if it is necessary to take the matter further, there was nothing unfair in requiring Mr Dinnie to repay the monies and therefore it would be unfair to allow him to unjustly enrich himself by receiving monies to which he was not entitled and which were paid to him by error and which, therefore, constituted a windfall. Thus, his interests should not be allowed to supersede his employer's interests and duty and the community interest under s26(1)(d) which requires that he not be allowed to benefit at the public expense from his employer's error.

FINALLY

46 For all of those reasons, I would find that there is no merit in the claim. I would find that the exercise of the discretion at first instance miscarried according to the principles laid down in *House v The King* (op cit) because irrelevant factors were considered and because the relevant fact of unjust enrichment was not. I am of opinion that the Full Bench should substitute its decision for that of the Commission at first instance, making the findings which I have said above should be made and dismissing the application.

47 In addition, on the "no work no pay" principle, Mr Dinnie was said not to be entitled to recover the monies and there is some substance in that argument. However, it is not necessary to decide it in this matter, having regard to what I have otherwise found.

48 For those reasons, the appeal is made out. I would uphold the appeal. I would vary the decision at first instance by dismissing the application made by the CSA.

COMMISSIONER JF GREGOR:

49 I have had the benefit of reading the decision of His Honour the President in draft. I generally agree with him but add the following comments. The key issue in deciding whether there was an industrial matter is whether there was any right to the sick leave payments. Clearly Mr Dinnie never had any right because his sick leave was exhausted. That there was over utilisation of sick leave could not create a right that never existed.

50 The issue of sick leave in my view is a matter of an industrial nature. I respectfully agree with His Honour's exposition of this issue and with his determination that the Public Service Arbitrator could hear and determine the matter.

51 This does not mean that the Respondent as a government employer was not under an obligation to recover the monies which are incorrectly and in particular without the requisite authority paid out of the consolidated fund. This was its duty as a matter of law and principle as is set out in the *Attorney General v Gray (1977) NSWR 400.*

52 It was not unfair that Mr Dinnie repay the money which after all was a benefit at the public expense arising from an error. These matters should have been considered by the Commission at first instance and if the commands of s26 (1) (a) and (c) had been applied would have overwhelmed the conclusion reached.

53 For these reasons I would allow the appeal and substitute a decision at first instance with an Order dismissing the application.

COMMISSIONER S. J. KENNER:

54 The background to this appeal and the issues arising have been set out in the reasons of the President which I gratefully adopt on this occasion.

55 The first issue to be determined is whether the claim by the respondent (the applicant at first instance), was within the jurisdiction of the learned Arbitrator for the purposes of s 80E of the Industrial Relations Act 1979 ("the Act"). Relevantly, s 80E provides as follows:

"80E. Jurisdiction of Arbitrator

(1) Subject to Division 3 of Part II and subsections (6) and (7), an Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a Government officer, a group of Government officers or Government officers generally.

(2) Without limiting the generality of subsection (1) the jurisdiction conferred by that subsection includes jurisdiction to deal with —

(a) a claim in respect of the salary, range of salary or title allocated to the office occupied by a Government officer and, where a range of salary was allocated to the office occupied by him, in respect of the particular salary within that range of salary allocated to him; and

(b) a claim in respect of a decision of an employer to downgrade any office that is vacant.

(3) An Arbitrator also has the jurisdiction conferred on an Arbitrator as a relevant industrial authority by —

(a) Part VID Division 5 Subdivision 3;

(b) section 97WI; and

(c) section 97WK.

(4) The jurisdiction referred to in subsection (3) is to be exercised in accordance with the relevant provisions of Part VID, and the provisions of —

(a) subsection (6); and

(b) section 80G,

do not apply to the exercise of any such jurisdiction by an 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.

(6) Notwithstanding subsection (1), but subject to subsection (7), an Arbitrator may —

(a) with the consent of the Chief Commissioner refer an industrial matter referred to in subsection (1) or any part of that industrial matter to the Commission in Court Session for hearing and determination by the Commission in Court Session; and

(b) with the consent of the President refer to the Full Bench for hearing and determination by the Full Bench any question of law, including any question of interpretation of the rules of an organisation, arising in a matter before the Arbitrator,

and the Commission in Court Session or the Full Bench, as the case may be, may hear and determine the matter, or part thereof, or question, so referred.

(7) Notwithstanding subsections (1) and (6), an Arbitrator does not have jurisdiction to enquire into or deal with, or refer to the Commission in Court Session or the Full Bench, any matter in respect of which a procedure referred to in section 97(1)(a) of the Public Sector Management Act 1994 is, or may be, prescribed under that Act."

56 For the application at first instance to be within the learned Arbitrator's jurisdiction, it needed to deal with any "industrial matter relating to a government officer". It was not in issue that the individual concerned, the subject of the proceedings at first instance, was a "government officer". The definition of "industrial matter" is set out in s 7 of the Act as follows:

***"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) 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;

(c) the employment of children or young persons, or of any person or class of persons, in any industry, or the dismissal of or refusal to employ any person or class of persons therein;

(ca) the relationship between employers and employees;

d) any established custom or usage of any industry, either generally or in the particular locality affected;

(e) the privileges, rights, or duties of any organisation or association or any officer or member thereof in or in respect of any industry;

(f) in respect of apprentices or trainees —

(i) their wage rates; and

(ii) subject to the Industrial Training Act 1975 —

(I) their other conditions of employment; and

(II) the rights, duties, and liabilities of the parties to any agreement of apprenticeship or training agreement;

(g) any matter relating to the collection of subscriptions to an organisation of employees with the agreement of the employee from whom the subscriptions are collected including —

(i) the restoration of a practice of collecting subscriptions to an organisation of employees where that practice has been stopped by an employer; or

(ii) the implementation of an agreement between an organisation of employees and an employer under which the employer agrees to collect subscriptions to the organisation;

(h) deleted]

(i) any matter, whether falling within the preceding part of this interpretation or not, where —

(i) an organisation of employees and an employer agree that it is desirable for the matter to be dealt with as if it were an industrial matter; and

(ii) the Commission is of the opinion that the objects of this Act would be furthered if the matter were dealt with as an industrial matter;

and also includes any matter of an industrial nature the subject of an industrial dispute or the subject of a situation that may give rise to an industrial dispute but does not include —

(j) compulsion to join an organisation of employees to obtain or hold employment;

(k) preference of employment at the time of, or during, employment by reason of being or not being a member of an organisation of employees;

(l) non-employment by reason of being or not being a member of an organisation of employees; or

(m) any matter relating to the matters described in paragraph (j), (k) or (l);"

57 In determining whether the respondent's claim at first instance fell within the jurisdiction of a Public Service Arbitrator pursuant to s 80E of the Act, it is necessary to characterise the nature of the claim that came to the learned Arbitrator in this case. The terms of the notice of application originating the proceedings at first instance, are set out at AB 4 - 6. The schedule to the application, sets out the history in relation to the issue concerning Mr Dinnie in relation to his applying for and taking sick leave. This ultimately involved the utilisation of some of Mr Dinnie's annual leave, to make up a shortfall in his sick leave entitlement, for the period of his absence. Importantly, there seemed no dispute between the parties in the proceedings at first instance that ultimately, Mr Dinnie took a period of sick leave in respect of which he had no lawful entitlement to be paid. That is, there was no dispute in existence at first instance, about Mr Dinnie's entitlement to the sick leave in issue.

58 It seems clear from pars 9 and 10 to the schedule to the application, that having received sick leave payments to which he was not entitled, the appellant was seeking to recover from Mr Dinnie those payments and various options were proposed for that

purpose. Additionally, the remedy sought from the learned Arbitrator at first instance, was "an order that Mr Dinnie not be penalised for any over utilisation of sick leave entitlements with respect to the period of his extended illness ie. 26 September 2002 to 2 May 2003." It seems common ground that the sum of the over payment of sick leave to Mr Dinnie, was in the amount of $4,858.50. Given that the various options outlined by the appellant to Mr Dinnie had not been agreed, the appellant had given notice that it intended to commence proceedings in the Local Court to recover the over payments from Mr Dinnie.

59 At AB 17 in his reasons for decision, the learned Arbitrator at par 42, characterised the claim before him as in essence, "an issue as to the quantum of sick leave available to Mr Dinnie and the payment by the respondent to Mr Dinnie for his entire period of absence on sick leave". The learned Arbitrator therefore characterised the matter before him as a matter of an "industrial nature" falling within the definition of "industrial matter" under s 7 of the Act.

60 In my opinion, the learned Arbitrator erred in characterising the claim before him in this way. The background to the matter referred for a compulsory conference under s 80E of the Act, disclosed that the appellant and the respondent were in dispute in relation to payments made to Mr Dinnie by the appellant, to which he had no lawful entitlement. As I have already said, there was no dispute that this was the case. What the background to the matter reveals, is that the appellant was trying to recover from Mr Dinnie, by various suggested means, this over payment. The respondent, in referring the matter for determination under s 80E of the Act, was clearly in my opinion, attempting to avoid that outcome as against Mr Dinnie, such that he would "not be penalised for any over-utilisation of sick leave entitlements", as set out in the notice of application. Ultimately, the respondent was successful at first instance, as the order issued by the learned Arbitrator, had the effect of conferring upon Mr Dinnie, an entitlement for the period of sick leave in dispute, hereby depriving the appellant in my opinion, of any remedy to recover that amount. Seen in its entire context, in my view, the essence of the dispute at first instance was an attempt by the appellant to recover from Mr Dinnie amounts of salary overpaid to him and in relation to which, he had no lawful entitlement under his contract of service with the respondent.

61 That being so for the following reasons, the matter before the learned Arbitrator was not an "industrial matter" for the purposes of ss 7 and 80E of the Act, and was beyond jurisdiction and power.

62 A similar circumstance as the instant case was the subject of appeal proceedings before the Full Bench in *The Association of Draughting, Supervisory and Technical Employees, Western Australian Branch v Building Management Authority* (1992) 72 WAIG 2162. In that case, a dispute existed between the parties concerning an over payment of wages to an employee. As in the present matter, there was no dispute that the employee in question had been overpaid a sum of money, in error by the employer, to which he had no lawful entitlement under his contract of service. In characterising the claim in that matter as one relating to the over payment of an employee, the Full Bench came to the conclusion at 2165, that the claim was not one relating to an "industrial matter" under the Act, as it only indirectly related to the relationship of employer and employee. This was so, notwithstanding the naturally broad meaning of "industrial matter" under the then s 7 of the Act.

63 In my opinion, the present matter is on all fours with the *BMA* case. This decision bound the learned Arbitrator at first instance and in my view, required him to dismiss the application as being beyond the jurisdiction of the Arbitrator.

64 As I have said, given that the matter should have been characterised as an attempted recovery by the appellant of the over payment of sick leave to Mr Dinnie, in my opinion, on the authority of *BMA*, the matter before the learned Arbitrator, although it arose from the employment relationship, did so only indirectly and as counsel for the appellant submitted, was not in "any meaningful way affected or related to the work of an employer and employee in an industrial sense, and nor was it "dependant on the existence of an employer/employee relationship": *Robe River Iron Associates v The Metal and Engineering Workers Union, Western Australian Branch* (1995) 75 WAIG 2478 per Murray J at 2479 and per Scott J at 2482.

65 Whilst s 7 of the Act was amended in 2002 by amending Act number 20 of 2002, to expand the definition of "industrial matter" I am not persuaded that the extended definition brought the claim at first instance within the jurisdiction of an Arbitrator under s 80E of the Act. It is the case that s 7 of the Act as to the definition of "industrial matter" has been broadened to include the words in the penultimate part of the definition set out above, "and also includes any matter of an industrial nature...". However, the meaning of "industrial nature" must be read in my view, in the context of the preceding parts of the definition of "industrial matter" that being the relevant dispute of an industrial nature must have an industrial character or complexion: *Hotcopper v Saab* (2002) 83 WAIG 2020. The issue of the repayment of monies by an employee of an employer, which monies are unconnected with the contract of employment or any other industrial instrument applicable between the parties, and which is only indirectly related to the employment relationship, is not a matter of an industrial nature as defined. I am therefore of the view that the *BMA* case remains sound authority for the proposition which it enunciated and is unaffected by the amendments to the definition of industrial matter in s 7 of the Act.

66 I would therefore uphold ground one of the grounds of appeal.

67 If I am incorrect in concluding that the matter before the learned Arbitrator was not an industrial matter, then by ground two of the grounds of appeal, the appellant asserts that the learned Arbitrator erred in not dismissing the matter on the basis that further proceedings were not necessary or desirable in the public interest, pursuant to s 27(1)(a)(ii) of the Act. The basis of this submission was that the learned Arbitrator erred in exercising his discretion to make the order he did, because it contravened the principle that a "payment out of the consolidated fund made without Parliamentary authority is simply illegal and ultra vires, and may be recovered by the Government if it can be traced": *Attorney General v Gray* [1977] 1 NSWLR 406; *Auckland Harbour Board v R* [1924] AC 318.

68 The fact of the matter was in this case, that it was not in dispute that Mr Dinnie had been paid funds out of consolidated revenue to which he had no entitlement. That being the case, irrespective of the quantum of the sum of monies involved, the State has a right, and arguably a duty, to seek to recover those monies overpaid consistent with the principle enunciated in *Gray*. In my opinion, to the extent that the learned Arbitrator did not apply this general principle and sought to apply s 26 of the Act, having regard to the circumstances of Mr Dinnie, then this was in error. Whilst s 26(1)(a) of the Act requires an Arbitrator and the Commission to deal with a matter in accordance with equity, good conscience and the substantial merits of the case, this does not permit an Arbitrator or the Commission to depart from the duty to apply the general law: *Ory and Ory v Betamore Pty Ltd and Others* (1993) 60 SASR 393; *Qantas Airways Ltd v Gubbins and Others* (1992) 28 NSWLR 26 per Gleeson CJ and Handley JA; *Director General, Department of Justice v The Civil Service Association of Western Australia, Incorporated* (2003) 83 WAIG 908.

69 The effect of the order made at first instance, was to prevent the appellant from seeking to recover the over payment made to Mr Dinnie, contrary to the principles set out in *Gray.* It is to be noted that in *Gray*, as in the present case under consideration, the monies were paid to the employee in question by mistake. In that case it was held that there was no room for the equitable doctrine of estoppel to prevent the Crown from recovering the monies paid to the employee: per Hutley JA at 410; Glass JA at 412-413 (Samuels JA agreeing at 414).

70 There may be circumstances, for example, where the action of the employer is occasioned by malice or bad faith, to warrant the exercise of the discretion under s 26(1)(a) in favour of an employee, in such a case, after having applied the principle in

Gray. The present circumstances did not give rise to such considerations in my opinion. In this case, the equity and good conscience lay with the appellant being able to prosecute its lawful right to recover the monies overpaid to Mr Dinnie and indeed, for him to pay it back.

71 As to the application of s 125 of the Property Law Act 1969 (WA), I am not persuaded that its provisions would alter the approach that should have been taken to this matter at first instance. There must also be some doubt that this legislation would overturn the very longstanding principle referred to in *Gray,* without some clear indication to that effect: *Potter v Minihan* (1908) 7 CLR 277.

72 I do not need to consider ground 3. In my view the discretion at first instance miscarried for the foregoing reasons. The appeal should be upheld and the decision of the learned Arbitrator be varied by dismissing the respondent's application.

THE PRESIDENT:

73 For those reasons, the appeal is upheld and the decision at first instance varied.

Order accordingly

2005 WAIRC 00013

PARTIES	THE DIRECTOR GENERAL OF THE DEPARTMENT OF JUSTICE **APPELLANT** **-and-** THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INC) **RESPONDENT**
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY COMMISSIONER J F GREGOR COMMISSIONER S J KENNER
DELIVERED	FRIDAY, 24 DECEMBER 2004
FILE NO/S	FBA 32 OF 2004
CITATION NO.	2005 WAIRC 00013

Decision	Appeal upheld and the decision at first instance varied.
Appearances	
Appellant	Mr D J Matthews (of Counsel), by leave, and with him Ms V Jabr (of Counsel), by leave
Respondent	Mr M Amati, as agent

Order

This matter having come on for hearing before the Full Bench on the 29th day of October 2004, and having heard Mr D J Matthews (of Counsel), by leave, and with him Ms V Jabr (of Counsel), by leave, on behalf of the appellant, and Mr M Amati, as agent on behalf of the respondent, and the Full Bench having heard and determined the matter, and the reasons for decision having been delivered on the 24th day of December 2004, it is this day, the 24th day of December 2004, ordered as follows:-

(1) THAT appeal No FBA 32 of 2004 be and is hereby upheld.

(2) THAT the decision of the Commission in matter No PSACR 21 of 2004 made on 19 August 2004, be and is hereby varied by substituting therefor an order dismissing application No PSACR 21 of 2004.

By the Full Bench

(Sgd.) P J SHARKEY,
President.

[L.S.]

FULL BENCH—Ceremonial Addresses

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BEFORE THE WESTERN AUSTRALIAN

INDUSTRIAL RELATIONS COMMISSION

SPECIAL SITTING OF THE FULL BENCH OF THE
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS
COMMISSION TO WELCOME CHIEF COMMISSIONER
BEECH AND SENIOR COMMISSIONER GREGOR

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON THE 10TH DAY OF DECEMBER 2004

BEFORE THE FULL BENCH OF THE WESTERN AUSTRALIAN INDUSTRIAL COMMISSION

HIS HONOUR THE PRESIDENT P.J. SHARKEY

AND FULL COMMISSION

MR J. RADISICH appeared on behalf of the Honourable Minister.

MS M. SARACENI represented the Law Society.

MR R. GIFFORD represented the AMMA.

MS M. KUHNE represented the C.C.I.

MR D. ROBINSON represented the Unions WA.

Welcome

PRESIDENT: The Full Bench sits today to welcome Chief Commissioner Anthony Richard Beech and Senior Commissioner John Francis Gregor to their new offices as Chief Commissioner and Senior Commissioner respectively, their appointments having been announced last week by the Minister and they having been duly commissioned. It is very pleasing to see such a large and representative gathering here this morning. I welcome you all and I thank you for attending this important occasion. I extend a particular welcome to the relatives and friends of the Chief Commissioner and Senior Commissioner. I welcome the Chief Commissioner's partner, Gail Phillips, herself an accomplished professional; I welcome his daughters, Helen and Shauna, his father, Les, and mother, Nora, and his sister, Lesley, and her husband, Victor Gregg.

I digress for a moment to observe that Les Beech has been well known for many years in industrial relations in this state and in this Commission and not so well known and somewhat undeservedly not so well known for being a former member of the crew of the Queen Elizabeth class battleship, "HMS Warspite", accounted the best gunnery ship in the fleet no doubt due to his presence.

I extend a particular welcome too to Ms Pam Gregor, herself also an accomplished professional. She is the wife of the Senior Commissioner. I welcome his son-in-law, Mr Scott Binet and his daughter, Mrs Melanie Binet, who although she is of counsel and has appeared in that capacity in this Commission has duty - - has somewhat onerous duties which take up the bulk of her time in relation to two future advocates in this Commission who are hers and Scott's sons. And needless to say assists in the bringing up of their grandfather.

I welcome former Chief Commissioners - Eric Kelly, Bruce Collier and Bill Coleman. Former Senior Commissioners Court and Fielding; Commissioners Cawley, Salmon and Negus and the Commissioner for Equal Opportunity, Yvonne Henderson.

I record amongst others the apologies of the Attorney General, the Honourable J.A. McGinty MLA and the Minister for State Development, the Honourable Clive Brown.

I welcome to and thank officers of the Commission, those most important people present at this gathering.

It is unnecessary for me to recite the achievements of these colleagues of ours over the years. Both gentlemen are long-serving, able and experienced members of this Commission and their achievements in this Commission and in industrial relations speak for themselves.

Chief Commissioner Beech was welcomed to this Commission on the 5th of October 1988 as a Commissioner and Senior Commissioner Gregor on the 19th of March 1985. They have served 16 years and 19 years respectively and are known and respected throughout the Western Australian community, particularly the industrial relations' community.

Chief Commissioner Beech has also, whilst he was a member of this Commission, studied for and conferred upon - - and has had conferred upon him the Degree of Bachelor of Laws and is not only an authority on trade union history but, indeed, something of an oracle. Senior Commissioner Gregor is also known for his very competent work as chair of the Commission on Government which was something of a milestone in the consideration of the civic affairs of this state. But perhaps more importantly than that, he is what I might describe as an intrepid aviator.

Both Chief Commissioner Beech and Senior Commissioner Gregor by their achievements as members of this Commission have the respect of the community and the respect and affection of us their colleagues. They possess all of the attributes for the senior offices which they now occupy. These appointments are a fitting recognition of their attributes and are of great benefit to this Commission. It is a great pleasure on behalf of the Commission to welcome them in their new offices and on behalf of the Commission I wish both the Chief Commissioner and the Senior Commissioner a long and happy occupation and as Owen once enjoined a person to do, to enjoy their offices.

Mr Radisich?

MR RADISICH: Thank you, your Honour.

Your Honour, the - - Your Honour, Chief Commissioner, Senior Commissioner, Commissioners, my name is Jeff Radisich. For those who don't know me, I'm - - I've been requested by the Minister for Consumer and Employment Protection to represent him here this morning at this ceremony to welcome the Chief Commissioner and the Senior Commissioner on their respective appointments.

The former Chief Commissioner Coleman resided for some 17 years during a period of fairly dramatic change in the industrial relations' landscape in Western Australia. Since 1987, your Honour, we have moved from a centralised system based on arbitration and conciliation through to a system with greater emphasis on collective bargaining and a safety net of - - safety net of minimum standards. It is to the credit of all of the Commissioners that the Commission's independence has been upheld during these periods of change. Indeed, the role of the Commission in maintaining decent living standards and dignity in employment has contributed to a better society in this state.

A question needs to be asked however, and that is what challenges confront the Commission during the leadership of the new Commissioner...(on tape)... and the new Senior Commissioner. Some challenges will be continuing, other challenges will be new. And the answer I guess is that only time will tell, but some of the challenges will include the maintenance of a fair minimum wage - - the maintenance of fair minimum wages and conditions. This will be - - this will continue to be a community issue upon which the Commission must rule independently and in the interests of all, but particularly for those in disadvantaged positions.

The setting of a minimum wage for - - of - - for the work of West Australian employees will continue and invariably in an environment of competing interests and often under strong external criticism. Indeed, the Commission's role in maintaining the minimum standard of working conditions which can be expected by all West Australians should never ever be underestimated or diminished.

Disputation will continue to occur. Many very familiar matters will be brought before the Commission for conciliation and arbitration, but other matters will be new, untested and invariably difficult to resolve. Those matters could include issues like joint employment, equal remuneration and pay equity, work and family issues, dealing with the increase in casualisation of the workforce, retaining our aging workforce or the rights of workers to organise freely.

There'll be threats to the independent operation of the Commission. At this time we have a Federal Government seeking to impose its own particular view of workplace relations upon our state under the guise of a simplified or a unified system. How the Commission responds to these challenges will be of vital importance to the people of Western Australia. It is the government's view that the strong and - - that a strong and - - that strong and vibrant workplaces need to be supported by a fair industrial relations system in which the rules are properly applied.

The government implemented important reforms through the Labour Relations Reform Act 2002 which have provided valuable tools to the Commission to increase wages for the low paid, reinvigorate collective bargaining over a strong award safety net and to resolve disputes. More change will undoubtedly occur in the legislative framework and the Minister's assurance is that under this government the Commission will retain its pre-eminence in labour relations in this state.

And now I'll move, your Honour, to almost like a version of "This is your life" and, if you'll bear with me, in relation to Chief Commissioner Beech: You've had a distinguished career in senior ranks in the union movement representing workers across many industries, rising to the president - - to the position of President of the TLC and working with employers and government on the National Occupational Health and Safety Commission, on the board of the Metropolitan Water Authority and the Westscheme Superannuation Fund. You were appointed to the Commission, as the President has stated in 1988; you've dealt effectively with matters across the building industry, rail, transport, maritime security, cleaning and health industries. You've also shouldered the burden of chairman of the Government School Teachers' Tribunal, Public Service Arbitrator, Railways Classification Board and, of course, was Senior Commissioner from 2002.

In the Commission you have been central to successfully dealing with, amongst other things, matters to do with the difficult areas of prisons, state and minimum wage cases and BHP Billiton's operations in the north-west. I also understand that for some time you've been involved in the introduction of new technology to bring a greater efficiency to the Commission's procedures. At the same time as fulfilling this heavy workload - and I think mentioned by his Honour - you've taken time to pass on your knowledge of advocacy and negotiation to university students.

And now Senior Commissioner Gregor, another version of "This is your life". Like many other practitioners - and this is a matter dear to my heart - you started out as a government industrial relations officer. You also, like many other practitioners, you moved to the CCI, specialising in construction and mining industry, and undertaking representation in state and federal tribunals. Significant projects delivered with your considerable IR input include the 1975 Hamersley expansion and the significant 13 billion North West Shelf Project. In 1985, as already stated, you were appointed to the Commission with allocations across the public sector - prisons, meat and a range of other industries - and in 1990 were appointed to the Federal Commission. Importantly, and also mentioned, in 1994 you chaired the Commission on Government. You examined ways to prevent corruption and improper conduct in the public sector. Recently you assisted in resolving the roof tilers' dispute, yet again demonstrating your ability as an independent peacemaker and the importance of having a well resourced and empowered State Industrial Relations Commission. You've been active in the Army Reserve, in hockey, tennis, Industrial Relations Society and my notes saying in "flying high" but I understand that to mean flying aeroplanes at high altitude.

Although each of you has come to the Commission with a background in either predominantly union or employer experience, both of you have established reputations as impartial and effective Commissioners enjoying the support of all parties in the industrial relations system.

So in conclusion, the Minister wishes both of you continuing success and enjoyment in fulfilling your important roles in the Commission and assisting WA workplaces through the challenges ahead. I might add, these sentiments are also shared by myself, my staff who appear before the Commission from time to time and the many public sector employers that we represent.

Thank you.

PRESIDENT: Thank you, Mr Radisich. Ms Saraceni?

MS SARACENI: Mr President and Commissioners, it is with great pleasure that on behalf of the Law Society of Western Australia I welcome the elevation of Senior Commissioner Beech to the position of Chief Commissioner and Commissioner Gregor to the position of Senior Commissioner.

It briefly crossed my mind today that as a legal practitioner practicising in this jurisdiction, I might need to seek leave to appear until I recalled I had been invited to address. Apart from this anomaly or technicality, this jurisdiction is now well frequented not only by our member lawyers but also by our member barristers, including Senior Counsel. This representation, I'm pleased to say, is for employees, unions and employers. It can now be said that lawyers are an accepted part of the industrial relations jurisdiction in this state. The ever changing legislative framework within which this Commission operates confirms the place of lawyers in assisting not only those it represents but also the Commission in dealing with matters before it.

Over the last 15 or so years that I have practicised in the industrial relations jurisdiction, I've had the opportunity and pleasure to appear before both Chief Commissioner Beech and Senior Commissioner Gregor when exercising their conciliatory and arbitral functions. They are both exponents of the principals of dealing with matters in reliance on equity, good conscience and the substantial merits of the case, always within the legal framework established by Parliament. This is to their credit and their elevation today is public recognition of this.

Chief Commissioner Beech, if I could address you first. The Law Society looks forward to working collaboratively with you in ensuring that the practices and procedures of this

Commission meet Best Practice standards and are appropriately tailored to the jurisdiction. I say that conscious that I'm speaking to a fellow Bachelor of Laws graduate. I echo the words of the now-Attorney General on your appointment as a Commissioner, a few years ago it had been said, and I quote:

"I think your appointment will add significantly to the stature of this Commission to enable it to function properly over the years ahead."

16 years on and those words remain true.

Senior Commissioner Gregor, the Law Society particularly recalls the work you did as the chairperson on the Commission on Government and your dealings with the public sector. And I quote from your own concluding remarks at the 1985 inauguration to the position of Commission - - Commissioner, and I quote:

"One of the most important things about my appointment is that it allows me to do something to serve our community. I hope that I have accumulated the experience necessary to discharge the task I think I want to do. I believe that the Commission has an important role to play in the conciliatory settlement of disputes and I would intend to pursue the aims of the Act in that respect, whether it discomforts the parties or not."

And I stress those last words. History shows that you have been true to your word and I imagine there is more discomfort to come for parties appearing before you.

On a personal note, I'd like to say "congratulazioni" and "buon natale" to both of you, and if it pleases the Commission, thank you, I'm sure everyone's understood those words.

PRESIDENT: Thank you very much, Ms Saraceni. Mr Gifford?

MR GIFFORD: May it please your Honour and members of the Commission all.

On behalf of the state manager of Australian Mines and Metals Association, John Flood, who unfortunately was unable to be here as he is overseas, I would like to extend AMMA's congratulations to the new appointees - Tony Beech as Chief Commissioner and Jack Gregor as Senior Commissioner. And on a personal note, I'd confirm that I've had the pleasure to congratulate them personally when, as his Honour indicated, the announcement was made when - - in the course of last week by the Minister at the function for the retiring Chief Commissioner Coleman.

Both, now-Chief Commissioner Tony Beech and Senior Commissioner Jack Gregor, have in their former capacities here at the Industrial Relations Commission represented their positions particularly well and hence their appointments are particularly well deserved based upon, as his Honour has already indicated, achievements which really speak for themselves. Certainly they have had, both, very extensive experience in a wide range of industry sectors and disputes and industrial matters before this Commission and they both therefore have a range of knowledge which would be difficult to surpass - bearing in mind, of course, their appointments extend, in Senior Commissioner Gregor's case, back to 1985 and Chief Commissioner Beech's case 1988.

There's also been a demonstrated capacity, particularly, of course, with Tony Beech having made - - having held the Senior's role for some period, a demonstrated capacity to act in a delegatory role.

Each of the members have brought their own styles to their roles to date before this Commission and no doubt will continue to do so but it can clearly be said that both have contributed directly to maintaining the standing and the integrity of this tribunal in the eyes, not only of the industrial relations' community but the community at large. And, of course, we may be assured that that will continue.

During the period that they've been here, that is in the Commission, they have witnessed and, indeed, been part of an era of very significant change in industrial relations as has been already touched upon by Mr Radisich. The shift to agreement making and the notion of awards as safety nets, up-to-date safety nets, the development of and the focus upon individual agreements both state and federal and the shift to the latter; the Federal and State Government legislative involvement in prescribing parties' rights and obligations, an issue that was not a relevant issue back in the 80s, and, of course, the development of freedom of association. These - - those kinds of changes will, of course, continue to develop in the future and there will be new challenges confronting the Commission - again, as has been touched upon by Mr Radisich, for instance, in relation to the Federal legislative proposals in relation to further involvement in parties' rights and obligations, indeed even a restriction thereof - and the wider issue of the harmonisation of the activities and roles of the industrial tribunals, that issue being more in the nature of a long-term issue.

Let me just interpose very quickly in relation to that and reinforce the fact that Australian Mines and Metals maintains a very close and ongoing interest in the role and activity of this tribunal and the legislation that underpins it and as a section 50 party, we very much value that role and seek to participate at every opportunity where such role allows us to.

Chief Commissioner Beech will be for the future at the forefront of dealing with those challenges that are going to come, those that I referred to earlier, and meeting those challenges we can all confidently say he has already demonstrated, and will in the future demonstrate, his capacity to act in a totally independent - and I also say totally objective - manner. And we would believe too that that approach, whilst it's inherent in the rest of the members of the Commission, his approach we think will enable a cohesive team work to continue to remain - - well, to develop further, I should say, within the Commission.

If Chief Commissioner Beech deals with members of the Commission as he deals with parties and representatives that have come before him in the whole period that he's been here, that is to say with a great deal of courtesy and a great deal of empathy with their permission - - with their positions, then that cohesiveness within the Commission will surely be achieved.

I don't know that it's going to be possible for Chief Commissioner Beech to emulate the years of service as Chief that his predecessor has just concluded. In my eyes he's still a relatively young bloke, but that notwithstanding I don't think there's still 17 years that are capable of being filled. But we wish you the best opportunity that's available to you to measure up to that standard.

As far as Senior Commissioner Gregor is concerned, he too in a different role though will need to participate and deal with those challenges to which I have referred and he has certainly all of the capacity to do so. Without wanting to draw any comparisons or contrasts - and it's a very dangerous thing for an advocate to be doing - but I did feel that I wanted to make the observation that there's one particularly well recognised characteristic of Commissioner Gregor's role - and I'm not saying it's not evident in the Chief Commissioner's role, but particularly with Mr Gregor - and that is his capacity to recognise and size up circumstances - and there are only some circumstances like this - that require a pragmatic outcome and require some persuasion of the parties to see that pragmatic outcome. That's a bit of a tradition that goes back to a former Chief Commissioner Collier who was very oriented in that way. But it caused me, in reflecting on that, to reflect back - which one, of course, shouldn't do, we should only reflect forward - but I do reflect back to the time in my involvement in the mining sector in the late 80s, early 90s, when the mining industry at that time made very significant use of the Commission and because Commissioner Gregor was allocated that industry, the extent of contact was very considerable indeed. And when these days old advocates like myself set about telling war stories, we do revert back to that particular period - or I do certainly - in particular, the interplay between Commissioner Gregor and the late Stan Carter of WMC fame. And many of those incidents readily come to mind and I think resound very well. They - - we might smile at them now but at the time some of them were quite serious. But we got through it.

That's enough from me. We very much appreciate the opportunity, the invitation to have extended our welcome and again, I reinforce that our organisation extends congratulations to both in their appointments.

May it please your Honour, Commissioners.

PRESIDENT: Thank you, Mr Gifford. In my eyes, still a relatively young man.

Ms Kuhne - -

MS KUHNE: Your Honour, Chief Commissioner, Senior Commissioner and members of the Commission. Marcia Kuhne representing CCI, the Chamber of Commerce and Industry.

I do bring apologies this morning from my colleagues, Bruce Williams and Geoff Blyth who are unfortunately in other places this morning and so the - - this very happy task falls to me.

CCI thoroughly welcomes and supports the appointment of both Chief Commissioner, Tony Beech, and Senior Commissioner, Jack Gregor, to the bench of the Commission and congratulates each of them on their appointments and looks forward to participating in the many challenges that the members of - - or that my colleagues have referred to this morning. So I congratulate both of you and thank you for the invitation to CCI to make a contribution this morning.

PRESIDENT: Thank you indeed. Mr Robinson?

MR ROBINSON: Thank you, your Honour. Your Honour, Chief Commissioner Beech, Senior Commissioner Gregor and members of the Commission, it gives me great pleasure I must say to be at this ceremony this morning representing the Trades and Labor Council and affiliated unions in Western Australia to welcome the new Chief Commissioner and Senior Commissioner.

I think, your Honour, there's been a certain theme running through presentations this morning and I intend to continue that theme and in doing so it is apparent to us that the Commission may well face some difficult times in the near future and the experience certainly of both the now Chief Commissioner and Senior Commissioner will be absolutely invaluable, we believe, in meeting the challenges that may be thrust upon them. As Federal and State Governments come and go and, of course, they do no matter whoever is the longest serving Prime Minister or Premier, so too does the support for this country's unique tribunal system which, of course, is charged with the responsibility for ensuring fairness and equity in workplaces. Indeed, the waxing and waning of this support can perhaps be traced back to the support, or lack of, of our political institutions. The current political climate provides a contemporaneous and clear illustration, we believe, of this very point.

We believe that the Commission has a critical role in the West Australian community. There will always be a need in our view for a countervailing force to deal with the imbalance or the inequality of bargaining power that is inherent in the bargaining relationship between employer and employee. Obviously the union movement is one such horse, but so is the Commission. Might I suggest that that role is as critical today and will be, as it ever has been.

To you, Chief Commissioner, as I am now able to formally address you, the union movement is delighted to welcome and congratulate you on your appointment. I understand you are the second or, depending on who you talk to, the third Chief Commissioner from a union background in Western Australia and quite properly a very proud achievement. I will, of course, point out that the other former Chief Commissioner with a union background who is here today progressed from out of the Civil Service Association which, I must say, is an excellent union.

I must also remind you, Chief Commissioner, as I have on a previous formal occasion of the great lost opportunity that you suffered when you, in fact, failed to employ me as an industrial officer at the LHMU following a gruelling interview that left me feeling completely inadequate and bemused - and I think that was probably 20 years ago. Perhaps, Chief Commissioner, the words of T.S. Elliott are of some comfort to people like myself, and in 1939 he said:

"Success is relative. It is what we can make of the mess we have made of things."

Chief Commissioner, we don't believe you fit into that category. Your success and your progress through this Commission is all too apparent and, indeed, within the movement it is our - - our fate, I guess, that you moved on as one of the movement's finest advocates far too early in our mind.

Anyway, given the challenges that we believe this Commission will face in the future, it is, I think, appropriate to also remind you, Chief Commissioner, of comments that you, in fact, made in welcoming Chief Commissioner Coleman to this position back in 1987. While the circumstances are different, the challenges I suggest remain remarkably the same. And I quote:

> "We observe that we cannot judge in advance the next 20 years in industrial relations by reference to the 20 years just past. And it is apparent that this jurisdiction with others will be tested to its limits in the future. With the experience that you have gained we are confident that those who are seeking that change by the methods demonstrated thus far will meet with failure. The vast majority of persons who I ultimately represent are quite dependent on this Commission for their way of life and their interests, and it is in their interests and therefore in the community's interests that those persons should fail."

We concur absolutely with those comments, Chief Commissioner. We have absolute confidence that you and the Commission as a whole can meet the challenges to be thrown down in the future and to agendas of those who would diminish the rights of working people in order for the few to gain at their expense.

Senior Commissioner, the Trades and Labor Council also extends its congratulations to you on your appointment. It is - - I was going to say perhaps there aren't too many in this room who know of your work on Commission in Government but clearly that's a redundant sentence now. But there is due recognition to be paid to those achievements and unfortunately some of those achievements get lost in time or, indeed, in inactivity. I speak, of course, of the work - - your work on COG. As an official at the time with the Civil Service Association it was obvious that much was wrong or distorted across government. You, Senior Commissioner, took on the invidious role of ultimately recommending institutions and processes that sought to be bring about more open and accountable government. And it is probably to the shame of successive governments that some of your insightful work has not been acted upon and, indeed, has probably been lost. Perhaps though, Senior Commissioner, there is some degree of comfort in the fact that today's boardrooms and hopefully governments are consumed with the policies and practices of good corporate governments. Maybe you were just that bit too early.

Your experience both within and outside this Commission is invaluable and we will recognise your positive and continuing contribution to the Commission. In his speech to commemorate the centenary of this Commission, the then-Chief Commissioner Coleman referred to the "integrity, independence and dedication" of the members of the Commission and its predecessors as being integral to the enduring presence of the uniqueness of our industrial relations system. We believe that both you, Chief Commissioner Beech, and you, Senior Commissioner Gregor, embody those values.

Again, on behalf of the Trades and Labor Council and all affiliated unions I congratulate you on your appointments, wish you well in carrying out your important work and look forward to the continuing positive relationship that has been developed with you into the future. Thank you.

PRESIDENT: Thank you, Mr Robinson. The Chief Commissioner.

BEECH CC: Thank you very much, Mr President, and may I thank all of you for your words of welcome to the position of Chief Commissioner of the Commission.

Since my first appearance in it in 1973 until today I have developed the utmost respect for its value and its worth to the community of this state. But as Mr Radisich and Mr Robinson and others have said, industrial relations has been one of the areas of our society which has changed the most over time as governments of one persuasion or another change the Act. On each occasion they use the words "reform the Act". It nevertheless remains a change and reform, like beauty, is in the eye of the beholder. It's therefore - - one can never really take for granted what words will be made by the persons who appear at occasions such as this and I'm very grateful for the words of support that you have given.

I have no doubt that the future in industrial relations holds the prospect of as many changes in the future as have occurred in the past. However the Commission's value and its worth continues, as does its strong independence from the government of the day, and the Commission will continue to do as it has done, as Ms Saraceni has observed, it will discharge its duty in accordance with the Act according to equity, good conscience and the substantial merits of the case.

I appreciate the Chief Commissioner's position has its own significant challenges and I look forward to meeting those challenges. I consider myself fortunate to work with the colleagues who are with me on the bench this morning. I am especially pleased at the appointment of Jack to the position of Senior Commissioner. We have known each other for over 30 years; we have worked as Commissioners since my appointment in 1988 and I will value his contribution as Senior Commissioner not just for the reason referred to by Mr Gifford, but the other qualities as well and I welcome Jack to that position.

I am acutely conscious also of the former Commissioners, Senior Commissioners and Chief Commissioners who I am delighted to see in court this morning. Eric Kelly and Don Court were appointed when the Commission was established in 1964. While one must look forward and not backwards in industrial relations, I have a keen sense of history and I try to recall the lessons to be learned from it and it is a privilege to be welcomed as Chief Commissioner in the presence of two of the persons who were appointed originally in 1964.

So too it's a pleasure to see Bruce Collier - I'm not sure if Gary Halliwell is present. But they together with Eric and Don will all remember my youthful appearances before them in 1970 and even now still regard me as a whipper-snapper. Rod Gifford's not alone in that regard.

And then those past colleagues who are able to be present today with whom I've been fortunate to serve in my time at the Commission - Owen Salmon, Sally Cawley if she's here, Gavin Fielding, Bob George if he's here, John Negus I see, and, of course, Bill Coleman whose decision to retire a fortnight ago I respected but would have appealed if I could have done so. To Bill especially for the last 2 years until my appointment as Chief, I owe a debt of gratitude and I thank you.

To be Chief Commissioner in the presence of three previous Chief Commissioners of such standing is most daunting, let me tell you. I owe thanks to you all for the support given to me at times and the lessons that I've learned from you all and I hope that I do not forget those lessons.

I'm also delighted that one of my oldest friends, Cathy Digwood, is present and also Yvonne Henderson, the Commissioner for Equal Opportunity, and thank you for attending.

I would also like to thank my family who are here for their support, my parents - particularly my father who as the President has commented upon is known to many of you from his long service as a union official and his frequent appearances in the Commission itself from the late 1960s; my sister, her husband, Vic, and my daughters Helen and Shauna, and to Gail, thank you all for attending and sharing this occasion with me.

To my present associate, Rama Allison, and to June Stack who has worked with me now since June 1997, thanks also to you both.

Mr President, I look forward to my role with great enthusiasm and may I thank you for your courtesy in convening this Full Bench and thank you very much.

PRESIDENT: The Senior Commissioner.

GREGOR SC: Your Honour, thank you very much.

First I'd like to thank you at the bar table, and bene grazie, Maria, for your kind comments. I want to thank some other people too, particularly my wife. I'm sort of lucky, because my wife is a psychologist. When I - - early in her career, she was an industrial psychologist, so - - and now she's an educational psychologist and both of those disciplines have been of assistance with me because first of all I needed to know a bit about industrial relations, then I needed some further education which she has provided. And the good thing about it is that she's never, ever given me a bill for it, although Ron Linney has a car park with my name on it outside his shop in Subiaco. So I thank Pam for all her support.

Too, I have the support of my daughter, Melanie. It's good to have a real lawyer in the family, good black letter lawyer. The downside of that is she's very acerbic about my decision writing and - - but I nevertheless appreciate her involvement in the profession. Her involvement goes back when she was a little girl, she used to come to court with me and sit in the back and watch and come out with me on jobs and it's really good that she's developed the way she has and has married a fine man and has got two fine boys.

Rod Gifford talked about pragmatic dispute solution. Some of the lawyers in the room would have shaken a little bit when they - - when they said that but I learned it at the feet of Bruce Collier in the big Robe decision cases in 1987 when we were in Karratha for many months. Bruce and I used to walk around Karratha at night time, usually going to find a beer, but I always remember Bruce's wise counsel and advice to me about how I should apply my talents and hone them and that how valuable it is that when people come to this Commission, what they're seeking is a calm atmosphere where their problems can be examined and a solution that they're comfortable with and their opposition are comfortable with can be found. That's what we try and do. We try and ensure that there's a balance between people and that the outcome is something that they like. Not always can we do that and then we have to arbitrate and when you arbitrate, someone wins and someone loses because it doesn't matter how good the arbitrator is, it's very rare that you can find something which is absolutely right for both. So Bruce and my other colleagues from those days, I thank for teaching me this - - this business.

I started here in 1985, which is a long time ago. I still have the same feelings about the job and its mission and its aim as I did then. There's been some discussion about the changing political and social times in which we find ourselves. Well that's not unusual, that's the dynamic of the law that we deal with here. It's affected by our society and it's affected by politics and the law that we administer comes to reflect that society and those politics. But the overriding thing that remains the same is a requirement that here we act with fairness, that this is an equity-based place, and that regardless of how the politicians want to amend the Act, always its basis is the balancing of power and the fairness and the use of that balance.

I consider it an absolute privilege to be in this position. It's probably the best job that anyone could ever have - I love doing it, I enjoy the work in the atmosphere that's created by this Commission from the President and the Chief Commissioner and my colleagues. I'm looking forward to serving it - - the Commission still further as Senior Commissioner and I welcome the opportunity to serve as Senior Commissioner to the new Chief Commissioner.

Thank you very much for your kind words.

PRESIDENT: Thank you again for your attendance this morning. May I, on behalf of the Commission, wish you all peace and happiness for Christmas and the New Year. These proceedings are now adjourned.

PRESIDENT

PRESIDENT—Unions—Matters dealt with under Section 66—

2005 WAIRC 00173

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES IAN HALL

APPLICANT

-and-

THE SECRETARY, COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION

RESPONDENT

CORAM HIS HONOUR THE PRESIDENT P J SHARKEY
DATE THURSDAY, 27 JANUARY 2005
FILE NO/S PRES 1 OF 2004
CITATION NO. 2005 WAIRC 00173

Decision Application discontinued by consent.

Order

The Notice of Application herein, having been filed in the registry of the Commission on the 6th day of January 2004, and having been listed for hearing before the Full Bench on the 1st day of February 2005, and the parties herein, on the 25th day of January 2005, having filed in the Registry of the Commission a Proposed Minute of Consent Order to discontinue the application 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 27th day of January 2005, ordered and declared, by consent, as follows:-

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

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

(Sgd.) P J SHARKEY,
President.

[L.S.]

AWARDS/AGREEMENTS—Application for—

2005 WAIRC 00145

CLERKS (UNIONS AND LABOR MOVEMENT) AWARD 2004

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES, WA CLERICAL AND ADMINISTRATIVE BRANCH

APPLICANT

-v-

WEST AUSTRALIAN BRANCH, AUSTRALASIAN MEAT INDUSTRY EMPLOYEES' UNION, INDUSTRIAL UNION OF WORKERS, PERTH AND OTHERS

RESPONDENTS

CORAM COMMISSIONER P E SCOTT
DATE TUESDAY, 25 JANUARY 2005
FILE NO A 10 OF 1996
CITATION NO. 2005 WAIRC 00145

Result New Award.

Order

HAVING heard Mr M Kane on behalf of the Applicant and Mr J Walker on behalf of the Trades and Labor Council, the United Firefighters' Union and the Western Australian Prison Officers' Union of Workers; Ms C Nobbs on behalf of the Australian Nursing Federation; and Ms J Freeman on behalf of the Liquor, Hospitality and Miscellaneous Union, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby makes the following Award:

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

SCHEDULE

1. - TITLE

This award shall be known as the "Clerks (Unions and Labor Movement) Award 2004".

1B. - MINIMUM ADULT AWARD WAGE

(1) No adult employee shall be paid less than the Minimum Adult Award Wage unless otherwise provided by this clause.

(2) The Minimum Adult Award Wage for full time adult employees is $467.40 per week payable on and from 4th June 2004.

(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) 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.

(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.

(6) (a) 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.

(b) 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.

(7) Subject to this clause the Minimum Adult Award Wage shall -

(a) apply to all work in ordinary hours.

(b) 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.

(8) Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for adult employees 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.

(9) Adult Apprentices

(a) Notwithstanding the provisions of this clause, an apprentice, 21 years of age or over, shall not be paid less than $406.70 per week.

(b) The rate paid in paragraph (a) above is payable on superannuation and during any period of paid leave prescribed by this Award.

(c) 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.

(d) Nothing in this clause shall operate to reduce the rate of pay fixed by the award for an adult apprentice in force immediately prior to 5th June 2004.

2. – ARRANGEMENT

Part 1 - Application and Operation

1. Title
1B. Minimum Adult Award Wage
2. Arrangement
3. Area
4. Scope
5. Term
6. Definitions
7. No Reduction
8. Dispute Settlement Procedure

Part 2 - Hours and Overtime
9. Hours
10. Additional Rates for Ordinary Hours
11. Breaks
12. Overtime
Part 3 - Salaries and Related Matters
13. Classifications and Wage Rates
14. Junior Employees
15. Supported Wage System
Part 4 - Employment Categories and associated conditions
16. Full-Time Employees
17. Part-Time Employees
18. Casual Employees
Part 5 - Leave of Absence and Public Holidays
19. Annual Leave
20. Sick Leave
21. Bereavement Leave
22. Carer's Leave
23. Parental Leave
24. Leave to attend Union Business
25. Trade Union Training Leave
26. Public Holidays
27. Long Service Leave
Part 6 – Termination of Employment and Redundancy
28. Termination of Employment
29. Redundancy
30. Transmission of Business
Part 7 – Staff Development and Related Matters
31. Training
Part 8 – Record and Payment
32. Record
33. Payment of Wages
34. Award Availability
35. Superannuation
Part 9 – Allowances
36. Vehicle Allowances
37. Location Allowances
38. Traveling Time
39. Higher Duties Allowance
Part 10 – Miscellaneous
40. Certificate of Age
41. Right of Entry
42. Uniforms
43. Award Flexibility
44. Notification of Change
45. Blood Donors
Schedule "A" - Respondents
Schedule "B" - Named Union Party
Schedule "C" – Named Employer Parties

3. - AREA

This award shall operate within the State of Western Australia.

4. - SCOPE

(1) This award shall apply to all clerical and administration employees employed in the classifications set out in this award and in the industry of the labor movement, and employed by:

(a) unions of employees and or the branches of unions of employees registered under the Industrial Relations Act 1979 (WA) or the Workplace Relations Act 1996 (Cth), including as listed in Schedule A;

(b) the Trades and Labor Council or any company owned and or operated by the Trades and Labor Council,

and any other employer listed in Schedule A engaged in the labor movement industry.

5. - TERM

The term of this award shall be for a period of three years commencing as from the beginning of the first pay period commencing after the date hereof.

6. - DEFINITIONS

"Adult" means any employee twenty-one years of age and over, or an employee who is in receipt of the prescribed adult rate of pay.

"Commission" means the Western Australian Industrial Relations Commission.

"Labor movement" means the industrial and political organizations whose stated primary aim and purpose is to support and improve working and social conditions for working people.

7. - NO REDUCTION

An existing employee (including casuals) who continues to be employed with the same employer after the operation of this award shall not be paid less or suffer any reduction of conditions than they would have been allowed prior to the registration of this award.

8. - DISPUTE SETTLEMENT PROCEDURE

(1) Any grievance, complaint, claim or dispute, or any matter which is likely to result in a dispute between any party to this award, shall be subject to discussion procedures which ensure that the parties are promptly and fully informed of the issues involved, and any differences arising therefrom shall be discussed with a view to avoiding industrial action.

(2) The employer shall advise the accredited representatives of the union of any proposed changes in the normal pattern of working arrangements affecting members and if the matter is not resolved the general machinery provisions of this clause shall apply.

(3) The employee(s) concerned shall discuss the matter with the immediate supervisor. If the matter can not be resolved at this level the supervisor shall, within three days of receiving the dispute, refer the matter to a more Senior Officer nominated by the employer, and employee(s) shall be advised accordingly.

(4) The Senior Officer shall, if able, answer the matter raised within one week of it being referred and if not able to do so, shall refer the matter to the employer for its attention, and the employee(s) shall be advised accordingly.

(5) The employer shall respond to the employee(s) within one week of it being referred.

(6) If not settled at this stage the matter shall be the subject of formal discussion between the union and the employer.

(7) Should the issue remain in dispute either party may refer the matter to the Commission for determination.

The settlement procedures provided by this clause shall be applied to all manner of disputes referred to in subclause (1) of this clause, and no party, or individual, or group of individuals, shall commence any other action, of whatever kind, which may frustrate a settlement in accordance with its procedures. Observance of these procedures shall in no way prejudice the right of any party or individual in dispute to refer the matter for resolution by the Commission.

9. - HOURS

(1) The ordinary hours of duty shall not exceed thirty-eight hours in any one week or eight hours in any day and may be worked Monday to Friday.

(2) In establishments where the ordinary hours of work:

(a) are worked over 19 days in each four week cycle, forty hours may be worked in any three weeks of such cycle; or

(b) are worked over 9½ days in each two week cycle, forty hours may be worked in any one week of such cycle.

10. - ADDITIONAL RATES FOR ORDINARY HOURS

An employee who is required to work any ordinary hours prior to 7.30am or after 6.00pm on any day Monday to Friday both inclusive shall be paid, for each hour so worked, the ordinary rate plus twenty percent.

11. – BREAKS

(1) Meal break

(a) A meal break shall be taken at a time mutually arranged between the employer and employee after no more than five hours of work.

(b) The meal break shall be one hour, except in cases where the employer and employee agree that the meal break shall be for a lesser period not shorter than thirty minutes.

(c) Where an employee is required to work through a meal break, overtime rates shall apply until the meal period is allowed.

(2) Refreshment breaks

All employees shall be allowed at least one paid refreshment break for every three and a half hours worked.

(3) Meal Allowance

In addition to the overtime prescribed in Clause 12. - Overtime, a meal allowance of $7.30 shall be paid to each employee in the following circumstances:

(a) To an employee who, at the requirement of the employer, works two hours or more overtime after the completion of the ordinary hours on any day.

(b) If the employee is required to work until after 1.00 p.m. on Sunday or any holiday prescribed under this Award.

(c) An employer may supply the employee with a suitable meal in lieu of making the payment prescribed by this clause.

12. - OVERTIME

(1) All time worked in excess of eight hours in any one day and/or in excess of 38 hours in any week, shall be paid for at the rate of time and one half for the first two hours and at the rate of double time thereafter.

(2) (a) All work performed on a Sunday or after 12 noon on a Saturday shall be paid for at the rate of double time.

(b) All time worked on any of the Public Holidays prescribed by this Award shall be paid for at the rate of double time and a half.

(3) In the computation of overtime each day shall stand by itself.

(4) (a) By agreement between the employer and an employee, time off during ordinary hours shall be granted instead of payment of overtime pursuant to the provisions of this clause. Such time off shall be calculated in accordance with the same formula outlined within subclauses (1) and (2).

(b) All time accrued in accordance with paragraph (a) of this subclause shall be taken within one month of it being accrued at a time agreed between the employer and the employee.

(c) Where such time off in lieu is not taken in accordance with paragraph (b) of this subclause, it shall, by agreement between the employer and the employee, be taken in conjunction with a future period of annual leave or the employer shall discharge its obligation to provide time off in lieu by making payment for the accrued time off when the employee's wages are paid at the end of the next pay period.

(d) Upon termination of an employee's service with an employer, the employee shall be paid for all accrued time off which remains owing to the employee at the date of termination.

(5) (a) When overtime work is necessary it shall, wherever reasonably practicable, be so arranged that employees have at least 10 consecutive hours off duty between the work of successive days.

(b) If, on the instructions of the employer, such an employee resumes or continues work without having had such 10 consecutive hours off duty, he/she shall be paid at double rates until he/she is released from duty for such period and he/she shall then be entitled to be absent until he/she has had 10 consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

(6) (a) Subject to paragraph (b) of this subclause an employer may require an employee to work reasonable overtime at overtime rates.

(b) 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:

(i) any risk to the employee's health and safety;

(ii) the employee's personal circumstances including any family responsibilities;

(iii) the needs of the workplace or enterprise;

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

(v) any other relevant matter.

(7) Any employee in receipt of a salary at the rate of twenty per centum per week or more in excess of the rate herein prescribed for his/her classification may agree with the employer an alternative method of compensation for hours worked outside of ordinary hours.

13. – CLASSIFICATIONS AND WAGE RATES

(1) Grading structure

(a) Advising employees of grading

(i) All employees covered by this award shall be graded according to the grading structure set out in this clause. Employers shall advise in writing their employees on engagement of their grading and of any changes to their grading.

(ii) Employees shall be graded at this level where the principal functions of their employment, as determined by the employer, require the exercise of any one or more of the skill levels set out in the Grade descriptors.

(iii) This classification structure will not be used to assess the award wage rate of any person who is a proprietor, director, or manager of a company, business or undertaking, or any person to whom has been delegated the right to engage and terminate the employment of other employees.

(iv) Employees may be required to train other employees in the skills of their own grade, or grades below their own, by means of personal instruction and demonstration.

(b) Employees disputing grading

(i) An employee can dispute any grading or new grading made in accordance with subclause (1) hereof by advising the employer in writing.

(ii) If this dispute cannot be resolved by the employer and employee in a reasonable time it will be dealt with in accordance with the dispute resolution procedure in this award.

(2) Classifications and wage rates

(a) Grade 1 clerical assistant

Adults Weekly award rate

First year of experience at this grade	$500.80
Second year of experience at this grade	$514.60
Third year of such experience and thereafter	$526.20

(i) Employees in this grade perform and are accountable for clerical and office tasks as directed within the skill levels set out. They work within established routines, methods and procedures. Supervision is routine or direct.

(ii) Machine operation - skill level 1

Operate telephone/intercom systems (eg Commander type), telephone answering machines, facsimile machines, photocopiers, franking machines, guillotines, calculator and adding machines, paging system, typewriter and telex machines.

(iii) Computer - Skill Level 1

Use knowledge of keyboard and basic menu-driven options and function keys to enter, retrieve and print data; use printer. Use of safe and correct opening and closing down procedures.

(iv) Information handling skills - skill level 1

Receive, sort, open, distribute incoming mail, process outgoing mail, receive incoming and dispatch outgoing courier mail, deliver messages and documents to appropriate persons/locations; Work with established filing/records system in accordance with set procedures including creating and indexing new files, distributing files/publications within the organisation as requested; monitoring file locations. Prepare and collate documents, take telephone messages; Transcribe information into records, sort and file documents/records accurately in correct locations/sequence using an established filing system.

(v) Enterprise/industry, specialist skills - skill level 1

Acquire and apply a limited knowledge of office procedures and requirements. Relay internal information.

(vi) Business/Financial - skills level 1

Sort, process and record original source financial documents (e.g. invoices, cheques, correspondence) on a daily basis.

(b) Grade 2 clerical officer

Adults Weekly award rates

First year of experience at this grade	$536.70
Second year of experience at this grade	$540.80
Third year of experience at this grade and thereafter	$546.70

(i) Employees in this grade perform clerical and office tasks using a more extensive range of skills and knowledge at a level higher than required in Grade 1. They are responsible and accountable for their own work, which is performed within established routines, methods and procedures. Supervision is general.

(ii) Technical Skills

Machine Operation - skill level 2

Operate switchboard (PABX system).

Keyboard Typing - skill level 1

Produce documents using standard formats at 25 wpm with 98% accuracy.

Computer - skill level 2

Manipulate previously created data bases, spreadsheets/worksheets; calculate alphanumerical and related information to perform routine tasks and generate simple reports.

Word Processing - skill level 1

Produce simple and routine documents using keyboard skills within designated timeframes.

(iii) Information handling skills - skill level 2

Maintain mail register and records. Use and maintain established filing/records systems in accordance with set procedures including creating and indexing new files, distributing files within the organisation as requested, monitoring file locations.

(iv) Enterprise/industry, specialist skills - skill level 2

Acquire and apply a working knowledge of office or sectional operating procedures and requirements. Interpret and action information supplied. Acquire and apply a working knowledge of the organisation's structure and personnel in order to deal with inquiries at first instance, locate appropriate staff in different sections, relay internal information, respond to or redirect inquiries, greet visitors.

(v) Business/financial skills - skill level 1

Assist in the maintenance of financial records and journals, including checks and authorisation. Maintain and record petty cash, prepare bank deposits and withdrawals banking; Check time and wage records.

(c) Grade 3 clerical officer

Adults Weekly award rates

First year of experience at this grade	$554.20
Second year of experience at this grade	$561.20

(i) Employees in this grade perform clerical and office tasks using a more extensive range of skills and knowledge at a level higher than required in Grade 2. They are responsible and accountable for their own work, which is performed within established guidelines, they exercise limited discretion within the range of their skill and knowledge. Supervision is limited. Employees holding a Certificate of Office & Secretarial Studies (TAFE) or accredited equivalent and who are required to use skills and perform tasks within the range of skills in Grade 3 shall be graded at Grade 3 or above.

(ii) Technical Skills

Machine Operation - skill level 3

Operate computerised radio telephone equipment, dictaphone equipment or other equipment of equal complexity.

Computer - skill level 3

Use one or more software application package(s) to operate and populate a database, spreadsheet/ worksheet to achieve a desired result; graph previously prepared spreadsheet; use simple menu utilities. Following standard procedures to template for the preceding functions using existing models/fields of information. Create, maintain and generate simple reports.

Keyboard Typing - skill level 2

Accurately produce documents and correspondence using knowledge of standard formats, touch type, audio type within established procedures. Copy type at 40 wpm with 98% accuracy.

Word Processing - skill level 2

Use one or more software packages to create format, edit, proof read, spell check, print and save text documents, e.g. standard correspondence and business documents. Apply additional functions such as search and replace, variable fonts, moving and merging across documents and simple maths.

(iii) Secretarial - skill level 1

Take shorthand notes at 80 wpm and transcribe with 98% accuracy. Arrange travel bookings and itineraries, make appointments.

(iv) Enterprise/industry, specialist skills - skill level 3

Apply a working knowledge of the organisation's products/services, functions, locations and clients. Respond to and act upon most internal/external inquiries in own function area.

(v) Information handling skills - skill level 3

Oversee record management systems including review and analysis.

(vi) Business/financial skills - skill level 2

Maintain financial records and journals, maintain payroll records; prepare accounts payable for payment.

(d) Grade 4 clerical officer

Adults Weekly award rate

$589.00

(i) Employees in this grade perform clerical and office tasks using a more extensive range of skills and knowledge at a level higher than required in Grade 3. They are responsible and accountable for their own work, and exercise discretion and initiative in the organisation of work within prescribed limits. Supervision is limited.

(ii) Keyboard typing - skill level 3

Format complex documents including technical data, technical language, tables, graphs, text design, indexing, variable type face; produce documents requiring specified form or to comply with regulations or standards.

(iii) Computer - skill level 3

Apply knowledge of intermediate functions to manipulate data, i.e. modify fields of information, develop new basic databases or spreadsheet models; spreadsheet, perform reconciliation.

(iv) Word processing - skill level 2

Use one or more software packages to apply advanced functions such as text columns, money columns, tables, e.g. to produce financial statements, printed forms, sorting, boxes, create displays of charts or graphs in report format, select style sheets appropriate to final presentation.

(v) Secretarial - skill level 2

Take shorthand notes at 100 words per minute and transcribe at 95% accuracy; manage executive appointments; respond to invitations; organise internal meetings on behalf of executive; establish and maintain reference lists/personal contact systems for executives.

(vi) Enterprise/industry, specialist skills - skill level 4

Provide detailed advice and information on the organisation's products and services; respond to client/public/supplier and internal organisation inquiries, within own function area, using such techniques as personal interview and liaison; explain organisation's viewpoint to clients and appropriate persons; using knowledge of internal/external regulatory requirements related to own function area. Acquire and use specialist vocabulary, i.e. technical/medical/legal within the scope of this grade.

(vii) Information handling skills - skill level 4

Create new forms of files and records as required using computer-based records systems; e.g. customer/client/supplier and subscription lists. Access, identify, and extract information as required from external sources, e.g. databases, libraries, local authorities.

(viii) Business/financial skills - skill level 3

Prepare cash payment summaries and banking reports; apply purchasing and inventory control requirements; reconcile debtors, creditors and general ledger accounts to balance; follow-up unpaid accounts by telephone liaison/interview, prepare documentation on overdue accounts for senior

officers or referral to debt recovery processes; calculate wage and salary requirements including tax, superannuation and other deductions and transfer payments for authorisation; calculate stock valuations; prepare bank reconciliation; calculate costing using established formulae for all inputs and margins.

(ix) Supervisory - skill level 1

Allocate work tasks to individuals, check work progress and correct errors.

(e) Grade 5 administrative officer

Adult Weekly award rate

$622.00

(i) Employees in this grade perform clerical and administrative duties using a more extensive range of skills and knowledge at a level higher than required in Grade 4. They are responsible and accountable for their own work, and may have limited responsibility for the work of others. They exercise initiative, discretion and judgment within the range of their skills and knowledge. Supervision is minimal.

(ii) Computer - skill level 4

Use a variety of application software packages within a micro/personal computer network including importing data from one package to another. Evaluate usefulness or applicability of software programs (using existing software programs) and recommend preferred solutions to meet new or different application requirements. Use advanced spreadsheet functions (e.g. Macro functions etc) to enhance operation of the spreadsheet. Use a central computer resource to an equivalent standard.

(iii) Word processing - skill level 3

Use all preceding word processing functions and integrate word processing software with other application software packages to produce complex text and data documents. Apply knowledge of desktop publishing to integrate complex documents. Apply advanced functions including Macros, moving columns for complex formatting of documents such as multi-column reports and presentations, including booklets. Apply complex maths functions.

(iv) Secretarial - skill level 3

Take shorthand notes at 120 words per minute and transcribe at 95% accuracy; attend executive/organisational meetings and take minutes; answer executive correspondence from verbal or rough hand-written instructions; organise teleconferences.

(v) Enterprise industry, specialist skills - skill level 5

Apply detailed knowledge of the industry in which the organisation operates to complex issues/arrangements in such areas as consumer/client services, special products/service knowledge, and respond within established internal/external regulatory parameters and policies. Indicative Specialist Skills Include; apply detailed knowledge of customs law and regulations to overseas sales and ordering. Apply detailed knowledge of inventory/stock requirements to obtain competitive quotations and initiate purchasing. Apply detailed knowledge of internal/external regulatory parameters and policies relating to industrial employment law, occupational health and safety, workers compensation claims procedures, superannuation requirements.

(vi) Information handling skills - skill level 5

Develop, plan and implement new paper based/manual filing records systems for the enterprise; assist in separate undertaking research (locate/solicit, summarise/extract and interpret information) related to function areas.

(vii) Business/financial skills - skill level 4

Post transactions to ledger and prepare a trial balance; prepare end of the period adjustments and transfers using general journal; prepare financial/tax schedules for periodic tax requirements such as payroll, sales and group tax returns; reconcile general ledger accounts; determine costing by calculating input costs and margins. Apply detailed knowledge of organisations credit terms to new accounts and to following up significant debtors, prepare periodic debtor statements.

(viii) Supervisory - skill level 2

Resolve operational problems for staff in lower grades, co-ordinate work flow within a section or unit, and counsel and advise staff who are under routine supervision.

(f) Grade 6 administrative officer

Adults Weekly award rates

$662.00

(i) Employees in this grade perform clerical and administrative duties using a more extensive range of skills and knowledge at a level higher than required in Grade 5. They are responsible and accountable for their own work, and may have responsibility for the work of a section or unit. They exercise initiative, discretion and judgment within the range of their skills and knowledge. Supervision is by means of reporting to more senior staff as required.

(ii) Computer - skill level 5

Operating/co-coordinating a group of computers such as a small multi-user system or a large group of personal computers which may include operating a help desk, running and monitoring batch jobs and performing regular back-ups and restores.

(iii) Enterprise/industry, specialist skills - skill level 6

Apply knowledge of the organisation's objectives and performance, and apply specialist knowledge, in areas such as projected growth, product trends and general industry conditions, examples include: knowledge of competitors and major clients market structure in the performance of own responsibilities; import/export activities. Indicative Specialist Skills Include; Use knowledge of basic statistics to interpret data from spreadsheets, statistical tables, graphs and frequency tables in the performance of own responsibilities. Administration of workers compensation claims, insurance and disputed claims.

(iv) Supervisory - skill level 3

Plan and organise work priorities of a unit or section; re-schedule workloads as necessary and resolve operational problems for unit or section; monitor work quality of those supervised; use observations, diagnosis and intervention skills to ensure unit/section meets objectives; organise and chair necessary work meetings/conferences; assist in planning future sectional/office organisational resources and equipment needs.

(v) Business/financial skills - skill level 5

Administer individual salary packages, travel expenses, allowances and company transport. Administer specialist salary and payroll requirements, e.g. Eligible Termination Payments, Superannuation Trust Deed Requirements, Redundancy Calculations, Maintenance Support Schemes, etc.

(vi) Secretarial - skill level 4

As well as having shorthand skills of Skill Level 3, arrange conferences and external meetings, including venues, agendas, documentation, audio-visual requirements, catering, transport and accommodation; originate executive correspondence; assist executive in preparing, attending and following up appointments, interviews, meetings, etc; assume responsibility for Designated areas of executive's work, on delegated authority.

(3) Supervision

Employees are subject to five defined levels of supervision which can be generally categorised as follows:

Direct - the employee receives detailed instructions on work to be performed and is subject to frequent personal progress checks.

Routine - the employee receives broad instructions on work to be performed except when new or unusual features require more specific instructions. Work in progress is checked intermittently while all work is checked on completion.

General - the employee receives specific instructions only when new procedures or tasks are involved. Work is checked on completion.

Limited - the employee is subject to work checks which are generally confined to establishing that satisfactory progress is being made. Work is reviewed on completion.

Minimal - the employee is subject to final review/report back on work and may receive assistance with specific problems.

NB. Supervision is not a criterion for determining classification levels but should be used as a guide in determining the overall level of responsibility and autonomy expected of the principal functions of the job.

14. - JUNIOR EMPLOYEES

Base Rate (per week) expressed as a percentage of the rate prescribed for the relevant year of experience at the Grade in Clause 13. – Classifications and Wage Rates appropriate to the work performed by the junior employee -

At 15 years of age 40 %

At 16 years of age 50 %

At 17 years of age 60 %

At 18 years of age 70 %

At 19 years of age 80 %

At 20 years of age 90 %

15. - SUPPORTED WAGE SYSTEM

(1) This clause sets out the provisions to apply to employees who because of the effects of a disability are eligible to be employed under the Supported Wage System in accordance with this clause.

(2) Definitions

In the context of this clause, the following definitions shall apply:

(a) "Supported Wage System" means the Commonwealth Government system to promote employment for people who can not work at full award wages because of a disability, as documented in 'Supported Wage System: Guidelines and Assessment Process'.

(b) "Accredited Assessor" means a person accredited by the Management Unit established by the Commonwealth under the Supported Wage System to perform assessment of an individual's productive capacity within the Supported Wage System.

(c) "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.

(d) "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.

(3) Eligibility Criteria

(a) 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.

(b) The clause does not apply to any existing employee who has a claim against the employer which is subject to the provisions of workers' compensation legislation or any provision of this clause relating to the rehabilitation of employees who are injured in the course of their current employment.

(c) (i) This clause does not apply to employers in respect of their facility, program, undertaking, service or the like which receive funding under the Disability Services Act 1986, and fulfil the dual role of service provider and sheltered employer to people with disabilities who are in receipt of or eligible for a Disability Support Pension.

(ii) Provided that this exclusion shall not prevent services funded under Sections 10 or 12A of the Act referred to in sub-paragraph (i) hereof, engaging persons who meet the eligibility criteria under the Supported Wages System on work covered by this award where both parties wish to access the system, provided all other criteria are met.

(4) Supported Wage Rates

(a) (i) 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	% of Prescribed Award Rate
10%	10%
20%	20%
30%	30%
40%	40%
50%	50%
60%	60%
70%	70%
80%	80%
90%	90%

(ii) Provided that the amount payable shall be not less than the 'ordinary income free area' as defined in the Social Security Act 1991 (which at 1 July 1994 was $45 per week).

(b) Where an employee's assessed capacity rate is ten percent, they shall receive a high degree of assistance and support.

(5) Assessment of Capacity

For the purpose of establishing the percentage of the award rate to be paid to an employee under this award, the productivity capacity of the employee will be assessed in accordance with the Supported Wage System and documented in an Assessment Instrument by either:

(a) The employer and the union, in consultation with the employee, or, if desired, by any of these; or

(b) The employer and an Accredited Assessor from a panel agreed to by the parties to the award and the employee.

(6) Lodgement of Assessment Instrument

(a) All Assessment Instruments under the condition of this clause including the appropriate percentage of the award rate to be paid to the employee, shall be lodged by the employer with the Registrar of the Commission.

(b) All Assessment Instruments shall be agreed and signed by the parties to the assessment, provided that where the union party to this 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.

(7) Review of Assessment

The assessment of the applicable percentage to be applied in respect of the rate of pay 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 procedure for assessing capacity under the Supported Wage System.

(8) Other Terms and Conditions of Employment

Where an assessment has been made, the applicable percentage shall apply to the minimum 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, but be paid at the rate of wage as determined in accordance with this clause.

(9) 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 redesign of job duties, working time arrangements and work organisation in consultation with other employees in the area.

(10) Trial Period

(a) In order for an adequate assessment of the employee's capacity to be made, an employer may employ a person under the provision of this clause for a trial period not exceeding 12 weeks, except that in some cases additional work adjustment time, not exceeding four weeks, may be utilised where required.

(b) During the trial period the assessment of capacity shall be undertaken and the proposed wage rate for a continuing employment relationship shall be determined.

(c) The minimum amount payable to the employee during the trial period shall be not less than the figure defined in subclause (4)(a)(ii) of this clause.

(d) Work trials should include induction or training as appropriate to the job being trialled.

(e) Where the employer and the 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 subclause (5) of this clause.

(11) The conditions of employment to apply during the trial period or in a continuing employment relationship shall be documented, a copy of which shall be provided by the employer to the person employed in accordance with this clause.

16. - FULL-TIME EMPLOYEES

A full-time employee shall mean an employee who regularly works 38 ordinary hours a week.

17. - PART-TIME EMPLOYEES

(1) A part-time employee shall mean an employee who regularly works less than 38 ordinary hours per week.

(2) At the time of engagement the employer and the employee shall agree to the number of ordinary hours to be worked by the employee in each week.

(3) Progression through the incremental levels of the appropriate grade in Clause 13. – Classifications and Wage Rates, shall be strictly related proportionately in accordance with the number of hours worked, to the conditions for full-time employees.

(4) A part-time employee shall receive payment for wages, annual leave, sick leave and public holidays on a pro rata basis in the same proportion as the number of hours regularly worked each week bears to 38 hours.

18. - CASUAL EMPLOYEES

(1) Subject to the provisions contained within this clause, a casual employee shall mean an employee engaged and paid as such, and whose employment may be terminated by the giving of one hour's notice on either side, or the payment or forfeiture, as the case may be, of one hour's pay.

(2) (a) A casual employee may only be employed for a minimum period of four hours and a maximum period of four weeks but the duration of the casual engagement may be extended to thirteen weeks in the event that the employee is engaged to cover for another employee who is absent on account of leave.

(b) If after the expiry of the maximum duration specified in paragraph (a), the employee may continue to be employed on an ongoing casual basis subject to the employer providing the employee with the choice of becoming permanent or temporary, depending on whether the position is ongoing or not.

(3) (a) A casual shall be paid while so employed, twenty-five percent in addition to the rates prescribed within this award.

(b) If requested to work, a casual employee must have a minimum engagement of four hours but if the engagement is less than four hours, then they must be paid for the whole four hours.

19. - ANNUAL LEAVE

(1) Except as hereinafter provided an employee, other than a casual employee, is entitled to 152 hours annual leave with payment at his or her ordinary rate of pay after a period of twelve months' continuous service with an employer.

(2) All entitlements to annual leave accrue pro rata on a weekly basis.

(3) (a) During a period of annual leave an employee shall be paid a loading of 17 ½ per cent calculated on his/her ordinary rate of wage.

(b) The loading prescribed by this subclause shall not apply to proportionate leave on termination.

(c) By written agreement between the employer and an employee, the loading may be included as a component in the employee's salary.

(4) If any award holiday falls within an employee's period of annual leave and is observed on a day which in the case of that employee would have been an ordinary working day, that day shall be added to the employee's annual leave entitlement.

(5) (a) If after one week's continuous service in any qualifying twelve monthly period an employee lawfully leaves his/her employment, or the employment is terminated by the employer through no fault of the employee, that employee shall be paid one thirteenth of a week's pay at his/her ordinary rate of wage in respect of each completed week of continuous service.

(b) If an employee leaves his/her employment or that employment is terminated by the employer, the employee is entitled to be paid for any untaken leave that relates to a completed year of service, except if the employee has been dismissed for misconduct, the employee is not entitled to be paid for any untaken leave that relates to the year of service during which the misconduct occurred.

(6) Any time in respect of which an employee is absent from work, except time for which he is entitled to paid leave as prescribed by this award, shall not count for the purpose of determining his/her right to annual leave.

(7) Where an employer and employee have not agreed when the employee is to take annual leave, the employer is not to refuse the employee taking, at any time suitable to the employee, any period of annual leave which accrued more than 12 months before that time.

(8) No employee shall be required to proceed on annual leave unless at least two weeks' prior notice is given. The employer shall, as far as practicable, arrange to grant annual leave to suit the convenience of the employee. In the event of disagreement on any proposed alteration to annual leave arrangements once they are made by an employer and employee the matter shall be dealt with in accordance with the dispute resolution procedure.

(9) (a) At the request of an employee, and with the consent of the employer, annual leave prescribed by this clause may be given and taken before the completion of 12 months continuous service as prescribed by subclause (1) of this clause.

(b) If the service of an employee terminates and the employee has taken a period of leave in accordance with this subclause and if the period of leave so taken exceeds that which would become due pursuant to subclause (4) of this clause, the employee shall be liable to pay the amount representing the difference between the amount received by him/her for the period of leave taken in accordance with this subclause and the amount which would have accrued in accordance with subclause (4) of this clause. The employer may deduct this amount from monies due to the employee by reason of the other provisions of this Award at the time of termination.

(c) The annual leave loading provided by subclause (3)(a) of this clause, shall not be payable when annual leave is taken in advance pursuant to the provisions of this subclause. The loading not paid, for the period of leave taken in advance, shall be payable to the employee at the end of the first pay period following the employee completing the qualifying period of continuous service provided in subclause (1) of this clause.

(10) Notwithstanding anything else herein contained an employer who observes a Christmas close-down for the purpose of granting annual leave may require an employee to take annual leave in not more than two periods but neither of such periods shall be less than one week.

(11) In the event of an employee being employed by an employer for portion only of a year he/she shall only be entitled subject to subclause (4) of this clause, to such leave on full pay as is proportionate to the employee's length of service during that period with such employer and, if such leave is not equal to the leave given to the other employees, he/she shall not be entitled to work or pay whilst the other employees are on leave on full pay.

(12) In the event of the death of an employee the cash equivalent of all annual leave due at the time of death shall be paid to the employee's estate.

20. - SICK LEAVE

(1) (a) An employee who is unable to attend or remain at his/her 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.

(b) Entitlement to payment shall accrue at the rate of 1/26 (one twenty sixth) of a week for each completed week of service.

(c) If in the first or successive years of service with the employer an employee is absent on the ground of personal ill health or injury for a period longer than the employee's 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.

(2) Unused portions of paid sick leave shall accumulate from year to year.

(3) An employee shall as soon as reasonably practicable advise the employer of his/her inability to attend for work, the nature of their illness or injury and the estimated duration of the absence.

(4) An employee shall not be required to produce proof with respect to absences of two days or less unless after two such absences in any year of service the employer requests in writing that the next and subsequent absences in that year if any, shall be accompanied by such proof.

(5) (a) An employee who suffers personal ill health or injury during the time when he/she is absent on annual leave and an employee may apply for and the employer shall grant paid sick leave in place of paid annual leave.

(b) Application for replacement shall be made within seven days of resuming work and then only if the employee was confined to his/her place of residence or a hospital as a result of his/her personal ill health or injury for a period of seven consecutive days or more and the employee produces proof that the employee was so confined.

(c) Replacement of paid annual leave by paid sick leave shall not exceed the period of paid sick leave to which the employee was entitled at the time he/she proceeded on annual leave and shall not be made with respect to fractions of a day.

(d) Payment for replaced annual leave shall be at the rate of wage applicable at the time the leave is subsequently taken provided that the annual leave loading prescribed in Clause 19. - Annual Leave shall be deemed to have been paid with respect to the replaced annual leave.

(6) For the purposes of this clause "proof" means a certificate from a medical practitioner or evidence that would satisfy a reasonable person.

21. – BEREAVEMENT LEAVE

(1) An employee (including a casual) is entitled to paid bereavement leave of up to 2 days per year, on the death of:

(a) the spouse or de facto partner of an employee;

(b) the child or step-child of an employee;

(c) the parent or step-parent of an employee; or

(d) any other person who, immediately before that person's death, lived with the employee as a member of the employee's family.

(2) The 2 days per year need not to be consecutive.

(3) Bereavement leave is not to be taken during a period of any other kind of leave prescribed within this award.

(4) An employee who claims to be entitled to paid leave is to provide to the employer, if so requested by the employer, evidence that would satisfy a reasonable person as to the death that is subject of the leave sought and the relationship of the employee to the deceased person.

22. - CARER'S LEAVE

(1) An employee is entitled to use up to 5 days of the employees entitlement to Sick Leave, to be the primary care giver of a member of the employee's family or household who is ill or injured and in need of the immediate care and attention.

(2) A member of the employee's family mentioned within subclause (1) means any of the following

(a) the employee's spouse or de facto partner;

(b) a child for whom the employee has parental responsibility as defined by the Family Court Act 1997;

(c) an adult child of the employee;

(d) a parent, sibling or grandparent of the employee; or

(e) any other person who lives with the employee as a member of the employee's family.

23. - PARENTAL LEAVE

(1) (a) The provisions of this clause apply to full-time, part-time and eligible casual employees, but do not apply to other casual employees.

(b) Subject to the terms of this clause employees are entitled to parental leave such as maternity leave, parental leave for spouses and partners and adoption leave and to work part-time in connection with the birth and adoption of a child.

(c) An "eligible casual employee" means a casual employee:

(i) employed by an employer on a regular and systematic basis for several periods of employment or on a regular and systematic basis for an ongoing period of employment during a period of at least 12 months; and

(ii) who has, but for the pregnancy or the decision to adopt, a reasonable expectation of ongoing employment.

(d) For the purposes of this clause, "continuous service" is work for an employer on a regular and systematic basis (including any period of authorised leave or absence).

(e) An employer must not fail to re-engage a casual employee because:

(i) the employee or employee's spouse is pregnant; or

(ii) the employee is or has been immediately absent on parental leave.

(f) The rights of an employer in relation to engagement and re-engagement of casual employees are not affected, other than in accordance with this clause.

(2) Definitions

(a) For the purpose of this clause "child" means a child of the employee under the age of one year except for adoption of a child where "child" means a person under the age of five years who is placed with the employee for the purposes of adoption, other than a child or step-child of the employee or of the spouse of the employee or a child who has previously lived continuously with the employee for a period of six months or more.

(b) Subject to paragraph (c) of this subclause, in this clause "partner" includes a de facto partner or former spouse.

(c) In relation to subclause (7) of this clause, "partner" includes a de facto partner but does not include a former partner.

(3) Basic entitlement

(a) After twelve months-continuous service, parents are entitled to a combined total of 52 weeks unpaid parental leave on a shared basis in relation to the birth or adoption of their child. For females, maternity leave may be taken and for spouses or partners, parental leave may be taken. Adoption leave may be taken in the case of adoption.

(b) Subject to subclause (5) of this clause parental leave is to be available to only one parent at a time, in a single unbroken period, except that both parents may simultaneously take:

(i) For maternity and parental leave, an unbroken period of up to one week at the time of the birth of the child;

(ii) For adoption leave, an unbroken period of up to three weeks at the time of placement of the child.

(4) Maternity leave

(a) An employee must provide notice to the employer in advance of the expected date of commencement of parental leave. The notice requirements are:

(i) Of the expected date of confinement (included in a certificate from a registered medical practitioner stating that the employee is pregnant) – at least ten weeks;

(ii) Of the date on which the employee proposes to commence maternity leave and the period of leave to be taken - at least four weeks.

(b) When the employee gives notice under subparagraph (i) of paragraph (a) of this subclause, the employee must also provide a statutory declaration stating particulars of any period of parental leave sought or taken by her partner and that for the period of maternity leave she will not engage in any conduct inconsistent with her contract of employment.

(c) An employee will not be in breach of this clause if failure to give the stipulated notice is occasioned by confinement occurring earlier than the presumed date.

(d) Subject to paragraph (a) of subclause (3) of this clause, and unless agreed otherwise between the employer and employee, an employee may commence parental leave at any time within six weeks immediately prior to the expected date of birth.

(e) Where an employee continues to work within the six week period immediately prior to the expected date of birth, or where the employee elects to return to work within six weeks after the birth of the child, an employer may require the employee to provide a medical certificate stating that she is fit to work on her normal duties.

(5) Special maternity leave

(a) Where the pregnancy of an employee not then on maternity leave terminates after 28 weeks other than by the birth of a living child, then the employee may take unpaid special maternity leave of such periods as a registered medical practitioner certifies as necessary.

(i) Where an employee is suffering from an illness not related to the direct consequences of the confinement, an employee may take any paid sick leave to which she is entitled in lieu of, or in addition to, special maternity leave.

(ii) Where an employee not then on maternity leave suffers illness related to her pregnancy, she may take any paid sick leave to which she is then entitled and such further unpaid special maternity leave as a registered medical practitioner certifies as necessary before her return to work. The aggregate of paid sick leave, special maternity leave and parental leave, including parental leave taken by a partner, may not exceed 52 weeks.

(b) Where leave is granted under paragraph (d) of subclause (4) of this clause, during the period of leave an employee may return to work at any time, as agreed between the employer and the employee provided that the time does not exceed four weeks from the re-commencement date desired by the employee.

(6) Parental leave for spouses or partners

(a) An employee, whose is the spouse or partner of the mother, will provide to the employer at least ten weeks prior to each proposed period of parental leave:

(i) A certificate from a registered medical practitioner which names his or her partner, that states that she is pregnant and the expected date of confinement, or states the date on which the birth took place;

(ii) Written notification of the dates on which he or she proposes to start and finish the period of parental leave; and

(iii) A statutory declaration stating:

(aa) He or she will take that period of parental leave to become the primary care-giver of a child;

(bb) Particulars of any period of maternity leave sought or taken by his or her partner; and

(cc) That for the period of parental leave he or she will not engage in any conduct inconsistent with his or her contract of employment.

(b) The employee will not be in breach of paragraph (a) if the failure to give the required period of notice is because of the birth occurring earlier than expected, the death of the mother of the child, or other compelling circumstances.

(7) Adoption leave

(a) The employee will notify the employer at least ten weeks in advance of the date of commencement of adoption leave and the period of leave to be taken. An employee may commence adoption leave prior to providing such notice, where through circumstances beyond the control of the employee, the adoption of a child takes place earlier.

(b) Before commencing adoption leave, an employee will provide the employer with a statutory declaration stating:

(i) The employee is seeking adoption leave to become the primary care-giver of the child;

(ii) Particulars of any period of adoption leave sought or taken by the employee's partner; and

(iii) That for the period of adoption leave the employee will not engage in any conduct inconsistent with his/her contract of employment.

(c) An employer may require an employee to provide confirmation from the appropriate government authority of the placement.

(d) Where the placement of a child for adoption with an employee does not proceed or continue, the employee will notify the employer immediately and the employer will nominate a time not exceeding four weeks from receipt of notification for the employee's return to work.

(e) An employee will not be in breach of this clause as a consequence of failure to give the stipulated periods of notice if such failure results from a requirement of an adoption agency to accept earlier or later placement of a child, the death of a partner, or other compelling circumstances.

(f) An employee seeking to adopt a child is entitled to unpaid leave for the purpose of attending any compulsory interviews or examinations as are necessary as part of the adoption procedure. The employee and the employer should agree on the length of the unpaid leave. Where agreement cannot be reached, the employee is entitled to take up to two days unpaid leave. Where paid leave is available to the employee, the employer may require the employee to take such leave instead.

(8) Variation of period of parental leave

Unless agreed otherwise between the employer and employee, an employee may apply to the employer to change the period of parental leave on one occasion. Any such change to be notified at least four weeks prior to the commencement of the changed arrangements.

(9) Parental leave and other entitlements

An employee may in lieu of or in conjunction with parental leave, access any annual leave or long service leave entitlements which they have accrued subject to the total amount of leave not exceeding 52 weeks.

(10) Transfer to a safe job

(a) Where an employee is pregnant and, 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 will, 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 maternity leave.

(b) If the transfer to a safe job is not practicable, the employee may elect, or the employer may require, the employee to commence parental leave for such period as is certified necessary by a registered medical practitioner.

(11) Returning to work after a period of parental leave

(a) An employee will notify of his/her intention to return to work after a period of parental leave at least four weeks prior to the expiration of the leave.

(b) An employee will be entitled to the position which they held immediately before proceeding on parental leave. In the case of an employee transferred to a safe job pursuant to subclause (10), the employee will be entitled to return to the position they held immediately before such transfer.

(c) Where such position no longer exists but there are other positions available which the employee is qualified for and is capable of performing, the employee will be entitled to a position as nearly comparable in status and pay to that of his/her former position.

(12) Effect of parental leave on employment.

Notwithstanding any award or other provision to the contrary, absence on any form of 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 of the award.

(13) Termination of employment.

(a) An employee on parental leave may terminate his/her employment at any time during the period of leave by notice given in accordance with this award.

(b) An employer shall not terminate the employment of an employee on the ground of her pregnancy or of his/her absence on parental leave, but otherwise the rights of an employer in relation to termination of employment are not hereby affected.

(c) A replacement employee is an employee specifically engaged as a result of an employee proceeding on parental leave.

(d) Before an employer engages a replacement employee under this subclause, the employer shall inform that person of the temporary nature of the employment and of the rights of the employee who is being replaced.

(e) Before an employer engages a person to replace an employee temporarily promoted or transferred in order to replace an employee exercising his/her rights under this clause, the employer shall inform that person of the temporary nature of the promotion or transfer and of the rights of the employee who is being replaced.

(f) Provided that nothing in this subclause shall be construed as requiring an employer to engage a replacement employee.

(g) A replacement employee shall not be entitled to any of the rights conferred by this clause except where his/her employment continues beyond the twelve months qualifying period.

24. - LEAVE TO ATTEND UNION BUSINESS

(1) (a) The employer shall grant paid leave during ordinary working hours to an employee:

(i) who is required to give evidence before any industrial tribunal;

(ii) who as union-nominated representative of the employees is required to attend negotiations and/or conferences between the union and employer;

(iii) when prior agreement between the union and employer has been reached for the employee to attend official union meetings preliminary to negotiations or industrial hearings; or

(iv) who as a union-nominated representative of the employees is required to attend joint union/management consultative committees or working parties.

(b) The granting of leave pursuant to paragraph (a) of this subclause shall only be approved:

(i) where an application for leave has been submitted by an employee a reasonable time in advance;

(ii) for the minimum period necessary to enable the union business to be conducted or evidence to be given;

(iii) for those employees whose attendance is essential;

(iv) when the operation of the organisation is not being unduly affected and the convenience of the employer impaired.

(2) (a) Leave of absence will be granted at the ordinary rate of pay.

(b) The employer shall not be liable for any expenses associated with an employee attending to union business.

(c) Leave of absence granted under this clause shall include any necessary travelling time in normal working hours.

(3) (a) Nothing in this clause shall diminish the existing arrangements relating to the granting of paid leave for union business.

(b) An employee shall not be entitled to paid leave to attend union business other than as prescribed by this clause.

(c) The provisions of this clause shall not apply to special arrangements made between the parties which provide for unpaid leave for employees to conduct union business.

(4) The provisions of this clause shall not apply when an employee is absent from work without the approval of the employer.

25. - TRADE UNION TRAINING LEAVE

(1) Subject to the provisions of this clause:

(a) The employer shall grant paid leave of absence to employees who are nominated by their union.

(b) Paid leave of absence shall also be granted to attend similar courses or seminars as from time to time approved by agreement between the parties.

(2) An employee shall be granted up to a maximum of five days' paid leave per calendar year for trade union training.

(3) (a) Leave of absence will be granted at the ordinary rate of pay and shall not include shift allowances, penalty rates or overtime.

(b) Where a public holiday or rostered day off (including a rostered day off as a result of working a 38-hour week) falls during the duration of a course, a day off in lieu of that day will not be granted.

(4) Subject to subclause (3) of this clause shift employees attending a course shall be deemed to have worked the shifts they would have worked had leave not been taken to attend the course.

(5) The granting of leave pursuant to the provisions of subclause (1) of this clause is subject to the operation of the organisation not being unduly affected and to the convenience of the employer.

(6) (a) Any application by an employee shall be submitted to the employer for approval at least four weeks before the commencement of the course, provided that the employer may agree to a lesser period of notice

(b) All applications for leave shall be accompanied by a statement from the relevant union indicating that the employee has been nominated for the course. The application shall provide details as to the subject, commencement date, length of course, venue and the Authority which is conducting the course.

(7) (a) The employer shall not be liable for any expenses associated with an employee's attendance at trade union training courses.

(b) Leave of absence granted under this clause shall include any necessary traveling time in normal working hours immediately before or after the course.

26. - PUBLIC HOLIDAYS

(1) The following days or the days observed in lieu shall subject to Clause 12. - Overtime, and subject as hereinafter provided, be allowed as holidays without deduction of pay, namely:

New Year's Day
Australia Day
Good Friday
Easter Monday
Anzac Day
Labor Day
Foundation Day
Queen's Birthday
Christmas Day
Boxing Day

Provided that another day may be taken as a holiday by arrangement between the parties in lieu of any of the days named in this subclause.

(2) When any of the days mentioned in subclause (1) of this clause falls on a Saturday or a Sunday the holiday shall be observed on the next succeeding Monday and when Boxing Day falls on a Sunday or a Monday, the holiday shall be observed on the next succeeding Tuesday. In each case the substituted day shall be a holiday without deduction of pay and the day for which it is substituted shall not be a holiday.

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

(4) When any of the days mentioned in subclause (1) of this clause falls on an employee's rostered day off the employer and the employee may agree that the employee receive:

(a) an additional day's wages;

(b) another day off within twenty-eight days of the award holiday; or

(c) an additional day off in conjunction with a period of annual leave.

(5) All ordinary hours of work performed on a holiday provided by this clause shall be paid at the rate of double time and a half.

(6) Except for the provisions of subclause (5) of this clause, the provisions of this clause shall not apply to casual employees.

27. - LONG SERVICE LEAVE

The long service leave provisions set out in Volume 84 of the "Western Australian Industrial Gazette" at pages 1 to 4 inclusive are hereby incorporated in and shall be deemed to be part of this award except that the date of the first day of April, 1958 in subclause (2) of clause (2) is to be amended to read the twenty-fourth day of December, 1958.

28. - TERMINATION OF EMPLOYMENT

(1) (a) The employment of any employee may be terminated by the following notice period, provided that an employee has not been dismissed on the grounds of gross misconduct in which case shall only be paid up to the time of dismissal.

Employee's Period of Continuous service with the employer	**Period of Notice**
Not more than one year	At least one week
More than one year but not more than 3 years	At least 2 weeks
More than three years but not more than 5 years	At least 3 weeks
More than 5 years	At least 4 weeks

(b) An additional week's notice is required to the amount mentioned in paragraph (a) if the employee is over the age of 45.

(c) Any compensation in lieu of notice instead of the notice must equal or exceed the total of the amounts that, if the employee's employment had continued until the end of the required period of notice, the employer would have become liable to pay to the employee because of the employment continuing during that period.

(d) The compensation in lieu of notice must be worked out on the basis of

(i) The employee's ordinary hours of work (even if they are standard or not); and

(ii) The amounts ordinarily payable to the employee in respect of those hours, including (for example) allowances, loading and penalties; and

(iii) Any other amounts payable under the employee's contract of employment.

(2) The notice requirement period for an employee terminating his/her employment with an employer shall be the same requirement as that which is required to be given by an employer, with the exception of the additional one week's notice for an employee over the age of 45.

29. - REDUNDANCY

(1) Definition

Redundancy occurs when an employer decides that the employer no longer wishes the job the employee has been doing to be done by anyone and this is not due to the ordinary and customary turnover of labour.

(2) Transfer to lower paid duties

Where an employee is transferred to lower paid duties by reason of redundancy the same period of notice must be given as the employee would have been entitled to if the employment had been terminated and the employer may at the employer's option, make payment in lieu thereof of an amount equal to the difference between the former ordinary rate of pay and the new ordinary time rate for the number of weeks of notice still owing.

(3) Severance pay

(a) In addition to the period of notice prescribed for ordinary termination in Clause 22. - Termination of Employment, of this award an employee whose employment is terminated by reason of redundancy must be paid, subject to further order of the Commission, the following amount of severance pay in respect of a continuous period of service:

Period of continuous service	Severance pay
1 year or less	Nil
1 year and up to the completion of 2 years	4 weeks' pay
2 years and up to the completion of 3 years	6 weeks' pay
3 years and up to the completion of 4 years	7 weeks' pay
4 years and over	8 weeks' pay

(b) Week's pay means the ordinary time rate of pay for the employees concerned.

(c) Provided that the severance payments shall not exceed the amount which the employee would have earned if employment with the employer had proceeded to the employee's normal retirement date.

(4) Employee leaving during notice period

An employee whose employment is terminated by reason of redundancy may terminate the employment during the period of notice and, if so, will be entitled to the same benefits and payments under this clause had they remained with the employer until the expiry of such notice. However, in this circumstance the employee will not be entitled to payment in lieu of notice.

(5) Alternative employment

An employer, in a particular redundancy case, may make application to the Commission to have the general severance pay prescription varied if the employer obtains acceptable alternative employment for an employee.

(6) Time off during notice period

(a) During the period of notice of termination given by the employer an employee shall be allowed up to one day's time off without loss of pay during each week of notice for the purpose of seeking other employment.

(b) If the employee has been allowed paid leave for more than one day 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 the employee shall not receive payment for the time absent. For this purpose a statutory declaration will be sufficient.

(7) Superannuation benefits

(a) Subject to further order of the Commission where an employee who is terminated receives a benefit from a superannuation scheme, the employee shall only receive under subclause (3) of this clause the difference between the severance pay specified in that clause and the amount of the superannuation benefit the employee receives which is attributable to employer contributions only.

(b) If this superannuation benefit is greater than the amount due under subclause (3) of this clause then the employee shall receive no payment under that clause.

(8) Employees exempted

This clause shall not apply to employees with less than one year's continuous service or where employment is terminated for misconduct, or in the case of casual employees or employees engaged for a specific period of time or for a specified task or tasks.

(9) Employers exempted

Subject to an order of the Commission, in a particular redundancy case, this clause shall not apply to employers who employ less than fifteen employees.

(10) Incapacity to pay

An employer, in a particular redundancy case, may make application to the Commission to have the general severance pay prescription varied on the basis of the employer's incapacity to pay.

30. - TRANSMISSION OF BUSINESS

(1) (a) Where a business is before, or after the date of this award, transmitted from an employer (in this paragraph called the transmittor) to another employer (in this paragraph called the transmittee) and an employee who at the time of such transmission was an employee of the transmittor in that business becomes an employee of the transmittee:

(i) the continuity of the employment of the employee shall be deemed not to have been broken by reason of such transmission; and

(ii) the period of employment which the employee has had with the transmittor, or any prior transmittor, shall be deemed to be service of the employee with the transmittee.

(b) In this clause "business" includes trade, process, business or occupation and includes part of any such business; transmission includes transfer, conveyance, assignment or succession whether by agreement or by operation of law; and transmitted has a corresponding meaning.

(2) Where a business has been transmitted from one employer to another and the employee's service has been deemed continuous in accordance with subclause (1), the sick leave, annual leave and any other standing leave entitlement under this award to the credit of the employee at the date of transmission from service with the transmittor shall stand to the credit of the employee at the commencement of service with the transmittee and may be claimed in accordance with the provisions of this award.

(3) The transmission of business provisions for long service leave are set out in Volume 84 of the "Western Australian Industrial Gazette" at pages 1 to 4 inclusive are hereby incorporated in and shall be deemed to be part of this award except that the date of the first day of April, 1958 in subclause (2) of clause (2) is to be amended to read the twenty-fourth day of December, 1958.

31. - TRAINING

(1) The parties to this award recognise that in order to increase efficiency, productivity and international competitiveness of industry, a greater commitment to training and skill development is required. Accordingly, the parties commit themselves to:

(a) Developing a more highly skilled and flexible workforce.

(b) Providing employees with career opportunities through appropriate training to acquire additional skills.

(c) Removing barriers to the utilisation of skills acquired.

(2) Following proper consultation through the establishment of a training committee, an employer shall develop a training programme consistent with:

(a) The current and future skill needs of the enterprise.

(b) The size, structure and nature of the operations of the enterprise.

(c) The need to develop vocational skills relevant to the enterprise and the labor movement through courses conducted by accredited educational institutions and providers.

(3) Where it is agreed that a training committee be established, such training committee shall be constituted by equal numbers of employer and employee representatives and have a charter which clearly states its role and responsibilities, for example:

(a) Formulation of a training programme and availability of training courses and career opportunities to employees.

(b) Dissemination of information on the training programme and availability of training courses and career opportunities to employees.

(c) The recommending of individual employees for training and re-classification.

(d) Monitoring and advising management and employees regarding the ongoing effectiveness of the training.

(4) (a) Where, as a result of consultation through a training committee and/or with the employee concerned, it is agreed that additional training in accordance with the programme developed pursuant to subclause (2) of this clause, should be undertaken by an employee, that training may be undertaken either on or off the job and if the training is undertaken during ordinary working hours, the employee concerned shall not suffer any loss of pay. The employer shall not unreasonably withhold such paid training leave.

(b) Any costs associated with standard fees for prescribed courses and prescribed textbooks (excluding those textbooks which are available in the employer's technical library) incurred with the undertaking of training shall be reimbursed by the employer upon production of evidence of such expenditure. Provided that reimbursement shall be on an annual basis, subject to the presentation of reports of satisfactory progress.

(c) Travel costs incurred by an employee undertaking training in accordance with this clause, which exceed those normally incurred in travelling to and from work, shall be reimbursed by the employer.

(5) Subclauses (2), (3) and (4) of this clause shall operate as interim provisions and shall be reviewed after nine months' operation. In the meantime, the parties shall monitor the effectiveness of those interim provisions in encouraging the attainment of the objectives detailed in subclause (1) of this clause. In this connection, the union reserves the right to press for the mandatory prescription of a minimum number of training hours per annum, without loss of pay, for an employee undertaking training to meet the needs of an individual enterprise and the labour movement.

32. - RECORD

(1) Each employer bound by this Award shall maintain a record containing the following information relating to each employee:

(a) The name and address given by the employee.

(b) The age of the employee.

(c) The classification of the employee and whether the employee is full-time, part-time or casual.

(d) The commencing and finishing times of each period of work each day.

(e) The number of ordinary hours and the number of overtime hours worked each day and the totals for each pay period.

(f) The wages and any allowances paid to the employee each pay period and any deductions made therefrom.

(g) All leave taken by the employee, whether paid, partly paid or unpaid;

(h) The information necessary for the calculation of the entitlement to , and payment for, long service leave under the *Long Service Leave Act 1958*

(2) (a) At the time of payment of wages the employee may be given a pay slip showing that part of the record specified in paragraphs (e) and (f) of subclause (1) of this clause, with respect to the pay period for which payment is being made.

(b) If a pay slip is not given to the employee as prescribed in paragraph (a) hereof the employer shall permit the employee to inspect the record either at the time of payment or at such other time as may be convenient to the employer. The employer shall not unreasonably withhold the record from inspection by the employee.

(3) Notwithstanding sub clause (2) (b) an employee or a duly authorised union official may inspect their employment records. Before exercising a power of inspection the employee or authorised union official shall give reasonable notice of not less than 24 hours to the employer.

(a) The record may be maintained in one or more parts depending on the system of recording used by the employer whether manual or mechanical provided that if the record is maintained in more than one part, those parts shall be kept in such a manner as will enable the inspection referred to in subclauses (2) and (4) of this clause, to be conducted at the establishment.

(b) The record shall be kept in date order so that the inspections referred to in subclauses (2) and (4) of this clause may be made with respect to a period of not less than 7 years preceding the date of inspection.

(c) The employer may, if it is part of normal business practice, periodically send the record or any part of the record to another person, provided that the provisions of this paragraph shall not relieve the employer of the obligations with respect to provisions contained elsewhere in this clause with the exception of those contained in paragraph (b) of this subclause.

(d) Subject to this clause the record shall be available for inspection by the employee or a duly authorised official of the union during the normal hours of business of the employer, but excepting any time when the employer or its employees who are required to maintain the record may be absent.

(e) The employee or union official shall be permitted reasonable time to inspect the record and, if he/she requires take an extract or copy of any of the information contained therein.

(4) (a) If, for any reason, the record is not available for inspection by the employee or union official when the request is made, the employee or union official and the employer or its agent may fix a mutually convenient time for the inspection to take place.

(b) If a mutually convenient time cannot be fixed, the employee or union official may advise the employer in writing that he requires to inspect the record in accordance with the provisions of this Award and shall specify the period contained in the record which he or she requires to inspect.

(c) (i) Employers who normally keep the record at a place more than 35 kilometres from the GPO Perth shall send a copy of that part of the record specified to the office of the union within ten days of the receipt of such advice; and

(ii) Employers who normally keep the record at a place less than 35 kilometres from the GPO Perth shall make the record available to the union official at the time specified by the union official. If the record is not then made available to the employee or union official the employer shall within 3 days send a copy of that part of the record specified to the office of the union.

(d) In the event of a dispute between the union and the employer as to the availability and/or supply of the record, the parties may apply to the Commission for direction. An application for direction shall, subject to that direction, stay the requirements contained elsewhere in this clause.

33. - PAYMENT OF WAGES

(1) (a) The employer may elect to pay employees in cash, by cheque or by means of a credit transfer to a bank, building society or credit union account in the name of the employee. The day that the credit transfer is credited to the employee's account shall be deemed to be the date of payment.

(b) Payment shall be made within three trading days from the last day of the pay period and if in cash or by cheque shall be made during the employee's ordinary working hours.

(c) No employer shall change the method of payment to employees without first giving them at least four weeks' notice of such change.

(d) No employee shall be required to accept a change in the method of payment if such change causes hardship. Any dispute concerning hardship in a particular case shall be referred to a Board of Reference for determination.

(2) (a) The employer may elect to pay employees weekly or fortnightly in accordance with subclause (1) of this clause.

(b) No employer shall change the frequency of payment to employees without first giving them and the union at least four weeks' notice of such change.

(c) The method of introducing a fortnightly pay system shall be by the payment of an additional week's wages in the last weekly pay before the change to fortnightly pays to be repaid by equal fortnightly deductions made from the next and subsequent pays provided the period for repayment shall not be less than 20 weeks, or some other method agreed upon by the union and the employer.

(3) For the purposes of affecting the rostering off of employees as provided by this award, ordinary wages may be paid either for the actual hours worked each pay period or an amount being calculated on the basis of the average of 38 hours per week.

34. - AWARD AVAILABILITY

The employer shall allow a copy of this award to be posted in a place which is easily accessible to the employees.

35. - SUPERANNUATION

The superannuation provisions contained herein operate subject to the requirements of the hereinafter prescribed provision titled - Compliance, Nomination and Transition.

(1) Application

(a) Subject to the provisions of subclause (4) - Exemptions of this clause, each employer to whom this award applies shall execute an agreement to become a participating employer in the preferred or an approved Occupational Superannuation Scheme, within one month of the enactment of this clause.

(b) For the purpose of this award the preferred Occupational Superannuation Scheme is the Westscheme.

(2) Contributions

(a) Subject to the provisions of subclause (4) - Exemptions of this clause each employer shall make monthly contributions to the fund in respect of all eligible employees at the rate of 9% of ordinary time earnings.

(b) Eligible employees are all full time and part time employees to whose employment this award applies and whose length of employment with the employer exceeds one month, and all casual employees who are over 18 years of age and earn over $450 a month.

(c) Subject to the provisions of subclauses (3) and (4) of this clause, contributions shall be made in respect of each current eligible employee from the date the employer executes the fund trust deed. Contributions in respect of all other eligible employees shall be made from commencement of employment with the employer but in no case prior to the date the employer executes the fund trust deed.

(d) "Ordinary time earnings" (which for the purposes of the Superannuation Guarantee (Administration) Act 1992 will operate to provide a notional earnings base) shall mean the ordinary rate of pay the employee receives for ordinary hours of work including shift loading, special rates, location allowance and higher duties allowances where applicable. The term includes any regular over-award pay as well as casual rates received, and additional rates and allowances paid for work undertaken during ordinary hours of work including fares and travelling allowances. Other reimbursement allowances are excluded.

(e) Contributions shall be paid for all periods during which the eligible employee is in receipt of payments from the employer under the Workers Compensation and Rehabilitation Act 1981 and during which the employee is employed by the employer.

(f) Subject to the trust deed an employer shall not be required to contribute during periods of unpaid leave in excess of 38 hours.

(g) Subject to the trust deed an employer shall not be required to contribute during periods of unauthorised absence in excess of 8 hours.

(3) Employee Entry into Fund

(a) On executing the fund trust deed the employer shall provide each current employee with an application form and documentation explaining the fund.

(b) If an employee fails to return to the employer a completed application form to join the fund within two weeks of receipt the employer shall provide a reminder notice together with an application form and documentation explaining the fund to the employee.

(c) If the employee fails to complete and return the application to join the fund within two weeks of receipt of the second form no contribution need be made in respect of that employee until such time as a completed application form is received by the employer.

(d) It shall be the responsibility of the employer to ensure that all new employees complete an application to join the fund during the first month of employment.

(e) Provided that where an eligible employee refuses to complete an application to join the fund the employer shall notify the union in writing of the employee's refusal to do so.

(4) Exemptions

(a) Employers of eligible employees who are covered by a Superannuation Order or Award made pursuant to the Industrial Relations Act 1979 shall be exempted from the provisions of this clause in respect of those employees to whose employment the said Order or Award applies.

(b) Employers of eligible employees who are contributing to a Superannuation Fund, in accordance with an Order or Award made pursuant to the Industrial Relations Act 1979 or the Workplace Relations Act 1996 for a majority of employees and, at the date of issue of this Order, makes payment for eligible employees covered by this award in accordance with that Order or Award shall be exempt from the provisions of this clause.

(c) Where an employer intends to join an approved Occupational Superannuation Scheme other than Westscheme the employer shall notify the appropriate union(s) prior to so doing.

In the event of a dispute the matter shall be referred to the Commission.

(d) Any other approved occupational superannuation fund to which an employer or eligible employee who is a member of the religious fellowship known as Brethren elects to contribute.

(e) An employer may make application to the Commission for exemption from the provisions of this clause and until proceedings before the Commission are finalised the provisions of this clause shall be deemed to have been complied with.

Compliance, Nomination and Transition

Notwithstanding anything contained elsewhere herein which requires that contribution be made to a superannuation fund or scheme in respect of an employee, on and from 30 June 1998:

(a) Any such fund or scheme shall no longer be a complying superannuation fund or scheme for the purposes of this clause unless:

(i) the fund or scheme is a complying fund or scheme within the meaning of the Superannuation Guarantee (Administration) Act 1992 of the Commonwealth; and

(ii) 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;

(b) The employee shall be entitled to nominate the complying superannuation fund or scheme to which contributions are to be made by or in respect of the employee;

(c) The employer shall notify the employee of the entitlement to nominate a complying superannuation fund or scheme as soon as practicable;

(d) A nomination or notification of the type referred to in paragraphs (b) and (c) of this subclause shall, subject to the requirements of regulations made pursuant to the Industrial Relations Legislation Amendment and Repeal Act 1995, be given in writing to the employer or the employee to whom such is directed;

(e) The employee and employer shall be bound by the nomination of the employee unless the employee and employer agree to change the complying superannuation fund or scheme to which contributions are to be made;

(f) The employer shall not unreasonably refuse to agree to a change of complying superannuation fund or scheme requested by an employee;

Provided that on and from 30 June 1998, and until an employee thereafter nominates a complying superannuation fund or scheme;

(g) if one or more complying superannuation funds or schemes to which contributions may be made be specified herein, the employer is required to make contributions to that fund or scheme, or one of those funds or schemes nominated by the employer;

or

(h) if no complying superannuation fund or scheme to which contributions may be made be specified herein, the employer is required to make contributions to a complying fund or scheme nominated by the employer.

36. - VEHICLE ALLOWANCES

(1) Where an employee is required and authorised to use his/her own motor vehicle in the course of the employee's duties the employee shall be paid an allowance not less than that provided for in the table set out hereunder.

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

Area and Details	Over 2600 cc	Over 1600 cc -2600 cc	1600 cc & Under
		Rate per kilometre (cents)	
Metropolitan Area	69.0	58.9	48.9
South West Land Division	71.5	61.1	51.0
North of 23.5 South Latitude	78.7	67.3	56.4
Rest of the State	73.7	62.9	52.4
Motor Cycle (in all areas)	23.9		

(2) "Metropolitan Area" means that area within a radius of fifty kilometres from the Perth Railway Station.

"South West Land Division" means the South West Land Division as defined by Schedule 1 of the Land Administration Act 1997 excluding the area contained within the Metropolitan Area.

37. - LOCATION ALLOWANCES

(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 prescribed 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

TOWN	PER WEEK
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
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

(2) Except as provided in subclause (3) of this clause, an employee who has:

(a) a dependent shall be paid double the allowance prescribed in subclause (1) of this clause;

(b) a partial dependent shall be paid the allowance prescribed in subclause (1) of this clause plus the difference between that rate and the amount such partial dependent is receiving by way of a district or location allowance.

(3) Where an employee:

(a) is provided with board and lodging by his/her employer, free of charge; or

(b) 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 662/3 per cent of the allowances prescribed in subclause (1) of this clause.

The provisions of paragraph (b) of this subclause shall have effect on and from the 24th day of July, 1990.

(4) Subject to subclause (2) of this clause, 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 the employee's wage for ordinary hours that week is to the adult rate for the work performed.

(5) Where an employee is on annual leave or receives payment in lieu of annual leave he/she shall be paid for the period of such leave the location allowance to which he/she would ordinarily be entitled.

(6) Where an employee is on long service leave or other approved leave with pay (other than annual leave) he/she shall only be paid location allowance for the period of such leave he/she remains in the location in which he/she is employed.

(7) For the purposes of this clause:

(a) "Dependant" shall mean -

(i) a spouse or de facto partner; or

(ii) 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.

(b) "Partial Dependant" shall mean a "dependent" as prescribed in paragraph (a) of this subclause who receives a location allowance which is less than the location allowance prescribed in subclause (1) of this clause 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.

(8) Where an employee is employed in a town or location not specified in this clause the allowance payable for the purpose of subclause (1) of this clause shall be such amount as may be agreed between Australian Mines and Metals Association, the Chamber of Commerce and Industry of Western Australia and the Trades and Labor Council of Western Australia or, failing such agreement, as may be determined by the Commission.

(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.

38. - TRAVELLING TIME

(1) When an employee is required to work temporarily at a location other than the usual place of duty, any excess fare over that which he/she normally incurs shall be paid by the employer.

(2) When an employee is engaged at such a distance that he/she cannot return at night, suitable board and lodging shall be found at the employer's expense.

(3) All travelling time outside ordinary working hours shall be paid for at ordinary rates up to a maximum of twelve hours in any twenty-four hours' period from the time of starting on the journey.

39. - HIGHER DUTIES ALLOWANCE

(1) An employee relieving another employee whose principal function as determined by the employer requires the exercise of any one or more of the skill levels set out in a higher grade for a period of not less than one week continuously shall be paid the higher minimum rate appropriate to the position whilst so employed.

(2) If an employee is directed to perform higher duties applicable to a higher grade position on any subsequent occasion within twelve months, the employee shall only have to perform those duties for one working day or more in order to become entitled to the minimum salary of the higher graded position.

(3) An employee who is required to carry out only part of a higher graded position shall be paid at a rate agreed between the employer and employee.

(4) Where an employee, whilst in a higher graded position and in receipt of a higher classification pay commences annual or sick leave, the employee shall receive any payment to which she or he is entitled at the higher classification rate, if the employee has been performing the higher duties for a period in excess of 3 months prior to taking the leave.

(5) Where an employee has been required to carry out the duties of a higher classified position for a continuous period in excess of 12 months, she or he shall be permanently appointed to that position.

40. - CERTIFICATE OF AGE

Upon engagement an employee, if requested, shall furnish the employer with a certificate showing the following particulars:

(a) name in full;

(b) date of birth;

(c) name of each previous employer; and

(d) class of work performed for each previous employer.

No employee shall have any claim upon an employer for additional wages in the event of any of the above particulars being wrongly stated on the certificate. If any employee shall willfully misstate his/her age in the certificate then he/she alone shall be guilty of a breach of this award.

41. - RIGHT OF ENTRY

A duly authorized representative of the union shall be permitted right of entry consistent with Division 2G of the Industrial Relations Act 1979.

42. - UNIFORMS

Where uniforms are required to be worn they shall be supplied by the employer.

43. - AWARD FLEXIBILITY

(1) The parties are committed to modernising the terms of this award.

(2) Employers and employees covered by this award may reach agreement at the level of individual enterprises to provide for more flexible working arrangements, improved quality of working life, enhanced skills and job satisfaction. Such Enterprise Agreements may involve a variation in the application of award provisions in order to meet the requirements of individual enterprises and their employees. Agreements may be negotiated in accordance with subclause (3) of this clause.

(3) The union will discuss all matters relating to increased flexibility that are raised by the employer. Any such discussion with the Union shall be on the premise that:

- (a) The majority of employees at the enterprise must genuinely agree.
- (b) No employee will lose income as a result of the change.
- (c) The union must be party to the agreement, in particular, where enterprise level discussions are considering matters requiring any variation to the award, the union shall be invited to participate.
- (d) The union shall not unreasonably oppose any agreement.
- (e) Agreements will have effect following a written agreement being signed by the union and the employer.

44. - NOTIFICATION OF CHANGE

(1) Employer's Duty to Notify

- (a) Where an employer has made a definite decision to introduce major changes in production, programme, organisation, structure or technology that are likely to have "significant effects" on employees, the employer shall notify the employees who may be affected by the proposed changes and their union.
- (b) "Significant effects" include termination of employment; major changes in the composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations; and the restructuring of jobs. Provided that where the award makes provision for alteration of any of the matters referred to herein an alteration shall be deemed not to have "significant effects".

(2) Employer's Duty to Discuss Change

- (a) The employer shall discuss with the employees affected and their union, the introduction of the changes referred to in subclause (1) of this clause among other things, the effects the changes are likely to have on employees, and measures to avoid or minimise the adverse effects of such changes on employees and shall give prompt consideration to matters raised by the employees and/or their union in relation to the changes.
- (b) The discussion shall commence as soon as is practicable after a definite decision has been made by the employer to make the changes referred to in subclause (1) of this clause.
- (c) For the purpose of such discussion, the employer shall provide in writing to the employees concerned and their union, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees and other matters likely to affect employees provided that an employer shall not be required to disclose confidential information the disclosure of which would be inimical to the employer's interests.

45. - BLOOD DONORS

(1) A full time or part time employee who is absent during ordinary working hours for the purpose of donating blood shall not suffer any deduction of pay for the period involved.

(2) Such employee shall arrange as far as practicable for his/her absence to be as close as possible to the beginning or finishing time of his/her ordinary working hours.

(3) An employee shall notify the employer as soon as possible of the time and date upon which they are requesting to be absent for the purpose of donating blood.

(4) Reasonable proof of the attendance of the employee at the recognised place for the purpose of donating blood and the duration of such attendance, shall be furnished by the employee to employer.

SCHEDULE "A" - RESPONDENTS

Union Employers registered under Industrial Relations Act 1979

Association of Professional Engineers, Australian Services Union
(Western Australia Branch) Organisation of Employees
Suite1, 12/14 Thelma Street
WEST PERTH WA 6005

Australian Institute of Marine and Power Engineers,
Western Australian Union of Workers
28 Mouat Street
FREMANTLE WA 6160

Australian Municipal, Administrative, Clerical and
Services Union of Employees, W.A. Clerical and
Administrative Branch
102 East Parade
EAST PERTH WA 6004

Building Trades Association of Unions of Western
Australia (Association of Workers)
82 Royal Street
EAST PERTH WA 6004

Civil Service Association of Western Australia
Incorporated
5th Floor,
445 Hay Street
PERTH WA 6000

Communications, Electrical, Electronic, Energy, Information, Postal,
Plumbing and Allied Workers Union of Australia, Engineering & Electrical
Division, WA Branch
U24, 257 Balcatta Road
BALCATTA WA 6021

Health Services Union of Western
Australia (Union of Workers)
8 Coolgardie Terrace
EAST PERTH WA 6005

Murdoch University Academic Staff Association
Murdoch University
Transportable 1, Room 8
South Street
MURDOCH WA 6150

Salaried Pharmacists' Association Western Australian Union of Workers
8 Coolgardie Terrace
PERTH WA 6000

Sales Representatives' and Commercial Travellers'
Guild of W.A., Industrial Union of Workers
5th Floor,
25 Barrack Street
PERTH WA 6000

Seamen's Union of Australia, West Australian Branch
2nd Floor,
2-4 Kwong Alley
NORTH FREMANTLE WA 6159

The Australian Collieries' Staff Association, Western Australian Branch
43 Deakin Street
COLLIE WA 6225

The Australian Maritime Officers Union – Western
Area Union of Employees
28 Mouat Street
FREMANTLE WA 6160

The Australian Nursing Federation, Industrial Union of
Workers Perth
260 Pier Street
PERTH WA 6000

Rail, Tram and Bus Union,
Western Australian Branch
2/10 Nash Street
PERTH WA 6000

The Australian Workers' Union, West Australian
Branch, Industrial Union of Workers
Cnr Moore & Lord Streets
PERTH WA 6000

The Automotive, Food Metals, Engineering, Printing
and Kindred Industries Union of Workers – Western
Australian Branch
121 Royal Street
EAST PERTH WA 6004

The Boot Trade of Western Australian Union of Workers
110 Charles Street
PERTH WA 6000

The Breweries and Bottleyards Employees' Industrial
Union of Workers of Western Australia
11/64 Bannister Road
CANNINVALE WA 6155

The Coal Miners' Industrial Union of Workers of
Western Australia, Collie
C/- Mineworkers Institute
75 Throssell Street
COLLIE WA 6225

The Construction, Forestry, Mining and Energy Union
of Workers
82 Royal Street
EAST PERTH WA 6004

The Disabled Workers' Union of Western Australian Services Union
Suite 1/82 Beaufort Street
PERTH WA 6000

The Federated Brick, Tile and Pottery Industrial Union
Of Australia (Union of Workers) Western Australian Branch
14 Prospect Road
ARMADALE WA 6112

The Federated Millers and Mill Employees' Union of
Workers of Western Australian Services Union
110 Charles Street
NORTH PERTH WA 6006

The Food Preservers' Union of Western Australia
Union of Workers
5th Floor, 25 Barrack Street
PERTH WA 6000

The Forest Products, Furnishing and Allied Industries
Industrial Union of Workers, W.A. Branch
'Wellington Fair'
Cnr Wellington & Lord Streets
PERTH WA 6000

The Independent Schools Salaried Officers' Association
of Western Australia, Industrial Union of Workers
143 Edward Street
PERTH WA 6000

The Mining Unions Association of Employees of
Western Australian (Iron Ore Industry)
PO Box 6289
EAST PERTH WA 6004

The Plumbers and Gasfitters Employees' Union of
Australia, Wester Australian Branch, Industrial Union of
Workers
Unit 24/257 Balcatta Road
BALCATTA WA 6021

The Shop, Distributive and Allied Employees'
Association of Western Australia
5th Floor, 25 Barrack Street
PERTH WA 6000

The State School Teachers Union of W.A.
(Incorporated)
150-152 Adelaide Terrace
EAST PERTH WA 6004

The West Australian Hairdressers' and Wigmakers' Employees' Union of Workers
5th Floor, 25 Barrack Street
PERTH WA 6000

The Western Australian Branch of the Australian Medical Association Incorporated
14 Stirling Highway
NEDLANDS WA 6009

The Western Australian Clothing and Allied Trades' Industrial Union of Workers
5th Floor, 25 Barrack Street
PERTH WA 6000

The Western Australian Gold and Nickel Mines Supervisors Association Industrial Union of Workers
18 Sturt Pea Crescent
KAMBALDA WEST WA 6444

Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch
Suite 302, 3rd Floor
82 Beaufort Street
PERTH WA 6000

United Firefighters Union of Western Australia
63 Railway Parade
MT LAWLEY WA 6050

University of Western Australia Academic Staff Association
W2 Winthrop Tower
University of Western Australia
NEDLANDS WA 6009

W.A Dental Technicians' and Employees' Union of Workers
8 Coolgardie Terrace
EAST PERTH WA 6004

West Australian Branch, Australasian Meat Industry Employees' Union, Industrial Union of Workers, Perth
1st Floor, Unity House
79 Stirling Street
PERTH WA 6000

West Australian Railways Officers' Union
Kenafick House
102 East Parade
EAST PERTH WA 6004

Western Australian Grain Handling Salaried Officers Association (Union of Workers)
Room G07 - 22 Delhi Street
WEST PERTH WA 6005

Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers
112 Charles Street
WEST PERTH WA 6005

Western Australian Police Union of Workers
639 Murray Street
WEST PERTH WA 6005

Western Australian Prison Officers' Union of Workers
63 Railway Parade
MT LAWLEY WA 6050

Union employers registered under Workplace Relations Act
Association of Professional Engineers, Scientists and Managers, Australia
Suite1,
12/14 Thelma Street
WEST PERTH WA 6005

Australasian Meat Industry Employees Union
1st Floor
7 Stirling Street
PERTH WA 6000

Australian Education Union
150-152 Adelaide Terrace
EAST PERTH WA 6004

Australian Institute of Marine and Power Engineers
28 Mouat Street
FREMANTLE WA 6160

Australian Maritime Officers' Union, The
28 Mouat Street
FREMANTLE WA 6160

Australian Municipal, Administrative, Clerical and Services Union
102 East Parade
EAST PERTH WA 6004

Australian Nursing Federation
260 Pier Street
PERTH WA 6000

Rail, Tram and Bus Union
2/10 Nash Street
PERTH WA 6000

Australian Workers' Union, The
Cnr Moore & Lord Streets
PERTH WA 6000

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union
121 Royal Street
EAST PERTH WA 6000

Communications, Electrical, Electronic, Energy, Information,
Postal, Plumbing and Allied Services Union of Australia
(Communications Division P& T Group and T&S Group)
196 Lord Street
PERTH WA 6000

Communications, Electrical, Electronic, Energy, Information,
Postal, Plumbing and Allied Services Union of Australia
(Electrical and Plumbing Divisions)
U24, 257 Balcatta Road
BALCATTA WA 6021

Construction, Forestry, Mining and Energy Union
82 Royal Street
EAST PERTH WA 6004

CPSU, the Community and Public Sector Union
445 Hay Street
PERTH WA 6000

Finance Sector Union of Australia
Level 3,
165 Adelaide Tce
EAST PERTH WA 6004

Health Services Union of Australia
8 Coolgardie Tce
PERTH WA 6000

Independent Education Union of Australia
143 Edward Street
PERTH WA 6000

Liquor, Hospitality and Miscellaneous Union
61 Thomas Street
SUBIACO WA 6008

Maritime Union of Australia, The
U2, 2-4 Kwong Alley
NORTH FREMANTLE WA 6159

Media, Entertainment and Arts Alliance
123 Claisebrook Street
PERTH WA 6000

Musicians' Union of Australia
123 Claisebrook Street
PERTH WA 6000

National Tertiary Education Industry Union
W2, Winthrop Tower

University of Western Australian
35 Stirling Highway
NEDLANDS WA 6009

Shop, Distributive and Allied Employees Association
5th Floor, 25 Barrack Street
PERTH WA 6000

Textile, Clothing and Footwear Union of Australia
5th Floor,
25 Barrack Street
PERTH WA 6000

Transport Workers' Union of Australia
Suite 302,
3rd Floor
82 Beaufort Street
PERTH WA 6000

Union of Christmas Island Workers
PO Box 84
Christmas Island
INDIAN OCEAN WA 6798

United Firefighters' Union of Australia
63 Railway Parade
MT LAWLEY WA 6060

Western Australian Shire Councils,
Municipal Road Boards, Health Boards,
Parks, Cemeteries and Racecourse, Public Authorities, Water Boards Union
PO Box 183
LEEDERVILLE WA 6902

Woolclassers' Association of Australia
8 Stubbs Place
BOORAGOON WA 6164

SCHEDULE “B” - NAMED UNION PARTY

Australian Municipal, Administrative, Clerical and Services Union of Employees - W.A Clerical and Administrative Branch

SCHEDULE “C” - NAMED EMPLOYER PARTIES

The Trades and Labor Council or any company owned and or operated by the Trades and Labor Council; and

Unions of employees and the branches of unions of employees listed in Schedule A.

2005 WAIRC 00191

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	DEPARTMENT OF HOUSING AND WORKS
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	WEDNESDAY, 2 FEBRUARY 2005
FILE NO/S	A 1 OF 2005
CITATION NO.	2005 WAIRC 00191

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS an application was lodged in the Commission pursuant to section 36A of the *Industrial Relations Act 1979*;

AND WHEREAS the applicant subsequently filed a Notice of Discontinuance in the Commission;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order -

THAT the application be discontinued.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

2005 WAIRC 00121

DEPARTMENT FOR COMMUNITY DEVELOPMENT (FAMILY RESOURCE WORKERS, WELFARE ASSISTANTS AND PARENT HELPERS) AWARD 1990 NO. PSAA 1 OF 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DEPARTMENT FOR COMMUNITY DEVELOPMENT
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DATE	FRIDAY, 21 JANUARY 2005
FILE NO	P 29 OF 2004
CITATION NO.	2005 WAIRC 00121

Result	Award varied.

Order

HAVING heard Mr M Sims on behalf of the applicant and Ms G Calkin on behalf of the respondents, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Department for Community Development (Family Resource Workers, Welfare Assistants and Parent Helpers) Award 1990 (No. PSAA 1 of 1989) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 19th day of January 2005.

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

SCHEDULE

Schedule D – Travelling Allowance: Delete this schedule and insert the following in lieu thereof:

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 47(1)(b)(ii) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 46(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 47(1)(b)(ii))
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
		$	$	$
(1)	WA - South of 26o South Latitude	11.35		
(2)	WA - North of 26o South Latitude	14.60		
(3)	Interstate	14.60		
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
		$	$	$
(4)	WA - Metropolitan Hotel or Motel	181.20	90.60	60.40
(5)	Locality South of 26o South Latitude	163.00	81.50	54.35
(6)	Locality North of 26o South Latitude			
	Broome	253.80	126.90	84.60
	Carnarvon	208.70	104.35	69.55
	Dampier	203.00	101.50	67.65
	Derby	176.35	88.20	58.80
	Exmouth	215.10	107.55	71.70
	Fitzroy Crossing	303.10	151.55	101.05
	Gascoyne Junction	128.10	64.05	42.70
	Halls Creek	243.60	121.80	81.20
	Karratha	320.35	160.20	106.80
	Kununurra	253.30	126.65	84.45
	Marble Bar	178.60	89.30	59.55
	Newman	247.95	123.95	82.65
	Nullagine	154.00	77.00	51.35
	Onslow	202.05	101.05	67.35
	Pannawonica	175.45	87.70	58.50
	Paraburdoo	241.60	120.80	80.55
	Port Hedland	220.10	110.05	73.35
	Roebourne	131.20	65.60	43.75
	Sandfire	159.60	79.80	53.20
	Shark Bay	175.10	87.55	58.35
	Tom Price	211.60	105.80	70.55
	Turkey Creek	165.60	82.80	55.20
	Wickham	301.60	150.80	100.55
	Wyndham	158.10	79.05	52.70

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 47(1)(b)(ii) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 46(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 47(1)(b)(ii))
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL—*continued*				
		$	$	$
(7)	Interstate - Capital City			
	Sydney	240.00	120.00	80.00
	Melbourne	240.35	120.20	80.10
	Other Capitals	203.15	101.60	67.65
(8)	Interstate - Other than Capital City	163.00	81.50	54.35
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
(9)	WA - South of 26o South Latitude	75.75		
(10)	WA - North of 26o South Latitude	92.05		
(11)	Interstate	92.05		
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED.				
(12)	WA - South of 26o South Latitude:			
	Breakfast	13.65		
	Lunch	13.65		
	Dinner	37.15		
(13)	WA - North of 26o South Latitude			
	Breakfast	15.35		
	Lunch	26.60		
	Dinner	35.50		
(14)	Interstate			
	Breakfast	15.35		
	Lunch	26.60		
	Dinner	35.50		
DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE 46(5))				
(15)	Each Adult	21.95		
(16)	Each Child	3.75		
MIDDAY MEAL (CLAUSE 36(12))				
(17)	Rate per meal	5.30		
(18)	Maximum reimbursement per pay period	26.50		

2005 WAIRC 00116

GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD 1989 NO. PSAA 3 OF 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED **APPLICANT**
	-v-
	ALBANY PORT AUTHORITY AND OTHERS **RESPONDENTS**
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DATE	FRIDAY, 21 JANUARY 2005
FILE NO	P 30 OF 2004
CITATION NO.	2005 WAIRC 00116

Result Award varied.

Order

HAVING heard Mr M Sims on behalf of the applicant and Ms G Calkin on behalf of the respondents, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Government Officers Salaries, Allowances and Conditions Award 1989 (No. PSAA 3 of 1989) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 19th day of January 2005.

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

SCHEDULE

1. Schedule F – Clause 41. – Camping Allowance: Delete this schedule and insert the following in lieu thereof:

South of 26° South Latitude

ITEM			RATE PER DAY
1	Permanent Camp	Cook provided by the Department	32.70
2	Permanent Camp	No cook provided by the Department	43.55
3	Other Camping	Cook provided by the Department	54.45
4	Other Camping	No cook provided	65.35

North of 26° South Latitude

ITEM			RATE PER DAY
1	Permanent Camp	Cook provided by the Department	40.80
2	Permanent Camp	No cook provided by the Department	51.70
3	Other Camping	Cook provided by the Department	62.60
4	Other Camping	No cook provided	73.50

2. Schedule J – Travelling, Transfer and Relieving Allowance: Delete this schedule and insert the following in lieu thereof:

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 49(1)(b)(ii)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 52(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 49(1)(b)(ii))
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
		$	$	$
(1)	WA - South of 26o South Latitude	11.35		

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 49(1)(b)(ii)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 52(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 49(1)(b)(ii))
ALLOWANCE TO MEET INCIDENTAL EXPENSES—*continued*				
		$	$	$
(2)	WA - North of 26o South Latitude	14.60		
(3)	Interstate	14.60		
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
		$	$	$
(4)	WA - Metropolitan Hotel or Motel	181.20	90.60	60.40
(5)	Locality South of 26o South Latitude	163.00	81.50	54.35
(6)	Locality North of 26o South Latitude			
	Broome	253.80	126.90	84.60
	Carnarvon	208.70	104.35	69.55
	Dampier	203.00	101.50	67.65
	Derby	176.35	88.20	58.80
	Exmouth	215.10	107.55	71.70
	Fitzroy Crossing	303.10	151.55	101.05
	Gascoyne Junction	128.10	64.05	42.70
	Halls Creek	243.60	121.80	81.20
	Karratha	320.35	160.20	106.80
	Kununurra	253.30	126.65	84.45
	Marble Bar	178.60	89.30	59.55
	Newman	247.95	123.95	82.65
	Nullagine	154.00	77.00	51.35
	Onslow	202.05	101.05	67.35
	Pannawonica	175.45	87.70	58.50
	Paraburdoo	241.60	120.80	80.55
	Port Hedland	220.10	110.05	73.35
	Roebourne	131.20	65.60	43.75
	Sandfire	159.60	79.80	53.20
	Shark Bay	175.10	87.55	58.35
	Tom Price	211.60	105.80	70.55
	Turkey Creek	165.60	82.80	55.20
	Wickham	301.60	150.80	100.55
	Wyndham	158.10	79.05	52.70
(7)	Interstate - Capital City			
	Sydney	240.00	120.00	80.00
	Melbourne	240.35	120.20	80.10
	Other Capitals	203.15	101.60	67.65
(8)	Interstate - Other than Capital City	163.00	81.50	54.35

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 49(1)(b)(ii)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 52(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 49(1)(b)(ii))
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
		$	$	$
(9)	WA - South of 26o South Latitude	75.75		
(10)	WA - North of 26o South Latitude	92.05		
(11)	Interstate	92.05		
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED.				
(12)	WA - South of 26o South Latitude:			
	Breakfast	13.65		
	Lunch	13.65		
	Dinner	37.15		
(13)	WA - North of 26o South Latitude			
	Breakfast	15.35		
	Lunch	26.60		
	Dinner	35.50		
(14)	Interstate			
	Breakfast	15.35		
	Lunch	26.60		
	Dinner	35.50		
DEDUCTION FOR NORMAL LIVING EXPENSES (Transfer Clause 52)				
(15)	Each Adult	21.95		
(16)	Each Child	3.75		
MIDDAY MEAL (Travelling Clause 53)				
(17)	Rate per meal	5.30		
(18)	Maximum reimbursement per pay period	26.50		

2005 WAIRC 0118

GOVERNMENT OFFICERS (SOCIAL TRAINERS) AWARD 1988, NO. PSAA 20 OF 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED **APPLICANT**
	-v-
	DIRECTOR GENERAL DISABILITY SERVICES COMMISSION **RESPONDENT**
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DATE	FRIDAY, 21 JANUARY 2005
FILE NO	P 31 OF 2004
CITATION NO.	2005 WAIRC 00118

Result Award varied.

Order

HAVING heard Mr M Sims on behalf of the applicant and Ms G Calkin on behalf of the respondents, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Government Officers (Social Trainers) Award 1988 (No. PSAA 20 of 1985) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 19th day of January 2005.

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

SCHEDULE

Schedule J – Travelling, Transfer and Relieving Allowance: Delete this schedule and insert the following in lieu thereof:

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 45(2)(b) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 47(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 45(2)(b))
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
		$	$	$
(1)	WA - South of 26o South Latitude	11.35		
(2)	WA - North of 26o South Latitude	14.60		
(3)	Interstate	14.60		
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
		$	$	$
(4)	WA - Metropolitan Hotel or Motel	181.20	90.60	60.40
(5)	Locality South of 26o South Latitude	163.00	81.50	54.35
(6)	Locality North of 26o South Latitude			
	Broome	253.80	126.90	84.60
	Carnarvon	208.70	104.35	69.55
	Dampier	203.00	101.50	67.65
	Derby	176.35	88.20	58.80
	Exmouth	215.10	107.55	71.70
	Fitzroy Crossing	303.10	151.55	101.05
	Gascoyne Junction	128.10	64.05	42.70
	Halls Creek	243.60	121.80	81.20
	Karratha	320.35	160.20	106.80
	Kununurra	253.30	126.65	84.45
	Marble Bar	178.60	89.30	59.55
	Newman	247.95	123.95	82.65
	Nullagine	154.00	77.00	51.35
	Onslow	202.05	101.05	67.35
	Pannawonica	175.45	87.70	58.50
	Paraburdoo	241.60	120.80	80.55
	Port Hedland	220.10	110.05	73.35
	Roebourne	131.20	65.60	43.75

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 45(2)(b) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 47(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 45(2)(b))
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL—*continued*				
		$	$	$
	Sandfire	159.60	79.80	53.20
	Shark Bay	175.10	87.55	58.35
	Tom Price	211.60	105.80	70.55
	Turkey Creek	165.60	82.80	55.20
	Wickham	301.60	150.80	100.55
	Wyndham	158.10	79.05	52.70
(7)	Interstate - Capital City			
	Sydney	240.00	120.00	80.00
	Melbourne	240.35	120.20	80.10
	Other Capitals	203.15	101.60	67.65
(8)	Interstate - Other			
	than Capital City	163.00	81.50	54.35
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
(9)	WA - South of 26o South Latitude	75.75		
(10)	WA - North of 26o South Latitude	92.05		
(11)	Interstate	92.05		
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED.				
(12)	WA - South of 26o South Latitude:			
	Breakfast	13.65		
	Lunch	13.65		
	Dinner	37.15		
(13)	WA - North of 26o South Latitude			
	Breakfast	15.35		
	Lunch	26.60		
	Dinner	35.50		
(14)	Interstate			
	Breakfast	15.35		
	Lunch	26.60		
	Dinner	35.50		
DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE 47(5)(a))				
(15)	Each Adult	21.95		
(16)	Each Child	3.75		
MIDDAY MEAL (CLAUSE 48(11))				
(17)	Rate per meal	5.30		
(18)	Maximum reimbursement per pay period	26.50		

2005 WAIRC 00122

GRAYLANDS SELBY-LEMNOS AND SPECIAL CARE HEALTH SERVICES AWARD 1999
NO. PSAA 1 OF 1999

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	METROPOLITAN HEALTH SERVICES BOARD AND THE HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)
	RESPONDENTS
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DATE	FRIDAY, 21 JANUARY 2005
FILE NO	P 32 OF 2004
CITATION NO.	2005 WAIRC 00122

Result Award varied.

Order

HAVING heard Mr M Sims on behalf of the applicant and Ms G Calkin on behalf of the Metropolitan Health Services Board and Mr J O'Malley on behalf of the Health Services Union of Western Australia (Union of Workers), and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Graylands Selby-Lemnos and Special Care Health Services Award 1999 (No. PSAA 1 of 1999) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 19th day of January 2005.

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

SCHEDULE

Schedule I – Travelling, Transfer and Relieving Allowance: Delete this schedule and insert the following in lieu thereof:

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38(2)(b) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 41(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 36(2)(b))
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
		$	$	$
(1)	WA - South of 26o South Latitude	11.35		
(2)	WA - North of 26o South Latitude	14.60		
(3)	Interstate	14.60		
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
		$	$	$
(4)	WA - Metropolitan Hotel or Motel	181.20	90.60	60.40
(5)	Locality South of 26o South Latitude	163.00	81.50	54.35
(6)	Locality North of 26o South Latitude Broome	253.80	126.90	84.60

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38(2)(b) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 41(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 36(2)(b))
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL—*continued*				
		$	$	$
	Carnarvon	208.70	104.35	69.55
	Dampier	203.00	101.50	67.65
	Derby	176.35	88.20	58.80
	Exmouth	215.10	107.55	71.70
	Fitzroy Crossing	303.10	151.55	101.05
	Gascoyne Junction	128.10	64.05	42.70
	Halls Creek	243.60	121.80	81.20
	Karratha	320.35	160.20	106.80
	Kununurra	253.30	126.65	84.45
	Marble Bar	178.60	89.30	59.55
	Newman	247.95	123.95	82.65
	Nullagine	154.00	77.00	51.35
	Onslow	202.05	101.05	67.35
	Pannawonica	175.45	87.70	58.50
	Paraburdoo	241.60	120.80	80.55
	Port Hedland	220.10	110.05	73.35
	Roebourne	131.20	65.60	43.75
	Sandfire	159.60	79.80	53.20
	Shark Bay	175.10	87.55	58.35
	Tom Price	211.60	105.80	70.55
	Turkey Creek	165.60	82.80	55.20
	Wickham	301.60	150.80	100.55
	Wyndham	158.10	79.05	52.70
(7)	Interstate - Capital City			
	Sydney	240.00	120.00	80.00
	Melbourne	240.35	120.20	80.10
	Other Capitals	203.15	101.60	67.65
(8)	Interstate - Other than Capital City	163.00	81.50	54.35
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
(9)	WA - South of 26o South Latitude	75.75		
(10)	WA - North of 26o South Latitude	92.05		
(11)	Interstate	92.05		
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED.				
(12)	WA - South of 26o South Latitude:			
	Breakfast	13.65		
	Lunch	13.65		
	Dinner	37.15		

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38(2)(b) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 41(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 36(2)(b))
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED.—*continued*				
		$	$	$
(13)	WA - North of 26o South Latitude			
	Breakfast	15.35		
	Lunch	26.60		
	Dinner	35.50		
(14)	Interstate			
	Breakfast	15.35		
	Lunch	26.60		
	Dinner	35.50		
DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE 41(5)(a))				
(15)	Each Adult	21.95		
(16)	Each Child	3.75		
MIDDAY MEAL (CLAUSE 42(11))				
(17)	Rate per meal	5.30		
(18)	Maximum reimbursement per pay period	26.50		

The allowances prescribed in this schedule shall be varied in accordance with any movement in equivalent allowances in the Public Service Award 1992.

2005 WAIRC 00014

HOSPITAL SALARIED OFFICERS' AWARD 1968 (NO. 39 OF 1968)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)

APPLICANT

-v-

HONOURABLE MINISTER FOR HEALTH IN HIS CAPACITY AS THE HOSPITAL BOARD FOR METROPOLITAN HEALTH SERVICES AND OTHERS

RESPONDENTS

CORAM COMMISSIONER P E SCOTT
PUBLIC SERVICE ARBITRATOR

DATE MONDAY, 10 JANUARY 2005

FILE NO P 36 OF 2004

CITATION NO. 2005 WAIRC 00014

Result Award varied.

Order

HAVING heard Mr G Bucknall on behalf of the applicant and Ms C Glenn on behalf of the respondents and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Hospital Salaried Officers' Award 1968 (No. 39 of 1968) be varied in accordance with the following Schedule and that such variation shall have effect on and from the 10th day of January 2005.

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

SCHEDULE

1. Clause 15. – Meal Money: Delete this clause and insert the following in lieu thereof:

An employee required to work overtime before or after the employees ordinary working hours on any day shall, when such additional duty necessitates taking a meal away from the employees usual place of residence, be supplied by the employer with any meal required or be reimbursed for each meal purchased at the rate of $8.05 for breakfast, $9.90 for the midday meal, and $11.90 for the evening meal: Provided that the overtime worked before or after the meal break totals not less than two hours. Such reimbursement shall be in addition to any payment for overtime to which the employee is entitled.

2. Clause 25. – Removal Allowance:

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

(b) The employee shall be reimbursed by the new employer:-

(i) The actual reasonable cost of conveyance for the employee and dependants.

(ii) The actual cost (including insurance) of the conveyance of an employee's household furniture, effects and appliances up to a maximum volume of 35 cubic metres, provided that a larger volume may be approved by the employer in special cases.

(iii) An allowance of $519.00 for accelerated depreciation and extra wear and tear on furniture, effects and appliances for each occasion that an employee is required to transport furniture, effects and appliances. Provided that the employer is satisfied that the value of household furniture, effects and appliances moved by the employee is at least $3,106.00.

(iv) Reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of $154.00.

Pets are defined as dogs, cats, birds or other domestic animals kept by the officer or the employee's dependents for the purpose of household enjoyment.

Pets do not include domesticated livestock, native animals nor equine animals.

B. Delete subclause (6) of this clause and insert the following in lieu thereof:

(6) Where an employee occupies hospital accommodation where furniture is provided and as a consequence is obliged to store furniture, the employee shall be reimbursed the actual cost of such storage up to a maximum allowance of $964.00 per annum. Actual cost is deemed to include the premium for adequate insurance coverage of the value of the furniture stored. An allowance under this subclause shall not be paid for a period in excess of four years without the approval of the employer.

2005 WAIRC 00120

PUBLIC SERVICE AWARD 1992 NO. PSAA 4 OF 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DEPARTMENT OF INDIGENOUS AFFAIRS AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DATE	FRIDAY, 21 JANUARY 2005
FILE NO	P 28 OF 2004
CITATION NO.	2005 WAIRC 00120

Result Award varied.

Order

HAVING heard Mr M Sims on behalf of the applicant and Ms G Calkin on behalf of the respondents, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Public Service Award 1992 (No. PSAA 4 of 1989) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 19th day of January 2005.

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

SCHEDULE

1. Schedule C – Camping Allowance: Delete this schedule and insert the following in lieu thereof:

South of 26o South Latitude

ITEM			RATE PER DAY
1	Permanent Camp	Cook provided by the Department	32.70
2	Permanent Camp	No cook provided by the Department	43.55
3	Other Camping	Cook provided by the Department	54.45
4	Other Camping	No cook provided	65.35

North of 26o South Latitude

ITEM			RATE PER DAY
1	Permanent Camp	Cook provided by the Department	40.80
2	Permanent Camp	No cook provided by the Department	51.70
3	Other Camping	Cook provided by the Department	62.60
4	Other Camping	No cook provided	73.50

2. Schedule I – Travelling, Transfer and Relieving Allowance: Delete this schedule and insert the following in lieu thereof:

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 50(2)(b) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 53(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 50(2)(b))
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
		$	$	$
(1)	WA - South of 26o South Latitude	11.35		
(2)	WA - North of 26o South Latitude	14.60		
(3)	Interstate	14.60		
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
		$	$	$
(4)	WA - Metropolitan Hotel or Motel	181.20	90.60	60.40
(5)	Locality South of 26o South Latitude	163.00	81.50	54.35
(6)	Locality North of 26o South Latitude			
	Broome	253.80	126.90	84.60
	Carnarvon	208.70	104.35	69.55
	Dampier	203.00	101.50	67.65
	Derby	176.35	88.20	58.80
	Exmouth	215.10	107.55	71.70
	Fitzroy Crossing	303.10	151.55	101.05
	Gascoyne Junction	128.10	64.05	42.70
	Halls Creek	243.60	121.80	81.20
	Karratha	320.35	160.20	106.80
	Kununurra	253.30	126.65	84.45
	Marble Bar	178.60	89.30	59.55
	Newman	247.95	123.95	82.65
	Nullagine	154.00	77.00	51.35

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 50(2)(b) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 53(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 50(2)(b))
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL—*continued*				
		$	$	$
	Onslow	202.05	101.05	67.35
	Pannawonica	175.45	87.70	58.50
	Paraburdoo	241.60	120.80	80.55
	Port Hedland	220.10	110.05	73.35
	Roebourne	131.20	65.60	43.75
	Sandfire	159.60	79.80	53.20
	Shark Bay	175.10	87.55	58.35
	Tom Price	211.60	105.80	70.55
	Turkey Creek	165.60	82.80	55.20
	Wickham	301.60	150.80	100.55
	Wyndham	158.10	79.05	52.70
(7)	Interstate - Capital City			
	Sydney	240.00	120.00	80.00
	Melbourne	240.35	120.20	80.10
	Other Capitals	203.15	101.60	67.65
(8)	Interstate - Other			
	than Capital City	163.00	81.50	54.35
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
(9)	WA - South of 26o South Latitude	75.75		
(10)	WA - North of 26o South Latitude	92.05		
(11)	Interstate	92.05		
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED.				
(12)	WA - South of 26o South Latitude:			
	Breakfast	13.65		
	Lunch	13.65		
	Dinner	37.15		
(13)	WA - North of 26o South Latitude			
	Breakfast	15.35		
	Lunch	26.60		
	Dinner	35.50		
(14)	Interstate			
	Breakfast	15.35		
	Lunch	26.60		
	Dinner	35.50		
DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE 53 (5)(a))				
(15)	Each Adult	21.95		
(16)	Each Child	3.75		

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 50(2)(b) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 53(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 50(2)(b))
MIDDAY MEAL (CLAUSE 54(11))				
		$	$	$
(17)	Rate per meal	5.30		
(18)	Maximum reimbursement per pay period	26.50		

AWARDS/AGREEMENTS—Variation of—

2005 WAIRC 00016

ACTIV FOUNDATION (SALARIED OFFICERS) AWARD, NO. 13 OF 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)

APPLICANT

-v-

THE BOARD OF MANAGEMENT, ACTIV FOUNDATION INCORPORATED

RESPONDENT

CORAM COMMISSIONER P E SCOTT
DATE MONDAY, 10 JANUARY 2005
FILE NO APPL 1508 OF 2004
CITATION NO. 2005 WAIRC 00016

Result Award varied.

Order

HAVING heard Mr G Bucknall on behalf of the applicant and Mr M O'Connor on behalf of the respondent and by consent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the ACTIV Foundation (Salaried Officers) Award, (No. 13 of 1977) be varied in accordance with the following Schedule and that such variation shall have effect on and from the 10th day of January 2005.

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

SCHEDULE

1. Clause 15. – Meal Money: Delete this clause and insert the following in lieu thereof:

An employee required to work overtime before or after the employees ordinary working hours on any day, shall, when such additional duty necessitates taking a meal away from the employees usual place of residence, be supplied by the employer with any meal required or be reimbursed for each meal purchased at the rate of $8.05 for breakfast, $9.90 for the midday meal, and $11.90 for the evening meal. Provided that the overtime worked before or after the meal break totals not less than two hours. Such reimbursement shall be in addition to any payment for overtime to which the employee is entitled.

2. Clause 27. – Removal Allowance:

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

(1) When an employee is transferred in the employer's interest or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the employee has no control, he shall be reimbursed:

(a) The actual reasonable cost of conveyance of the employee and dependants.

(b) The actual cost (including insurance) of the conveyance of an employee's household furniture effects and appliances up to a maximum volume of 35 cubic metres, provided that a larger volume may be approved buy the employer in special cases.

(c) An allowance of $519.00 for accelerated depreciation and extra wear and tear on furniture, effects and appliances for each occasion that an employee is required to transport furniture, effects and appliances. Provided that the employer is satisfied that the value of household furniture, effects and appliances moved by the employee is at least $3,106.00.

B. Delete subclause (6) of this clause and insert the following in lieu thereof:

(6) Where an employee is transferred to the employer's accommodation where furniture is provided and as a consequence is obliged to store furniture, the employee shall be reimbursed the actual cost of such storage up to a maximum allowance of $964.00 per annum. Actual cost is deemed to include the premium for adequate insurance coverage of the value of the furniture stored. An allowance under this subclause shall not be paid for a period in excess of four years without the approval of the employer.

Provided that nothing in this subclause shall preclude the employer from reimbursing an employee the actual cost of storage where it exceeds the prescribed maximum allowance, if the employer considers that cost has been necessarily and reasonably incurred in the circumstances of a particular case.

2005 WAIRC 00024

HOSPITAL SALARIED OFFICERS (AUSTRALIAN RED CROSS BLOOD SERVICE WESTERN AUSTRALIA) AWARD, 1978 NO. R 17 OF 1974

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS) **APPLICANT**
	-v-
	AUSTRALIAN RED CROSS BLOOD SERVICE **RESPONDENT**
CORAM	COMMISSIONER P E SCOTT
DATE	TUESDAY, 11 JANUARY 2005
FILE NO	APPL 1506 OF 2004
CITATION NO.	2005 WAIRC 00024

Result Award varied

Order

HAVING heard Mr G Bucknall on behalf of the applicant and there being no appearance on behalf of the respondent and by consent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Hospital Salaried Officers (Australian Red Cross Blood Service Western Australia) Award, 1978 (No. R 17 of 1974) be varied in accordance with the following Schedule and that such variation shall have effect on and from the 10th day of January 2005.

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

SCHEDULE

Clause 13. – Meal Money: Delete this clause and insert the following in lieu thereof:

Where an employee is required to work on a public holiday for more than two hours or work overtime and such overtime is worked for a period of at least two hours in excess of the required daily hours of work the employee shall be provided with a meal free of cost or shall be paid the sum of $11.90 as meal money.

This clause shall not apply where the employee has been advised of the necessity to work overtime on the previous day or earlier.

2005 WAIRC 00017

HOSPITAL SALARIED OFFICERS (CEREBRAL PALSY) AWARD 1978 NO. R 37 OF 1996

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS) **APPLICANT**
	-v-
	CEREBRAL PALSY ASSOCIATION OF WA INC **RESPONDENT**
CORAM	COMMISSIONER P E SCOTT
DATE	MONDAY, 10 JANUARY 2005
FILE NO	APPL 1509 OF 2004
CITATION NO.	2005 WAIRC 00017

Result Award varied.

Order

HAVING heard Mr G Bucknall on behalf of the applicant and Mr M O'Connor on behalf of the respondent and by consent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Hospital Salaried Officers (Cerebral Palsy) Award 1978 (No. R 37 of 1996) be varied in accordance with the following Schedule and that such variation shall have effect on and from the 10th day of January 2005.

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

SCHEDULE

Clause 13. – Meal Money: Delete this clause and insert the following in lieu thereof:

An employee required to work overtime before or after the employees ordinary working hours on any day, shall, when such additional duty necessitates taking a meal away from the employees usual place of residence, be supplied by the employer with any meal required or be reimbursed for each meal purchased at the rate of $8.05 for breakfast, $9.90 for the midday meal, and $11.90 for the evening meal. Provided that the overtime worked before or after the meal break totals not less than two hours. Such reimbursement shall be in addition to any payment for overtime to which the employee is entitled.

Meal allowance increases shall be calculated by estimating the percentage change from the appropriate CPI quarter index number nearest to the dated the allowance last changed to the latest quarter index number. This percentage change is then applied to the allowance previously paid.

2005 WAIRC 0015

SALARIED OFFICERS (ASSOCIATION FOR THE BLIND OF WESTERN AUSTRALIA) AWARD, 1995 NO. A 5 OF 1995

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)
	APPLICANT
	-v-
	ASSOCIATION FOR THE BLIND OF WESTERN AUSTRALIA (INCORPORATED)
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	MONDAY, 10 JANUARY 2005
FILE NO	APPL 1507 OF 2004
CITATION NO.	2005 WAIRC 00015

Result Award varied.

Order

HAVING heard Mr G Bucknall on behalf of the applicant and Mr M O'Connor on behalf of the respondent and by consent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Salaried Officers (Association for the Blind of Western Australia) Award, 1995 (No. A 5 of 1995) be varied in accordance with the following Schedule and that such variation shall have effect on and from the 10th day of January 2005.

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

SCHEDULE

Clause 12. – Meal Money: Delete this clause and insert the following in lieu thereof:

An employee required to work overtime before or after the employees ordinary working hours on any day, shall, when such additional duty necessitates taking a meal away from the employees usual place of residence, be supplied by the employer with any meal required or be reimbursed for each meal purchased at the rate of $8.05 for breakfast, $9.90 for the midday meal, and $11.90 for the evening meal. Provided that the overtime worked before or after the meal break totals not less than two hours. Such reimbursement shall be in addition to any payment for overtime to which the employee is entitled.

AWARDS/AGREEMENTS—Application for variation of—
No variation resulting—

2005 WAIRC 00216

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	WORMALD SECURITY
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	TUESDAY, 8 FEBRUARY 2005
FILE NO/S	APPL 645 OF 2003
CITATION NO.	2005 WAIRC 00216

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS an application was lodged in the Commission to vary the replacement of the Security Officers (North West Shelf Project) Order No. 1060 of 1998;

AND WHEREAS on 27 January 2005 the applicant filed a Notice of Discontinuance in the Commission;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order -

THAT the application be discontinued.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

AWARDS/AGREEMENTS—Interpretation of—

2005 WAIRC 00158

CULTURAL CENTRE AWARD 1987
NO A28 OF 1988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	THE LIBRARY BOARD OF WESTERN AUSTRALIA, THE TRUSTEES OF THE WESTERN AUSTRALIAN MUSEUM and THE BOARD OF THE ART GALLERY
	RESPONDENTS
CORAM	COMMISSIONER J H SMITH
DATE	TUESDAY, 25 JANUARY 2005
FILE NO.	APPL 1141 OF 2004
CITATION NO.	2005 WAIRC 00158

CatchWords	Declare true interpretation of clause 12 – Annual Leave – Cultural Centre Award 1987 (No A 28 of 1988) – calculation of rate of annual leave loading for continuous shift workers – *Industrial Relations Act 1979* (WA) s 46.
Result	Declaration and order to amend the award made
Representation	
Applicant	Mr J Nicholas
Respondents	Mr J Lange Ms K Tyers

Reasons for Decision

1 This is an application made under s 46 of the *Industrial Relations Act 1979* ("the Act") to declare the true interpretation of clause 12 – Annual Leave of the Cultural Centre Award 1987 (No A28 of 1988) ("the 1987 award").

2 The material provisions of clause 12 of the 1987 award are as follows:

> (1) Except as hereinafter provided a period of four consecutive weeks' leave with payment before taking such leave of ordinary wages as prescribed shall be allowed annually to an employee by his/her employer after a period of 12 months' continuous service with such employer.
>
> (2) The employee shall be paid for any period of annual leave prescribed by the clause at the ordinary rate of wage the employee has received for the greatest proportion of the calendar month prior to taking the leave and in the case of seven day rostered employees, and continuous shift employees that rate of wage shall include the weekend penalties or shift rates the employee would have received had the employee not proceeded on annual leave.
>
> Where it is not possible to calculate the weekend penalties the employee would have received, the employee shall be paid at the rate of the average of such payments made each week over the four weeks prior to taking the leave.
>
> …
>
> (10) In addition to his/her payment for annual leave and before taking such leave the employee shall receive a loading calculated on the rate of wage prescribed by subclause (2) of this clause. This loading shall be as follows:
>
> (a) All employees except continuous shift employees - an employee who would have worked on day work had he/she not been on leave – a loading of 17.5% on ordinary wages. Provided that:
>
> (i) The loading prescribed in this subclause shall not apply to proportionate annual leave on termination.
>
> (ii) The loading prescribed in this subclause shall be payable on retirement provided the employee has attained 55 years of age.
>
> (iii) Provided that in no case shall the loading for four weeks leave exceed the amount set out in the Commonwealth Bureau of Census and Statistics publication for "Average Weekly Earnings per Male Employees Unit" in W.A. for the September quarter immediately preceding the date of accrual of such leave.
>
> (b) Continuous shift employees - an employee who would have worked on continuous shift work had he/she not been on leave – a loading of 20% on ordinary wages.
>
> (i) Provided that where the employee would have received shift loadings prescribed by Clause 9. - Shift and Weekend Work of this award had he/she not been on leave during the relevant period and such loadings would have entitled him/her to a greater amount than the loading of 20%, then the shift loadings shall be added to the rate of wage prescribed by paragraph (b) of subclause (2) of this clause in lieu of the 20% loading.
>
> (ii) Provided further that if the shift loadings would have entitled him/her to a lesser amount than the loading of 20% then such loading of 20% shall be added to the rate of wage prescribed by paragraph (b) of subclause (2) of Clause 12. - Annual Leave of this award."

3 The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch ("the union") seeks an answer to the following question:

> "Are employees, to which the Cultural Centre Award 1987 applies, and who are defined as being 'continuous shift workers' for the purposes of that Award, entitled to be paid for any period of annual leave as follows:
>
> (a) at the 'ordinary rate of wage' as provided by sub-clause 12(1) and (2) of the Award, defined as including the weekend penalties or shift rates they would have received had they not proceeded on annual leave; plus
>
> (b) an additional payment, as provided by sub-clause 12(10)(b), being the higher of:
>
> (i) the shift loadings prescribed by Clause 9 – Shift and Weekend work that they would have received had they not proceeded on annual leave; or
>
> (ii) a loading of 20% of ordinary wages?"

4 The union says that if the answer to the question is "yes", then the union says that pursuant to s 46(1)(b) of the Act clause 12 of the 1987 award should be amended by deleting clause 12(2) and inserting in its place the following:

> "(2) (a) "Ordinary wage" for an employee other than a shift employee shall mean the rate of wage the employee has received for the greatest proportion of the calendar month prior to taking the leave;
>
> (b) "Ordinary wage" for a seven day rostered employee and continuous shift employee shall mean the ordinary rate of wage, including the weekend penalties or shift rates the employee would have received, had the employee not proceeded on annual leave;
>
> (c) Where it is not possible to calculate the weekend penalties the employee would have received, the employee shall be paid at the rate of the average of such payments made each week over the four weeks prior to taking the leave."

Background

5 The 1987 award was made by Commissioner Negus on 4 August 1989 (69 WAIG 2691). The order, made by Commissioner Negus making the 1987 award, reflects that the 1987 award was made by consent. The material provisions of clause 12 of the 1987 award has, for the purposes of this application, remained unamended since the 1987 award was made in 1989. Clause 1 of the 1987 award provides that the 1987 award replaces the Museum Attendants Award 1980 and the Art Gallery Attendants and Groundsmen Award 1980 ("the 1980 awards").

6 The Library Board of Western Australia employs security officers who are otherwise known as duty officers, who are continuous shift employees as defined by clause 5(3) of the 1987 award. In clause 5(3) "Continuous shift employee" is defined to mean:

> "an employee who may be rostered to work a day, afternoon or night shift on any of the seven days of the week."

7 Pursuant to clause 4 of the 1987 award, the 1987 award applied from 23 May 1989. It was common ground that from 1989 until 1996 clause 12 of the 1987 award was applied by the respondents to the award. In 1996 duty officers were paid an annualised salary pursuant to the Ministry for Culture and the Arts LISWA Service Agreement 1997 (77 WAIG 2270) ("the 1997 agreement"). Pursuant to clause 4 of schedule 4 of the 1997 agreement the duty officers were not entitled to be paid shift or weekend penalties as they were averaged over the year into an annualised salary. The 1997 agreement was replaced by the Cultural Centre General Agreement 2002 ([2002] WAIRC 06073) ("the 2002 agreement"). Pursuant to clause 8.1 of the 2002 agreement clause 12 of the 1987 award became operative again and remains operative pursuant to clause 9.1 of the Government Services (Miscellaneous) General Agreement 2004 ([2004] WAIRC 11797) which replaced the 2002 agreement.

8 It is common ground that since the 2002 agreement was made, the respondents have paid their continuous shift employees, when they have proceeded on leave, as follows:

(a) At the "ordinary rate of wage" excluding weekend penalties or shift rates they would have received had they not proceeded on annual leave; plus

(b) An additional payment being the higher of:

(i) The shift loadings prescribed by clause 9 – Shift and Weekend Work that they would have received had they not proceeded on annual leave; or

(ii) A loading of 20% of ordinary wages.

9 The union says that the ordinary rate of wage that should be paid by the respondents is prescribed by clause 12(2) of the 1987 award and that the ordinary rate of wage for continuous shift employees includes the weekend penalties or shift rates the employee would have received had they not proceeded on annual leave. Accordingly, the union says that continuous shift employees are entitled to be paid the ordinary rate of wage, including the penalties and shift rates plus the additional payment set out in paragraph [8](b) above.

10 The respondents say that the effect of the construction of clause 12, as contended by the union, is that continuous shift employees are entitled to a penalty payment on top of another penalty payment and this is contrary to industrial principles. Further, the respondents say that the ordinary rate of wage the duty officers are entitled to pursuant to clause 12(1) of the 1987 award, which should be construed to mean ordinary wages, is without weekend penalties or shift rates as prescribed by clause 16 – Wages of the 1987 award.

The Union's Evidence and Submissions

11 The union called one witness to give evidence in support of its case. Mr Desmond Tonge testified that he has been employed as a duty officer by the Library Board of Western Australia since 1985. He is a continuous shift employee. When he commenced employment the terms of his employment were not covered by an award but were paid according to the terms of the Art Gallery Attendants and Groundsmen Award 1980. He says that before 1996 he was paid for annual leave in two parts – ordinary projected wages, plus leave loading. He says that because he was a continuous shift worker his ordinary wages included projected penalties. Further, he says that his annual leave loading was calculated at the greater of either 20% of ordinary wages or the value of projected penalties. He was paid both weekend penalties and shift rates as part of his ordinary rate of pay and as part of his annual leave loading when he went on leave. He says that sometime prior to 1996 he had a debate with the Library Board pay clerk about how he should be paid and the pay clerk agreed that he should be paid in the manner set out above. When cross-examined Mr Tonge conceded that he did not have any payslips or records to support his contentions.

12 Both parties agree that the principles for interpretation of awards are well settled. The principles which are to be applied by the Commission were enunciated by the Industrial Appeal Court in *Norwest Beef Industries Ltd & Anor v West Australian Branch, Australasian Meat Industry Employees' Union, Industrial Union of Workers* (1984) 64 WAIG 2124 ("the Norwest Beef Case"). At 2127 Brinsden J set out those principles as follows:

> "The principles applied in interpreting awards are the same principles as are applied in the Courts of law for the constructions of deeds, instruments and statutes: *Tramways Union v Commissioner of Railways* (1928) 7 WAIG 155; *AWU v Lake View and Star* (1934) 14 WAIG 279 at 289 and *AWU v Co-operative Bulk Handling* (1946) 26 WAIG 353 at 354. Applying those principles the argument goes, the meaning of a provision in an award is to be obtained by considering the terms of the award as a whole. If the terms are clear and unambiguous, it is not permissible to look to extrinsic material to qualify that meaning. A number of cases were quoted in support of that proposition and it is only necessary to mention a few: *Amalgamated Society of Engineers v Adelaide Steamship Co* 28 CLR 129 at 161-2; *Life Insurance Co of Australia Ltd v Phillips* 36 CLR 60 at 70; *Jones v Walton* (1966) WAR 139 at 142. As clause 12 is unambiguous and clear in meaning, earlier awards, the progenitors of these awards, and the reasons for the making of the earlier awards, and the behaviour of the parties over the years in acting pursuant to the awards, are therefore irrelevant."

13 Mr Nicholas on behalf of the union also referred to the decision in *Brown & Root Energy Services Pty Ltd v Construction Industry Long Service Leave Payments Board* (2001) 81 WAIG 665 in which I observed at paragraph [48]:

> "In interpreting industrial instruments tribunals usually do not apply a literal approach, as awards and enterprise agreements may have been drafted by industrial rather than skilled draftsmen (*Robe River Iron Associates v Amalgamated Metal Workers' and Shipwrights' Union* per Kennedy J at 1100). This approach to interpretation was explained by Street J in *Geo A Bond and Co Ltd (in liq) v McKenzie* (1929) 28 AR 499 at 503-504:
>
> > 'Now, speaking generally, awards are to be interpreted as any other enactment is interpreted. They lay down the law affecting employers and employees in their relation as such, and they have to be obeyed to the same extent as any other statutory enactment. But at the same time, it must be remembered that awards are made for the various industries in the light of the customs and working conditions of each industry, and they frequently result, as this award in fact did, from an agreement between parties, couched in terms intelligible to themselves but often framed without that careful attention to form and draughtsmanship which one expects to find in an Act of Parliament. I think, therefore, in construing an award, one must always be careful to avoid a too literal adherence to the strict technical meaning of words, and must view the matter broadly, and after giving consideration and weight to every part of the award, endeavour to give it a meaning consistent with the general intention of the parties to be gathered from the whole award.' "

14 The union says that the terms of clause 12 of the 1987 award are clear and unambiguous and if the Commission agrees with this contention it is not permissible to look at extrinsic material to qualify the meaning of clause 12. Pursuant to the principles set out by Brinsden J in the Norwest Beef Case, the union also says that the Commission can have regard to the whole of the 1987 award in interpreting clause 12 of the 1987 award.

15 The union says that the clear and unambiguous meaning of clause 12 of the 1987 award is that clause 12 provides for annual leave payments for all employees to be paid in two parts:

(a) 'ordinary wages' as defined by clause 12(2); and

(b) In addition to payment of 'ordinary wages', a loading pursuant to clause 12(10).

16 The union says clause 12 provides for the two parts of annual leave payments to be approached differently for seven day rostered employees, continuous shift employees and all other employees. Clause 12(2) differentiates between seven day rostered employees and continuous shift employees compared with every other employee. Seven day rostered employees and continuous shift employees have the weekend penalties or shift rates they would have received had they not proceeded on annual leave included in the definition of 'ordinary rate of wage'. Each other employees' 'ordinary rate of wage' is calculated by reference to ordinary wages they have received for the greatest proportion of the calendar month prior to taking leave. Clause 12(10) differentiates between 'continuous shift employees' compared with every other employee. That is, while pursuant to sub-paragraph (a) every other employee receives a loading of 17.5% on 'ordinary wages', pursuant to clause (b) 'continuous shift employees' receive the greater of:

(a) the shift loading prescribed by clause 9 had they not been on annual leave; or

(b) a loading of 20% on 'ordinary wages'.

17 In summary, the union says clause 12 provides in relation to continuous shift workers that annual leave is paid firstly at the 'ordinary rate of wage' including weekend or shift rates they would have received (clause 12(2)), plus an additional loading, being the greater of the weekend or shift penalties they would have received, or 20% on ordinary wages (clause 12(10)).

18 The union says that the incorrect reference in clause 12(10)(b)(i) and (ii) to "paragraph (b) of subclause (2)" should be correctly understood to refer to the second part of clause 12(2) that states "… and in the case of seven day rostered employees, and continuous shift employees, that rate of wage shall include the weekend penalties or shift rates the employee would have received had the employee not proceeded on annual leave." These words define the "ordinary rate of wage" of continuous shift workers for the purposes of annual leave.

19 The union contends that interpretation is reinforced by the following:

(a) The first part of sub-paragraph (10) refers to the additional payment for annual leave being calculated on the 'rate of wage prescribed by subclause (2)', without the incorrectly numbered reference.

(b) The incorrectly numbered references in sub-paragraphs (10)(b)(i) and (ii) are dependent upon the principle laid down in the first part of sub-paragraph (10).

(c) Notwithstanding the incorrectly numbered references, sub-paragraphs (10)(b)(i) and (ii) clearly refer to the rate of wage provided by subclause (2) in relation to 'continuous shift employees'.

(d) The scheme of the Award is such that it consistently provides for arrangements that differentiate between continuous shift employees and other employees:

(i) Clause 5 defines continuous shift employees in relation to other employees.

(ii) Clause 7(4) provides that ordinary hours of employees who work continuous shift work may be worked at any time of the day or night.

(iii) Clause 7(5)(a) provides that employees, other than continuous shift employees, are entitled to an unpaid meal break. Clause 7(6) provides that continuous shift employees are entitled to a paid meal break provided they are available to respond to urgent work requirements.

(iv) Clause 8(1) provides for overtime rates for all employees other than those engaged on continuous shift work.

(v) Clause 8(3) provides for overtime rates for continuous shift employees at a greater rate than for other employees.

(vi) Clause 11(4)(c) provides that shift and rostered employees regularly rostered to work Sundays and Public Holidays not required to work on a holiday which falls on their rostered day off, have a day's leave with pay added to their annual leave.

(vii) Clause 12(3)(a) provides that continuous shift employees are entitled to an extra week's leave compared with every other employee.

(e) There is no other meaning that can be reasonably attributed to the words, i.e. there is no ambiguity.

20 The union says that it could be said that if it can be said that there is an ambiguity in clause 12 because of the reference in clause 12(10)(b)(i) and (ii) to paragraph (b) of subclause (2) then when one has regard to the antecedent awards to the 1987 award this ambiguity can be explained. As set out above, the 1987 award replaced the 1980 awards. The union contends that the 1980 awards contained annual leave provisions that provide for substantially the same benefit as clause 12 of the 1987 award.

21 The material parts of clause 16 of the Museum Attendants Award 1980 provided as follows:

"(1) Except as hereinafter provided a period of four consecutive weeks' leave with payment of ordinary wages as prescribed shall be allowed annually to an employee by his employer after a period of twelve months' continuous service with such employer.

(2) (a) "Ordinary wages" for an employee other than a shift employee shall mean the rate of wage, excluding penalty rates that the employee has received for the greatest proportion of the calendar month prior to his taking annual leave.

(b) "Ordinary wages" for a shift employee shall mean the rate of wage the shift employee would receive under Clause 10 – Shift and Weekend Work of this Award according to the employee's roster or projected roster including Saturday and Sunday shifts.

…

(10) During the period of annual leave an employee shall receive a loading calculated on the rate of wage prescribed by subclause (2) of this clause. This loading shall be as follows:

… (ii) Shift Employees – an employee who would have worked on shift work had he not been on leave – a loading of 20 per cent on ordinary wages.

Provided that where the employee would have received shift loadings prescribed by this award had he not been on leave during the relevant period and such loadings would have entitled him to a greater amount than the loading of 20 per cent, then the shift loading shall be added to the rate of wage prescribed by subclause 2(b) of this clause in lieu of the 20 per cent loading.

Provided further, that if the shift loadings would have entitled him to a lesser amount than the loading of 20 per cent then such loading of 20 per cent shall be added to the rate of wage prescribed by subclause 2(b) of this clause."

22 Except that clause 12(10)(b) of the 1987 award contains roman numerals, the subclause remains the same as the 1980 awards which contained the same paragraphs but different numbering. The only material change from the 1980 awards is that clause 12(2) of the 1987 award is not in the same form as clause 16(2)(a) and (b) of the Museum Attendants Award 1980. The union says when one has regard to the way in which clause 12 of the 1987 award is drafted, that when the parties drafted the 1987 award it is apparent they did not have regard to the fact that clause 12(2) did not to contain sub-paragraphs (a) and (b) which had existed in the 1980 awards. Accordingly, the union seeks the Commission to use its powers under s 46(1)(b) of the Act to vary clause 12 by deleting clause 12(2) and inserting in its place sub-paragraphs (a), (b) and (c), which would then reinstate the references to paragraph (b) of subclause 2 in the same way as was set out in the 1980 awards.

Respondents' Submissions

23 The respondents did not call any evidence. Mr Lange informed the Commission the respondents do not accept the evidence of Mr Tonge.

24 The respondents submit clause 12(1), (2) and (10) should be construed as applying the principle that holiday loading is a bonus payment on top of ordinary pay and it should not be construed so as to provide a penalty upon a penalty. In support of their submissions the respondents refer to the Australian Employment Law Guide in which it is stated:

"Holiday loading is a bonus payment on top of annual leave pay. Introduced into industrial awards in 1970, it spread rapidly and by 1973 a loading of 17½% was generally applicable. On 1 January 1997 annual leave loading became an "allowable matter" for the purpose of federal awards. This means that clauses dealing with annual leave loading are able to be included in awards.

Its rationale is twofold: first, it is meant to compensate workers for extra payments, such as overtime and special allowances, which they would normally expect to get, over and above their ordinary pay, if they stayed at work instead of taking holidays; second, and to a lesser extent, it is designed to contribute towards extra expenses which workers might face on holidays - - travel, holiday accommodation and so on.

…

Shiftworkers are usually entitled to either the loading or their shift allowance, whichever is the greater."

25 The respondents say that the reference to paragraph (b) of subclause (2) in clause 12(10) of the 1987 award creates an ambiguity the meaning of which can only be resolved when regard is had to the history of the 1987 award. The respondents say that the Commission should have regard to the transcript of proceedings before Commissioner Negus, when the 1987 award was made, and to also have regard to the industrial agreements that preceded the making of the 1980 awards. When the 1987 award was made Ms S Mayman appeared on behalf of the union, who was the applicant in the proceedings to make the 1987 award. Ms Mayman stated at page 2 of the transcript:

"The applicant before you, as explained in a section 32 conference, sir, seeks to bring a new award to cover three work-places – the Art Gallery of Western Australia, the Museum of Western Australia and the Library Board of Western Australia, into the one award called the Cultural Centre Award under application A28 of 1988. That award, in fact, seeks to replace two existing awards, The Art Gallery (Attendants and Groundsmen) Award, number 31 of 1980 and the Museum Attendants Award, number 30 of 1980. In addition the Cultural Award seeks to cover non-award employees currently employed in the position as security attendants in the Library Board of Western Australia.

Since those persons were first employed when the Alexander Library Building first opened, there has been agreement that those persons be employed under the existing conditions of the Art Gallery and Groundsmen Award. So to all intents and purposes their current provisions are much the same as they will be seeking under the Cultural Centre Award."

26 The only comment that was made in relation to clause 12(2) of the 1987 award was a brief comment made by Ms Mayman. At page 8 of the transcript she stated:

"In clause 12, Annual leave, subclause (2) has been inserted. It is in fact a standard clause from the Gardeners (Government) Award and it provides for consideration of weekend penalties or shift rates in the calculation of annual leave based on an averaging of the previous month worked. That previously did not apply in respect of these employees."

27 Mr Lange on behalf of the respondents referred to a copy of the Gardeners (Government) 1986 Award No 16 of 1983 and the copy of the Reasons for Decision when that award was made by Chief Commissioner Collier on 12 June 1986. Clause 13(2) of the Gardeners (Government) 1986 Award No 16 of 1983 provides:

"(2) The employee shall be paid for any period of annual leave prescribed by the clause at the ordinary rate of wage the employee has received for the greatest proportion of the calendar month prior to taking the leave and in the case of rostered employees, that rate of wage shall include the weekend penalties the employee would have received had the employee not proceeded on annual leave.

Where it is not possible to calculate the weekend penalties, the employee would have received, the employee shall be paid at the rate of the average of such payments made each week over the four weeks prior to taking leave."

28 Mr Lange on behalf of the respondents pointed out that when the terms of the Gardeners (Government) 1986 Award No 16 of 1983 are analysed that whilst clause 5 of that award contained a definition of a shift employee, shifts are not contemplated by the remaining terms of the award, nor are there any shift or weekend penalties provided for in that award as contemplated by clause 13(2) of that award.

29 The respondents say that the Cleaners and Caretakers (Art Gallery) Agreement 1971 and the Cleaners and Caretakers (Museum) Agreement 1971 ((1971) 51 WAIG 844 and 932) ("the 1971 agreements") were the predecessors to the 1980 awards. When the agreements were registered in 1971 the annual leave clauses of those agreements entitled employees to three weeks annual leave each year and did not provide for annual leave loading or payment of shift penalties or weekend penalties as part of the ordinary wages payable at the time of annual leave.

30 In 1973, the 1971 agreements were amended to provide, in respect of each of the annual leave clauses for ordinary wages for the purpose of payment of three consecutive weeks' leave to include payment of shift or weekend penalties.

31 The entitlement to annual leave loading on wages whilst on leave was inserted into the agreements in 1978. In August 1978, the Cleaners and Caretakers (Museum) Agreement 1975 was amended to provide that where shift workers, when receiving a payment of annual leave including penalty rates that was less than 20% in addition to the award rate of pay for five weeks' leave, a loading was to be paid that would produce an amount equal to 20% in addition to the award rate of pay for a maximum of five weeks. That agreement provision also provided: "Provided that the payment shall not exceed 5/4ths of the amount referred to in paragraph (b) hereof (maximum loading prescribed under paragraph (b)), but this limitation will not affect a worker's entitlement to any additional payment by way of penalties under subclause (2) of this clause should those penalties exceed 20%." Whilst it is clear that the amendment to this agreement is extremely convoluted the respondents submit that the effect of this amendment was to provide for a loading of 20% which could not exceed an amount of the shift and weekend penalties together with the loading except where the shift penalties and loading were greater than an amount of 20% then the shift penalties amount were payable. Accordingly, what was required to be calculated was the ordinary wage, without having regard to shift or weekend penalties. The shift and weekend penalties would be calculated as a separate amount and if that amount exceeded an amount of 20% then the shift penalties alone were payable. If the amount of the penalties was less than 20% then an amount of 20% loading was paid.

32 Consequently, the respondents say that when regard is had to the 1978 amendment, it is clear that the principle which was set out by the Australian Employment Law Guide, that the shift workers are usually entitled to either the loading or their shift allowance, whichever is the greater amount, is the way in which the 1987 award should be interpreted.

33 It was also contended on behalf of the respondents that the reference to the loading of 20% on ordinary wages in clause 12(10)(b) of the 1987 award should be construed to mean money which is provided for in clause 16 of the 1987 award, being the minimum award wage set out for each of the classifications in the 1987 award and could not be construed to include shift and weekend penalties. In support of the respondents' submissions Mr Lange referred to the decision of Commissioner Martin in *The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous WA Branch v Wormald International (Australia) Pty Ltd and Others* (1989) 70 WAIG 505.

Additional Material and Submissions by the Parties

34 At the conclusion of the hearing, the Commission gave leave to the parties to inspect the Commission's files in respect of the making of the 1980 awards. The parties did so and subsequently informed the Commission in written submissions that the 1980 awards files did not contain any information that is of assistance in this matter. The respondents sought to put further material and submissions before the Commission without leave to do so. The further material constitutes copies of seven Industrial Employees Circulars issued by the Public Service Board between 1972 and 1980; two circulars issued by Executive Director of the Office of Industrial Relations in 1988 and 1990 and one circular issued by the Chief Executive Officer of the Department of Productivity and Labour Relations in 1990. It is apparent from the circulars that they are statements of determinations made by Cabinet and by the Minister responsible for the administration of the Act. The union objects to the tendering of this material.

35 The respondents say in written submissions that clause 12(2) of the 1987 award provides that annual leave be paid at the ordinary rate of wage the employee has received for the greatest portion of the calendar month prior to taking the leave.

36 The respondents informed the Commission in written submissions that the Department for Culture and the Arts pays annual leave to its employees in accordance with the rule established in circular No 23 of 1980, that is payment is made at the rate of pay at the time of taking leave and not by strictly applying the award provision. The respondents also say that the historical examination of the annual leave loading provisions requires a variation of clause 12 of the 1987 award in accordance with s 40B(1)(d) of the Act.

37 The union says in its written submissions that if the circulars are admitted, circular No 13 of 1972 and circular No 19 of 1973 support the union's case in that:

(a) Circular No 13 of 1972 provides that 'ordinary wages' includes shift and weekend penalties; and

(b) Circular No 19 of 1973 supports a 20% minimum loading for shift workers that in no way limits the amount payable under circular No 13 of 1972.

Conclusion

38 Having read the material, I am of the opinion the material should not be admitted. I am of the opinion that the circulars do not provide assistance in interpreting clause 12 of the 1987 award. Statements in the circulars make it plain they are to apply administratively until awards and agreements have been amended to reflect government decisions. There is nothing before the Commission in this matter that shows these circulars have been reflected in the making of the 1980 awards or the 1987 award.

39 Secondly, the circulars show the following:

(a) In 1972 Cabinet decided to adopt the principle set out by the Commonwealth Conciliation and Arbitration Commission to pay shift and weekend penalties on annual leave. Circular No 13 of 1972 proposed that amendments to awards be made to define "ordinary wages" and in the case of shift workers to include the shift and weekend penalties the worker would have received for ordinary time had the worker not proceeded in annual leave.

(b) Circular No 19 of 1973 informed public sector employers that:

> "Cabinet has directed that Government Wages subject to industrial awards or agreements of the WA Industrial Commission be paid annual leave loadings in accordance with the following rules.
>
> Shift Workers
>
> 1. Shift workers are already receiving annual leave loadings in the form of make up pay – see Industrial Employees Circular No. 13 of 1972 dated December 13, 1972. That instruction should continue to be applied except where the amount paid for weekend and shift penalties is less than 20% of the ordinary award rate of pay for five weeks leave. In which case, a loading shall be added to the weekend and shift penalties which will produce an amount equal to 20% of ordinary wages for a maximum of five weeks leave with a maximum payment of 5/4ths of the Bureau's published weekly earnings for the preceding September quarter. This in no way limits the amount which is payable under Industrial Employees Circular No. 13 of 1972."

(c) Circular No 19 of 1973 was reflected in amendments made to the Cleaners and Caretakers (Museum) Agreement 1975 in 1978 (58 WAIG 1158) (see paragraph 31 of these reasons for decision).

(d) On 14 August 1980, circular No 23 of 1980 was published which referred to circular No 19 of 1973 and stated:

> "Clause 7 of Circular No. 19 of 1973 – Accrued Leave – provides that the annual leave loading shall be that applicable at the date of accrual notwithstanding that leave may be taken some time later.
>
> The Hon. Minister for Labour and Industry has now given approval for the loading to be calculated on the rate of pay the employee is receiving at the time of taking the leave."

(e) Circulars No 1 of 1989, No 3 of 1990 and No 1 of 1991 set out maximum amounts that were to be paid to shift workers.

40 The 1980 awards were made by the Commission on 25 November 1981 (1981) 61 WAIG 1922 and on 22 December 1981 (1981) 62 WAIG 43 by consent.

41 The Union's interpretation of the 1980 and 1987 annual leave provisions, in my view, is correct. The 1980 award provisions entitled shift employees to "ordinary wages" which included shift and weekend penalties together with a loading of 20% except if the shift and weekend penalty that would have been earnt by the employee but for the period of leave would be more than 20%. In that case the employee would have been entitled to a loading equal to that amount. This in my view is the plain and unambiguous meaning of the 1980 award annual leave loading provisions.

42 Prima facie it could be said that the 1980 provisions were contrary to circulars No 13 of 1972 and No 19 of 1973. However, as the 1980 awards were made by consent it cannot be assumed that approval to make the 1980 awards was not given by the government of the day. It is my view that the same conclusion can be reached in respect of the 1987 award. If I am wrong about that, in my view it is arguable that the union's interpretation of circulars No. 13 of 1972 and No. 19 of 1973 as set out in paragraphs 37 of these reasons. In any event, there is no evidence or material before the Commission that shows that the 1980 provisions or the 1987 provision was agreed to by parties by having regard to these circulars.

43 Pursuant to clause 12(1) of the 1987 award an employee is entitled to four consecutive weeks' leave with payment before taking such leave of "ordinary wages as prescribed". It is my view that the ordinary wages referred to in clause 12(1) is prescribed in the first paragraph of clause 12(2). In the case of seven day rostered employees and continuous shift employees their ordinary wages include the weekend penalties or shift rates the employees would have received had they not proceeded on annual leave. This, in my view, is the clear and unambiguous meaning of clause 12(2). This interpretation is supported by the first sentence of clause 12(10) which provides: "In addition to his/her payment for annual leave and before taking such leave the employee shall receive a loading calculated on the rate of wage prescribed by subclause (2) of this clause." The reference of the rate of wage being prescribed by subclause (2) means that the ordinary wages, as prescribed, in relation to continuous shift employees includes their weekend penalties or shift rates.

44 The next part of clause 12 which needs to be interpreted is whether the loading is to be calculated as an additional sum on the rate of wage prescribed in subclause (2) of clause 12. In my view it is clear from the words in the first sentence of clause 12(10) of the 1987 award which provide "loading calculated on the rate of wage prescribed" mean the loading is to be calculated as a separate sum in addition to the wage prescribed in clause 12(2). In relation to continuous shift employees, this interpretation is further confirmed by clause 12(10)(b) by the opening words of which provide: "Continuous shift employees – an employee who would have worked on continuous shift work had he/she not been on leave – a loading of 20% on ordinary wages." Those words mean that the loading is an additional sum of 20% on the rate of wage prescribed by clause 12(2). In considering the provisos in clause 12(10)(b)(i) and (ii) I agree that an ambiguity arises in that there is a reference to "the rate of wage prescribed by paragraph (b) of subclause (2) of this clause".

45 This ambiguity, however, can be resolved in two ways. Firstly, it is apparent when one has regard to clause 12(1) and the first sentence of clause 12(10) that the rate of wage prescribed for continuous shift employees is in subclause (2) and that the reference to paragraph (b) is redundant. In my view the reference to paragraph (b) is capable of severance. Secondly, when regard is had to the 1980 awards the reasons why the reference to paragraph (b) can be explained as the 1980 awards contained a subclause (2)(b) which provided: "Ordinary wages for a shift employee shall mean the rate of wage the shift employee would receive under Clause 10 – Shift and Weekend Work of this Award according to the employee's roster or projected roster including Saturday and Sunday shifts." This subclause is in substance the same as the second part of clause 12(2).

46 For the reasons set out above I answer the union's question in the affirmative. It is also my view that because the reference to paragraph (b) is redundant, the 1987 award should be varied. I do not, however, agree that the amendment should be made in the terms sought by the union because when clause 12(2) is analysed the amendment sought by the union does not preserve the prescription that presently applies to shift employees of considering what an employee has received for the greater proportion of the calendar month prior to taking the leave, which applies to all employees including seven day rostered employees and continuous shift employees. In my view the only amendment that needs to be made to clause 12 is to delete the words "paragraph (b) of" in clause 12(10)(b)(i) and (ii). In light of these reasons for decision I will issue Minutes of Proposed Order which reflect these reasons for decision.

47 I do not agree that clause 12 of the 1987 award should be dealt with under s 40B(1)(d) of the Act. This is an application made under s 46 of the Act. I am of the view that the only amendment that should be made to clause 12 is set out in paragraph 46 of these reasons for decision.

2005 WAIRC 00226

CULTURAL CENTRE AWARD 1987
NO A28 OF 1988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	THE TRUSTEES OF THE WESTERN AUSTRALIAN MUSEUM, THE LIBRARY BOARD OF WESTERN AUSTRALIA and THE BOARD OF THE ART GALLERY
	RESPONDENTS
CORAM	COMMISSIONER J H SMITH
DATE	WEDNESDAY, 9 FEBRUARY 2005
FILE NO.	APPL 1141 OF 2004
CITATION NO.	2005 WAIRC 00226

Result	Declaration and order to amend the award made
Representation	
Applicant	Mr J Nicholas
Respondents	Mr J Lange
	Ms K Tyers

Declaration

HAVING heard Mr J Nicholas on behalf of the Applicant and Mr J Lange and Ms K Tyres on behalf of the Respondents, pursuant to s 46(1) of the *Industrial Relations Act 1979* ("the Act") the Commission hereby:–

(1) Declares that employees to which the Cultural Centre Award 1987 ("the Award") applies, and who are defined as being 'continuous shift workers' for the purposes of the Award are entitled to be paid for any period of annual leave:

  (a) at the 'ordinary rate of wage' as provided by sub-clause 12(1) and (2) of the Award, which includes the weekend penalties or shift rates they would have received had they not proceeded on annual leave; plus

  (b) an additional payment, as provided by sub-clause 12(10)(b) of the Award, being the higher of:

    (i) the shift loadings prescribed by Clause 9 – Shift and Weekend work that they would have received had they not proceeded on annual leave; or

    (ii) a loading of 20% of ordinary wages.

(2) Orders that clause 12(10)(b)(i) and (ii) of the Award be varied to delete in each sub-clause the words "paragraph (b) of".

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

AGREEMENTS—Industrial—Retirements from—

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 105 of 2005

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Department of Consumer and Employment Protection will cease to be a party to the Department of Consumer & Employment Protection Agency Specific Agreement 2003 PSA AG 6 of 2003 on and from the 3rd day of March 2005.

DATED at Perth this 2nd day of February 2005.

J.A. SPURLING,
Registrar.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 59 of 2005

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Civil Service Association of Western Australia Incorporated will cease to be a party to the Department of Culture and the Arts Agency Specific Agreement 2003 PSA AG 27 of 2003 on and from the 20th day of February 2005.

DATED at Perth this 2nd day of February 2005.

J.A. SPURLING,
Registrar.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 57 of 2005

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Civil Service Association of Western Australia Incorporated will cease to be a party to the Department of Health Agency Specific Agreement 2003 PSA AG 41 of 2003 on and from the 20th day of February 2005.

DATED at Perth this 2nd day of February 2005.

J.A. SPURLING,
Registrar.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 61 of 2005

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Civil Service Association of Western Australia Incorporated will cease to be a party to the Department of Local Government and Regional Development Agency Specific Agreement 2003 PSA AG 25 of 2003 on and from the 20th day of February 2005.

DATED at Perth this 2nd day of February 2005.

J.A. SPURLING,
Registrar.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 58 of 2005

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Civil Service Association of Western Australia Incorporated will cease to be a party to the Equal Opportunity Commission Agency specific Agreement 2003 PSA AG 19 of 2003 on and from the 20th day of February 2005.

DATED at Perth this 2nd day of February 2005.

J.A. SPURLING,
Registrar.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 60 of 2005

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Civil Service Association of Western Australia Incorporated will cease to be a party to the South West Development Commission Agency Specific Agreement 2003 PSA AG 23 of 2003 on and from the 20th day of February 2005.

DATED at Perth this 2nd day of February 2005.

J.A. SPURLING,
Registrar.

CANCELLATION OF—Awards/Agreements/Respondents—

2005 WAIRC 00218

CANCELLATION OF AWARD UNDER S.47 OF THE INDUSTRIAL RELATIONS ACT 1979
ANI ENGINEERING BASSENDEAN (WA) WAY FORWARD ENTERPRISE AWARD 1998

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	(COMMISSION'S OWN MOTION)
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	TUESDAY, 8 FEBRUARY 2005
FILE NO/S	APPL 120 OF 2005
CITATION NO.	2005 WAIRC 00218

Result Award cancelled pursuant to section 47 of the Industrial Relations Act, 1979

Order

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applies, did give notice on the 27th October 2004 of an intention to make an Order cancelling such award;

AND WHEREAS the requirements of section 47(3) of the Act have been met;

AND WHEREAS at the 26th day of November 2004 there were no objections to the making of such an Order;

NOW THEREFORE I, the undersigned 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:

ANI Engineering Bassendean (WA) Way Forward Enterprise Award 1998.

[L.S.]

(Sgd.) J H SMITH,
Commissioner.

2005 WAIRC 00219

CANCELLATION OF AWARD UNDER S.47 OF THE INDUSTRIAL RELATIONS ACT 1979
BRADKEN BASSENDEAN (WA) WAY FORWARD ENTERPRISE AWARD 2001

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	(COMMISSION'S OWN MOTION)
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	TUESDAY, 8 FEBRUARY 2005
FILE NO/S	APPL 121 OF 2005
CITATION NO.	2005 WAIRC 00219

Result Award cancelled pursuant to section 47 of the Industrial Relations Act, 1979

Order

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applies, did give notice on the 27th October 2004 of an intention to make an Order cancelling such award;

AND WHEREAS the requirements of section 47(3) of the Act have been met;

AND WHEREAS at the 26th day of November 2004 there were no objections to the making of such an Order;

NOW THEREFORE I, the undersigned 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:

Bradken Bassendean (WA) Way Forward Enterprise Award 2001 A 6 of 2001.

[L.S.]

(Sgd.) J H SMITH,
Commissioner.

2005 WAIRC 00241

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION (COMMISSION'S OWN MOTION) **APPLICANT**
	-v-
	(NOT APPLICABLE) **RESPONDENT**
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 10 FEBRUARY 2005
FILE NO/S	APPL 143 OF 2005
CITATION NO.	2005 WAIRC 00241

Result	Award cancelled
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS the Commission, being of the opinion that there is 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 9th day of February 2005 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:

Furniture Trades (Government) Award 1979 No. R34 of 1979

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

2004 WAIRC 12933

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT**
	-v-
	JOHN HOLLAND PTY LTD **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	MONDAY, 6 SEPTEMBER 2004
FILE NO/S	AG 144 OF 2003
CITATION NO.	2004 WAIRC 12933

Result	Agreement cancelled
Representation	
Applicant	Mr T Kucera (of counsel) and with him Ms L Dowden on behalf of the applicant union
Respondent	No appearance

Order

HAVING HEARD from Mr Kucera on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the *Industrial Relations Act, 1979* hereby orders:

THAT the *John Holland Building Operations Agreement 2000*, AG 142 of 2000, be and is hereby cancelled.

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

NOTICES—Award/Agreement matters—

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 23 of 2005

APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "AUSTRALIAN WORKERS UNION AND DEPARTMENT OF CONSERVATION AND LAND MANAGEMENT VISITOR CENTRES INDUSTRIAL AGREEMENT 2004"

NOTICE is given that an application has been made by the Executive Director of the Department of Conservation and Land Management 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

For the purposes of the Industrial Agreement the following definitions shall apply.

a) "Award" means the AWU (Western Australian Public Sector) Award 2002.

b) "Certified Agreement" means Australian Workers Union and Department of Conservation and Land Management Visitor Centres Certified Agreement 2004.

c) – h) …

5. APPLICATION AND PARTIES BOUND

5.1 The parties bound by the Industrial Agreement are:

a) the Australian Workers' Union Western Australian Branch (AWU); and

b) the Department of Conservation and Land Management.

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 number of employees bound by the Industrial Agreement is approximately 57.

5.4 The Industrial Agreement shall be read in conjunction with the federal AWU and Department of Conservation and Land Management Visitor Centres Certified Agreement 2004.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J.A. SPURLING,
Registrar.

8 February 2005

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 11 of 2005

APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "AUSTRALIAN WORKERS UNION (WESTERN AUSTRALIAN PUBLIC SECTOR) AGRICULTURE AND LAND MANAGEMENT INDUSTRIAL AGREEMENT 2004"

NOTICE is given that an application has been made by the Director General of the Department of Agriculture 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

For the purposes of the Industrial Agreement the following definitions shall apply.

a) "Award" means the AWU (Western Australian Public Sector) Award 2002.

b) "Certified Agreement" means AW (Western Australian Public Sector) Department of Agriculture Certified Agreement 2004.

c) – h) …

5. APPLICATION AND PARTIES BOUND

5.1 The parties bound by the Industrial Agreement are:

a) the Australian Workers' Union Western Australian Branch (AWU); and

b) the Department of Agriculture.

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 number of employees bound by the Industrial Agreement is approximately 5.

5.4 The Industrial Agreement shall be read in conjunction with the federal AWU (Western Australian Public Sector) Department of Agriculture Certified Agreement 2004.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J.A. SPURLING,
Registrar.

24 January 2005

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 22 of 2005

APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "AUSTRALIAN WORKERS UNION (WESTERN AUSTRALIAN PUBLIC SECTOR) DEPARTMENT OF CONSERVATION AND LAND MANAGEMENT INDUSTRIAL AGREEMENT 2004"

NOTICE is given that an application has been made by the Executive Director of the Department of Conservation and Land Management 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

For the purposes of the Industrial Agreement the following definitions shall apply.

a) "Award" means the AWU (Western Australian Public Sector) Award 2002.

b) "Certified Agreement" means AWU (Western Australian Public Sector) Department of Conservation and Land Management Certified Agreement 2004.

c) – h) …

5. APPLICATION AND PARTIES BOUND

5.1 The parties bound by the Industrial Agreement are:

a) the Australian Workers' Union Western Australian Branch (AWU); and

b) the Department of Conservation and Land Management.

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 number of employees bound by the Industrial Agreement is approximately 220.

5.4 The Industrial Agreement shall be read in conjunction with the federal AWU (Western Australian Public Sector) Department of Conservation and Land Management Certified Agreement 2004.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J.A SPURLING,
Registrar.

8 February 2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICATION NO. 115 OF 2005

APPLICATION FOR VARIATION OF AWARD

ENTITLED

"GAOL OFFICERS' AWARD 1998"

NOTICE is given that an application has been made to the Commission by the Western Australian Prison Officers' Union of Workers under the Industrial Relations Act 1979 for a variation of the above Award.

As far as relevant, those parts of the variation which relate to area of operation or scope are published hereunder:-

Include in existing "SCHEDULE A - RATES OF PAY" the following new classification and pay rates:

TITLE RANK	ANNUAL RATE	WEEKLY RATE
LEVEL 2A		
Monday to Friday	$40,852	$783.12
Monday to Friday plus Public Holidays	$41,741	$800.16
Alternate Weekends	$46,625	$893.78

A copy of the proposed variation may be inspected at my office at 111 St George's Terrace, Perth.

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

23 February 2005.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICATION NO. A2 OF 2005

APPLICATION FOR REGISTRATION OF AN AWARD

ENTITLED "HEALTH SERVICES UNION (AGED CARE FACILITIES) AWARD 2005"

NOTICE is given that an application has been made to the Commission by the Health Services Union of Western Australia (Union of Workers) under the Industrial Relations Act 1979 for the above Award.

As far as relevant, those parts of the Award which relate to area of operation or scope are published hereunder.

3. – Effect, Area and Scope of Award.

(1) This award shall apply to –

(a) employees engaged in professional, administrative, clerical, technical, and supervisory callings employed in any health care facility for the aged, chronically ill and/or disabled including but not limited to any high care, low care, day care, respite care and or rehabilitation service for the aged, chronically ill and or disabled, and any community care service or hostel in or about or in connection with and or ancillary to the provision of such services including, but not limited to the callings listed in Schedule D of this Award;

(b) all employers employing those employees including but not limited to those employers named and engaged in the industries listed in Schedule B hereto; and

(c) the Health Services Union of Western Australia (Union of Workers), provided that;

(d) the award does not cover;

i) Registered Medical Practitioners;

ii) Nurses;

iii) Those employees who were employed in callings that were covered by the Residential Aged Care (Hostels) Award 2002 or the Private Hospital and Residential Aged Care (Nursing Homes) Award 2002 as at 30 April 2004;

iv) Those employees engaged as employees of either the Commonwealth or State public sector; and provided further that this award shall not apply to employees or employers bound by other awards to which at the date of this award the Health Services Union of Western Australia (Union of Workers) previously known as the Hospital Salaried Officers Association of Western Australia (Union of Workers), is a party.

(2) This award shall operate throughout the state of Western Australia.

(3) This Award cancels and replaces the Hospital Salaried Officers (Nursing Homes) Award 1976 No R18 and R19 of 1974.

(4) The Award has effect on and from the date of registration, until such time as it is cancelled or replaced.

SCHEDULE D

CLASSIFICATION AND GRADING OF EMPLOYEES

LEVEL	CLASSIFICATION
1	Clerical Assistants
2	Cashier, Typists, Data Processing Operators, Technical Assistants
2/3	Clerks, Administration Officer, Physiotherapy Assistant, Occupational Therapy Assistant, Music Therapy Assistant, Art Therapy Assistant
3	Chief Administrative Officers, Administrative Assistant, Secretary, Storekeeper, Welfare Officer
4	Stores Clerk, Senior Clerk,
4/5	Activity Co-ordinator
5	Senior Welfare Officer
7	Catering and Domestic Supervisor
8	Catering and Domestic Supervisor, Assistant Engineer
5/10	Pharmacist, Dietician, Physiotherapist, Occupational Therapist, Music Therapist, Diversional Therapist, Art Therapist, Speech Pathologist, Librarian, Social Workers, Podiatrist, Psychologist
11	Engineer, Maintenance Manager
11/12	Senior Pharmacist, Dietician, Physiotherapist, and Speech Pathologist (and all other Professional Callings, designated "Senior" other than Senior Welfare Officer)
13/14	Physiotherapists and Occupational Therapists in Charge (and all other Professional Callings, designated "in charge").

A copy of the proposed Award may be inspected at my office at 111 St George's Terrace, Perth.

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

9 February 2005.

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 13 of 2005

APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "LHMU – UNION RECOGNITION AND JOB SECURITY AGREEMENT – DEPARTMENT OF HEALTH – ABORIGINAL AND ETHNIC HEALTH WORKERS 2005"

NOTICE is given that an application has been made by The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch 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. AREA, INCIDENCE AND PARTIES BOUND

3.1 This agreement applies throughout the State of Western Australia and is binding on the parties and on employees engaged by the Employer to work in any of the classifications listed in Clause 24 - Wages of the LHMU - Department of Health Aboriginal and Ethnic Health Workers - (Federal) Agreement 2005.

3.2 The parties to the agreement are:

(a) The Liquor, Hospitality and Miscellaneous Union, WA Branch.

(b) The Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA) as:

(i) the Hospitals formerly comprised in the Metropolitan Health Service Board,

(ii) the Peel Health Services Board,

(iii) the South West Health Board,

(iv) the WA Country Health Service.

3.3 (a) The Director General of Health is the delegate of the Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA). In this capacity the Director General acts as the "Employer" for the purposes of this Agreement.

(b) If the Director General of Health onward delegates any capacity to act as the "Employer" to a Chief Executive of a Health Service or to any other office holder the Director General of Health shall inform the Union in writing of the terms of the delegation. An office holder who acts in accordance with the terms of a delegation from the Director General of Health shall be deemed to have acted as the "Employer" for the purposes of this Agreement.

3.4 This Agreement applies to approximately 100 employees.

4.DEFINITIONS

"Agreement" means the LHMU Union Recognition and Job Security Agreement - Department of Health Aboriginal and Ethnic Health Workers - 2005.

"Award" means the Health Workers - Community and Child Health Services Award 2000.

. . .

6. RELATIONSHIP TO AWARDS AND AGREEMENTS

6.1 This Agreement shall be read in conjunction with the Health Workers' Community and Child Health Services Award, 2000, provided that where there is any direct inconsistency between the express terms of this Agreement and the Award, the express terms of the Award shall take precedence to the extent of any such inconsistency.

6.2 This Agreement shall be read in conjunction with the LHMU - Department of Health Aboriginal and Ethnic Health Workers (Federal) Agreement 2005 ('the Federal Agreement'), provided that where there is any direct inconsistency between the express terms of this Agreement and the Federal Agreement, the express terms of the Federal Agreement shall take precedence to the extent of any such inconsistency.

6.3 This Agreement shall be read in conjunction with the Western Australian Government/Australian Liquor, Hospitality and Miscellaneous Workers Union Redeployment, Retraining and Redundancy Agreement 2004 (RRR Agreement), provided that where there is any inconsistency between the express terms of this Agreement and the RRR Agreement, the express terms of the RRR Agreement shall take precedence to the extent of any such inconsistency.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J.A. SPURLING,
Registrar.

24 January 2005

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 12 of 2005

APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "LHMU – UNION RECOGNITION & JOB SECURITY AGREEMENT – DEPARTMENT OF HEALTH – DENTAL HEALTH SERVICES 2005"

NOTICE is given that an application has been made by The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch 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. AREA, INCIDENCE AND PARTIES BOUND

3.1 This agreement is binding on the parties and on employees to which the Health Employees (Dental Health Services) Award 2003 applies.

3.2 The parties to the agreement are:

(a) the Liquor, Hospitality and Miscellaneous Union; and

(b) the Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA) as the Hospitals formerly comprised in the Metropolitan Health Services Board.

3.3 (a) The Director General of Health is the delegate of the Minister for Health in his incorporated under s.7 of the Hospitals and Health Services Act 1927 (WA). In this capacity the Director General acts as the "Employer" for the purposes of this Agreement.

(b) If the Director General of Health onward delegates any capacity to act as the "Employer" to a Chief Executive of a Health Service or to any other office holder the Director General of Health shall inform the Union in writing of the terms of the delegation. An office holder who acts in accordance with the terms of the delegation from the Director General of Health shall be deemed to have acted as the "Employer" for the purposes of this Agreement.

3.4 The approximate number of employees covered by this Agreement is 34.

4. DEFINITIONS

"Agreement" means the LHMU - Union Recognition & Job Security Agreement - Department of Health - Dental Health Services 2005.

"Award" means the Health Employees (Dental Health Services) Award 2003.

. . .

6. RELATIONSHIP TO AWARDS AND AGREEMENTS

6.1 This Agreement shall be read in conjunction with the Award, provided that where there is any direct inconsistency between the express terms of this Agreement and the Award, the express terms of the Award shall take precedence to the extent of any such inconsistency.

6.2 This Agreement shall be read in conjunction with the LHMU - Department of Health – Dental Health Services Federal Agreement 2005 ('the Federal Agreement') certified pursuant to the Workplace Relations Act 1996, provided that where there is any direct inconsistency between the express terms of this Agreement and the Federal Agreement, the express terms of the Federal Agreement shall take precedence to the extent of any such inconsistency.

6.3 This Agreement shall be read in conjunction with the Western Australian Government/Australian Liquor, Hospitality and Miscellaneous Workers Union Redeployment, Retraining and Redundancy Agreement 2004 (RRR Agreement), provided that where there is any inconsistency between the express terms of this Agreement and the RRR Agreement, the express terms of the RRR Agreement shall take precedence to the extent of any such inconsistency.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J.A. SPURLING,
Registrar.

24 January 2005

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 15 of 2005

APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "LHMU – UNION RECOGNITION AND JOB SECURITY AGREEMENT – DISABILITY SERVICES COMMISSION SUPPORT WORKERS 2004"

NOTICE is given that an application has been made by The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch 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. AREA, INCIDENCE AND PARTIES BOUND

3.1 This agreement applies throughout the State of Western Australia and is binding on the parties and on employees to which the Health and Disability Services – Support Workers – Western Australian Government – Award 2001 applies.

3.2 The parties to the agreement are:

(a) The Liquor, Hospitality and Miscellaneous Union, WA Branch.

(b) The Disability Services Commission.

3.3 The Agreement applies to approximately 152 employees.

4. DEFINITIONS

"Agreement" means the LHMU - Union Recognition & Job Security Agreement – Disability Services Commission Support Workers 2004.

"Award" means the Health and Disability Services – Support Workers – Western Australian Government – Award 2001.

. . .

6. RELATIONSHIP TO AWARDS AND AGREEMENTS

6.1 This Agreement shall be read in conjunction with the Health and Disability Services – Support Workers – Western Australian Government – Award 2001, provided that where there is any direct inconsistency between the express terms of this Agreement and the Award, the express terms of the Award shall take precedence to the extent of any such inconsistency.

6.2 This Agreement shall be read in conjunction with the LHMU – Disability Services Commission Support Workers Federal Agreement 2004 ('the Federal Agreement') certified pursuant to Part VIB, Division 4 of the Workplace Relations Act 1996, provided that where there is any direct inconsistency between the express terms of this Agreement and the Federal Agreement, the express terms of the Federal Agreement shall take precedence to the extent of any such inconsistency.

6.3 This Agreement shall be read in conjunction with the Western Australian Government/Liquor, Hospitality and Miscellaneous Union Redeployment, Retraining and Redundancy Agreement 2004 (RRR Agreement), provided that where there is any inconsistency between the express terms of this Agreement and the RRR Agreement, the express terms of the RRR Agreement shall take precedence to the extent of any such inconsistency.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J.A. SPURLING,
Registrar.

24 January 2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application 131 of 2005

APPLICATION FOR JOINDER OF PARTY TO THE

"RESTAURANT TEAROOM AND CATERING WORKER'S AWARD" NO. R 48 OF 1978

NOTICE is given that an application has been made to the Commission by THE RESTAURANT AND CATERING INDUSTRY ASSOCIATION OF EMPLOYERS OF WESTERN AUSTRALIA (INC) to be joined to the above Award.

The application may be inspected at my office at 111 St Georges Terrace, Perth by any interested person without charge and any such person may, by giving written notice of objection to the Commission and to the applicant within 28 days of this notice, appear and be heard on the hearing of this application.

J.A. SPURLING,
Registrar.

23 February 2005.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 21 of 2005

APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "TAFE LECTURERS' SUPPLEMENTARY CONDITIONS AGREEMENT 2005"

NOTICE is given that an application has been made to the Commission by the Director General, Department of Education and Training under the Industrial Relations Act for registration of the above Agreement.

As far as relevant, those parts of the Agreement that relate to area of operation and scope are published hereunder.

3. DEFINITIONS

. . .

"Certified Agreement" means the Western Australian TAFE Lecturers' Certified Agreement 2005.

. . .

5. APPLICATION AND PARTIES BOUND

5.1.1 the State Schools Teachers' Union of Western Australia Inc; and

5.1.2 the employer parties listed in Schedule B - Employer Parties.

5.2 The Agreement applies to employees of the employer parties listed in Schedule B who are members of, or eligible to be members of, the Union.

5.3 . . .

5.4 The Agreement shall be read in conjunction with the Certified Agreement.

SCHEDULE B – EMPLOYER PARTIES

Governing Council of Central TAFE
Governing Council of Central West TAFE
Governing Council of Challenger TAFE
Governing Council of CY O'Connor TAFE
Governing Council of Great Southern TAFE

Governing Council of Kimberley TAFE
Governing Council of Pilbara TAFE
Governing Council of South West Regional College of TAFE
Governing Council of Swan TAFE
Governing Council of West Coast TAFE
Director General, Department of Education and Training

A copy of the Agreement may be inspected at my office at 111 St Georges Terrace, Perth.

J.A. SPURLING,
Registrar.

8 February 2005

POLICE ACT 1892—APPEAL—Matters Pertaining To—

2004 WAIRC 11413

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALLAN RAYMOND CARLYON
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN SENIOR COMMISSIONER A R BEECH COMMISSIONER P E SCOTT
DATE	MONDAY, 10 MAY 2004
FILE NO	APPLICATION 1721 OF 2003
CITATION NO.	2004 WAIRC 11413

Result	Leave for appellant to tender new evidence granted in part
Representation	
Applicant	Ms M. Ridley (of counsel) on behalf of the appellant
Respondent	Mr R Bathurst (of counsel) on behalf of the respondent

Reasons for Decision -

Appellant's application to tender new evidence

1 The Appellant seeks leave to tender new evidence pursuant to section 33R(3) of the *Police Act 1892*. The Commission heard both parties in relation to that application and our decision has been reached for the following reasons. The numbering which follows is the numbering of those matters in the Appellant's application which were proceeded with before us.

1.1(b): matters raised in the IAU and IIU Folio Summaries

2 By section 33L(5)(b) of the *Police Act 1892* if the Commissioner of Police decides to take removal action he shall provide to the member a copy of any documents and make available to the member for inspection any other materials that were examined and taken into account by the Commissioner in making the decision. Commission was informed that the IAU complaints histories and IIU complaints history being items 12 and 13 of the "Materials examined and taken into account by the Respondent" in the Appeal book were not provided to the Appellant prior to the decision to remove him being made. The Appellant seeks to tender new evidence being his responses to the matters raised in those histories.

3 The Commission considers that such a response is "new evidence" for the purposes of section 33R(11) of the *Police Act 1892.* We have noted the submission of Mr Bathurst that there is no evidence that the Commissioner of Police took the histories into account prior to making the decision. Indeed we note that the histories are not referred to in the Notice of Removal of 7 November 2003 (AB 123). We are, however, of the view that there is no evidence before us which could lead to the positive conclusion that the Commissioner of Police did not take those histories into account. Indeed, as the histories are included in the Appeal book under the heading of "Materials examined and taken account by the Respondent" we consider it would be difficult for the Commissioner of Police to deny that they were taken into account.

4 By section 33R(3)(b)(iii) the Commission may grant the Appellant leave to tender new evidence if it in the interest of justice to do so. We consider it is in the interests of justice for the Appellant to be given the opportunity to comment upon the histories given that they are materials examined and taken into account by the Commissioner of Police upon which he had no opportunity to comment.

5 We have also given consideration to the manner in which the new evidence is to be tendered. We acknowledge that the incorporation of section 27(1)(b) and (hb) of the *Industrial Relations Act 1979* into an Appeal of this nature by virtue of section 33S of the *Police Act 1892* permits the Commission to receive oral evidence.

6 We note, however, that by section 33R(6) of that Act that if the Appellant is given leave to tender new evidence under section 33R(3) the Commission is to give the Commissioner of Police a reasonable opportunity to consider the new evidence. We are of the view therefore that the tendering of the new evidence on this occasion is best achieved by requiring under section 27(1)(hb) that the Appellant's new evidence permitted by the Commission be presented in writing by way of affidavit.

1.1(c): Matters within the knowledge of the Commissioner of Police when making his determination, in particular:

7 (i) Injuries sustained by the Appellant in the performance of his duty

8 The Commission notes that in his response to the Commissioner of Police of 1 August 2003 (AB 84) the Appellant referred to being on a return to work program under the guidance of health and welfare branch at the time of the incident and being under enormous professional and personal stress as a result of incidents at work since his transfer to Broome (AB 89/90). We consider that pursuant to section 33R(4) we have not been persuaded that the Appellant was not aware of the substance of the new evidence and that it was contained in a document to which he had reasonable access before his removal from office. In particular, his inclusion of the letter from the Northwest Mental Health Service (AB 81) leads us to conclude that he did. Accordingly, we do no grant leave.

9 (ii) Management issues at Broome Police Station

10 The Commission understands that the Appellant wishes to bring new evidence regarding his application to be transferred from the Broome Police Station which had not been agreed to because of manpower issues. This matter does not appear to have any real relevance to or connection with the issues surrounding his removal from office. We have had regard to the matter set out in section 33R(4) and are not satisfied that leave should be granted.

11 (iii) Duties performed by the Appellant from the date of offence until dismissal from the WA Police Service

12 The Commission has noted in this regard that the report of the Assistant Commissioner (Professional Standards) to the Commissioner of Police of 23 September 2003 (AB 113) states that the Appellant had been stood down from duty on full pay since 11 April 2003. We note that this was incorrect. However in his response the Appellant stated that he had "continued my duties at Broome Police Station and again I have maintained my commitment and integrity to the job" at (AB 90). Further, the consent of the Commissioner of Police to the tendering as new evidence the affidavit of John Allen Hallett means that the evidence in that affidavit of the duties is to be put to the Commissioner of Police. Accordingly, leave is not granted.

1.2: Affidavit evidence of Senior Sergeant Hallett

13 The Commissioner of Police consents to this affidavit being received. Pursuant to section 33R(3)(a) of the Act. Leave is therefore granted.

1.3: Evidence of the Commissioner of Police

14 The Appellant seeks leave of the Commission to issue a summons to the Commissioner of Police. By section 33S of the *Police Act 1892* the provisions of section 33 of the *Industrial Relations Act 1979* are incorporated into this Appeal. Significantly, it is provided that a summons may be issued to the Commissioner of Police but only at the direction of a Commissioner if that Commissioner is satisfied that there are extraordinary grounds for doing so. It may be shortly stated that the Commission is not of the opinion that there are extraordinary grounds before the Commission for issuing such a direction as is sought. Accordingly, the direction will not be given and to the extent that leave is sought for that to occur, that leave is refused.

15 The parties recognise, indeed section 33R(6) provides, the Appellant having been given leave to tender new evidence obliges the Commission to give the Commissioner of Police a reasonable opportunity to consider the new evidence. We are cognisant that whilst the Commissioner of Police is aware of the contents of the affidavit of Senior Sergeant Hallett, the Commissioner of Police is not aware of the new evidence to be given by the Appellant in accordance with the decision. On that basis, it is somewhat difficult to estimate the time which will constitute that reasonable opportunity. We are mindful that on the basis of the content of the affidavit of Senior Sergeant Hallett the Commissioner of Police submitted that one week's adjournment would be a reasonable opportunity. We also acknowledge in our consideration the logistical difficulties within the Commission in reconvening given court listings already made. We advise the parties that by virtue of section 33(6) of the Act, the matter listed for 11 May 2004 is adjourned and that date is hereby vacated. The Appeal is hereby re-listed for Friday 4 June 2004. We consider that that timeframe provides more than a reasonable opportunity for the Commissioner of Police to consider the new evidence. The Minute of the Order giving effect to these reasons now issues.

2004 WAIRC 11435

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALLAN RAYMOND CARLYON **APPELLANT**
	-v-
	COMMISSIONER OF POLICE **RESPONDENT**
CORAM	CHIEF COMMISSIONER W S COLEMAN SENIOR COMMISSIONER A R BEECH COMMISSIONER P E SCOTT
DATE	TUESDAY, 11 MAY 2004
FILE NO/S	APPLICATION 1721 OF 2003
CITATION NO.	2004 WAIRC 11435

Result	Order issued
Representation	
Appellant	Ms M Ridley (of counsel) on behalf of the appellant
Respondent	Mr R Bathurst (of counsel) on behalf of the respondent

Order

HAVING HEARD Ms M Ridley (of counsel) for the appellant and Mr R Bathurst (of counsel) for the Commissioner of Police in the matter of the application by the appellant for leave to tender new evidence, the Western Australian Industrial Relations Commission pursuant to section 33R(3) of the *Police Act 1892* hereby grants leave for the following evidence to be tendered by the appellant in Appeal No. 1721 of 2003:

(a) evidence of the appellant in relation to the IAU and IIU Complaints Histories set out at pages 101 – 112 of the appeal book; and

(b) Affidavit evidence of Senior Sergeant John Hallett.

FURTHERMORE pursuant to section 33S of the *Police Act 1892* whereby the terms of section 27(1)(b),(f) and (hb) of the *Industrial Relations Act 1979* have application, the Western Australian Industrial Relations Commission hereby orders:

1. That the evidence of the appellant in relation to the IAU and IIU Complaints Histories set out at pages 101 – 112 of the appeal book be given by way of affidavit filed in the Commission and served upon the Commissioner of Police within six (6) days of the date of this order.
2. That the hearing of this appeal be adjourned and the hearing date of 11 May 2004 be hereby vacated; and
3. That this appeal be re-listed to commence at 9:30 a.m. on Friday 4 June 2004.
4. That the application to tender new evidence otherwise be dismissed.

(Sgd.) W S COLEMAN,
On Behalf of the
[L.S.] Western Australian Industrial Relations Commission.

2004 WAIRC 11966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALLAN RAYMOND CARLYON
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
	SENIOR COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
DATE	THURSDAY, 8 JULY 2004
FILE NO	APPLICATION 1721 OF 2003
CITATION NO.	2004 WAIRC 11966

Result	Appeal pursuant to section 33P of the *Police Act 1892* dismissed
Representation	
Appellant	Ms M Ridley (of counsel) on behalf of the Appellant
Respondent	Mr R Bathurst (of counsel) on behalf of the Respondent

Reasons for Decision

1 This is an appeal by Allan Raymond Carlyon ("the Appellant") under section 33P of the *Police Act, 1892* ("the Act") against the action taken by the Commissioner of Police to remove him from the Western Australian Police Service.

2 Under section 33L(1) of the Act the Commissioner of Police gave the Appellant notice of loss of confidence in his suitability to continue as a member of the Police Force (Appeal Book pages 19 – 21). After taking into account written submissions from the Appellant in response to the grounds which the Commissioner of Police cited as the basis upon which he had lost confidence in the Appellant, the Commissioner of Police decided to take removal action under section 33L(5) of the Act. The Appellant was advised of the reasons upon which the removal action was taken. These reasons were set out in a memorandum from the Commissioner of Police to the Minister for Police. A copy of that memorandum was attached to the notice to remove the Appellant from the WA Police Service (Appeal Book pages 122 and 122A). That advice fulfilled the requirements of section 33L(5) of the Act for the Appellant to be advised of the reasons.

3 The circumstances and reasons for removal are summarised in the Commissioner of Police's memorandum:

> "During the early hours of 7th December 2002, Senior Constable Allan Raymond Carlyon was off duty when he approached a group of eight young persons who were seated outside a restaurant within the Broome townsite. The complainant, Jeremy Andrew Brown, 19 years was seated with the group.
>
> Senior Constable Carlyon engaged some of the group in conversation and attempted to obtain information about a family related issue. In response Brown stood up and Senior Constable Carlyon challenged him before assaulting him by head butting and then punching him several times to the head.
>
> Brown reported the matter to the officer on duty at Broome Police Station and as a result of an investigation by Inspector Nigel White of the Kimberley District Office, Senior Constable Carlyon was charged with assault occasioning actual bodily harm pursuant to section 317 of the Criminal Code. The hearing has been adjourned part completed until 8-10 December, 2003.
>
> As a result of investigations into this event the Investigating Inspector recommended Senior Constable Carlyon be dealt with by way of the Commissioner's Loss of Confidence under the provisions of the Police Act. Subsequent to the Investigating Inspector's recommendation that Carlyon be dealt with by way of the Commissioner's Loss of Confidence, a Review Officer was appointed.

The Review Officer was appointed to inquire into the key issues of the preceding investigation and provide a balanced view as to the suitability of Carlyon to remain as a member of the Police Service. Consequently the Review Officer recommended that Carlyon be served with a Notice of Intention to remove from the Police Service.

Accordingly I notified Carlyon that I intended to recommend his removal from the Police Service, as I was not satisfied that his conduct and integrity were of the standard expected and required of a member of the Police Service and necessary to maintain public confidence in the Police Service. I hold this view in respect of the incident, which has been the subject of investigation and a review process.

In forming that view I have considered Carlyon's detailed responses and the analysis of those responses by the Review Officer. I generally concur with the analysis and conclusions reached by the Review Officer.

Carlyon, in his record of interview with Inspector White, stated he was socializing from about 5.30pm on the 6 December, 2002 to 1.00am the following morning, but he had only consumed four or five cans of Carlton Mid-Strength beer. The incident took place after he and his party left the Roebuck Hotel and he walked towards the Wings Restaurant.

Carlyon in his response denies he acted in the matter alleged although he states he regrets having engaged in a verbal altercation with Brown, rather than backing off or attempting to defuse the situation. The witnesses clearly identify Carlyon, as behaving in a confrontational manner toward the group and he was the person who struck the first blow by head-butting Brown, a 19 year old teenager.

In my view Carlyon's behaviour clearly amounts to conduct unbecoming of what is expected of a member of the Police Service. Carlyon is a person of 39 years of age, and is a Senior Constable with 13 years in the Western Australian Police Service.

Having evaluated Carlyon's conduct and integrity I do not consider that he meets the high standards required and expected of a member of the Police Service. I have accordingly lost confidence in his suitability to remain as a member and consider that he should be removed from office forthwith."

4 The grounds upon which this appeal is pursued are as follows:

"The decision of the Commissioner of Police to take removal action relating to the Appellant was harsh, oppressive or unfair for the following reasons:

(a) The Respondent, when making his determination to recommend the removal of the Appellant from office, took account of additional materials which were not referred to in the Notice of Intention to Remove and specifically:

(i) IAU Complaints history;

(ii) IIU Complaints history; and

(iii) Assistant Commissioner of Professional Standards memo of 23 September 2003;

and, accordingly, the Appellant was not given the opportunity to provide a response to the matters raised in those additional materials.

(b) Further to paragraph (a) above, the memo of Assistant Commissioner of Professional Standards dated 23 September 2003 is wrong in two material respects:

(i) the Appellant had not "*been stood down from duty on full pay since 11 April 2003*" and, in fact, continued to fulfil his duties as a Police Officer until served with the letter of removal from the Commissioner of Police on 12 November 2003; and

(ii) Senior Sergeant Hallett, the OIC of Broome Police Station does not state "*the officer would have to be moved from Broome if he is to remain in the Service*" which suggests the Appellant could not fulfil his duties if he were to remain in Broome and, in fact, Senior Sergeant Hallett says "*Allan will have to be moved from Broome to allow opportunity for further development and allowing him time to better position himself within the Agency*."

(c) The Respondent relied upon the unsworn and untested evidence of intoxicated juvenile witnesses which was specifically excluded from the materials taken into account in making a determination to issue the Notice of Intention to Remove. In reliance on that exclusion, the Appellant specifically did not comment upon the evidence of those witnesses in his response (at page 6) but the evidence was then included by the Review Officer in his subsequent report dated 5 September 2003 and taken into account by the Respondent in making a determination to recommend the Appellant's removal from office.

(d) The Respondent elected to proceed with the removal action before the outcome of the criminal trial and ought to have accepted the evidence of the Appellant over the unsworn, uncorroborated and conflicting evidence of intoxicated juveniles.

(e) The Respondent accepted the unsworn and untested evidence of the complainant in preference to the evidence of the Appellant.

(f) The decision of the Respondent is based on conclusions which could not reasonably be drawn from the material before him as the evidence of the witnesses is not supported by the independent evidence of the treating medical practitioners or the attending police officers.

(g) The consequences for the Appellant are disproportionate to the gravity of the misconduct.

(h) The Respondent has concluded the "*conduct and integrity*" of the Appellant does not meet "*the high standards required and expected of a member of the Police Service*" when there is no issue of integrity raised in the material before him.

(i) The conduct referred to by the Respondent does not have a relevant connection to the employment of the Appellant to warrant removal action being taken as it does not undermine the Appellant's capacity to perform his duties or diminish his status and authority to such an extent that it affects his fitness to discharge the duties of his office.

(j) At the time of the incident, the Appellant was on a return to work program, was recovering from Post Traumatic Stress Disorder and Severe Major Depressive Illness and was on medication as a direct consequence of injuries received and victimisation suffered whilst fulfilling his duties as a police officer.

The Appellant seeks the following relief:

(a) An order that the Appellant's removal from office is and is to be taken to have always been of no effect.

In the alternative:

(b) An order that the Respondent do pay to the Appellant an amount of compensation for loss or injury caused by the removal."

5 Conciliation under section 32 of the *Industrial Relations Act 1979* as provided for by section 33S of the Act was unavailing and the appeal was set down for hearing.

6 Applications were received from the Respondent (on 17 February 2004) and the Appellant (on 29 April 2004) for each to tender new evidence under sections 33R(2)(b) and 33R(3) of the Act respectively.

7 These applications were dealt with by the WAIRC on 7 May 2004 (*Allan Raymond Carlyon v Commissioner of Police* (2004) 84 WAIG 1395) and 10 May 2004 (*Allan Raymond Carlyon v Commissioner of Police* 2004 WAIRC 11413 unreported). Orders issued granting leave for:

(a) the Respondent to tender the transcript of the criminal trial and the Magistrate's reasons dated 10 December 2003 (*Allan Raymond Carlyon v Commissioner of Police* 2004 WAIRC 11363 unreported) for convicting the Appellant of assault occasioning bodily harm ; and

(b) the Appellant to tender the evidence in relation to the IAU and IIU Complaints Histories set out at pages 101-112 of the Appeal Book and affidavit evidence of Senior Sergeant John Hallett (*Allan Raymond Carlyon v Commissioner of Police* (2004) 84 WAIG 1397).

8 The WAIRC's reasons for decision dated 10 May 2004 sets out those matters for which the Appellant had sought leave to tender new evidence but for which leave was refused (*Allan Raymond Carlyon v Commissioner of Police* 2004 WAIRC 11413 unreported).

9 The WAIRC subsequently issued reasons for decision as to whether or not new evidence tendered by the Appellant was "in response" to the evidence tendered by the Respondent pursuant to that set out in (a) above [to come when other decision submitted]. This new evidence from the Appellant went to the records of criminal charges of three other members of the Western Australian Police Service who continue to serve as officers notwithstanding their convictions for those charges.

10 The evidence was accepted by the WAIRC as coming within the scope of being "in response" to that tendered by the Respondent. Three serving officers against whom convictions are recorded attended the hearing under summons.

Proceedings on Appeal – Addressing the requirements of section 33Q(1)(a) of the Act:

First the WAIRC shall consider the Commissioner of Police's reasons for deciding to take removal action

11 The question arises as to the WAIRC's duty under section 33Q(1)(a) of the Act when proceeding to hear an appeal.

12 Does section 33Q(1)(a) serve to draw the WAIRC's attention to those reasons, to take note of them and to give heed to those reasons and go no further? Or, does the statute impose a duty to also examine, scrutinise or inspect those reasons?

13 A limited interpretation would serve to reinforce the importance of the reasons as the basis upon which removal action was taken. The onus to show that there had been an error in the process including consideration of an irrelevant matter, a mistake of fact or a fettering of the Commissioner of Police's discretion in determining those reasons would be borne by an Appellant.

14 A wider interpretation of the requirement to "consider" would not only serve to remind the WAIRC to be attentive to the reasons but would impose upon it the duty to inspect the efficacy and adherence to the statutory requirements which must be followed in their formulation as the basis upon which the decision was taken to remove an officer from the Police Force.

15 While it is noted that at all times an appellant has the burden of establishing that the decision to take removal action was harsh, oppressive or unfair, we believe that provision of section 33Q(1)(a) imposes a duty on the WAIRC to not only be attentive to the reasons for which the Commissioner of Police decided to remove a member, but also to examine closely those reasons in terms of substance and the process by which they were formulated.

16 In addressing the requirements of section 33Q(1)(a) of the Act for consideration to be given to the Commissioner of Police's reasons for deciding to take removal action, the WAIRC must satisfy itself that those reasons are soundly based and that the Appellant has had the opportunity to address matters relevant to the determination of those reasons before they were acted upon to remove an officer from the Police Force. In this respect:

- The Commissioner of Police must have given the member the opportunity to answer any allegations and to review all of the evidence.
- The reasons must be based on the evidence and conclusions that were reasonably open to the Commissioner of Police to draw.
- The Appellant must have been able to address the reasons for the loss of confidence in his/her suitability with access to all of the information/evidence available to the Commissioner of Police and any other information/evidence which would be of benefit to him.
- The Commissioner of Police must not have decided to take removal action unless he has taken into account any written submission received from the member under section 33L(2) of the Act, with respect to addressing the reasons on which the Commissioner has lost confidence in the member's suitability to continue as a member of the Police Force.
- Where (as in this case) new evidence is tendered and the Commissioner of Police does not revoke the removal action (as in this case) but reformulates reasons under section 33R(8)(a) of the Act, the WAIRC shall consider the reasons as if they had been reasons given to the member under section 33L(5)(a) of the Act. In this respect the member shall be advised of those reasons.

17 As Mr Bathurst for the Respondent points out the WAIRC is bound by statute to accept the re-formulated reasons for removal action being taken that may arise after new evidence is tendered by the Appellant. In this respect the Respondent's advice to the Appellant dated 27 May 2004 is claimed to constitute the re-formulation of the reasons for loss of confidence under section 33R(8)(a) of the Act.

18 Not all of that advice, however, is a re-formulation. Much of it goes to addressing the new evidence that the Respondent was required to consider and in this regard is irrelevant to the reasons for deciding to take removal action. However, the additional comments serve to show that the Respondent has reconsidered what has been put to him by way of new evidence.

19 It is appropriate to put the re-formulated reasons for loss of confidence which led to removal action into context. The reasons as initially expressed by the Respondent and received by the Appellant were:

"(a) the Appellant's conduct on 7 December 2002 in assaulting Mr Jeremy Brown, a 19 year old, by head butting him and then punching him several times in the head, and

(b) in fact in his written response to the Respondent dated 1 August 2003 the Appellant denied unlawfully assaulting Mr Brown and dishonestly alleged that it was Mr Brown who had struck the Appellant."

(*Appeal Book folios 5 and 6*)

20 The relevant part of the advice from the Respondent to the Appellant dated 27 May 2004 re-formulates the reasons as being:

"Rather, I decided to take removal action because I lost confidence in your suitability to remain as a member of the Force given your conduct on 7 December 2002 in unlawfully assaulting Mr Jeremy Brown. I also had regard to the fact that in your written response to me dated 1 August 2003, you denied unlawfully assaulting Mr Brown and alleged that it was Mr Brown who first struck you."

(*Letter dated 27 May 2004 from Commissioner of Police to Mr Carlyon*)

21 In our view the re-formulated reasons merely re-state the two grounds upon which the loss of confidence was originally based, i.e. the conduct in assaulting Jeremy Brown (which with the fact of conviction became expressed as "unlawful assault") and the dishonest denial of the assault with the allegation that it was Jeremy Brown who struck the Appellant first.

22 The Appellant received notification of the re-formulation in writing in accordance with section 33R(10) of the Act.

23 It is noted that the Respondent's intention to take removal action against the Appellant on 7 July 2003 was based on the view that he had "acted in a manner unbecoming of a member of the Western Australian Police Service" when he engaged in a "public altercation with Jeremy Andrew Brown and assaulted that person causing him bodily injury". The advice of this intention followed an investigation by Inspector White of the Kimberly District Office into a criminal investigation which resulted in the Appellant being summonsed to appear at the Broome Court of Petty Sessions on Monday 9 June 2003 on a charge of assault occasioning bodily harm under section 317 of the Criminal Code.

24 As at July 2003 the Appellant had been charged with a criminal offence, but had not been convicted.

25 The Appellant's response to the Notice of Intention to Remove him from the Police Force dated 1 August 2003 gave rise to the second limb of the reasons for taking removal action i.e. in dishonestly alleging that it was Mr Brown who struck him first. It is appreciated that the *Police Amendment Act 2003* amended the *Police Act 1892* to provide a procedure for removing members of the Police Force and for dealing with appeals in relation to those removals. It also provided for matters relating to disciplinary offences but they are not relevant to the appeal procedure.

26 The *Police Amendment Act 2003* was assented to on 27 March 2003 and came into effect on 27 August 2003. Prior to that date an administrative process was in place which enabled the Respondent's decision to recommend the removal of a member to the Minister for Police, to be reviewed by the WAIRC prior to removal being effected under section 8 of the *Police Act 1892*. In this matter the incident and the investigation which culminated in the Respondent's determination that he had lost confidence in the Appellant's suitability to continue as a member occurred prior to the amending legislation coming into effect. The subsequent consideration of the Appellant's response and the decision that removal action be taken all came within the provisions of Part IIB – Removal of Members of the *Police Act 1892*, as amended by the *Police Amendment Act 2003*.

27 In this respect it is noted that the Commissioner of Police may give a written "Notice of Loss of Confidence" to a member before removal action is taken (section 33L(1) of the Act). In this matter the advice sent to the Appellant on 7 July 2003 was not identified as such but was headed "Notice of Intention to Remove from Police Force of Western Australia". Although the substance of the advice complies with section 33L(1) of the Act in that it identifies the Respondent's reasons for loss of confidence in the Appellant, it does so in the context of an intention already formed to recommend his removal from the Police Force of Western Australia, "in the absence of being persuaded otherwise" (see Appeal Book Folio 19).

28 The Act now makes it clear that it is after the receipt of written submissions from the member under section 33L(2) in respect of the grounds upon which the Commissioner of Police has stated that he has lost confidence in the member to continue, that the Commissioner of Police then, subject to sections 33L(4)(a) and (b), decides whether or not to take removal action under section 33L(3) of the Act.

29 If the Commissioner of Police decides to take removal action the member is to be advised of the reasons for the decision. In this matter, as already noted, advice was conveyed to the Appellant by way of a copy of the memo to the Minister recommending his removal. The memo records the steps taken in the process whereby the investigating Inspector recommended that the Appellant be dealt with by way of the Commissioner of Police's loss of confidence under the provisions of the *Police Act 1892*. Then with the appointment of a Review Officer the recommendation was made that the Appellant be served with a Notice of Intention to Remove him from the Police Force.

30 The issue arises as to whether in notifying the Appellant on 7 July 2003 that he had lost confidence in the Appellant's suitability to remain a member of the Police Force, the Commissioner of Police in also stating that he intended, "in the absence of being persuaded otherwise to recommend to the Minister for Police, that she approve your removal from the Police Force of Western Australia" prejudiced the Appellant.

31 In formulating an intent to remove the Appellant before considering his written submissions in response to the Commissioner of Police's grounds upon which the Commissioner stated he had lost confidence in the Appellant's suitability to continue as a member of the Police Force, could the Commissioner of Police be seen to have closed his mind to the possibility of being persuaded otherwise? In other words, did the Commissioner of Police fail to properly address the requirements of section 33L(4)(a) in order to reassess his position under section 33L(4)(b) of the Act?

32 Sections 33L(2), (3) and (4) of the Act provide:

"(2) If a notice is given to a member under subsection (1), the member may, before the expiration of the period of 21 days after the day on which the notice is given or such longer period as is allowed by the Commissioner of Police, make written submissions to the Commissioner of Police in respect of the grounds on which the Commissioner has lost confidence in the member's suitability to continue as a member.

(3) After the end of the period referred to in subsection (2), the Commissioner of Police shall –

(a) decide whether or not to take removal action; and

(b) give the member written notice of the decision.

(4) The Commissioner of Police shall not decide to take removal action unless the Commissioner –

(a) has taken into account any written submissions received from the member under subsection (2) during the period referred to in that sub section; and

(b) still does not have confidence in a member's suitability to continue as a member, having regard to the member's integrity, honesty, competence, performance or conduct."

33 The process which was followed in this case is not a matter which attracted consideration by the parties nor to which their attention was drawn in the hearing. However, if a loss of confidence in the member's suitability to continue as a member carries with it the implication that the member should be removed from the Police Force, and we think that it does, then the statement made by the Commissioner of Police of the intention to recommend removal subject to being persuaded otherwise, does not itself impugn the process. What is important is consideration being given by the Commissioner of Police to the Appellant's written response to the Notice of Loss of Confidence in accordance with section 33L(4) of the Act. It is clear from the documents before us that this has occurred.

34 In accordance with section 33X of the Act, if this is merely a failure to comply with the procedure prescribed under Division 2 of the Act which regulates the removal of members from the Police Force, it is not substantive and does not invalidate or call into question the action of the Commissioner of Police.

35 Another matter is the form of the advice to the member when the Commissioner of Police decides to take removal action under section 33L(5) of the Act. A notice to the member which clearly sets out the reasons, and is not merely a copy of the recommendation to the Minister, would seem far more preferable. It is not for the Appellant nor for the WAIRC to extract from background notes the reasons upon which the decision was taken to remove the member from the Police Force.

36 In this case no issue was taken about the form of the advice under section 33L(5)(a) of the Act. Indeed, with the advent of new evidence the reformulation of reasons pursuant to section 33R(8)(a) of the Act has reaffirmed the basis upon which the Commissioner of Police does not have confidence in the Appellant's suitability to continue as a member.

37 In addressing section 33Q(1)(a) of the Act we reiterate what was stated about the fact of a criminal conviction when we considered the Respondent's application to tender the transcript and reasons of the Magistrate in convicting the Appellant of assault occasioning bodily harm.

> "In *Neville Raymond Smith v Director-General of Transport* [2002] WASCA 64, a taxi driver recently convicted of the offence of assault occasioning bodily harm appealed against the Magistrate's decision to dismiss the application made by the taxi driver to review the Director-General of Transport's decision to cancel the applicant's endorsement for a taxi driver's licence on the grounds that the Director-General had reason to believe that the taxi driver was not of good character. The conviction had occurred in circumstances where the assault involved took place in the course of his occupation as a taxi driver.
>
> While it was made clear that the conviction could not be attacked or called into question by a collateral attack in the review proceeding (*Mickelberg v Director of Perth Mint* [1986] WAR 365 at 372) the particular facts established by the conviction needed to be considered to ascertain the way upon which they revealed or reflected the character of the taxi driver. Heenan, J went on to say:
>
> > "The ultimate issue for determination was whether or not the appellant was of sufficiently good character to hold a taxi driver's licence. Proof of his conviction causing bodily harm did not make it inevitable that he was not of sufficient character to hold that licence but it is certainly a telling fact. The role of a court in reviewing a decision on that ultimate issue must have regard to his overall character and the requirements of the occupation for which the licence is necessary – compare *Ziems v The Prothonotary at the Supreme Court of NSW* (1957) 97 CLR 279.
> >
> > This may involve the court scrutinising the conviction which is relied upon in the case before it to demonstrate unfitness to practice a profession, hold a licence, or obtain some other right or privilege in order to identify what facts the conviction necessarily establishes and which must, therefore, be taken to be conclusively proved in the absence of some fresh evidence or other factor (such as the institution of a separate action to set aside a conviction or judgment on the grounds that it was obtained by fraud). In such circumstances the court will need to examine the issues in the case, as established from the formal charge or indictment and the plea made in answer to it, and the factual issues upon which the determination of guilt turned in those circumstances. In doing this the court will naturally have regard to any reasons for decision given by the court, where there are any, and the terms of any special verdict which might have been given by a jury. Similarly, sentencing remarks may be helpful in identifying what was necessarily established by the conviction (op cit at para 24 and 25)."
>
> Here, where the Appellant accepts that the appeal does not present the forum to re-try issues determined in the conviction proceedings, the fact of the conviction establishes for the Commission the facts of the incident upon which the Commissioner of Police took removal action."
>
> *(Allan Raymond Carlyon v Commissioner of Police (2004) 84 WAIG 1395 at 1397*)

38 On 7 July 2003, when the Commissioner of Police expressed loss of confidence in the Appellant's suitability to continue as a member of the Police Force, he cited the Appellant's alleged conduct on 7 December 2002. That decision was reached after considering the Summary of Investigation by the Review Officer. The Summary of Investigation took into account the record of interview with the Appellant conducted on 31 December 2002 by Inspector White. That interview included reference to the following matters:

- At the outset Inspector White reminded the Appellant of his duty to report and obey a lawful order as provided by the Police Force Regulations. The Appellant was then ordered to answer every question put to him in the interview. He was reminded that he was required to answer even though any answer may tend to incriminate him. The Appellant was assured that the answers would not be used in any criminal proceedings against him.
- Furthermore, he was advised that any answer given which is found to be wilfully or negligently false, misleading or inaccurate would result in disciplinary action being taken against him. It may result in his dismissal from the Police Service. The Appellant indicated that he understood the import of this.
- Inspector White outlined the allegations made against the Appellant which included the claim that he had head butted Jeremy Brown causing his nose to bleed, that he then grabbed him by the shirt around the neck area with both hands and started slinging him around. Further, it was put to the Appellant that he ripped Brown's shirt and hit him in the face approximately 5 to 7 times. When examined by a doctor a few days later, the injuries sustained by Brown were consistent with being assaulted in the manner in which he described to the doctor.
- In outlining his version of events that occurred in the early hours of Saturday 7 December 2002 the Appellant stated that:
    - After socialising with his wife and daughter and other off-duty officers and their spouses on Friday evening he approached a group of people sitting on the steps of the Wings Chinese Restaurant in Broome. He went over to talk to them about threatening phone calls his son had been receiving. He suspected that this group were involved in making the calls.

- At this time the Appellant says he was in good spirits. As the Appellant approached the group his daughter pointed out Jeremy Brown.
- The Appellant asked Brown if he had been ringing his son. With that Brown, who had been sitting, got to his feet and became abusive.
- The Appellant stated that while he and Brown were yelling at each other Brown leant in and head butted the Appellant on the left side of the head. It was not a full force head butt. The Appellant says he then pushed Brown away. It was then asserted that Brown "danced" in a boxing pose and came back and punched the Appellant in the right eye. He claimed he was then hit again. He was stunned but then "shaped up" to Brown and with a left jab hit him square in the face, next he missed with a haymaker but then connected Brown with an upper cut to the nose. Next the Appellant's wife grabbed hold of him and said "Allan, we're leaving".
- The Appellant stated that Brown yelled out that he wanted the police. To this the Appellant claims to have said "Look, no use making a scene you're going to make it worse for everyone, let's go down to the police station."
- Accompanied by his wife and daughter, the Appellant then proceeded to the police station.

- The Investigating Officer put to the Appellant what some other witnesses had said. In effect this was that the Appellant had instigated the whole issue, and that when Brown stood up, the Appellant had head butted him causing his nose to bleed.
- The Appellant stood by his version of the incident, re-affirmed that he had punched Brown twice but that it was Brown who had thrown the first punch and had leant in and head butted the Appellant.
- The Appellant's recollection was that the incident ended when his wife pulled him away and Sergeant Thompson grabbed hold of Brown, who was still in a fighting stance.
- The Investigating Officer confirmed with the Appellant that he was to return to a work programme with "Health and Welfare", working 4 hours a day.
- Inquiries were also pursued as to whether the Appellant was intoxicated on the night in question and if he was taking drugs as part of his rehabilitation programme. The Investigating Officer sought information from the Appellant as to whether there was any warning on the medication not to consume alcohol. The Appellant's position was that he did not believe that the alcohol and drugs would have affected his memory of events that occurred. He stated that he had a full recollection of everything that happened that night and did not believe the medication or alcohol impaired his judgment or made him intoxicated.
- It was put to the Appellant that other witnesses were very clear that on the evening of the incident he was asking him questions about a person named Lloyd Cobb. The Appellant stated that prior to the incident he did not know a person by the name of Lloyd Cobb other than that he was a friend of his daughter.
- In again focusing on the physical altercation between the Appellant and Brown, the Appellant was emphatic that he did not head butt Brown. As to being the instigator the Appellant does blame himself for the incident. He says he should not have walked over to the group. That is all he could say.
- While he admits to hitting Brown twice, the Appellant says that only came about after he had been head butted and punched twice by Brown. He admitted:

  > "… I'd basically, I'd lost any sense of self-control and it was more of a flight or fight. I couldn't run away because my daughter was there and I didn't know where she was. As I say I was outnumbered and ..err .. basically didn't have anywhere to go. The only other natural human response was to fight back in self defence, ...provocation type of situation. As I say I hit Jeremy twice. He hit me three times and as I say, thrown at least one more punch that I knew about which was the left hand haymaker over the top which didn't make contact on..err.. as I say, my only thought at that stage was he was going to kick punch me until.. if someone pulled him away or I fell to the ground."

  (*Appeal Book Folio 76*)

- In refuting that he had head butted Brown the Appellant was invited to consider whether, in the initial confrontation with Brown "where he's leaned in and head butted you, that you've had a reflex action and head butted him back or pushed him back with your head, which could be misconstrued as a head butt?" In response to this the Appellant reiterated that Brown's was not a full blooded head butt on him but rather that with a stiff neck Brown pushed into his head. At the same time the Appellant says he actually pushed him back.
- The Appellant says that at no point in the fight did he lose control. He maintains that he threw only a few punches.
- At the conclusion of the interview the Appellant stated that he had not wilfully or negligently made false, misleading or inaccurate statements to the questions.

39 In the written response to the Commissioner of Police's loss of confidence in him the Appellant maintained that he had acted in self defence. He maintains that he did not provoke the situation by merely asking who had been telephoning his son. It is the Appellant's position that Brown became abusive and threatening towards him. He admits to having maintained his position when Brown stood from sitting on the steps and that he (the Appellant) verbally abused Brown in response.

40 The Appellant maintains that Brown head butted him (by which he means Brown pushed against the Appellant's head with the top of his head) and inflicted an injury to the Appellant's right eye. With Brown continuing to challenge him the Appellant hit back. He says that he was concerned not only for his own safety but the safety of his daughter.

41 While the Appellant expressed his regret for having engaged in a verbal altercation with Brown he maintains that he did not provoke the situation. Once Brown became violent towards him he claims to have reacted, as any man or Police Officer would, in defending himself and his family who were in close proximity.

It is claimed that the injuries sustained by Brown are entirely consistent with the Appellant's account of the incident and inconsistent with that given by Brown. The Appellant put to the Commissioner of Police that:

> "It should be borne in mind that the incident occurred in a matter of seconds and that it is always easy to criticise with the benefit of hindsight in an analytical way without the presence of the circumstances and emotions."

42 The Appellant maintained that the incident should, at worst, be judged as an error of judgment in a split second decision.

43 The review in response to the Appellant's written submission to the Commissioner of Police dated 1 August 2003 identifies five "points of contention". In summary, these are:

1. The Appellant was off duty at the time and submits that this is highly relevant. He concedes that the conduct of police officers must be exemplary at all times, particularly when stationed in small towns.

2. When the Appellant approached the young people he was not seeking an altercation but saw it as an opportunity to resolve the issue of his son receiving menacing and threatening phone calls.

   The Appellant maintains that there is no evidence that he commenced the altercation or challenged Brown.

   From witness statements of the young people present at the time, including Brown and from the Appellant's response, the Review Officer suggests that the Appellant was affected by alcohol and at the time was displaying his anger.

3. The Appellant does not agree he challenged Brown or that he assaulted him by inflicting a head butt on Brown's face or by punching him several times.

   The Review Officer notes that the Appellant confirmed in the investigation interview that he and Brown were in each other's "personal space" being face to face and probably chest to chest. The Appellant admits to having twice punched Brown in the face. These actions are claimed to be in self defence.

   From the Review Officer's analysis of the witness statements he concludes that the Appellant did strike the first blow on Brown by the use of a head butt.

4. The Appellant was critical of the manner in which the Review Officer's initial report was written. He considers it highly prejudiced in that the Review Officer is keen to identify the four witnesses as members of the Appellant's family and friends and yet fails to identify that six witnesses who do not support his recollection are friends of Brown.

   The Review Officer notes that the Appellant has identified the group of young people he approached on the night in question as being known to him as friends of his children. Five of the six witnesses identify themselves as being friends of the Appellant's children.

5. The Appellant states that there are many inconsistencies in the statements of the witnesses, which he believes will be discredited at his trial.

44 The Review Officer's conclusion states:

> "Carlyon, in his record of review with Inspector White, stated he was socializing from about 5.30pm on the 6th December 2002, to 1.00am the following morning, but he had only consumed four or five cans of Carlton Mid-Strength Beer.
>
> The incident took place after he and his party left the Roebuck Hotel and he walked towards the Wings Restaurant.
>
> The statements of the witnesses clearly identify Carlyon as behaving in a confrontational manner toward the group and he was the person who struck the first blow by head-butting Brown, a 19 year old teenager.
>
> In my view Carlyon's behaviour clearly amounts to conduct unbecoming of what is expected of a member of the Police Service, Carlyon is a person of 39 years of age, and is a Senior Constable with 13 years in the Western Australia Police Service.
>
> Carlyon in his response denies he acted in the manner alleged although he states he regrets having engaged in a verbal altercation with Brown, rather than backing off or attempting to defuse the situation.
>
> In this matter, it is clearly open to the Commissioner of Police to lose confidence in Carlyon's suitability to remain a member of the Western Australia Police Service and recommend that the Honourable Minister approve the removal of Carlyon from the Police Service.
>
> Senior Sergeant Hallett, Senior Sergeant Fuller and Sergeant Hayden have forwarded favourable character references on behalf of Carlyon.
>
> Also attached are two letters concerning the on going mental health state of Carlyon in respect of depression and Post Traumatic Stress Disorder from Dr Lili Costello, Psychiatric Registrar and Ms Melinda Andrews, Psychologist.
>
> A character reference has also been attached to Carlyon's response from Mr Paul Fowler, Proprietor Broome's Last Resort Inn.
>
> Submitted for your information and consideration of the Commissioner of Police in making his determination."
>
> (*Appeal Book Folios 120 and 121*)

45 The Commissioner of Police was presented with a memo dated 23 September 2003 from the Assistant Commissioner (Professional Services) (Appeal Book folio 113). The memo includes the following:

> "The Review Officer, Superintendent Gascoigne has completed his review and analysis of the response and states that it is clearly open to you not to have confidence in this officer to remain in the Service. I note that Senior Constable Carlyon included a number of referees with response. One referee Dr Costello states he (*sic*) treated Senior Constable Carlyon for a major depressive illness and that he has responded to treatment for his illness. Another referee, Senior Sergeant Hallett, the OIC of Broome Police Station is supportive of the work ethic of Senior Constable Carlyon. However, he states that the officer would have to be moved from Broome if he is to remain in the service.
>
> Further to the above Senior Constable Carlyon was charged with assault occasioning bodily harm from the circumstances that gave rise to this Loss of Confidence motion. This matter was part heard in the Broome Court of Petty Sessions on 15, 18 and 19 September 2003 and has now been adjourned to 8, 9 and 10 December 2003."
>
> (*Appeal Book Folio 113*)

46 Receipt of this information by the Commissioner of Police completed his consideration of written submissions received from the Appellant under section 33L(2) of the Act.

47 The Commissioner of Police then decided to take removal action and in accordance with section 33L(5)(a) of the Act on 2 October 2003 advised the Appellant of the reasons for his decision by way of a copy of the memo forwarded to the Minister of Police (Appeal Book 122 and 122A).

48 The fact of the Appellant's criminal conviction and leave to tender the transcript and reasons of the Magistrate must be taken into account by the WAIRC. The re-formulation of the Respondent's reasons for taking removal action comprehends the availability of this information together with other new evidence for which leave was granted to the Appellant to tender.

49 As Heenan J observed in *Neville Raymond Smith v Director General of Transport* [2002] WASCA 64 the facts the conviction necessarily establish must be taken to be conclusively proven. In the circumstances of this matter the WAIRC will need to examine the issues in the case as established from the formal charge and the plea made in answer to it. The Commission will also need to consider the factual issues upon which the determination of guilt turned in those circumstances.

50 The Appellant pleaded not guilty to a charge of assault occasioning bodily harm on Jeremy Brown on 7 December 2002. In these proceedings, the Appellant stated that when he attended the Police Station after the incident he said to Senior Constable Carter that when walking past the Chinese restaurant, "Wings", he saw a group of young people and someone yelled a "smart-arse" comment and that he went over because he believed that one of them had been ringing up his son. He told the officer that Brown got up and head butted him and threw three punches. Further, the Appellant stated that he suggested that they go to the police station but that Brown said that he wouldn't go. The Magistrate observed that this was contrary to the evidence of other witnesses. They said that it was Brown who instigated going to the police station after he had been assaulted.

51 The Magistrate noted that Senior Constable Carter said that the Appellant was not affected by alcohol but that Brown was intoxicated to such an extent that he would not take a statement from him. Senior Constable Carter allowed the Appellant to answer telephone calls at the police station that evening as they were particularly busy at the time Brown and the Appellant attended. Senior Constable Carter also noted that Brown complained to him of being head-butted by the Appellant and he believed it was some "tit-for-tat complaints". The Appellant had told him that he had retaliated to the head butt from Brown and that he had punched Brown in the head twice.

52 The Magistrate considered the submission that the prosecution case was "an orchestrated litany of lies by the young people at worst, and at best deception by them as to what happened … and whether or not their evidence was in fact tainted by any collusion talking with regards to what had happened."

(Transcript of proceedings before Mr C Cullen, SM at Broome on 19 September 2003)

53 The Magistrate also considered how consistent was the medical evidence of injuries sustained on the version of events given by the respective parties.

54 The evidence of Brown was reviewed by the Magistrate. He noted that Brown had consumed six cans of full strength alcohol that evening and that he had felt tipsy. He described how he and his friends had gone to a food van adjacent to Tokyo Joe's nightclub and also to Wings Chinese Restaurant that evening. He had lent his belt to Lloyd Cobb for him to go into the nightclub. The shorts he was wearing were too big for him. Brown knew the Appellant's daughter and her mother. He did not know that the Appellant was a police officer.

55 It appeared to the Magistrate that the Appellant had gone to the young people and demanded to know the whereabouts of Lloyd Cobb. According to the Magistrate, Brown said he "stood right over me, over the top of me". The Appellant said "Why are you standing up to me?" Then he was head-butted by the Appellant between the eyes. His nose bled and the Appellant grabbed him by the shirt, around the neck, and punched him several times. Brown threw a couple of punches. He was holding his shorts up with his left hand at the time. The Appellant told him to leave his son, Allan, alone. Then Sergeant Thompson took the Appellant away. Brown says he shouted "I'm going to the cop shop". The Appellant replied, "I'll see you there".

56 The Magistrate then reviewed the Appellant's version of the incident. He alleged that Brown's reaction to the question "Who's been ringing Allan, threatening to break his neck?" was met with an aggressive outburst. The pair stood close to each other and Brown pushed his head into the Appellant's left eyebrow. He says he was stunned and pushed Brown away with an open hand to the chest. Brown then punched him in the right eye. It was then that the Appellant says he retaliated and put an end to the matter with an upper cut to Brown's face. According to the Appellant Brown wanted to keep going. He then said to Brown, "Let's go to the police station" but according to the Appellant this was rejected.

57 The Magistrate comments:

> "It is interesting to note that at no time did the defendant say to Brown he was a police officer, did he warn him as to his behaviour, or inform him that he could be arrested or that he was under arrest, nor did he retreat from the confrontation, on his version of events, from Brown."

(Op cit at p 86)

58 The Appellant denied being aggressive or asking for Cobb. Several of the young people with Brown knew the Appellant was a police officer and were apprehensive about him approaching them that night. The Magistrate describes their perception of him as being "aggressive and wild about something", being frustrated and "angry, angry and in an aggravated voice".

59 The Magistrate notes:

> "No one else heard Brown make any threats. Why would he? Why would he jump up and head-butt a total stranger? If he had done that, then the others would no doubt have informed him at that point that he was a police officer. I have no doubt that the reaction of the defendant towards Brown gave the young people who were present on that particular night a shock as to what was transpiring, and they were no doubt in disbelief as to what was happening on (sic) front of them by the man whom they knew was a police officer."

(Op cit at p 89)

60 The Magistrate was satisfied that on that particular night, the Appellant went up to the group of young people to gain some retribution with regards to the phone calls to his son. It was not in the circumstances a correct thing for him to have done. The Appellant had been drinking; he was an off duty police officer. The Magistrate found that he was aggressive and that he had head-butted Brown, "no doubt in frustration for getting no response to his questions as to who was Lloyd Cobb". The Magistrate went on to find that the Appellant was affected by alcohol. He rejected the version of events that Brown either head-butted or threw the first punch at the Appellant. He accepted the evidence of the young people present. In his view the prosecution negatived any question of self-defence relied upon by the Appellant. He was the attacker.

61 The prosecution proved each of the elements of the offence of assault occasioning bodily harm.

62 It is also relevant to consider what was put before the penalty was imposed and what the Magistrate said in sentencing the Appellant.

63 The Magistrate was told that the Appellant is 40 years of age. He has been married for 20 years and has two children aged 20 and 19. In all the Appellant has 23 years of service in State and Government agencies; 10 years in the Royal Australian Navy and then 13 years in the Police Service of Western Australia. He has no record of any similar conduct and it is not likely that he will re-offend. At the time of his conviction the removal notice had been effected. The Appellant's employment prospects were uncertain. The medical reports which were presented to the Magistrate showed his particular circumstances at the time of the incident. Then he was on a return to work programme having been on sick leave for some time as a result of post traumatic stress disorder and a severe major depressive illness. The Appellant was on medication at the time of the offence.

64 It was put to the Magistrate that although it was found as a matter of fact that he was affected by alcohol, the effect that his medication may have had on him was unclear.

65 References were tendered which went to showing that this incident was out of character and that the Appellant had been experiencing difficulties at work which had affected his personal life.

66 The Appellant's counsel stated:

> "I would put to you, sir, that this is an error of judgment of the defendant at the time. The incident of violence itself would have taken at most 30 seconds, and I would suggest, for a shorter time. That compared with his 39, now 40 years of good conduct (which) needs to be weighed up by you, particularly in the line of work he was in on the night he approached the group, who were known to him due to an association with his son. I would put to you that he was acting as a father and not as a police officer. … He was approaching as a father in an attempt to sort the matter out, certainly an error of judgment and certainly in hindsight, had that not occurred, had he not approached, they all would have gone home on this evening".

67 In sentencing the Appellant the Magistrate noted that his appointment as a member of the Police Force had been terminated. He also referred to the references of a good work ethic and the fact that over a period of time the Appellant had suffered trauma from a motor vehicle accident and an assault which had left him with some depressive illness which was being treated. The Magistrate considered that the incident on 7 December 2002 was not only an error of judgment but also an act of gross stupidity for someone who had been a police officer as long as him. He had obviously got mixed up on that particular night between his responsibility as a police officer and that of a father. The Magistrate saw that the unfortunate consequence of his actions that particular evening was that young people who saw what transpired between him and Brown will judge other police officers by the way the Appellant had acted. He had therefore done immeasurable harm to himself and to other police officers in this State. The fine imposed on the Appellant recognised that he had been removed from the Police Service and thereby paid the "ultimate sacrifice" for his acts. But the penalty also had to be commensurate with the offence and taking into account that what he had done had made a lasting impression on the young people who were present, a fine of $500 was appropriate.

68 In this appeal new evidence, for which leave to tender was given to the Appellant, went to the IAU and IIU Complaints Histories. These are matters which the Appellant cites in paragraph 1(a)(i) and (ii) of the grounds of appeal and which he asserts were taken into account by the Respondent and which were not referred to in the Notice of Intention to Remove.

69 The Appellant gave evidence by way of affidavit as to the background and origin of complaints being raised against him upon his transfer to Broome as the Alcohol Drug Advice (ADA) Officer. It is the Appellant's position that in discharging his duties to enforce provisions of the Liquor Licensing Act, which he believed had not previously been enforced in Broome, he came into direct conflict with hoteliers and his colleagues who enjoyed an advantaged position prior to his arrival.

70 The Appellant submits that he was able to prove in the IIU and IAU investigations that the complaints were frivolous and vexatious. They were made in an attempt to have him removed from Broome as ADA Officer. In conclusion the Appellant notes that he had a completely clean record until his transfer to Broome. He goes on to state that:

> "The number and nature of the complaints against me whilst I was in Broome highlight the extremely difficult professional and personal pressures brought to bear upon me as a police officer and a father which culminated in my medical condition and, no doubt, my lack of judgment which I always admitted in having approached the group of youths on 7 December 2002."

71 Other new evidence which was tendered with the agreement of the Respondent and for which leave was not required was evidence sworn under affidavit by Senior Sergeant John Allen Hallett. He attested to having no difficulty having the Appellant work on his team in any area or station even with full knowledge of matters pertaining to his dismissal. Any contrary interpretation of a reference he had previously provided is incorrect. Senior Sergeant Hallett maintains the view that the correspondence conveyed that the Appellant's removal from Broome when he was a police officer should not have been for any reason associated with misconduct, but rather for his professional development.

72 The WAIRC's consideration of the Commissioner of Police's reasons for deciding to take removal action against the Appellant has meant that we have had to review each step in the process which culminated in the final re-formulation of those reasons after the removal from office had been effected. This has involved the initial investigation carried out by Inspector White on Tuesday, 31 December 2002, the formulation of the Notice of Intention to Remove and the Appellant's response dated 1 August 2003 to that notice. Then followed the Commissioner of Police's consideration of the response, the re-affirmation of this decision and the notice of removal. The fact of the conviction (with reference to the transcript of proceedings and the findings and comments on the conviction were noted). The other new evidence was inspected.

73 The final step in the process for the purpose of the appeal is the re-formulation of the reasons for which the Commissioner of Police justified the Appellant's removal from the Police Force and thereby the rejection of any new evidence which would have caused him to revoke the removal action under section 33N(2) of the Act.

74 The text of the re-formulated reasons is set out in full hereunder:

> "I have carefully considered the new evidence you tendered under section 33R of the Police Act 1892, consisting of:
>
> (a) an affidavit of Senior Sergeant John Hallett, dated 3 May 2004; and
>
> (b) an affidavit sworn by you, dated 17 May 2004.
>
> In relation to Senior Sergeant Hallett's affidavit, I particularly note that:
>
> (a) it is Senior Sergeant Hallett's belief that you would be a beneficial member of the Police Service;
>
> (b) Senior Sergeant Hallett would have no difficulty with you working on his team in any area or station;
>
> (c) Senior Sergeant Hallett's statement in his letter dated 1 August 2003 that "Allan will have to be moved from Broome to allow opportunity for further development and allowing him time to better position himself within the Agency" should not be interpreted to suggest that Senior Sergeant Hallett believes you could not work in Broome or should be moved from Broome as a result of misconduct; and
>
> (d) following the incident on 7 December 2002, to continue to work at the Broome Police Station until 12 November 2003.
>
> In relation to your affidavit, I have considered the matters you raise in relation to the IIU summary and the IAU summary. While I read those documents prior to recommending your removal from office, I did not base my decision on them. Rather, I decided to take removal action because I lost confidence in your suitability to remain as a member of the Police Force given your conduct on 7 December 2002 in unlawfully assaulting Mr Jeremy Brown. I also had regard to the fact that in your written response to me dated 1 August 2003, you denied unlawfully assaulting Mr Brown and alleged it was Mr Brown who first struck you.

While I did not base my decision to take removal action on the IIU and IAU summaries, nonetheless, I note that some of the statements in your affidavit are inaccurate. In particular, the IAU report found the following four complaints against you were sustained:

(a) using threatening and abusive language towards Senior Constables Hallam and Mustchin after they had interviewed your son in relation to a criminal offence;

(b) failing to display proper court etiquette during court proceedings on 8 March 2002 involving your son;

(c) improperly approaching a juvenile prosecution witness in a prosecution against your son; and

(d) accumulating personal frequent flyer points while performing work-related prisoner escorts.

Further, the IAU report did not recommend that you "be transferred from Broome due to the untenable position [you] had been placed in by the WA Police Service." It did suggest, however, that your position in Broome was untenable because Magistrate Bloeman had identified you "as a police officer who lacked credibility".

Having carefully considered the new evidence put forward by you, I continue to have a loss of confidence in your suitability to be a member of the Police Service.

Yours sincerely

(signed) B E Matthews

Commissioner of Police

27 May 2004"

75 There is nothing to conclude that following consideration of the Commissioner of Police's reasons for deciding to take removal action, that there is anything either procedurally or substantively that would lead us to conclude that those reasons were not properly formulated (and re-formulated) or that prima facie the reasons were not reasonably open to the Commissioner of Police to conclude in the light of what was before him. As noted we have also had to have regard to the fact of the criminal conviction and the factual basis upon which the determination of guilt turned in those circumstances (*Neville Raymond Smith v Director General of Transport* [2002] WASCA 64).

Addressing the requirements of section 33Q(1)(b) of the Act:

Secondly, the WAIRC shall consider the case presented by the Appellant as to why that decision was harsh, oppressive or unfair

76 The Appellant, by reference to the grounds of appeal (already set out in these reasons for decision) sought to show in the first instance that notwithstanding the limitation the Commissioner of Police sought to impose on the Appellant in responding to the "Notice of Intention to Remove" by directing him only to the transcript of interview between himself and Brown, the Commissioner of Police had in fact taken into account additional material.

77 While Ms Ridley, for the Appellant, concedes that those matters referred to in Grounds 1(b) of the appeal have been remedied the Appellant believes that at the time the Notice of Intention to Remove was formulated, the Commissioner of Police took into account the unsworn and untested testimony of juvenile witnesses which had been specifically excluded from the material to which the Appellant is requested to respond. That, it is argued, gives rise to a degree of unfairness which subsequently cannot be rectified because the Appellant did not have the opportunity to respond.

78 With respect to grounds 1(d), (e) and (f) these refer to reliance being placed on unsworn, uncorroborated and conflicting evidence of intoxicated juveniles being preferred to that of the Appellant. While the Appellant accepts that the legislation now provides that the Commissioner of Police can proceed to remove a member before the outcome of a trial, in the circumstances of this matter it is submitted that findings of misconduct were made which were not open to him on the evidence. Where the respondent proceeds to remove a member before the outcome of a trial he should accept the best evidence. In this case the Commissioner of Police relied on the evidence of police witnesses and medical advice when he should only have accepted admitted facts, rather than make a determination which ought to properly have been left to the court. The Commissioner of Police could not have been satisfied at the time of making the decision that the conduct warranted dismissal. It is argued that he cannot rely on the outcome of the subsequent trial to justify his position at some later stage.

79 By ground 1(g) the Appellant argues that the consequences for him by removal from the Police Force are disproportionate to the gravity of the misconduct. A decision to terminate employment may be harsh because of its personal and economic consequences for the employee or because it is disproportionate to the gravity of the conduct (Ross VP in *Rose v Telstra Corporation Ltd* Print Q9292).

80 In this matter it is argued that in the first instance the decision to remove was based on the consideration of the conduct unbecoming a police officer; there was nothing which relied on bringing discredit to the police force nor the integrity of the Appellant.

81 The incident occurred very quickly. There was no premeditation; it arose out of circumstances that occurred at a particular time. The Appellant admits to showing poor judgment and for having let the situation deteriorate. Even police officers are entitled to make one mistake. But it appears to the Appellant that there are some mistakes which are not forgiven.

82 In the circumstances of this matter it is submitted that disciplinary action under section 23 of the *Police Act 1892* would have been more appropriate.

83 The Appellant submits that the issue of his integrity was not in issue when the focus of the Respondent's concern was his "unbecoming behaviour". In addressing ground 1(h) the Appellant argues that the notice of dismissal deals with his behaviour as a member in relation to a particular incident, it does not call into question his integrity.

84 As to the incident which occurred when the Appellant was off duty it is submitted under ground 1(i) that under general principles of employment law an employee's behaviour outside work hours will only have an impact on their employment if it breaches an express or implied term of their employment. The conduct must be viewed objectively to see whether it damages the employer's conduct or is incompatible with the employee's duty as an employee (see Ross VP *Rose v Telstra Corporation Ltd* Print Q9292).

85 The Appellant accepts that these general principles must be weighed against the issues of public interest and the nature of the special relationship between the Commissioner of Police and members of the Police Service. However, in the circumstances of this case the Appellant submits that he was acting in his role as a parent. He has always admitted that he was wrong in approaching the group of young people. The issue is whether there is a relevant connection to his employment from his actions that night. The fact of a conviction alone does not dispose of his claim that removal was too harsh.

86 The Appellant submits that his actions that night have not unduly impacted on his ability to perform his duties as a police officer, particularly in his role of enforcing liquor licensing laws. In uniform he has the anonymity of a member of the Police Force. He would have the status and authority that goes with the uniform. Most members of the public would identify with the office of a member of the Police Force and not him as an individual.

87 He was for a period of 11 months prior to his removal from the Force able to effectively discharge duties as a member. There were no other incidents arising from his conduct during that time.

88 Ground 1(j) of the Appeal raises the issue of whether the effect of a major illness the Appellant was suffering at the time of the incident should have been a factor considered by the Commissioner of Police. It is acknowledged by the Appellant that he did not rely upon or seek to excuse or explain his behaviour by reference to his major depressive illness. However, it was submitted that the facts of that illness were known to the Commissioner of Police and notwithstanding that this matter was not pleaded by the Appellant, should have been taken into account by him.

89 The Appellant then turned his attention to addressing the new evidence.

90 In the Appellant's view the issue of integrity was only raised at the point of his removal from the Police Force. He maintains the position that he did not lie to the Commissioner in the initial investigation nor in his response. The Appellant submits that his position was consistent with the defence he argued against the charge before the Magistrate in the Court of Petty Sessions. Subsequent to that he has not been charged with perjury.

91 The Appellant notes that the Magistrate accepts that there are inconsistencies in all of the evidence. It is not open to the Respondent to conclude that because of these inconsistencies in everyone's stories that the Appellant lied. The Appellant submits that there will be different perceptions and personal circumstances which colour all witnesses' recollections of the incident. He accepts for the purpose of this appeal that weight of evidence "on this occasion" went against his understanding of what happened. However, he submits that the finding of fact and the defence he raised also had to be weighed against the finding of fact that he was affected by alcohol. That was not an issue he argued. That is not a situation he would ever be in again when discharging his duties as a police officer.

92 When considering the findings made by the Magistrate, the Appellant argues that it should also be realised that it was found that he had "acted out of frustration in the circumstances that existed once he had approached the group."

93 The Magistrate also noted the Appellant felt threatened and head butted Brown.

94 The Appellant argues that the finding made was that there were inconsistencies in the evidence of all the witnesses. On this basis it is submitted that it is not open to the Respondent to conclude that the Appellant had lied.

95 As to matters referred to in section 33Q(4) of the Act it is submitted that the interests of the Appellant require the WAIRC to consider the gravity of the consequences of what has happened to him. The loss of employment is the most serious consequence that can occur. That in turn leads to a loss in income and that affects his family. His 13 years of service in the Police Force is a relevant consideration. This, together with his 10 years in the Royal Australian Navy, amounts to a significant period of work in the community.

96 When weighted against the interests of the Commissioner of Police it needs to be appreciated that the Appellant was off-duty at the time of the incident and involved a conflict between his role as a parent and that of a member of the Police Force. Alcohol was present and affected his judgment.

97 The medical report (Appeal Book Folio 91) about the Appellant's treatment for a major depressive disorder and the issues in the work environment in Broome and the Police Station, show the level of stress he has been working under for several years. According to the Appellant he was dealing with them at the time of the incident. The affidavit submitted by the then Officer in Charge, Senior Sergeant Hallett, attests to the pressures the Appellant was being subjected to and the undue criticism being levelled against the Appellant by some people who were not in possession or knowledge about the effects that family issues and work pressures had on his well-being. Notwithstanding these difficulties it is submitted that the Appellant showed a considerable work ethic and continued to discharge policing duties to the satisfaction of his superiors for a considerable period of time even after the incident. It is submitted that there is nothing to suggest that what happened on 7 December 2002 would ever happen again.

98 With respect to the WAIRC's consideration of the public interest that, it is argued, should not be judged in disregard of the Appellant's interests. The Appellant's age, his service record, the fact that the incident occurred while he was off-duty and the conflicting role between being a police officer and a parent should all be taken into account. It is submitted that the incident received no publicity. There is no evidence of public knowledge of the indiscretion of the Appellant which has brought about criticism of the Police Service. Even after the Commissioner of Police advised the Appellant that his loss of confidence in him would lead to his removal, that did not occur for over one month and during that time he continued to discharge his functions as a member of the Police Force. He could, it is argued, be effectively deployed elsewhere in Western Australia.

99 The Appellant accepts that his indiscretion should not go unsanctioned and submits that the public expectation of disciplinary action against him could be met by action under section 23 of the *Police Act 1892*.

100 On the issue of public interest, the Appellant presented new evidence from three serving officers each with a criminal conviction but who continue to serve as members of the Police Force. Each of the officers attended the hearing under summons and was cross examined.

101 The first case involved the assault of a 10 year old female child by the officer while on duty. At the time the child was in his care and protection. Furthermore, when the incident occurred he was the senior officer with responsibility for three junior officers and three juvenile detainees. The Commissioner of Police issued the officer with a Notice of Intention for his removal from the Police Service on 4 May 2003, that being some 15 months after the officer was convicted of criminal assault in the Perth Court of Petty Sessions. The conviction arose from the officer's action in slapping the child in circumstances which the officer said was done to stop her spitting at him. At his trial the defence of "self-defence" was rejected by the Magistrate. The inquiry which led to the Commissioner of Police's loss of confidence in the officer's suitability commented that the claim that he had attempted to push the child's face away to avoid being spat at was "unbelievable". Furthermore, the investigating officer expressed the view that "his defence in my view is illogical within the context of the evidence" and that "given that his defence entirely relied upon the act of self-defence a serious doubt is raised concerning his credibility on this point".

102 Notwithstanding the fact of conviction and the rejection of the defence of "self-defence" by the Magistrate, the Commissioner of Police after re-considering all of the factors found that his confidence in the officer's suitability to continue as a member of the Police Service had been restored. This was after the Commissioner of Police commented:

> "You have maintained in your response that your actions in slapping X was to prevent her spitting at you, a justification of self-defence which was rejected by Magistrate Black. I also find this explanation unconvincing and incongruent with the evidence of all the other witnesses as to what was said and done by you …

> … It concerns me when considering your future that you have persisted with this self-defence explanation to justify your unprofessional conduct."
>
> (*Copy of correspondence included as attachment to Affidavit of the witness*)

103 The next officer to give evidence was charged with making a false statement under the *Stamp Act 1921* in 1999. He pleaded guilty and was fined $200 and a spent conviction was ordered. The sentence was appealed by the complainant and the appeal was upheld. The fine was increased to $1000 and the spent conviction was set aside. In the course of the decision which issued on 14 September 2000 McKechnie J stated:

> "I note that a conviction recorded against the respondent is likely to have particular consequences in view of his occupation as a police officer. The offence was not committed in the course of that occupation, but related to an ancillary business venture. This is a factor to be weighed. On the other hand, there may be a public interest in recording a conviction against a person whose daily duties involve them in the administration of justice, enforcing the law or holding a position of public trust.
>
> By my finding, this was not a spur of the moment careless breach of the Stamp Act but a deliberate attempt to evade duty. Furthermore, no remorse is demonstrated by the continuation of the evasion up to the hearing before the Magistrate"
>
> (*Attachment to the Affidavit of the witness*)

104 The Commissioner of Police issued a Notice of Intention to Remove the officer from the Police Force on 7 September 2001. The reasons for initiating removal action included reference to the conclusion that the officer had "wilfully misled" the investigating officer of the State Revenue Department in December 1998 and then in August 1999 sent a letter to the Presiding Magistrate that "contained information that was false in relation to the facts surrounding the purchase of the motor vehicle". The summary of investigation which the Commissioner of Police took into account in formulating his reasons for the officer's removal noted that by maintaining this deception (about the facts surrounding the purchase of the motor vehicle) the officer had attempted to place before the Magistrate a set of circumstances that were untrue.

105 It is noted that the officer pleaded guilty to the charge before the Magistrate but this was in the context of having proffered to the Court information which was false.

106 The officer attests to the Commissioner of Police regaining confidence in his ability to effectively discharge the functions of his office as a member of the Police Force. That advice was conveyed to the officer in November 2001 some 14 months after his decision by the Supreme Court which withdrew the spent conviction and imposed the additional fine of $1000.

107 The final matter to which the Commission's attention was drawn involved the criminal conviction of a constable arising from an incident with a 19 year old male. The constable considered that an offence had been committed and that in striking the youth on the knees with his baton the constable believed he was entitled to use that amount of force in discharging his duties. The court rejected that defence and the constable was convicted of assault and fined $1500. In the investigating officer's report the constable's use of force was described as "unprovoked and unnecessary". The youth was not charged with any offence. Disciplinary action was taken against the constable by the Commissioner of Police under section 23 of the *Police Act 1892*. At no stage did the Commissioner lose confidence in the constable's ability to serve as a member of the Police Force.

108 The Appellant cites each of these cases to show that matters of public interest have not been prejudiced notwithstanding that the three members have received criminal convictions. Each has attested to the following:

> "Since my conviction I have had no comment made to me in relation to my suitability to be a police officer from any member of the public or any solicitor or court officer during a trial in which I have given evidence.
>
> I am not aware of any adverse consequences to the Western Australian Police Service as a result of the Commissioner of Police retaining confidence in me and allowing me to continue to discharge my duties as a police officer."
>
> (*Attested to by each witness by way of affidavit*)

109 We have taken into account each ground of appeal cited by the Appellant and reviewed all of the evidence presented on his account. There are difficulties for the Appellant in maintaining the position that he has taken from the outset of the investigation with respect to his version of the incident on 7 December 2002. As noted the fact of his criminal conviction could not be attacked or called into question by a collateral attack in these proceedings. This was not attempted and the particular facts established by the conviction need to be considered within the context of the Appellant's suitability to continue as a member of the Police Force when the Commissioner of Police has lost confidence in his ability, having regard to the conduct cited as the reason for his removal.

110 We have considered these issues which go to the interests of the Appellant and how they may be seen as being balanced with matters of public interest, including those set out in section 33Q(4)(b)(i) and (ii) of the Act.

Addressing the requirements of section 33Q(1)(c):

Thirdly, the WAIRC shall consider the case presented by the Commissioner in the Appellant's Case

111 The Respondent sets out the legal principles that he considers should be addressed in dealing with appeals against removal action.

112 First, it is emphasised that there must be an appreciation of the very wide managerial power to remove police officers that resides with the Commissioner of Police under section 8 of the Act.

113 As statutory officers not all the principles that arise in the cases that deal with unfair dismissals necessarily apply to police officers under the *Police Act 1892*.

114 Under the Act the Commissioner is entrusted with the responsibility to act to maintain public confidence in the Police Force and its members and to take prompt action to that end if he sees it necessary and desirable (*R v Miller*; ex parte Parker, unreported, WA Full Court, Lib No 980249 per Franklyn at 11). It is the responsibility of the Commissioner of Police to ensure that only officers who are trustworthy and adequately behaved should remain in the Police Force (*Bigg v NSW Police Service* (1997) 72 IR 330 at 332).

115 Removal of an officer from the Police Force is not done as a punitive measure. In this case there is no charge of misconduct nor was it to be the basis upon which punishment was determined. Removal action results from the Commissioner of Police's lack of confidence in a member's suitability to continue in the Police Force, it is effected to protect the public, to maintain proper standards of conduct of members and to protect the reputation of the Police Force.

116 Removal from the Police Force under the Commissioner of Police's loss of confidence is not an avenue through which to exact retribution (*Minister for Police & Another v Smith* (1993) 73 WAIG 2311 at 2327).

117 The Respondent points out that when considering appeals against removal action, it is not a question of whether the "punishment fits the crime" but rather has the action been justified to maintain the proper functioning of the Police Force?

118 The effectiveness of the police in protecting the community rests heavily upon the community's confidence in the integrity of members of the Police Force, upon their assiduous performance of duty and upon judicious exercise of their powers (*Public Service Board and Another v Morris and Martin* (1984-85) 156 CLR 397 at 412).

119 On the basis of the above principles and subject to the statutory requirements set out in section 33Q of the Act in conducting an appeal it is, in the Respondent's view, appropriate for the WAIRC to adopt the approach which it set out in the Report to the Minister under section 80ZE of the *Industrial Relations Act 1979* on 18 December 1998:

> "We have approached the matter on the basis that the Commissioner of Police has a statutory duty to maintain an efficient and effective Police Force in which the public has confidence. It is trite to say that the "effectiveness of the police in protecting the community rests heavily upon the community's confidence in the integrity of the members of the police force, upon their assiduous performance of duty and upon the judicious exercise of their powers". Moreover, we have approached the matter, recognising that it is the Commissioner of Police, and not us, who is charged with the responsibility of managing the Police Force. In common with industrial tribunals in other States, the Industrial Commission has been at pains to point out that in examining allegations of harsh, oppressive or unfair dismissal from employment the Commission is not to put itself in the position of taking over the management of the relevant workplace by substituting its opinion for that of the appropriate manager. Instead, its task is to determine whether there was a fair and reasonable explanation for the decision of the manager, which when viewed objectively, would be regarded by fair-minded persons as being totally legitimate. In the context of this review, the question is whether the recommendation of the Commissioner of Police was one which was open to a fair-minded person charged with the statutory responsibilities of the Commissioner of Police. In considering that question, it is necessary to have regard for the fact that … as with all members of the Police Force, occupies a statutory office, which is unlike that held by most other people who come before this Commission complaining of being unfairly dismissed from their employment. The duties and responsibilities of members of the Police Force are such that the public is entitled to expect that they always act in a way which is above suspicion and reproach.
>
> As already noted, the Commissioner of Police … asserts that by reason of his conduct, whether or not it constitutes misconduct, he has lost all confidence in his capacity to fulfil the role of a member of the Police Force. He is not recommending that he be removed from the Police Force as a punitive measure but as a means of maintaining confidence in the Police Force. Industrial tribunals, and indeed the civil courts, for a long time have made it clear that in such circumstances it is not necessary that the Commissioner establish that the police officer concerned is guilty of misconduct, but simply that there be a proper basis upon which the Commissioner of Police could conclude that the conduct of the police officer in question was of such a nature as to put the public confidence in the Police Force in jeopardy. For the Police Force to have the confidence of the public, members of the Police Force must not only act above suspicion and reproach but be seen [to] act above suspicion and reproach."

120 In answer to the first ground of appeal there is the allegation that the Commissioner of Police took into account additional material not referred to in the Notice of Intention to Remove i.e. IIU and IAU complaints and that the Appellant was not given the opportunity to comment on the memorandum of the Assistant Commissioner of Police (Professional Services) of 23 September 2003.

121 The Respondent submits that this ground of appeal falls away as there is no obligation on the Respondent to provide the Appellant with an opportunity to provide a response to the IIU and IAU Complaints Histories nor to the Assistant Commissioner's memo, either under the Memorandum of Understanding which regulated appeals prior to August 2003, or under the statutory provisions which had effect from 27 August 2003.

122 Furthermore, in any event the Appellant has now, through tendering new evidence, had the opportunity to provide a response to his IAU and IIU Complaints Histories as well as to the memo dated 23 September 2003.

123 The Respondent then points out that the mistakes of fact identified in Ground 1(b) have been rectified by the new evidence submitted by way of affidavit from John Hallett on the Appellant's account.

124 It is noted that the matters raised in grounds 1(a) and (b) of the Appeal have been considered by the Commissioner of Police and are the subject of comment in his re-formulated reasons for taking removal action as set out in the letter to the Appellant dated 27 May 2004.

125 By ground 1(c) the Appellant attacks the Respondent's reliance on "unsworn and untested evidence of intoxicated juvenile witnesses" which he says was specifically excluded from the materials taken into account by the Respondent in making the determination to issue the Notice of Intention to Remove. The Appellant goes on to assert that in reliance on that exclusion he specifically did not comment on the evidence of those witnesses in his response. However, the Appellant asserts that this evidence was then included by the Reviewing Officer in his subsequent report dated 5 September 2003 and was taken into account by the Commissioner of Police in making the determination to remove the Appellant from the Police Force.

126 The Respondent points to the Appellant's response to the Notice of Intention to Remove dated 1 August 2003 and notes that reference is made to "the many inconsistencies in the statements of those witnesses" (Appeal Book folio 89).

127 The Respondent submits that it is quite clear that the Appellant was aware of the evidence of the witnesses in question but for his own reasons chose not to make a detailed response. This the Respondent surmises may have been either because of the nature of that evidence against the Appellant or for tactical reasons in view of the prosecution he faced.

128 As far as the Respondent is concerned, regulation 6A07 enables the Commissioner of Police to receive additional information following receipt of a police officer's written submission. In view of the denials put up by the Appellant and the claim that indeed it was him that was assaulted, the Commissioner of Police then received the evidence of six other witnesses. The Commissioner was entitled to do this under the Regulations. It is submitted there can be no complaint on this ground.

129 The Respondent answers the claim about receiving "unsworn" and "untested" evidence by pointing to the outcome of the trial before the Court of Petty Sessions. As to who started the altercation and as to who was assaulted the findings of the Magistrate cannot now be challenged. The Appellant cannot (and indeed did not) assert in the appeal that the evidence of the witnesses in question was false as this would amount to a collateral attack on his conviction (*Smith v Director General of Transport* op cit). However, the Respondent submits that the Appellant cannot escape the fact that he lied to the Commissioner of Police. There remains in the Respondent's view a continuing unwillingness in these proceedings to accept the truth of what happened.

130 In electing to proceed with removal action before the outcome of the criminal trial it is argued that the Commissioner of Police should have accepted the evidence of the Appellant over the unsworn, uncorroborated and conflicting evidence of the intoxicated youths.

131 The Respondent points out that it is clear that the Commissioner of Police does not have to wait for the outcome of related criminal proceedings before recommending removal action (section 33W of the Act).

132 While acknowledging that there are some inconsistencies in the evidence of the witnesses they were consistent in stating that the Appellant had head-butted Brown. Further, it is submitted that in any event, the reasons for decision of the Magistrate dated 10 December 2003 in the Appellant's criminal trial, makes it clear that the Appellant cannot now argue that his evidence was truthful and that of the witnesses against him was untruthful (*Smith v Director General of Transport* op cit).

133 The Respondent submits that it is an extraordinary proposition that there was in any sense entrapment of the Appellant by the Commissioner of Police by moving to remove the Appellant from the Police Force prior to the criminal trial. The inference which could be taken from the Appellant's argument under this ground of appeal is that the Commissioner of Police "should wait to allow the Appellant to see if he could get off at the trial so that he can see whether he could lie in his response" to the Commissioner of Police. The Respondent emphasises that a member of the Police Force is obliged to tell the truth, the whole time, whether in response to the Commissioner or in Court.

134 The Respondent acknowledges that there are inconsistencies in the evidence of the witnesses to the Appellant's conduct but they were all consistent in stating that the Appellant had assaulted Brown. The relevant extracts were placed before the Commissioner of Police in the Review Officer's report of the responses given by the Appellant to the Notice of Intention to Remove (refer to Appeal Book pages 118 and 119).

135 The Respondent submits:

> "Now, the final point – and this is really the nail in the coffin for this ground of appeal, as it is for so many others – is that given the result in the criminal trial it is now accepted that the Appellant's evidence that he hadn't started this fight, that he was acting in self-defence, was simply false and so it cannot now be said that that evidence should have been accepted over the evidence of the other people because it's clear now that the other people were telling the truth and that the Appellant was lying. For that reason as well, that appeal ground must fall away."
>
> *(Transcript p 94)*

136 With respect to appeal ground 1(e) that the Respondent accepted the unsworn and untested evidence of the complainant in preference to the evidence of the Appellant, even without the conviction it is submitted that the Appellant's story is inherently improbable. To accept the Appellant's version of events requires acceptance that the seven young people conspired together to set up the Appellant. This was specifically rejected at the trial.

137 Another reason why the Respondent argues that the Appellant's story is inherently improbable is that it requires acceptance that after being assaulted without provocation the Appellant, who is a police officer for some 13 years, makes no effort to arrest or charge the person who has assaulted him. Neither does the other police officer who was there at the time.

138 It is submitted that ground 1(f) suffers from the same fatal flaw. That ground states:

> "The decision of the Respondent is based on conclusions which could not reasonably be drawn from the material before him as the evidence of the witnesses is not supported by the independent evidence of the treating medical practitioners or the attending police officers."

139 The response points to the report from the Acting Senior Medical Officer in the Kimberley Health Region, dated 10 December 2002:

> "He (Brown) presented at 1514 on 7 December 2002. He alleged he had been head-butted and punched several times in the face. At the time of the injuries he had had a bleeding nose. No loss of consciousness occurred. At that time he had a painful left cheek, upper lip and left anterior neck/sternomastoid.
>
> Examination revealed the following injuries:
>
> 1. Abrasion to right nasal mucosa
> 2. Bruising, swelling and tenderness to the left corner of mouth and left cheek.
> 3. Small abrasion on right neck
> 4. Chipped upper canine
> 5. Tender left upper sternomastoid. …
>
> The injuries are consistent with having been inflicted as alleged …"
>
> (*Appeal Book Pages 47 and 48*)

140 Given the findings made by the Magistrate, it is submitted that, for the purposes of these proceedings, the Appellant did in fact attack Brown; ground 1(f) is simply inarguable.

141 Ground 1(g) raises the issue of "whether the punishment fits the crime". Are the consequences for the Appellant disproportionate to the gravity of the conduct?

142 The Respondent submits that the removal of a member under section 8 of the *Police Act 1892* is not about punishing police officers for misconduct, this is dealt with under disciplinary matters elsewhere in the Statute. Section 8 is about protecting members of the public, maintaining standards of conduct and protecting the reputation of the Police Force. The public is entitled to expect that police officers will always act in a way which is above reproach. In this way they are different from most people. They are not employees they are police officers at all times, not just when they are on duty.

143 The Respondent submits that the Appellant has been a police officer for 13 years and just as the Magistrate observed, he really should have known better.

144 Rather than seeing if the "punishment fitted the crime" the question to be addressed according to the Respondent is that given the Commissioner of Police's statutory duty was it fairly open to him to recommend the removal of the Appellant to protect members of the public, to maintain standards of conduct of the Police Force and to protect the reputation of the Police Force?

145 The Respondent submits that when this test is applied it is apparent that it was open to the Commissioner of Police to take the course he did.

146 As to the evidence presented by three serving police officers with criminal convictions, that in the Respondent's view goes to an argument that says "Well look, there are people that are worse than me, and they are police officers. Why can't I be a police officer?" That is rejected as an acceptable line of argument. The issue is really, given the Appellant's conduct, what is the position with regard to him? In any event the comparisons that are drawn are not 'like with like'.

147 The constable who assaulted the 19 year old male had been out of the Police Academy only 9 months. He honestly believed he had the authority to use the force that he did. The Court considered that was not the case. The constable did not lie to the Court, he pleaded guilty. The circumstances where a young, inexperienced officer uses excessive force is quite different to an experienced officer, who under the influence of alcohol beats up a young man then lies about it. There can be no comparison between the two.

148 The Respondent acknowledges that the cases of the other two officers are a "bit more borderline". This is reflected in the Commissioner of Police's decision when he revoked the Notice of Intention to Remove.

149 First there was the officer who assaulted the 10 year old girl by slapping her across the face. He did not hit her with such force as to leave a permanent mark, nor as in this case, to cause bleeding or to chip a tooth. In response to the section 8 notice he maintained the defence of self-defence. The Commissioner of Police saw through that but responded to the plea for a second chance. Again that was a borderline case.

150 It is submitted that, with respect, it is not for this Commission to sit in judgment of what was done on that occasion. It is for the Commissioner of Police, given his experience and expertise in the area, to make the call as to which side of the line an individual may fall.

151 As to the officer who fraudulently misrepresented the purchase of a vehicle to evade stamp duty; he pleaded guilty to the charge and was the subject of a section 8 notice. The officer said he took responsibility for what he did and asked for a second chance. It is submitted that the point can be fairly made that this offence is not as serious as assaulting someone by head-butting them, punching them then lying to the police investigators, the Court and the Commissioner of Police. It doesn't excuse what this officer did and it was a difficult decision for the Commissioner of Police.

152 It is submitted that it is not for the WAIRC to stand in the Commissioner's shoes and proclaim that it would have done something different.

153 The WAIRC must accept that in the cases cited where confidence in the member's suitability was retained, the Commissioner of Police weighed up all of the issues, not least of which may have been the seriousness of the offence and the fact that each of the officers took responsibility for their actions.

154 It is not the function of the WAIRC to go through each case under section 8 of the *Police Act 1892* and make comparisons to see how "each stacks up against the others".

155 Ground of Appeal 1(h) takes exception to the conclusion that the Respondent has concluded that the "conduct and integrity" of the Appellant does not meet the high standards required and expected of a member of the Police Service when there is no issue of integrity raised in the material before him.

156 In answer to this the Respondent points out that in the re-formulated reasons for loss of confidence, no reference is made to the "integrity" of the Appellant. Therefore, this ground of appeal falls away. However, on reflection the Respondent considers that by his actions following the assault the Appellant proffered a version of events to suit himself to avoid the truth. In the Respondent's view this showed a level of dishonesty and lack of integrity. By lying to superior officers, the Court and the Commissioner of Police, it is submitted that the Appellant lacks the integrity necessary to fulfil the role of a member of the Police Service.

157 Under ground 1(i) the Appellant argues that the conduct referred to by the Respondent does not have a relevant connection to the employment of the Appellant sufficient to warrant removal action being taken. The conduct does not undermine the Appellant's capacity to perform his duties or diminish his status and authority to such an extent that it affects his fitness to discharge the duties of his office.

158 In response to this the Respondent notes that the Appellant accepts that particularly in small towns the conduct of police officers must be exemplary at all times.

159 The Respondent points to the Magistrate's reasons for decision in which he observed that in assaulting Brown, the Appellant did immeasurable harm to his own position as a police officer as well as to the reputation of the Police Force as a whole. Furthermore, the Magistrate commented on the lasting impact his assault on Brown will have on the young people present that night. The Magistrate noted that this will affect the way they will judge other police officers.

160 It is submitted that the Appellant cannot take any comfort from the fact that the Appellant continued to work in Broome for a further 11 months after the incident. The Appellant was taken off operational duties. There is no evidence before the WAIRC as to the Appellant's reputation.

161 It is emphasised that the WAIRC should not draw any conclusion adverse to the Respondent because the Appellant remained working while the process which culminated in his removal was worked through. The Respondent submits that as a matter of commonsense, if a police officer assaults a member of the public it damages the reputation of all police officers.

162 The point is made by the Respondent that it must be borne in mind what section 8 proceedings are all about; why officers are removed from the Police Force. It isn't simply about their ability to continue to do the work, it is about protecting the public and protecting the reputation of the police force.

163 Even on the basis of normal employment relationships, the misconduct committed by the Appellant would justify dismissal. But here, it is argued, we are dealing with the removal of an officer not solely because he cannot do his duty but to protect the public and to protect the reputation of the Police Force. These factors must be balanced when looking at the fairness of the Commissioner's recommendation for removal.

164 Turning to ground 1(j), the Appellant submits that at the time of the incident, the Appellant was on a return to work programme, was recovering from post traumatic stress disorder and severe major depressive illness. He was on medication as a direct consequence of injuries received and victimisation suffered whilst fulfilling his duties as a Police Officer.

165 The Respondent notes that the Appellant did not seek to rely on recovery from these illnesses to justify his actions. Rather he denied that he had unlawfully assaulted Brown and wrongly accused him of assault.

166 The Respondent notes the medical reports tendered in the Appeal Book. The letter from the Psychiatric Registrar dated 30 July 2003 notes the requirement for "intense treatment for a Severe Major Depressive Illness over the last six months." That period is after the assault incident in December 2002 (Appeal Book Page 91).

167 A letter from a Psychologist refers to counselling going back to October 2002 associated with "significant stress related to on-going difficulties at work. He also reported depressive symptoms, which were regularly impacting on his work, family and social life. His symptoms appeared consistent with a Major Depressive Episode …" The letter goes on to record that:

> "By 24 February 2003 Allan appeared to be making good progress and that he reported his depressive symptoms had subsided and he was able to manage stress more effectively both at home and at work. Allan attended a follow up session on 26 March 2003 where he reported he had maintained good progress, therefore, he would require no further sessions at this stage."
>
> (*Appeal Book folio 100*)

168 The Respondent points out the inconsistency between the two reports. The psychiatrist notes that for the first six months of 2003 the Appellant has severe major depressive illness which requires intensive treatment, whereas the psychologist records

that by February 2003 he is making good progress and his depressive symptoms have subsided. This contradiction remains unanswered.

169 It is also noted by the Respondent that in the record of interview conducted on 31 December 2002 the Appellant affirmed a full recollection of everything that occurred on the evening of the assault and expressed the view that he did not believe medication or alcohol impaired his judgment or made him intoxicated.

170 The Respondent makes the point that there was no suggestion from the Appellant at the time that his medication in any way caused him to do what he did nor the fact that he was recovering from illness could excuse his conduct. There is no medical evidence before the WAIRC to show that in some way the Appellant was incapable of controlling himself.

171 The Respondent refutes any suggestion that the Commissioner of Police had a duty to inquire into the Appellant's mental state given the fact that he was on a return to work programme in December 2002. This is said to be the case because the Appellant flatly denied that he had started the altercation or that he had head-butted the 19 year old male.

172 In the light of the denial it is submitted that it cannot be expected that the Commissioner of Police will "go hunting around every other peripheral issue that happens to be raised in response" (transcript page 113).

173 The Respondent submits that because the Appellant did not seek to justify his action by reference to his medical condition it does not behove him to try and do so after his conviction.

174 Finally, the Respondent reminds the Commission that the burden of establishing that the decision to take removal action was harsh, oppressive or unfair always rests with the Appellant.

Conclusion

175 As the Commission granted both parties leave to tender new evidence and this occurred right up to the time of the hearing, the case for the Appellant extends beyond the grounds that were submitted at the time the appeal was first lodged. Taking all of the evidence into account the thrust of the Appellant's case focuses on the following broad areas:

- The alleged unfairness which arises from the process whereby evidence was collected and made available for comment.
- The alleged lack of consideration given to matters going to the Appellant's interests; and
- An alleged failure in considering public interest in the light of other cases and the public perception of the Appellant's conduct.

176 In considering the Appellant's case in the broader context either as matters directly addressed or arising from or as a consequence of matters raised, the following questions and issues need to be addressed:

- Did the Commissioner of Police limit the evidence presented to the Appellant for comment and response and even if that was the case did consideration of what was tendered as new evidence rectify any fault?
- Were the conclusions reached by the Commissioner of Police as to the Appellant's behaviour reasonably open to him?
- Has the Commissioner of Police confused "integrity" with the conduct cited and thereby extended the reasons for the loss of confidence without a proper basis for so doing?
- Should a distinction be drawn between the assessment of evidence made by the Commissioner of Police on what was before him at the time he formulated the reasons for his loss of confidence in the Appellant and the findings which were subsequently made by the Court when the Appellant was convicted?
- Has there been a failure on the part of the Commissioner of Police to fully appreciate and to take into account the following matters?
    - That the incident occurred "out of hours" while the officer was off-duty.
    - That the Appellant was in a difficult situation. He was acting as a parent and carrying the responsibilities of a police officer.
    - That the decision to remove the Appellant has a dramatic economic impact on the Appellant and his family.
    - That insufficient weight was given to the Appellant's length of service as a police officer and as a member of the Royal Australian Navy serving the community.
    - The findings of the Magistrate that the Appellant was affected by alcohol and that at the time of the incident he felt threatened, were not considered or were not sufficiently considered by the Commissioner of Police.
    - The Commissioner of Police failed to take into account or to sufficiently consider that at the time of the incident the Appellant was on a return to work programme. Although the Appellant did not plead it, his state of mental health should have been considered by the Commissioner of Police.
- Did the Commissioner of Police consider the public interest in disregard of the Appellant's interests? According to the Appellant the incident received little or no publicity in the local community. Other officers have been convicted of offences after maintaining defences of "self-defence". The Commissioner of Police was prepared to revoke the loss of confidence in their suitability to continue as members of the Police Force. On the same measure is it unfair for the Commissioner of Police to re-affirm his loss of confidence in the Appellant?

177 In considering the case presented it is important from the Respondent's viewpoint for the WAIRC to appreciate that the Commissioner of Police is entrusted with the statutory responsibility to maintain an efficient and effective Police Force in which the public has confidence. In performing this duty the Commissioner of Police is given wide powers under section 8 of the *Police Act 1892* to remove officers in whom he has lost confidence.

178 Importantly, it is emphasised that it is not the WAIRC's role to take over the management of the Police Force with respect to the retention or removal of the Appellant as a member of the Police Force, by substituting our opinion for that of the Commissioner of Police. Adopting what was said by the WAIRC to the Minister in a report under section 80ZE of the Industrial Relations Act dated 18 December 1998 "… the question is whether the recommendation of the Commissioner of Police (to remove the Appellant) was one which was open to a fair-minded person charged with the statutory responsibilities of the Commissioner of Police."

179 It is the Respondent's case that this appeal should be considered on the basis of these principles.

180 We re-affirm acceptance of statements set out above going to the Commissioner of Police's statutory function in maintaining public confidence in the Police Force and his wide powers under section 8 of the *Police Act 1892*, to ensure that the public interest is served. What needs to be identified is the test to be applied to ascertain whether the decision of the Commissioner of Police to take removal action relating to a member of the Police Force was harsh, oppressive or unfair.

181 In this respect it is appropriate to set out what was stated by Brinsden, J in *Undercliffe Nursing Home v The Federated Miscellaneous Workers Union of Australia, Hospital, Service & Miscellaneous, WA Branch* (1985) 65 WAIG 385:

> "The jurisdiction has been variously stated: in *re Loty and Holloway v Australian Workers' Union* (1971) AR 95 at 99 Sheldon, J said that even though in the dismissal be it summary or on notice, the employer has not exceeded his common law and/or award rights, the Court was entitled to enquire as to whether the employee had received "less than a fair deal". He also approved what had been said in an earlier case whether there had been "a fair go all round". In a later case *Metropolitan Meat Industry Board v Australian Meat Industry Employees' Union* (New South Wales Branch) (1973) AR 231 at 233 Watson, J thought that even if there are grounds for terminating the contract of employment it was still open to the tribunal to examine the severity or otherwise of the step of dismissal. In the majority judgment in *Western Suburbs District Ambulance Committee v Tipping*, at 277 their Honours stated the question as being "whether the employer's action was harsh or unjust or that the employer had abused his right to dismiss his employee". In that case they considered the union had made out its case in connection with an employee whose services had been terminated pursuant to the award without any reason being given, the employee having been of impeccable conduct and service over a long period of years. Finally, in *North West Council v Dunn* 129 CLR 247 at 263 Walsh, J specifically approved a test stated by McKeon, J in the case immediately last cited as being the question to ask:
>
> > Has there been or has there not been oppression, injustice, or unfair dealing on the part of the employer towards the employee?
>
> As His Honour points out the question to be investigated is not a question as to the respective legal rights of the employer and the employee but a question whether the legal right of the employer has been exercised so harshly or oppressively against the employee as to amount to an abuse of that right?"

182 While the notion of a "fair go all round" encapsulates the test against which harshness, oppressiveness or unfairness of a member's removal is to be judged in an industrial sense, the provisions of section 33Q(4) of the Act impose a specific duty on the WAIRC in determining an appeal in that "it shall have regard to –

(a) the interests of the Appellant; and

(b) the public interest, which is taken to include

(i) the importance of maintaining public confidence in the integrity, honesty, conduct and standard of performance of members of the Police Force; and

(ii) the special nature of the relationship between the Commissioner of Police and members of the Force."

183 This provision ensures that the industrial standard based as it is on an employer/employee relationship is, in the circumstances of this statutory appeal process, particular to the service within the Police Force.

184 The interests of the Appellant and those aspects of public interest which go to the maintenance of public confidence in the Police Force have been identified by the parties in the cases considered here under section 33Q(1) of the Act, or in the reiteration by the WAIRC of legal principles which apply in an appeal.

185 What has not been articulated is the special nature of the relationship between the Commissioner of Police and members of the Police Force under section 33Q(4)(b)(ii) of the Act, which goes to the public interest and how these are to be regarded by the WAIRC in determining the appeal.

186 In our view this provision serves to remind the WAIRC to take into account that the nature of the relationship between the Commissioner of Police and members of the Police Force extends beyond those duties and obligations which are implied in normal employer/employee relationships. It goes beyond the member's duty of honesty, fidelity, obedience and to co-operate and the Commissioner of Police's duty to provide training and a safe work environment. It encompasses the commitment of a member to discharge the requirements of his/her commission whether on duty or off duty and to serve as a member of a disciplinary force. While the very nature of policing assumes that the environment in which members discharge their duties will not always be safe it is the duty of the Commissioner of Police to ensure that members receive appropriate education, training, information and supervision in order for them to make decisions appropriate to the proper discharge of their duties and in the public interest.

187 It is within the context of this relationship between the Commissioner of Police and the Appellant that the WAIRC must, in addition to the other matters cited in the statute, have regard in determining the appeal.

188 We consider that the specific requirements for the WAIRC to have regard to the interest of the Appellant and the public interest which is taken to include those matters set out in section 33Q(4)(b)(ii) of the Act can be accommodated with the industrial notion of a "fair go all round". We now turn to the grounds of the appeal and matters which were argued before us.

189 There is nothing which prompts us to consider that the Commissioner of Police's reasons for removing the Appellant from the Police Force can be impugned under matters which go to procedural fairness. This includes the evidence upon which the Commissioner initiated the Notice of Intention to Remove the Appellant, the information that was made available to the Appellant nor on subsequent matters considered by the Commissioner of Police, including the information he received following the review of the Appellant's response.

190 There are two matters which are relevant to the consideration of those elements of the appeal which go to the questions upon which the decision to remove the Appellant was based. First, there is the fact of the conviction. Second is the process which enabled the Commissioner of Police to re-formulate his reasons for determining that he had lost confidence in the Appellant to continue to serve as a member of the Police Force.

191 Notwithstanding anything that has gone before by way of an investigation, the fact of a member's conviction establishes the factual issues upon which the determination of guilt has turned. It matters not that the decision to remove the Appellant was made before the Court determined those issues. The appeal cannot be determined on the basis of an artificial premise that sets aside the fact of conviction for it to be considered only in the context of public interest after the Commissioner of Police's reasons for determining the Appellant's removal have been looked at in isolation.

192 The Commissioner of Police is duty bound to take into account any written submissions in response to the Notice of Loss of Confidence given before removal action is taken (section 33L(4)(a)). If removal action is pursued, the Appellant is to be advised of the reasons for the decision (section 33L(5)(a)).

193 The new evidence tendered under section 33R affords the Commissioner of Police the opportunity to re-formulate his reasons for not having confidence in the Appellant's suitability to continue as a member of the Police Force (section 33R(8)(a)).

194 If the reasons are re-formulated the Commissioner of Police is required to give the WAIRC and the Appellant notice in writing of the re-formulated reasons before resumption of the hearing. There is no obligation imposed on the Commissioner of Police to give the Appellant the opportunity to again provide a written submission in response to the re-formulated reasons.

195 In this case, however, the Commissioner of Police took the opportunity to address matters which were the subject of new evidence tendered by the Appellant. In this regard the Appellant was not disadvantaged by not knowing what the Commissioner of Police had taken into account. The letter titled "Re-formulated reasons for loss of confidence under section 33R(8) of the *Police Act 1892*" from the Commissioner of Police dated 27 May 2004, ensured that the Appellant's concerns about the correct interpretation of affidavit evidence of Senior Sergeant John Hallett and IIU and IAU Complaints Histories were before the Commissioner of Police.

196 In this respect there were no residual matters arising from the Appellant's written submission under section 33L(2) of the Act which were either not before the Commissioner of Police or were not the subject of clarification.

197 The Commissioner of Police did not limit the evidence presented to the Appellant for comment, and matters which were before the Commissioner of Police by way of new evidence ensured that any issues to which the Appellant wanted consideration given were presented to the Commissioner.

198 The WAIRC does not accept that the Commissioner of Police's reference to the Appellant's lack of integrity as well as reliance upon the Appellant's conduct as the basis upon which loss of confidence was founded are incompatible or are so separate and distinct so as to give cause to uphold the appeal on the basis that the reasons formulated by the Commissioner of Police are faulty. From the outset when the Notice of Intention to Remove was formulated, the Commissioner of Police stated that he was not satisfied that the Appellant's "integrity, honesty and conduct are of the standard expected or required of a member of the Police Force…"

(*Appeal Book, page 19*)

199 The subsequent notice of removal reiterated reference to the Appellant's "conduct and integrity" (Appeal Book, page 122A – Copy of Memo to Minister for Police and Emergency Services dated 2 October 2003). Finally, in the re-formulated reasons for loss of confidence under section 33R(8) of the Act reference was specifically made to the Appellant's conduct on 7 December 2002 in unlawfully assaulting Brown and to the Appellant's denial of that conduct, as well as the assertion that it was Brown who struck the Appellant first. In our view those denials go to the issue of the Appellant's integrity.

200 What cannot be avoided are the facts that have been established. It was the Appellant who initiated the altercation on 7 December 2002, it was he who head-butted the 19 year old male and notwithstanding the warnings given at the outset of the investigation as to his duty to answer all the questions truthfully, the Appellant persisted with a version of events which sought to deny culpability and mislead the Commissioner of Police. It was an explanation perpetuated before the Court and one which was roundly rejected.

201 The offence of which the Appellant was convicted went beyond common assault to assault occasioning bodily harm. Put in the context of an employee/employer relationship given that the conduct occurred out of hours, it would be necessary to consider whether the Appellant's behaviour had seriously damaged that relationship by being incompatible with the employee's duties or the employer's interests. However, when matters of public interest (as understood by reference to section 33Q of the Act) and the special relationship between the Appellant and the Commissioner of Police, which emphasises a duty to obey and uphold the standards of policing are taken into account, it is difficult to see that the decision to remove the Appellant from the Police Force could be harsh, oppressive or unfair.

202 Consideration of the matter, however, on such a narrow basis does not alone justify that conclusion. The notion of a "fair go all round" within the context of the Police Act demands that matters going to the interests of the Appellant require particular consideration. This, it is noted, is not only an obligation imposed on the Commissioner of Police but specifically one to which the WAIRC must have regard. It is not sufficient for us to note that the Commissioner of Police took these matters into account in reaching his decision to remove the Appellant from the Police Force. The WAIRC must make an independent assessment of the interests of the Appellant in determining whether removal from the Police Force was harsh, oppressive or unfair. We have in this respect identified all of the issues to which we must direct our attention.

203 These have been enumerated in our consideration of that which was put to us in the Appellant's case as well as what was submitted to the Magistrate on the Appellant's behalf before he was convicted. In summary, those matters go to the fact that the Appellant was off-duty at the time of the incident. He was acting as a parent in attempting to address a problem involving his son. As an officer with 13 years' service he had not been involved in this type of behaviour before. The incident took place in the space of less than a minute; the Appellant acknowledges that he should not have approached the youths that evening. The Magistrate found that the Appellant was affected by alcohol and at the time of the incident had felt threatened. In the light of this, the Appellant's behaviour could be seen as an aberration. The removal from the Force has had a dramatic economic impact on his family.

204 In considering matters which go to the interests of the Appellant we also note that at no time during the incident did he attempt to use his authority as a policeman to intimidate Mr Brown. In some respect this confirms the position that he was acting as a parent, albeit that because of his commission he was at all times a police officer.

205 We also note the matters which were tendered in new evidence which show that the Commissioner of Police has been able to retain confidence in other officers, notwithstanding their criminal conviction. It is sufficient to note that for the purpose of whether any sense of grievance arises from the outcomes of their cases compared with that of the Appellant, that consideration was given to their respective positions under a process which ensured that the Commissioner of Police took into account the fact of their conviction as well as the officers' responses. A different outcome does not imply an injustice. What is important is that the process by which the respective cases was dealt with was substantially consistent. Consistency does not necessarily mean equality of outcome (Madgwick, J in *Capral Aluminium Ltd v Sae* (1997) 75 IR 65).

206 Finally, we note that although it was never a matter which was put in issue either in the Commissioner of Police's investigation or in court proceedings, the Appellant had been suffering psychiatric problems for some time prior to the incident. He was, at the time of the assault, on a restricted work programme.

207 The *Police Act 1892* requires us to not only take into account those matters that are in the interests of the Appellant and the public interest but also those which go to the special relationship between the Commissioner of Police and members of the Police Force. In this regard there is an all encompassing requirement for members to uphold the highest standards of ethical behaviour. The Magistrate's assessment that the Appellant had done immeasurable harm to other Police officers in this State is not insignificant. A review of the *Police Force Regulations 1979* shows the scope and detail of the relationship and the duty that a member of the Force has under his/her oath.

208 There is, however, a reciprocal duty within that relationship. It is that which the Commissioner of Police owes to members to maintain their well being. The Commissioner has at all times the power to direct the member to attend a medical examination from a practitioner of the Commissioner's choice. The member is obliged to comply with that direction.

209 Where, as in the circumstances of this matter, the member's health only allows him to perform his duties on a restricted work programme and it was known to the Commissioner of Police through his Investigating Officer that the member is on

medication, then an enquiry to the member about the affect of that medication with alcohol would hardly seem to be a reliable basis upon which to discount the possibility that this may have contributed to his aberrant behaviour.

210 It is appreciated that the Appellant emphatically denied any such effect and steadfastly maintained that he had not struck the first blow and indeed, had been head-butted. However, just as the facts of the conviction established the factual issues upon which guilt was determined, for the purposes of appeal the other findings of the Magistrate must be considered.

211 It is established that the Appellant was intoxicated and that he felt threatened when Brown stood up and the two confronted each other.

212 The submission of medical reports from the Appellant on the state of his psychological well being was before the Commissioner of Police. While it may not be enough to cite an inconsistency between the reports of a psychologist and psychiatric registrar to discount the relevance of this information the fact of the Appellant's medical history was known to the Commissioner of Police and was taken into account.

213 At the end of the day matters of public interest which include the importance of maintaining public confidence in the integrity, honesty, conduct and standards of performance of a member of the Police Force, and that aspect of the special relationship between the Commissioner of Police and members of the Force, which bears so heavily on the member's duty of obedience, outweigh those matters which are of interest to the Appellant and those aspects of the special relationship which go to protecting his well being.

214 It is in the final analysis a judgment as to whether matters of interest to the Appellant outweigh the detriment that is suffered to the public interest. In the circumstances of this matter we have not been persuaded that the removal of the Appellant from the Police Force on the ground that the Commissioner of Police had lost confidence in his ability to continue in the Force was not open to him.

215 It is not open to the WAIRC to take over the role of the Commissioner of Police in the management of the Police Force in the respect of deciding, in the circumstances of this matter, that we would have come to a different conclusion to that of the Commissioner of Police. What is before us is the issue of whether in consideration of the reasons for losing confidence in the Appellant to continue to serve as a member of the Police Force and in addressing the matters specifically required under section 33Q(4) of the Act, has the Appellant been given a fair go all round? We conclude that he has. The Appellant has not shown that his removal is harsh, oppressive or unfair.

216 The appeal is dismissed.

2004 WAIRC 11969

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALLAN RAYMOND CARLYON
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
	SENIOR COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
DATE	FRIDAY, 9 JULY 2004
FILE NO/S	APPLICATION 1721 OF 2003
CITATION NO.	2004 WAIRC 11969

Result	Appellant's new evidence in response to the Respondent's evidence submitted pursuant to section 33R(5) of the *Police Act 1892* allowed
Representation	
Appellant	Ms M Ridley (of counsel) on behalf of the appellant
Respondent	Mr R Bathurst (of counsel) on behalf of the respondent

Reasons for Decision – section 33R(5) of the Police Act 1892

1 The WAIRC having granted the Commissioner of Police ("the Respondent") leave to tender new evidence on 4th May 2004, received applications from Allan Raymond Carlyon ("the Appellant") for the Commission to direct summonses to issue to witnesses for evidence to be tendered under section 33R(5) of the *Police Act, 1892* in response to new evidence tendered by the Respondent.

2 The WAIRC issued the directions sought but ordered that before commencing to hear the appeal under section 33P of the *Police Act, 1892* the WAIRC would hear from the parties on whether or not the new evidence for which the directions had been given was evidence in response to that tendered pursuant to section 33R(5) by the Respondent under leave granted on 4th May 2004. If the new evidence from the Appellant did not come within the scope of that provided for under section 33R(5) of the *Police Act, 1892* it could not be tendered without leave of the WAIRC. In that case the new evidence would have to be considered under an application pursuant to section 33R(3) of the *Police Act, 1892*.

3 The nature of the new evidence the Appellant sought to tender went to records of criminal charges of three other members of the Western Australian Police Service who continue to serve as officers notwithstanding their having being convicted of a criminal offence.

4 The Appellant argues that the fact of the criminal conviction was not a reason upon which the Commissioner of Police relied when the intention to remove the Appellant was formulated. The subsequent admission of that information and record necessarily attracts consideration of the effect that a criminal conviction will have on the public interest.

5 It follows that where other officers have been convicted of a criminal offence and yet have continued to serve as members of the Police Force, evidence of the details of the charge and conviction is relevant to the assessment of the public interest in terms of section 33Q(4) of the *Police Act, 1892*. In this respect the evidence of those convictions is in direct response to the admission of transcript of the criminal trial and the reasons for convicting the Appellant.

6 The Respondent argues that the requirement is for new evidence to be "in response" to that submitted by the Commissioner of Police. It must itself address the content of the Respondent's evidence. The Respondent acknowledges that the fact of a criminal conviction does not dispose of the appeal. However, the transcript and reasons for conviction establishes the facts upon which the conviction was recorded. The conviction cannot be attacked or called into question by a collateral attack in these proceedings (*Mickelberg v Director of Perth Mint* [1986] WAR 365 at 372).

7 In the Respondent's view the evidence that the Appellant seeks to tender goes to a different point; the matter of public interest is not directly related to the content of the transcript nor the Magistrate's reasons for the Appellant's conviction.

8 The WAIRC takes a contrary view to that of the Respondent. The provision for new evidence to be tendered without leave in response to that granted under section 33R(5) of the *Police Act, 1892* to the Commissioner of Police is wide enough to include matters going to an appreciation of issues going to the importance of maintaining public confidence in the integrity, honesty, conduct and the standard of performance of members of the Police Force when the fact of a criminal conviction is before the WAIRC.

9 On the basis of this the Commission accepts that the new evidence about the criminal convictions of other members submitted by the Appellant comes within the scope of matters which are in response to evidence submitted by the Respondent under section 33R(5) of the *Police Act, 1892*. In line with the summonses which issued, the witnesses must attend the Commission and while their evidence may be submitted by way of affidavit, they would then be available for cross examination by the Respondent.

10 The advent of any new evidence prompts reconsideration by the Commissioner of Police of the removal action (section 33R(7) of the *Police Act, 1892*). If no intention to revoke the removal action follows that reconsideration, the Commissioner of Police has the opportunity to re-formulate the reasons for having lost confidence in the Appellant's suitability to continue as a member of the Police Force and to again tender new evidence without the leave of the WAIRC. These re-formulated reasons may differ from or be additional to, the reasons given to the Appellant when the decision to remove was initially taken under section 33L(5)(a) (sections 33R(8) and 33R(9) of the *Police Act, 1892*).

11 In this matter the Respondent was content for the appeal to proceed on the basis of the re-formulated reasons for loss of confidence under section 33R(8) of the *Police Act, 1892* which followed receipt of new evidence from the Appellant following leave being granted by Order dated 11th May 2004 to tender:

(a) evidence of the Appellant in relation to the IAU and IIU Complaints Histories set out at pages 101-112 of the appeal book; and

(b) Affidavit evidence of Senior Sergeant John Hallett.

[2004 WAIRC 11435]

12 The re-formulated reasons are set out in the Respondent's letter to the Appellant dated 27th May 2004 and in the Reasons for Decision in the Appeal. It is sufficient to note that following the determination by the WAIRC on 4th June 2004 that the Appellant's new evidence about the criminal convictions of other members, the Respondent did not seek to again re-formulate the reasons for not having confidence as a member of the Police Force. Nor did the Respondent seek to tender new evidence.

13 For the above reasons we allowed the Appellant's new evidence in response to the Respondent's evidence submitted pursuant to section 33R(5).

2004 WAIRC 13730

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR ALLAN RAYMOND CARLYON
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
	SENIOR COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
DATE	TUESDAY, 13 JULY 2004
FILE NO.	APPL 1721 OF 2003
CITATION NO.	2004 WAIRC 13730

Result	Appeal pursuant to section 33P of the *Police Act 1892* dismissed
Representation	
Applicant	Ms M Ridley (of counsel) on behalf of the Appellant
Respondent	Mr R Bathurst (of counsel) on behalf of the Respondent

Order

HAVING HEARD Ms M Ridley (of counsel) on behalf of the Appellant and Mr R Bathurst (of counsel) on behalf of the Respondent, the Western Australian Industrial Relations Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* and the *Police Act 1892* hereby orders –

THAT the appeal pursuant to section 33P of the *Police Act 1892* be and is hereby dismissed.

(Sgd.) W S COLEMAN,
On Behalf of the
[L.S.] Western Australian Industrial Relations Commission.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2005 WAIRC 00170

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COLIN LESLIE BEAUMONT
	APPLICANT
	-v-
	COOGEE CHEMICALS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 28 JANUARY 2005
FILE NO.	APPL 1163 OF 2004
CITATION NO.	2005 WAIRC 00170

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 K Trainer (as agent)
Respondent	Ms J Auerbach (of counsel)

Reasons for Decision

1 On 10 September 2004 Colin Leslie Beaumont ("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 6 August 2004 by Coogee Chemicals 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 date on which an employee is terminated. As this application was lodged on 10 September 2004 it is seven days 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 in September 2000 the respondent employed the applicant as a carpenter and that he was terminated on 6 August 2004. At termination the applicant was given four weeks' pay in lieu of notice and seven weeks' wages as a redundancy payment and all accrued entitlements were paid, by agreement, a few days after the applicant ceased employment with the respondent.

7 The applicant's contract of employment was detailed in a letter the applicant signed when he accepted his position with the respondent (Exhibit R1).

8 The applicant's letter of termination is as follows (formal parts omitted):

> "We regret to confirm that your employment with Coogee Chemicals has been terminated. As agreed, termination is effective from 6th August 2004 as you have opted to receive payment in lieu of a 4 week notice period.
>
> As discussed with you at the meeting attended by Mike Sondalini and Geoff Nott on 6th August 2004, your role has been made redundant due to a lack of work in your department.
>
> We confirm that the following issues were discussed with you at that time:
>
> - The lack of work available in the Civil Group.
> - The uncertainty of occasional contract work being available in future.
> - The option to work out the 4 week notice period, or to take wages in lieu of notice and allow you to start looking for other employment immediately.
>
> The decision to terminate your employment was made after careful consideration of these issues and applying objective selection criteria.
>
> We will transfer via EFT $8342.87 and rollover to superannuation at your request $2,000 being a total of $10,342.47 (after tax) in payment of:
>
> - 190.5111 hours Annual Leave accrued
> - 8.0962 hours RDO accrued
> - 4 weeks payment in lieu of notice
> - 7 weeks severance payment
>
> We thank you for your service with Coogee Chemicals and wish you success in future endeavours."

(Exhibit A1)

9 It was common ground that the respondent gave the applicant leave without pay from time to time when the applicant had to attend to his wife's ongoing medical requirements.

10 The respondent maintains that the applicant was terminated due to a redundancy situation. Whilst the applicant conceded that the amount of work required of the civil workshop was declining the applicant maintained that he should have continued his employment with the respondent.

Applicant's Evidence

11 The applicant gave evidence that on 6 August 2004 he attended a meeting with his supervisors Mr Mike Sondalini and Mr Geoff Nott and he was told that he would be "finishing up" as the respondent was going to subcontract future carpentry work. When the applicant asked if he could undertake some of this subcontract work no commitments were given to him in this regard and he gave evidence that he had no discussions with Mr Sondalini or Mr Nott about any other employment options with the respondent.

12 The applicant stated that he obtained a job approximately 10 days after leaving the respondent and he worked in this position for two weeks and one day.

13 The applicant stated that the delay in lodging this application within the required timeframe arose because he arranged for his representative to send his application form by email but he gave his representative the wrong email address. As a result of working lengthy hours in the position he obtained soon after he was terminated as well as undertaking ongoing care of his wife the applicant took some time to follow up the non-receipt of Form 1. The applicant gave evidence that when he followed up the non-receipt of Form 1 it was already after the 28 day period for filing this application. As soon as he received the relevant forms from his representative the applicant visited his representative, signed his application and it was lodged the same day. The applicant stated that he had no computer literacy skills.

14 Under cross-examination the applicant agreed that a trades assistant who worked in the respondent's civil workshop in 2004 was transferred out of this section approximately two months before the applicant was terminated. The applicant conceded that when this employee was transferred there was insufficient work for the four employees in the civil workshop at the time and the applicant agreed that one of the employees Mr Terry Gilbert often did not attend work because of illness. The applicant conceded that even though he frequently worked additional overtime on weekends this work was completed after hours because it would have been inconvenient to undertake this work during normal working hours. The applicant maintained that carpentry and associated work was still required to be undertaken by the respondent however it was not being allocated to the civil workshop.

15 The applicant agreed that Mr Gilbert had approximately 15 years of service with the respondent, the relieving leading hand carpenter Mr John Reid had approximately eight years of service and the applicant had three years of service with the respondent.

16 The applicant agreed that at the meeting held on 6 August 2004 he was advised that there was insufficient work for three full time employees, he agreed that the respondent always subcontracted out major maintenance works and the applicant acknowledged that when he was informed of his redundancy he responded by saying it was a "Godsend". He stated that this was a knee jerk reaction. The applicant did not disagree that of the three remaining employees in the civil workshop it was appropriate to choose his position to be made redundant as he had the least amount of service with the respondent.

17 The applicant maintained that as a result of his extensive experience in the building industry he had developed a substantial range of skills which he believed could be used by the respondent. The applicant stated that he had a truck driver's licence, a first aid certificate, a certificate for working in confined spaces, a fork lift driver's licence and he could also read plans.

18 The applicant agreed that approximately two weeks after he was terminated he sought advice about lodging this application and was told at the time that he had 28 days within which to lodge his application. The applicant re-iterated that he was unable to meet this timeframe as he was working, looking for work and looking after his wife's needs. The applicant stated that he was panicking during this period because he was unsure of what was going to happen.

Respondent's Evidence

19 Ms Julie Anne Daniels is the respondent's Human Resources Adviser. Ms Daniels stated that she provided advice to Mr Sondalini and Mr Nott about how to effect the applicant's redundancy and she provided them with a check list of issues to be covered when dealing with a redundancy situation. Ms Daniels stated that even though the applicant was not entitled to a redundancy payment she suggested to the respondent that the applicant be given a redundancy payment as a matter of fairness.

Ms Daniels was unaware that the applicant was unhappy about his termination and that he would be contesting his dismissal. Ms Daniels confirmed that she gave advice to Mr Sondalini and Mr Nott that they should review the possibility of alternative positions for the applicant as part of the redundancy process. Ms Daniels agreed that the respondent has employees who drive fork lifts but stated that this only one of the duties these employees undertake and she also confirmed that the respondent employs truck drivers who drive dangerous goods.

20 Mr Nott is the Maintenance Manager and he oversees the civil workshop which undertakes a variety of maintenance jobs. Mr Nott gave evidence that in the three months prior to the applicant being terminated work to be undertaken by the civil workshop was declining and as a result the trades assistant in the civil workshop was transferred to the respondent's boilermaking and fitting areas. Mr Nott stated that work for the civil workshop continued to decline after this employee was transferred. Mr Nott stated that the respondent uses subcontractors for specific maintenance work such as roofing and specialist work and this has been the case for many years. Mr Nott stated that when the applicant was made redundant there was only two weeks' work left for one person in the civil workshop. Mr Nott stated that the applicant's position was chosen for redundancy as there was not enough work for the three existing employees in the civil workshop. Mr Nott stated that the applicant's position was made redundant as Mr Gilbert and Mr Reid had more diverse skills than the applicant, for example they had experience in purchasing, they were both computer literate, they had experience supervising contractors and their length of service was greater than that of the applicant. Mr Nott stated that he reviewed options elsewhere for the applicant within the respondent's operations however nothing was suitable for him.

21 Mr Nott stated that at the meeting with the applicant held on 6 August 2004, the applicant was initially shocked at being told he was being made redundant. The applicant then conceded that work in the civil workshop was declining. Mr Nott stated that the applicant then stated that he was happy to be terminated. A discussion then ensued about entitlements due to the applicant and the applicant was given the opportunity of leaving immediately and not working his four weeks' notice period. Mr Nott stated that after the applicant was terminated no additional employees have been employed to work in the civil workshop nor has there been any increase in subcontract work.

22 Mr Nott stated that he was unaware that the applicant was going to contest his termination and he only became aware of the applicant's claim when this application was served on the respondent.

23 Mr Nott stated that the meeting on 6 August 2004 took approximately ten minutes. Mr Nott stated that the decision to terminate the applicant was made on 2 August 2004 after discussions took place between Mr Sondalini and Mr Nott, in consultation with Mr Gilbert. Mr Nott agreed that he was given guidelines to follow in effecting the applicant's redundancy and he conceded that alternatives to termination were not discussed with the applicant although the applicant raised the issue of the possibility of subcontract work with the respondent. Mr Nott stated that the respondent gave no commitments in this regard but a commitment was made to look at this as a possibility if future work arose. Mr Nott stated that the respondent reviewed the possibility of the applicant working in the respondent's production area but decided that this work would be unsuitable for the applicant. Mr Nott conceded that other managers of departments within the respondent's organisation were not consulted about available work and the applicant was not considered for truck driving or fork lift duties.

24 Under re-examination Mr Nott stated that a licence was required to drive a truck containing hazardous goods and it was his view that there were no options available for the applicant within the respondent's operations.

Submissions

25 The applicant maintains that he had a credible explanation for the delay in lodging this application and the applicant was also under pressure during the period after he was terminated due to his wife's illness. The applicant maintains that the delay of seven days in lodging the application was not inordinate and there is therefore no real prejudice to the respondent in allowing this application. The applicant maintains there is merit to his claim as alternatives to termination were not discussed with him, the applicant was not notified that he was to be terminated before the decision was made to dismiss him and there was no consideration given to the possibility of the applicant working in other areas within the respondent's operations. The applicant maintains that the lack of consultation with the applicant about alternatives was unfair and unlawful as this constituted a breach of the *Minimum Conditions of Employment Act 1993*. On this basis the applicant argues that it would be unfair not to allow this application.

26 The respondent argues that there is no merit to the applicant's claim as the applicant was terminated due to a genuine redundancy situation as there was not enough available work for the three employees in the civil workshop to undertake. As no alternative options were available for the applicant within the respondent's operations the applicant would therefore have had difficulty in proving that he was unfairly terminated. The applicant did not voice any intention of challenging the respondent's decision prior to lodging his application even though the applicant had the opportunity to advise the respondent that he would be contesting his termination when he visited the respondent's premises soon after he was terminated. The applicant showed no signs that he was traumatised by the respondent's decision to terminate him, the applicant gained alternative employment of comparable status within a short period of time after his termination and the applicant received seven weeks pay over and above his contractual entitlements when he was terminated. Further, the applicant was not required to work out his notice period.

27 The respondent argues that the applicant did not ensure that his application was lodged in time even though he was aware that there was a specific timeframe to lodge the application and no adequate reasons were given as to why the applicant did not contact his representative earlier than he did.

28 The respondent concedes that if this application is allowed it will suffer no disadvantage apart from the normal disadvantage of dealing with an unfair termination claim as well as dealing with this application.

Findings and Conclusions

29 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. Whilst it appears that work was declining for the civil workshop as conceded by the applicant it is my view that there is sufficient doubt that the respondent did not review all possible alternative employment options for the applicant across the respondent's operations given the applicant's wide ranging skills and experience, nor did the respondent discuss possible alternatives with the applicant prior to effecting his termination. If these discussions were held it may have led to an outcome different to that of the applicant being terminated given the range of skills possessed by the applicant, as was the case for the trades assistant who was recently transferred out of the civil workshop due to a lack of work in the civil workshop. It is therefore my view that the applicant may have an arguable case that he was unfairly terminated.

30 I find that the applicant has an acceptable reason for the delay in lodging this application, which was lodged only seven days out of the required timeframe. Even though the applicant was aware of the required timeframe for lodging an application of this nature I accept that it was a difficult period for the applicant after he was terminated as he was seeking alternative employment, he found a job soon after he was terminated which required him to work lengthy hours and he had ongoing duties caring for his wife over and above the normal care that one would have for a partner as demonstrated by the applicant's

ongoing necessity to take time off work. I also accept that the delay in the applicant receiving the application from his representative was because he gave an incorrect email address to his representative and this led to the application not being received by the applicant until after the 28 day timeframe. I accept that once the applicant became aware that he had not received his application he followed this up expeditiously and on the same date that the applicant signed the Form 1 the application was lodged in the Commission.

31 I accept that the applicant did not indicate to the respondent that he intended to contest his termination after he was terminated. However this is balanced by the respondent conceding that it will not suffer any disadvantage apart from the normal disadvantage in dealing with a claim of this nature if the Commission allows this application.

32 When balancing the above findings and taking into account the relevant factors to consider in an application of this nature I find that it would be unfair not to accept this application. In reaching this view I take into account that I have found that there was an acceptable reason for the delay in lodging this application and that there is sufficient to establish that the applicant has an arguable case. Further, the respondent conceded that it will not be prejudiced any more than usual in allowing this application even though it was unaware that the applicant would be contesting his termination. It is my view therefore, that in all of the circumstances 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.

33 An order will issue to that effect.

2005 WAIRC 00182

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COLIN LESLIE BEAUMONT
	APPLICANT
	-v-
	COOGEE CHEMICALS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 1 FEBRUARY 2005
FILE NO/S	APPL 1163 OF 2004
CITATION NO.	2005 WAIRC 00182

Result	Application to accept applicant's claim which was lodged out of time granted

Order

HAVING heard Mr K Trainer as agent on behalf of the applicant and Ms J Auerbach of counsel on behalf of the Respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the application to accept the application out of time be and is hereby granted.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2005 WAIRC 00025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHIRLEY FOREMAN
	APPLICANT
	-v-
	CRAIGIE SENIOR HIGH SCHOOL P&C ASSOCIATION
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 12 JANUARY 2005
FILE NO.	APPL 4 OF 2004
CITATION NO.	2005 WAIRC 00025

Catchwords	Industrial Law (WA) - Termination of employment - Harsh, oppressive and unfair dismissal - Principles applied - Applicant harshly, oppressively and unfairly dismissed - Reinstatement impracticable – Compensation ordered – Industrial Relations Act 1979 s 29(1)(b)(i) Contractual benefits claim - Entitlements under contract of employment – Application upheld – Industrial Relations Act 1979 (WA) s 29(1)(b)(ii)
Result	Application alleging unfair dismissal upheld and order issued for compensation in lieu of reinstatement. Application for contractual benefits allowed.
Representation	
Applicant	Ms S Foreman on her own behalf
Respondent	No appearance

Reasons for Decision

1 On 5 January 2004 Shirley Foreman ("the applicant") lodged an application pursuant to s29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979* ("the Act") against Craigie Senior High School P&C Association ("the respondent") claiming she was unfairly terminated on or about 19 November 2003 and that she was due benefits under her contract of employment. The respondent denies that the applicant was unfairly terminated or that she is owed benefits under her contract of employment.

2 As the application was lodged out of time a hearing was held to determine whether or not it would be unfair not to accept this application. After hearing from the applicant (the respondent did not attend the hearing) the Commission as constituted determined that this application should be accepted under s29(3) of the Act and separate reasons for decision issued.

3 The respondent did not attend the hearing of this matter even though it was notified of the hearing by notice dated 6 October 2004 and the notification was not returned to the Commission. As I was satisfied that the respondent had been advised of the hearing and given the Commission's powers under s27(1)(d) of the Act I formed the view that it was appropriate in the circumstances to proceed with the hearing in the absence of the respondent. In doing so I also note that the Commission received correspondence from the respondent's agent on 16 April 2004 confirming that the respondent was dissolved on 6 April 2004.

Background

4 The applicant commenced employment with the respondent in September 1987 as a Canteen Assistant and in 1988 she became the respondent's Canteen Organiser. The applicant worked continuously with the respondent until her termination on 19 November 2003. The applicant stated that she worked 37 hours per week during school terms and her employment was subject to a written contract of employment which was regularly renegotiated between the parties. As a written contract of employment was not agreed between the parties for 2003 due to the possibility that Craigie Senior High School ("the School") would close at the end of 2003, the applicant's existing terms and conditions continued to apply to the applicant's employment throughout 2003.

5 The respondent lodged a Notice of Answer and Counter Proposal on 3 February 2004, in response to the applicant's claim which reads, in part, as follows:

"It is denied that the applicant was harshly, oppressively, or unfairly dismissed.

(i) The applicant went of (sic) sick leave from the 25th August, 2003.

(ii) The applicant submitted a valid medical certificate issued by Dr Claasen (sic) from the 25th August until the 8th September 2003.

(iii) It is denied that the President or the Secretary of the respondent requested the applicant to resign or that they told the applicant that she had been charged with stealing.

(iv) The President says that the applicant verbally offered to resign and was advised that if she was resigning she needed to submit a written resignation. This was not submitted.

(v) The applicant had utilised her paid sick leave entitlement and the respondent resolved at a meeting on the 2nd September that:

> *"the wages and conditions will be maintained until such time as we receive notification from Shirley Hutton (nee Foreman) that she will be able to return to work."*

(vi) On or about the 24th September the respondent received a medical certificate issued by Dr Tan. The Certificate was dated the 9th September and it appeared that the certificate had been altered.

(vii) There was different ink and writing on the certificate.

(viii) On the 25th September Mrs Vincent (President of the Respondent) telephoned Dr Tan's practice to seek to clarify the period for which the certificate had been issued. She was advised that the information could not be released without Mrs Foreman's permission. This was later confirmed in writing.

(ix) On the 26th September Dr Tan wrote to Mrs Vincent advising that he needed to obtain advice from the Medical Defence Association of WA before answering her questions. He also advised that he had been advised that there were no legal counsellors available until 30th September.

(x) On the 26th September the Executive of the respondent met and the 2nd September motion was rescinded and a new motion passed. That motion read:

> *"That wages of 6.5 hours per day will be paid on a weekly basis to canteen employee Shirley Hutton provided that a current medical certificate is produced on a weekly basis for the wages in question. If certificates are not produced, the time will be treated as leave without pay, unless Ms Hutton agrees to authorise payment by use of accrued leave entitlements. Payments will cease on the closure of the school on December 5,* 2003."

(xi) On 30th September Mrs Vincent spoke to Dr Tan and he advised her that he had been advised not to provide her with the information requested.

(xii) On the 14th October the respondents (sic) agent wrote to Dr Tan requesting details regarding the dates entered on the medical certificate issued by him on the 9th September. No response was ever received.

(xiii) On the 17th October the applicant was requested to provide written authorisation for Dr Tan to provide details regarding the medical certificate. No authorisation was given.

(xiv) It was not until a telephone discussion between the respondent's agent and the applicant on the 29th October that the applicant admitted altering the medical certificate to give the period of time off as seven (7) weeks rather than one (1) day.

(xv) On the 29th October a letter was sent to the applicant detailing the comments that she had made.

(xvi) The applicant has also admitted in her application that she altered the certificate.

(xvii) Sometime after the 20th October the applicant submitted a medical certificate from Dr Claasen dated 20th October 2003. This certified Mrs Hutton was unfit for work between 25th August until the 19th December 2003. This was accepted for the applicant's period of unpaid leave from the 20th October until the date her employment was to end on the 5th December.

(xviii) The applicant was advised that she was still required to submit a weekly certificate to meet the conditions of the resolution made on the 26th September.

(xix) The applicant submitted a Medical Certificate from Dr Tan for the period 11th – 18th November 2003. The Applicant was paid for the period 11th to the 17th November.

(xx) On the 17th November 2003 the applicant was advised in writing that as a result of her admitting to altering a medical certificate to give herself seven (7) weeks off work when in fact the Doctor (Dr Tan) had only given one (1) day off, that she was summarily dismissed. The dismissal took effect from 2.00pm (the applicant's usual finishing time) on the 18th November. As a gesture of goodwill, in recognition of the length of service, the applicant was given the opportunity to resign and receive the balance of he (sic) notice period and pro rata annual leave (approximately 2 weeks) and pro rata Long Service Leave (approximately 40 hours).

(xxi) The Applicant was given various opportunities to give her response to the allegation after enquiries were made to Dr Tan and the Australian Medical Association.

(xxii) The process of conducting the above enquiries before putting the allegation to the applicant, led to the applicant being paid for a period between submitting the altered medical certificate and her admitting she had altered it.

(xxiii) On the 3rd November the Applicant was issued with written notice of termination advising that it was as a result of the School, and consequently the Canteen, closing on the 5th December.

(xxiv) On the 6th November the applicant was given five (5) days to show cause why she should not be instantly dismissed for altering the Medical certificate issued by Dr Tan.

(xxv) An undated response was received on the 13th November. It was determined that the response was not satisfactory and that the applicant was to be summarily dismissed.

(xxvi) Written notice of Termination was issued on the 17th November 2003.

(xxvii) It is denied that the applicant was harshly, oppressively or unfairly dismissed.

(xxviii) It is denied that the applicant is due any contractual benefits. The applicant was given five (5) weeks notice on the 3rd November of the closure of the school on the 5th December. It is denied that the applicant was ever told that she would be paid until the 19th December."

(Notice of Answer and Counter Proposal – 3 February 2004)

6 The applicant is claiming the payment of wages for four weeks that the applicant was on sick leave that the respondent undertook to pay in the weeks prior to her termination but did not, five weeks redundancy pay which the applicant maintains she was promised in April 2003 because the School was to close in December 2003, four weeks annual leave and annual leave loading which the applicant maintains she is owed for her service in 2003 and two weeks long service leave which the applicant maintains was owed to her and which the respondent indicated in April 2003 would be paid on termination.

Applicant's Evidence

7 The applicant stated that in April 2003 she was advised by the respondent's President Ms Vincent that the School would be closing at the end of 2003 and that the canteen would therefore close. The applicant claimed that she was given a letter by Ms Vincent at the time confirming that due to the canteen's closure the respondent would give her five weeks pay for being made redundant and two weeks wages as payment for long service leave. The applicant also claims she was advised that at termination she would be paid the four weeks annual leave and annual leave loading due to her for 2003. Even though there was no specific date for the School's closure the applicant was verbally advised by Ms Vincent in early August 2003 that she would be employed by the respondent up to 19 December 2003.

8 The applicant stated that she was an excellent worker throughout her lengthy employment with the respondent and she ensured that the canteen operated profitably. The applicant stated that even though she had an ongoing problem with depression this did not affect her work. The applicant gave evidence that she was held in high regard by the School and she relies on a reference given to her by the School's Registrar written on 6 November 2003 in support of this assertion (Exhibit A1). The applicant stated that no performance issues were raised with her by the respondent until September 2003.

9 The applicant stated that on 25 August 2003 she was involved in an incident with a fellow worker and long time friend, Ms Boeyen and that as a result of this incident Ms Boeyen was abusive towards the applicant and as the applicant was upset by these events she became ill and went home. Later that day the applicant informed Ms Vincent about the incident and she then contacted Ms Fay, a voluntary helper at the canteen, to fill in for her whilst she was unwell.

10 The applicant had two phone conversations with the respondent's officers in the week following this incident. The respondent's secretary, Ms Longley contacted the applicant and asked her to submit her resignation prior to the respondent's next meeting. The applicant stated that Ms Vincent also contacted her and accused her of falsifying her leave entitlements in early August 2003 and told the applicant that the respondent was considering dismissing her. The applicant stated that she refused to resign because she claimed she had done nothing wrong and the applicant stated that the respondent was aware that she took leave in early August 2003 and had encouraged her to do so.

11 The applicant understood that the respondent met on 2 September 2003 to discuss her situation and determined that the applicant was to remain employed by the respondent. The applicant relies on minutes of this meeting which were submitted as Exhibit A7 in the applicant's out of time claim ("the previous matter") to confirm that she was to continue her employment with the respondent and be paid her normal wages until her return to work. These minutes confirm the following:

"Following a discussion regarding the contents of both letters from Shirley and Doreen, the committee felt there were areas of misunderstanding between canteen staff and the P&C and that in lieu of Shirley's long association with the school the following motion was made.

That wages and conditions will be maintained until such time as we receive notification from Shirley Hutton that she will be able to return to work.

Carried"

(Exhibit A7 of the previous matter)

The applicant maintained that the minutes do not properly reflect what was agreed at this meeting about her sick leave as the School's Principal Mr Terry McLaughlin, who the applicant claimed attended this meeting, told the applicant he understood that the motion was that the applicant was to be paid until she was well enough to return to work or until the end of the School year (see Exhibit A6 of the previous matter).

12 The applicant maintained that when she felt better she asked Ms Vincent if she could return to work however Ms Vincent refused to allow her to do so. Soon after this conversation the applicant stated that the respondent accused her of over paying herself and the applicant stated that because of her pre-existing depression this accusation led to her health significantly deteriorating.

13 The applicant claims she contacted Ms Vincent on 5 September 2003 when she was paid a weekly wage of $360.50 nett instead of her usual wage of $400.00 nett per week (Exhibit A3). Subsequent to raising this issue with Ms Vincent she received a letter from Ms Vincent dated 9 September 2003 as follows (formal parts omitted):

> "In response to your telephone conversation with me on the 5th September, 2003 regarding your claim of underpayment of salary. This is to confirm in writing what was discussed during that conversation. I am advising you that you were paid as per your stated hours of 7:30 a.m. – 2:30 p.m. with a ½ hour unpaid lunch break.
>
> I refer to our letter dated 14th February, 2003 point 6. *'Starting and finishing times are set by the P&C and any changes must be approved by the P&C before changing. As explained by Jenny Vincent last year to Shirley, the canteen will still be closing at lunch time and it's normal 2002 time regardless of the school lunch break hours unless advised differently. The P&C must approve any overtime before it will be paid.'*
>
> I acknowledge receipt of your letter dated 8-10-03 and wish to advise you that this cheque is for the correct amount and no replacement cheque will be issued.
>
> We have now identified that you have overpaid yourself, and there was no authorization given to you in 2003 to adjust your finishing hours from 2:30 p.m. to 3:00 p.m. The P&C reserves it's (sic) position on whether to seek restitution from you.
>
> Can you please provide a written explanation of why you have paid yourself an additional one (1) hour per day, and if you claim that such an additional time was authorized please advise who gave you that authorization.
>
> Please note also that all concerns and communication you have regarding your employment are to be directed in writing to, Jennifer Vincent, Craigie Senior High School P&C President. If you contact other P&C committee members or teaching staff about disputes you may have with the P&C, disciplinary action will be taken.
>
> According to your contract of 2002, after two (2) days sickness a doctor's certificate must be presented. We are in receipt of a doctor's certificate to the 8th September 2003, and request all further medical certificates be forwarded to me."
>
> (Exhibit A2)

The applicant was upset by this letter as her wages had always been audited by the P&C on a monthly basis and she claimed there was no basis for this accusation.

14 On 12 September 2003 she received a further letter from Ms Vincent in the following terms (formal parts omitted):

> "I am writing to ask for an explanation in regards to your phone call of more than ½ hour to Muriel during her work time on Friday the 12th September 2003 at 11:55 a.m. Please provide a written advice of whether you discussed any details of your dispute with the P&C or details about your conditions of your (sic) employment? If you deny discussing the above matters please advice (sic) what was discussed.
>
> Please ensure I have your written response by 12:00 p.m. Thursday 18th September 2003."
>
> (Exhibit A4)

After receiving this letter the applicant felt victimised, her health deteriorated further and as a result she was hospitalised for one week and twice attempted suicide.

15 The applicant stated that on 9 September 2003 she visited her General Practitioner of over thirty years Dr Michael Tan and that because she was having an anxiety attack at the time Dr Tan gave her a prescription for medication. Even though the applicant planned to ask Dr Tan for a medical certificate for time off work she forgot to do so. As a result the applicant returned to Dr Tan's surgery later that day to pick up a medical certificate. The applicant stated that when Dr Tan's secretary asked about the length of time for which she required a certificate the applicant told the receptionist that she did not care what end date was put on the certificate. After the applicant picked up the medical certificate from Dr Tan the applicant went home and had two Serapax which made her drowsy. After opening the sick note the applicant noted that there was no end date on the medical certificate and in her confusion the applicant wrote the end date on the certificate. The applicant stated that her actions felt logical to her at the time as she understood that Dr Tan had left the end date open for her to fill in.

16 The applicant stated that she saw her psychiatrist Dr Peter Claassen on a regular basis and she visited him soon after the incident on 25 August 2003. Initially Dr Claassen believed the applicant could cope with her situation but after she was hospitalised and twice attempted suicide Dr Claassen gave the applicant a medical certificate dated 20 October 2003 covering the period 25 August 2003 through to 19 December 2003. Dr Claassen's certificate states that the applicant's illness arose from "multiple stressors in her environment contributed to a major depressive illness and panic symptoms which occurred (sic) over past 5 years with progressive deterioration of her mood. (last 6 months)" (Exhibit A2 of the previous matter).

17 The applicant became aware that the respondent had a meeting on 26 September 2003 and that the motion it had passed on 2 September 2003 about paying the applicant whilst on sick leave was rescinded and a new motion passed which reads as follows:

> "That wages of 6.5 hours per day will be paid on a weekly basis to canteen employee Shirley Hutton provided that a current medical certificate is produced on a weekly basis for the wages in question. If certificates are not produced, the time will be treated as leave without pay, unless Ms Hutton agrees to authorise payment by use of accrued leave entitlements. Payments will cease on the closure of the school on December 5, 2003."
>
> (Respondent's Notice of Answer and Counter Proposal)

18 The applicant stated that on or about 20 October 2003 she had a discussion with the respondent's agent Mr A Thompson and admitted filling in the end date of the medical certificate given to her by Dr Tan.

19 The applicant gave evidence that even though she was reminded by Mr Thompson during a telephone conversation that Ms Vincent had previously told her that she had to provide weekly medical certificates she was too ill to do so and that she could not drive at the time. The applicant stated that she informed Ms Vincent of this situation. The applicant stated that she made every effort to provide medical certificates to the respondent but could not do so for every week. The applicant gave evidence that she was not paid for the weeks commencing 3 October 2003, 10 October 2003, 24 October 2003 and 7 November 2003.

20 A number of letters were exchanged between the parties subsequent to the applicant's conversation with Mr Thompson on or about 20 October 2003. On 4 November 2003 the respondent's agent wrote to the applicant advising the applicant that she had five days from receipt of this letter to show cause why she should not be summarily dismissed. The letter is as follows (formal parts omitted):

"I am instructed by the Craigie SHS P&C to advise you that you have five days from receipt of this letter to show cause why you should not be summarily (instantly) dismissed for submitting a medical certificate that you have admitted entering the period of time off as seven (7) weeks from the 9th September to the 28th October 2003 after Dr Tan did not give you any time off.

You had no authority to enter the dates or to complete the certificate or to make any changes to the certificate at all. As a consequence of your actions your employer has paid you for time off that you did not have a valid medical certificate and did not have any sick leave entitlement for.

This is a serious incident and your actions constitute an act of gross misconduct.

I am aware that Dr Claasen (sic) has issued a certificate from the 20th October to the 19th December 2003. The P&C accepts this certificate for your period of unpaid leave.

I am instructed that the P&C has decided at its meeting on 31st October 2003 that as you do not have any sick leave entitlements you be paid special weekly payments for the time off if you provide weekly medical certificates.

The P&C resolution is to pay you these special payments ONLY if you provide a weekly certificate. Any registered medical practitioner can issue the certificate. It is your responsibility to comply with this obligation if you wish to be paid.

Shirley, the P&C is a body representing parents and it has an obligation to account for all income and expenditure and to manage the organization in the best interests of its members. It also has a responsibility, and an obligation, to take action where staff conduct is unacceptable.

You are again advised that you may be instantly dismissed if you do not provide adequate reasons why you should not be dismissed.

Please forward directly to me your reply to this letter as soon as possible."

(Exhibit A3 of the previous matter)

21 The applicant responded on or about 11 November 2003 as follows:

"I am replying to the letter received from Tony Thompson on behalf of the P.&C. dated the 4th of November which I received on the 6th November, 2003.

Since leaving work my health has deteriorated to the point that I have days when I can't get out of bed. Days when I shake so much I can't drive and extremely bad days when I have anxiety attacks where I'm shaking so bad I can't hold a cup and the feeling in my stomach is unbearable. I've had two suicide attempts and a break down resulting in hospitalisation.

Following the incident in the Canteen when I went home from work because of stress and the first accusation I was greatly upset. I was told by Jenny that if I gave in my notice she would try to get whatever benefits she could.

Then you were so very wonderful and decided to keep paying me until I was well. I was so grateful to you all I thought it very very kind.

But everything that happened after that, in such a short time, seemed to attack me for no reason (that's why my letters to you seemed ungrateful and hostile). I was sent a pay cheque which the amount had been changed with no explanation; then a letter with an accusation that I had been over paying myself (see letter to me dated the 9th/9/03 (sic)). The result was very detrimental to my health. I did ring Jenny and Trish to find out what was happening. Then I received two more letters dated 12th and the 23rd asking me to please explain or face the consequences (sic)

On the day I saw Dr. Tan I was having an anxiety attack, it was absolutely unbearable. I felt like I was dying. I would have taken anything to relieve the agitation. I don't think I even told him I had been off work, all I wanted was some relief. He won't interfere with Dr Classen's (sic) treatment but did give me 10Sarapax (sic) tablets until my appointment with Dr Classen (sic).

When I got home I realised I hadn't asked for a sick note. I rang his surgery and when the receptionist asked me how long for I was so ill I said I don't care. So I couldn't take the Serapax and shouldn't have even been driving in my state, but I opened Dr Tan's sick note. Now I was already on very strong medication, all I remember doing was writing a date on the sick note, it seemed so unimportant. Now I have already been told twice that I could not be convicted of any wrong doing by two different lawyers. But always to me it was my health that was more worrying.

As you know fraud is an act of deception to obtain something you are not entitled to,- (sic) criminal intent.

I did not deceive you because you had said you would pay me until I was well so I had no need to commit any deception. I was extremely unwell, and writing a date on the sick note seemed unimportant to me, getting myself well was much more important.

But I can now see how it must have seemed to you, but I have never deceived you about my health.

Dr Claassen is a very strict doctor, I've been having counselling from him for about two years so believe me he would not write a sick note to do me any favours. If I had fallen at work or something I could understand where a weekly or fortnightly sick note would be appropriate, but it is a harsh request to ask someone who has had a complete breakdown to supply weekly sick notes. Apparently, as Dr Claassen has been treating me the whole time he can back date his sick note under certain circumstances, but that is something you can write to him about if you need to.

I miss my job and everyone so much I would give anything to be well and come back. Please I have had one pay in three weeks. I can't handle any more stress. If you accept my explanation and I really hope you will, please could I have my pay as the P.&C. so kindly decided at the September meeting of the committee.

The people who know me know I would never intentionally deceive anyone. I have always given to the Canteen not taken. I spent 16years (sic) working for the P.&C. and I was paid for it, but I also did everything possible to make very good profits. I spent time getting cheaper deals on stock, I was very careful with money, I instigated supplying lunches to the primary school and opening the Canteen to Tafe students in an endeavour to keep the profits as high as possible.

But since I left my health is now so bad I can't ever return to work this year. My honesty and my good name are so very important to me. If you are willing to pay me all my entitlements including the 5 weeks pay, plus leave entitlements (holiday pay) because of 16 years service then I would like you to accept this letter as my resignation."

(Exhibit A5)

22 This was followed by a further letter from the respondent's agent dated 17 November 2003 as follows (formal parts omitted):

> "I am instructed by the Craigie SHS P&C to advise you that following consideration of your reply (undated) but received on the 13th November it resolved as follows:
>
> The P&C has decided that your actions justify your instant dismissal. You will forfeit all entitlements to paid leave and paid notice. Your dismissal will take effect as from 2.00 pm Wednesday 18th November 2003.
>
> However, in recognition of your service, the P&C provides you with the opportunity to submit your resignation with immediate effect. That is, no payment will be made for any period of notice. If you choose this option you will receive your paid leave entitlements of approximately two (2) weeks pro rata annual leave and approximately one (1) weeks pro rata long service leave.
>
> You are required to provide me with your written response to the above by 2.00 pm Wednesday 19th November 2003.
>
> Please forward directly to me your reply to this letter as soon as possible."
>
> (Exhibit A4 of the previous matter)

23 As a result of receiving this last letter the applicant understood that she had been terminated for gross misconduct.

24 The applicant remained unwell subsequent to her termination. In February 2004 she commenced employment with Mercy Aged Care and has continued in this position on a part-time basis.

Submissions

25 The applicant maintains that she has been treated unfairly by the respondent. The applicant stated that she was upset at the respondent's treatment of her as she had worked hard and successfully for the respondent for 16 years. The applicant claimed that the accusations made against her at the end of 2003 had no basis and made her illness worse, the respondent made no efforts to enquire about her health after her altercation with Ms Boeyen and no effort was made by the respondent to restore the relationship between the applicant and Ms Boeyen. The applicant claimed that as she had a medical certificate from her psychiatrist Dr Claassen for the duration of her illness this should have been accepted by the respondent.

26 Even though the applicant concedes that she inserted the end date of Dr Tan's medical certificate this was done at a time when she was under great stress and suffering a panic attack and was not fully in control of what she was doing. The applicant maintains that she is entitled to be paid the monies that were promised to her in April 2003 and she understood that she would have continued employment with the respondent until 19 December 2003.

Findings and Conclusions

Credibility

27 I listened carefully to the evidence given by the applicant. In my view the applicant gave her evidence honestly and to the best of her recollection. As the applicant's evidence was corroborated by a substantial amount of documentation tendered during these proceeding and in the previous matter I have no hesitation whatsoever in accepting the applicant's evidence.

28 The applicant was summarily terminated on or about 19 November 2003 for altering the medical certificate issued by Dr Tan. In a termination of this nature the onus is on the applicant to demonstrate that the dismissal was unfair on the balance of probabilities. However, there is an evidential onus upon the employer to prove that summary dismissal is justified (see *Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677 at 679).

29 The question of whether a person is guilty of misconduct justifying summary dismissal is essentially a question of fact and degree (see *Robe River Iron Associates v Construction, Mining Energy, Timberyards, Sawmills and Woodworkers Union of Australia – Western Australian Branch & Ors* (1995) 75 WAIG 813 at 819). In most cases the employee should be given an opportunity to defend allegations made against them. In *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224 at page 229 the Full Bench of the South Australian Commission observed:

> "Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as was within its power, before dismissing the employee, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that having done those things the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged; and that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable."

30 On the facts as I find them I am satisfied, at least on balance that the respondent has not demonstrated that the applicant was guilty of gross misconduct justifying summary dismissal when she filled in the end date of Dr Tan's medical certificate. Further, I am satisfied that the applicant was treated unfairly and harshly because she was not given sufficient opportunity to defend herself against the allegations relied upon to effect the termination. She was not afforded "a fair go all round" (see *Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385).

31 I accept that the applicant had a lengthy and positive employment history with the respondent over 16 years and that the applicant's efforts ensured the financial viability of the School's canteen for this period. I also accept the applicant's evidence that no issues of a disciplinary nature were raised with her until September 2003.

32 It is clear that the incident which occurred on the 25 August 2003 between the applicant and her friend and colleague Ms Boeyen had a substantial impact on the applicant's health due to the applicant's long term friendship with Ms Boeyen. It was also not in dispute that as a result of this altercation the applicant took sick leave and obtained an initial medical certificate for the period 25 August 2003 to 8 September 2003 and that this medical certificate was followed by Dr Claassen's medical certificate declaring the applicant unfit for work for the period 25 August 2003 through to 19 December 2003. Even though this incident on 25 August 2003 was relatively minor I find that as the applicant suffered from depression on an intermittent basis this incident adversely affected the applicant's health and her ability to return to work at the canteen. I accept that because of health concerns arising from this incident the applicant visited her long standing GP Dr Tan on 9 September 2003 in order to obtain medication for her illness and a further medical certificate as she was unable to return to work. I find that because of the applicant's state of mind at the time she forgot to request the medical certificate when she attended Dr Tan's rooms on this date. I accept that when the applicant returned to Dr Tan's surgery to pick up the medical certificate that afternoon she was asked by Dr Tan's secretary about the length of time off she required which was to be stated on the certificate. As the applicant did not respond with a specific date I accept that the applicant was given a medical certificate by Dr Tan's secretary without the end date being specified. As the applicant took the medication prescribed for her by Dr Tan that afternoon I accept that she may have been in a confused state when she filled out the end date on the medical certificate as

being 28 October 2003. Even though I find that the applicant acted inappropriately by filling in the end date of the medical certificate I accept that the applicant did not do this to deliberately deceive the respondent and I accept the applicant's explanation that she understood that Dr Tan had left the end date of the medical certificate open for her to fill in and that she was not thinking clearly at the time. Further, the applicant did not deny that she filled out the end date on the medical certificate when asked by the respondent about this issue. It appears that when deciding to summarily terminate the applicant the respondent did not give any weight to the applicant's state of mind at the time the incident occurred and the applicant's excellent and lengthy employment history with the respondent prior to deciding to terminate the applicant. I also conclude that the respondent should take some responsibility for the applicant's poor health at the time as just prior to the applicant filling out the end date on the medical certificate the applicant was advised by Ms Vincent on 5 September 2003 that she had overpaid herself throughout 2003 even though the respondent audited the wages paid to the applicant and the applicant's wages were unilaterally reduced by the respondent on this date. Further, it is my view that at most the applicant deserved a warning for her actions given her previous unblemished work history with the respondent.

33 In my view the applicant was denied procedural fairness given the manner of her termination as the respondent was aware that the applicant was unwell as at the end of October 2003 (the respondent had Dr Claassen's medical certificate in its possession at the time giving the applicant sick leave for the period 25 August to 19 December 2003 in its possession) when it required that the applicant show cause at the time that she should not be summarily dismissed. Given the severity of the applicant's illness at the time and her necessity to be off work for such a lengthy period it is my view that the demands made of the applicant in correspondence from the respondent in November 2003 (see Exhibit A3 dated 4 November 2003 of the previous matter) about this incident were oppressive and inappropriate in the circumstances.

34 I therefore find that in all of the circumstances the applicant was unfairly terminated.

35 The applicant is not seeking re-instatement or re-employment, nor is this practicable given that the School's operations have ceased. Further, the respondent was dissolved on 6 April 2004.

Compensation

36 I therefore now turn to the question of compensation. I apply the principles set out in *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 3635 and *Tranchita v Wavemaster International Pty Ltd* (1999) 79 WAIG 1886.

37 On the evidence, I am satisfied the applicant took reasonable steps to mitigate her loss when she was well enough to return to work.

38 As the applicant was paid wages to 19 November 2003 and as the respondent undertook to employ the applicant until 19 December 2003 I find that the applicant should be paid the wages owing to her for the period from 19 November 2003 to 19 December 2003 as the applicant had a valid medical certificate for this period and I find that the respondent agreed to pay the applicant until this date. I determine this amount to be $1760.00 nett (4 weeks and 2 days at $400 nett per week).

Was the applicant denied benefits under her contract of employment?

39 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).

40 Given that I have found the applicant to be a credible witness I accept that in April 2003 the applicant was advised by Ms Vincent that as a result of the School and the respondent winding up its operations at the end of 2003 she was told that she would be given five weeks pay as a redundancy entitlement, two weeks pay in long service leave entitlements and four weeks of annual leave and annual leave loading entitlements at the end of 2003. I therefore find that the applicant has made out her claim that she is due the amounts she is claiming based on the applicant earning a nett amount of $400 per week, that is, five weeks redundancy pay ($2,000.00 nett), four weeks pay for annual leave and annual leave loading at 17½% per week ($1,880.00 nett) and two weeks pay for long service leave ($800.00 nett). I also accept the applicant's evidence that she was not paid for the four weeks commencing 3, 10 and 24 October 2003 and 7 November 2003 even though she had a medical certificate from Dr Claassen for the period 25 August to 19 December 2003. I find that the applicant is due payment for these weeks as it was not in dispute that the respondent accepted the certificate from Dr Claassen (see respondent's Notice of Answer and Counter Proposal) and that this certificate covered the full period 25 August 2003 to 19 December 2003. In my view the respondent's requirement that the applicant submit weekly medical certificates in order to be entitled to weekly payments was unfair and harsh given the severity of the applicant's illness at the time and her inability to travel to Dr Tan's surgery each week to obtain a certificate. I thus find that the applicant is owed $1600.00 nett in outstanding wages and $4680 by way of denied contractual benefits which total $6,280 nett.

41 A minute of proposed order will now issue.

2005 WAIRC 00025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHIRLEY FOREMAN
	APPLICANT
	-v-
	CRAIGIE SENIOR HIGH SCHOOL P&C ASSOCIATION
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 19 JANUARY 2005
FILE NO/S	APPL 4 OF 2004
CITATION NO.	2005 WAIRC 00095

Result Application alleging unfair dismissal upheld and order issued for compensation in lieu of reinstatement. Application for contractual benefits allowed.

Order

HAVING HEARD Ms S Foreman on her own behalf and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby:

1. DECLARES THAT the dismissal of Shirley Foreman by the respondent was unfair and that reinstatement is impracticable.
2. ORDERS the respondent to pay Shirley Foreman compensation in the sum of $1,760.00 nett within seven (7) days of the date of this order.
3. DECLARES that the respondent denied Shirley Foreman benefits under her contract of employment.
4. ORDERS that the respondent pay Shirley Foreman $6,280.00 nett within seven (7) days of the date of this order.

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

2004 WAIRC 13753

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MICHELLE JANE HOLT

APPLICANT

-v-

REALTY EXECUTIVES BUNBURY & DISTRICTS

RESPONDENT

CORAM COMMISSIONER S WOOD
DATE THURSDAY, 23 DECEMBER 2004
FILE NO. APPL 530 OF 2004
CITATION NO. 2004 WAIRC 13753

CatchWords Contractual entitlements claim – Credibility of witnesses – Terms of contract – Entitlements granted in part

Result Application granted in part
Representation
Applicant Mr M Devlin of Counsel
Respondent Mr G Smith of Counsel

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 Ms Michelle Jane Holt worked as an administrative assistant to a director of the respondent company for the period 7 January 2002 to 21 October 2003. Ms Holt was also a licensed real estate sales person and was able as part of her contract to execute listing and sales. The claim, as confirmed in closing submissions, is as follows:

1. Outstanding commissions $12,442.20
2. Mobile phone expenses $3,800 @ $300 per month
3. Fuel expenses $5,700 @ $50 per week
4. Overtime $10,926.87, ie. - $480 p/w/5 days = $96p/d/7 hours = $13.71
   2002 – 510 hours x 13.71 = $6992.10
   2003 – 287 hours x 13.31 = $3934.77
   Total – 797 hours
5. Days off owing $10,272 (ie. $107 days at $96 per day)
6. Trip to Bali – December 2002 – estimated cost $700, alternatively the estimated cost of the same trip in December 2004 –$700 with Flight Centre or $1300 - $1400 with Qantas and Harvey World Travel.

2 It is Ms Holt's evidence that she was employed by Mrs Roslyn Ierace, a director of the respondent company to act as her administrative assistant. Mrs Ierace and Ms Holt had a discussion at a coffee shop in Bunbury in December 2001 at which time the terms of employment for Ms Holt were agreed. Ms Holt says that she was to work a 5 day week, 2 days off. Sunday was to be a day of work and Friday and Saturday were to be the days off. She was to receive a salary of $25,000 per annum for her administrative duties and was also able to do sales duties. She was employed on a 3 month trial basis. All of this appears to be common ground. For her sales duties she was to receive 10% of the commission for listing and 10% of the commission for selling. In addition to this Ms Holt says that she was advised by Mrs Ierace that she was to get the same benefits as the other administrative assistant. These latter two claims are contested. There was no detailed discussion of what the benefit would be. The other administrative assistant was Ms Elizabeth Patterson who worked for the other director Mr Michael Caddy. She says Ms Patterson received a fuel card and her mobile phone expenses were paid. Ms Holt says that she

pursued unsuccessfully Mrs Ierace on many occasions to secure a written contract. She says Mrs Ierace always indicated she intended to provide such a contract. The claim for a trip to Bali is one that Ms Holt says she was promised by Mrs Ierace leading to Christmas 2002 as return for her good work. As to the claim for days off and overtime Ms Holt says she has gone back through the diaries in terms of days she worked. She says that she was to have Friday and Saturday off however, she typically worked Friday doing administrative work and Saturday morning would do home opens. She has also tallied the additional hours she worked and claimed these as overtime. Ms Holt put in at hearing a claim for 50% penalty as part of overtime claim.

3 Ms Holt says that at interview she indicated to Mrs Ierace that $25,000 would not be enough. She says this was to be renegotiated after 3 months. This never occurred. Ms Holt says Mrs Ierace also said that she wanted to keep things equal between Ms Patterson and Ms Holt in terms of terms and conditions. Exhibit A1 is the letter confirming for Centrelink Ms Holt's employment and her $25,000 per annum salary plus bonuses. Exhibits A2, A3 and A4 are letters which Ms Holt wrote to Mrs Ierace in August, September and October 2003 respectively. In these letters Ms Holt raises the need to sort out their employment agreement and the question of her salary and other sales payments. Exhibit A2 states:

> "I would like to sort out our employment agreement. I have requested to you verbally on several occasions to discuss my terms of employment and in particular if I will be receiving a pay rise. I have been in your employ for 19 months. Initially I was employed on a 3 month trial period with a wage of $25,000 per annum. After the trial period there was to be a re-negotiation of my employment. This did not happen. I would appreciate a written agreed contract stating work times days and pay rate. Since the beginning of my employment I have worked a 6 day week almost every week and yet our agreement was for a 5 day week and one of those days to be a Sunday. I think it is unfair that it is costing me money to make you money, by this I mean that I am paying my own fuel and phone yet I am not being compensated for this. In our initial interview I was promised the same agreement that Mick Caddy has with his personal assistant and this has not been fulfilled. I enjoy my position with your company and love what I do so I do not want to change employment. I am requesting a fair rate of pay for the work that I do. I would like a written response to my request within 5 days from the date of this letter. A copy of this letter has been sent to Wageline."

4 Exhibit A3 refers to non payment of wages in accordance with an award of the Commission. This is not the claim made now. Exhibit A4 is her letter of resignation. In that she says, "I have enjoyed my position but feel that I have not been compensated according to the award and the extent of work that I do on your behalf".

5 It is apparent from these letters and Ms Holt's evidence that she queried on a number of occasions the need to sort out a written employment agreement with Mrs Ierace. Her approaches were to no avail. It is apparent from Exhibit A2 that what Ms Holt sought was an increase in pay and payment for telephone and fuel.

6 Exhibit A5 is a summary made by the applicant of the 27 properties and commissions in question. There is some minor difference in figures between the parties and Mrs Ierace says that Ms Holt is due commission on the 9 Christopher Way property and the property at 70 Eaton Drive. It is conceded also that commission is to be paid on the Shenton Road property. Commission has still not been paid on these properties. With the exception of these differences the main dispute between the parties is that the applicant says that she is due a maximum of 20% of the commission payable to the respondent if she was to list and sell a property. The respondent says that Ms Holt is due a maximum of 10% of the commission payable to the respondent if she was to list and sell the properties. The difference being that Ms Holt says that the 10% for listing plus 10% for selling relates to a percentage of the total gross commission fee. The respondent says that any commission fee is split into listing and sales commissions on a 50/50 basis and whereas the applicant is entitled to 10%, it is 10% of the listing and 10% of the sales commissions separately. This approach produces a maximum of 10% of the total commission payable.

7 Ms Holt says she kept a personal diary and telephone diary. These are all exhibited as Exhibit A8. She has been through these diaries to total up the days that she worked, the days off that she says are owing to her and overtime hours [Exhibit A6]. Ms Holt says there was no formal end of trial period and after a month she asked for her contract. She says Mrs Ierace said that she had to get some professional advice from a Ms Bridget Green. Ms Green was to write up the contract. Ms Holt says she was always put off by Mrs Ierace in relation to the issue of the contract.

8 In relation to the claimed trip to Bali, Ms Holt says that around about the time of the expiry of her probationary period Mr Mortimer, a Mortgage Broker from the Commonwealth Bank, came into the office and said "oh well you're still here then". Mrs Ierace responded "Well I haven't sacked her yet ……..". Ms Holt says that Mrs Ierace then told Mr Mortimer that she was happy with Ms Holt's performance and that Ms Holt had been doing extremely well and Mrs Ierace mentioned a Christmas bonus of a trip to Bali. Ms Holt says that the bonus was promised, and it was expressed during a conversation regarding her work performance and how appreciative Mrs Ierace was of this. Under cross examination Ms Holt says that she believed that the offer of the trip was a genuine offer. She denies that Mrs Ierace said she had had enough and was packing up and going to Bali. She denies also that Mrs Ierace said in the presence of Mr Mortimer that her husband would not go with her, or that she said to Mr Mortimer that he could go with her, or that she said to Ms Holt to find someone to look after the kids and she could come. Ms Holt says that she was told that it would be a Christmas bonus and assumed it was such. Ms Holt says that when she did not receive the bonus she did not query it with Mrs Ierace. She agrees that she did not raise the issue of the Bali trip in her correspondence of 15 August 2003 [Exhibit A2].

9 Ms Holt claimed for her fuel and mobile telephone expenses on her 2002 [Exhibit R1], and 2003 [Exhibit R2] tax returns. She never presented an account for either to Mrs Ierace. In relation to the Christopher Way property Ms Holt says she is due $672 and for the Eaton Drive property $581.40. For the Shenton Road property Ms Holt says the commission due was $11,520 of which she should have received $2,304. Ms Holt says her cost for business purposes of the mobile phone was about $75 per week and for fuel about $50 per week. In both cases she had been through her receipts for telephone accounts and done an average costing over the period of her employment. In relation to the Bali trip she says that the figures provided are from a travel agency and relate to the cost of a Bali return value trip for either December 2002 or December 2004.

10 Under cross-examination Ms Holt says that her calculations are based on the fact that where she worked an extra day in the week past 5 days she considers that she should be given a day in lieu and paid overtime for the hours worked. She agrees that she could list and sell properties if she saw fit. However, she says that all of her work in relation to witnessing documents, writing offers and acceptances and listing properties fell within her administrative assistant work. She says she thought that her overtime was part of her bonuses. She says in addition to her 5 day week she should have been paid bonuses. She agrees it was never agreed that she would be paid overtime but she says that was implied as part of her work. She was expected to do the work. She raised the question of overtime after the 3 months trial. Ms Holt denies that she was to get 10% of the listing portion of the commission and 10% of the selling portion of the commission.

11 Mr Anthony Burke gave evidence that he was employed in January 2003 as a personal assistant to Mrs Ierace. He came to the business to work in commercial sales, but worked as Mrs Ierace's PA while that section developed. He says that he received a

letter of employment that detailed his conditions, being an initial three month probation period, at a rate of $20,000 per annum and commission on properties sold. He believes that it was 5% on the sale. He also says that if he bought a listing to the business that was sold he would get 5%. If he made a sale he would get 5% as well. He says that he was on a retainer and a small commission. There was no particular agreement in relation to mobile phone and car expenses. He says that based on his own experience in the industry, he claimed the expenses through his tax at the end of the year. Mr Burke worked Monday to Friday, every second Sunday and Saturdays. He says he worked in effect six days per week. He was paid for five days and the agreement on the weekend was that if a sale was made at a home open he would receive 5% commission. He says there was a meeting held in July between Ms Holt, Mrs Ierace and himself to discuss respective duties and for Ms Holt to raise issues with her pay scale. He did not stay for the finality of the meeting, but he believes that Ms Holt did not sort out her pay structure.

12 Under cross examination Mr Burke confirmed that he was paid a base rate for his PA duties and had the ability to earn commissions for other work. The commissions compensated him for the additional hours outside of the PA work. He also confirmed that he paid for his own mobile phone and vehicle expenses and then claimed them back on tax. Mr Burke confirmed that he was only paid commission on the sales in which he contributed.

13 Mrs Ierace says that she interviewed Ms Holt at Henry's Café and outlined the position, namely that she required a licensed representative that could act on her behalf, to list and sell properties under her. She says that she told Ms Holt there would be a retainer of $25,000 per annum and a commission structure of 10% on the listing fee (the fee being two separate halves) and 10% on the selling fee. If she listed and sold she would receive 10% of the whole commission. Work was 5 days per week. She preferred one of those days to be a Sunday and anything over and above that was up to Ms Holt.

14 Mrs Ierace says that as a sales representative or a Personal Assistant if a client calls and wants to have another look at a property you do not say no. If someone is shown through a house earlier in the week and they wish to go back and look on Saturday you would do that. She says it was up to Ms Holt and it was at her discretion. Mrs Ierace says that [Exhibit R4] was created on 23 January 2002 some weeks after Ms Holt's engagement. When a commission comes into the company it is split in half into a listing fee and a selling fee. She has no doubt that Ms Holt's commission payments were on the basis of 10% of listing fee if listed, 10% of selling fee if she sold it; or 10% on the whole if she did both. She says that Mr Burke, Mr Gavin Dobbie and Ms Sandra Dellaca all worked under this arrangement. She says that she has never employed anyone on the basis of 10% of the entire commission if they listed or 10% of the entire commission if they sold; or 20% commission if they did both.

15 Mrs Ierace says that Ms Holt was to work 5 days per week, preferably a Sunday, but it was her option. Hours were 8:30 – 9am until 5pm, with a lunch break that Ms Holt sometimes took. She says that this was the base and that anything else was up to Ms Holt. If she wanted to do more she could. Mrs Ierace denies that there was ever any agreement to pay overtime, or that Ms Holt asked to have days off in lieu, to pay for telephone expenses or to reimburse for fuel.

16 Mrs Ierace says of the Bali trip that one of her big jokes when she has had enough is to say that she will pack up and head off to Bali. She says that on the day Mr Mortimer came into the office she commented to him that Sam (her husband) did not want to come and that he should go with her. She says that Mr Mortimer laughed this off and made a comment about his wife. She then said to Ms Holt to organise someone to watch the kids and they would be off to Bali. It was not a serious offer and Ms Holt's 2002 Christmas bonus was a hamper which she gave to her personally. Mrs Ierace denies that at the meeting with Mr Mortimer she offered Ms Holt a trip to Bali, and further she denies that she offered her a trip to Bali on any other occasion.

17 Mrs Ierace says that she was not aware of Ms Patterson's terms and conditions when she went to interview Ms Holt. She did know Ms Patterson was on $30,000 per annum. She denies that she told Ms Holt that she would be employed on the same terms as Ms Patterson. Under cross examination she says that a few weeks after she interviewed Ms Holt and prior to her employing her she became aware of the extras being paid to Ms Patterson. She denies that she said to Ms Holt that she wanted things to be equal in the office or that she wanted her to be equal with Ms Patterson. She says that she was not aware of Ms Patterson's terms and conditions in December 2001 but later became aware. She did not purposely seek to find out but she had a discussion with Mr Caddy after she had decided to employ Ms Holt. She denies that the basis of the discussion was Ms Patterson's package.

18 Mrs Ierace says that the Shenton Drive property is rightly claimed as it was Ms Holt's listing and sale and that 10 per cent of the commission has been allocated to be paid to her. She says that Christopher Way is definitely due. She agrees that it may have been an internal error that Ms Holt was not paid. In relation to Eaton Drive she says that Ms Holt did the home open and that 3 or 4 weeks later it was her that signed the contract but she did not want to argue the point, she let it be. She says that there were others like this but she did not argue.

19 Mrs Ierace denies that she told Ms Holt that she would give her a trip to Bali at Christmas time. She says she placed the date on the back of [Exhibit R4] some time in 2004. She says that she printed the document out and put it on Ms Holt's personal file in 2002. She says that it was on the laptop and she thought that she had shown it to Ms Holt. She does not know if she printed it back then. Mrs Ierace says that the personal file did not have a lot in it and that it was not important as it did not really contain anything except the document [Exhibit R4]. She says that the file was created for the future to put more information into it. Exhibit R4 was the main item and everything else was on the laptop. She agrees that there was nothing stopping her from bringing the document to the attention of Ms Holt and having her sign it. She says that the terms of Ms Holt's employment had been discussed and she did not see any need for Ms Holt to sign Exhibit R4. Mrs Ierace says that towards the end of her employment Ms Holt began to ask for her terms and conditions in writing. She denies that Ms Holt queried this throughout her employment. Mrs Ierace says that she never went to see Bridget Green and disputes Ms Holt's evidence about this issue. In relation to having the terms and conditions of Ms Holt's employment expressed in writing Mrs Ierace says that she just did not have time. She denies telling Ms Holt that she would pick up or contribute towards the mobile phone costs. She says that the amount of times Ms Holt would have to use her phone would have been minimal. She says that Ms Holt was to meet her own fuel expenses. Mrs Ierace says at the first meeting she would have told Ms Holt that "phone and car is your responsibility". Telephone and car expenses were never offered and therefore they do not appear in Exhibit R4. However, those matters were raised in the context of advising Ms Holt that she would need her own telephone and car.

20 Mrs Ierace says that at the meeting at Henry's Café she discussed the issue of splitting the Commission into two. She says that it is commonly known in the real estate industry that when commissions come in they are split. She says that she cannot recall Ms Holt working on Saturdays, but she worked Sundays pretty much for the whole time. She says that Ms Holt was pretty much there every Friday. She says that Ms Holt sometimes had half days but she did not keep a tab of this. She denies that Ms Holt is due to be paid in lieu for working on days off. She did not expect Ms Holt to work on Fridays; it was her choice and it balanced out the time that she had off during the week. Ms Holt was able to come and go as she pleased and was never questioned about it. She denies giving Ms Holt the impression that she could have earned 20% commission.

21 The difficulty which Ms Holt's claims face are whether they are actually based on the contract agreed between the parties, rather than some notion of fairness and amounts due because Ms Holt worked hard for the business, sought a greater lever of remuneration and did not get paid this. It is the case that, with the exception of the claimed trip to Bali as a bonus, the contract rests on discussions between Ms Holt and Mrs Ierace in Henry's Café towards the end of 2001. The discussion was the basis for the contract of employment. It is common ground that that discussion covered salary and commission. The only other matter in contention from that discussion is whether fuel and telephone expenses were offered. It is the evidence of all three witnesses that Ms Holt pursued a clarification of her contract at later dates. It is the evidence of Ms Holt and Mrs Ierace that Ms Holt wanted something in writing but never achieved this. It is Ms Holt's evidence that she wanted a pay rise and never achieved this. The other difficulty with Ms Holt's claim is the lack of substantiation and the fact that most of what is claimed was never pursued through the course of her employment. The claims appear exaggerated and hence the credibility of Ms Holt's evidence is damaged. I will expand on this as I deal with each claim.

22 The other difficulty I have in assessing the claims is that I have little confidence in the evidence of Mrs Ierace. Mrs Ierace gives evidence in relation to Exhibit R4 [Transcript p.96-100] which in my view cannot be believed. She says that a crucial document concerning Ms Holt's contract of employment was shown to Ms Holt on the laptop, was not printed off at the time, or signed or dated, was later printed and placed as a sole piece of paper on a personal file (which was not discovered) and was later still dated and written on. This evidence has all the hallmarks of being made up under cross-examination, particularly given the requests by Ms Holt during her employment to have her contract put in writing.

23 The evidence of Mr Burke however can be relied upon entirely. Mr Burke was called by the applicant to give evidence. In my view his evidence damages substantially the claims of the applicant. His evidence was straightforward and convincing. He says he was employed on three months probation, a salary of $20,000 per annum and was paid commission on listings and sales he made at the rate of 5%. Hence his contract was different to the applicant's but had a similar structure. He claimed his fuel and telephone expenses on his taxation return. His job of personal assistant would appear to be similar, though not the same, as that of Ms Holt, and he did not work precisely the same days. His commission payments would compensate him for the hours he worked outside of his personal assistant role (Transcript p.64), Mr Burke then importantly says:

> "So the entire commission comes in. It's split in two. One represents listing. One represents sales?---Correct.
>
> And then your commission payment in this case, I think, was based on the sale component?---Yep.
>
> And that's how you understood it to work?---Yeah. Part of Roslyn's - - yeah.
>
> Yep. So you wouldn't be paid on - - your commission wouldn't be paid on the entire commission, just that part that you contributed to?---Correct" (Transcript p.65).

24 I must say that Mr Burke's straightforward evidence made sense. He was paid a percentage of the commission for listing or sale, or both if he was responsible for both. The commission was split into two components. His rate of commission was 5%. Ms Holt's rate of commission was 10%. However, she claims 10% of the total commission twice, totalling 20% in all, if she was responsible for a listing and a sale. Yet this is not how commissions were paid to her. She did not contest those payments during her employment and in Exhibits A2, A3 and A4 she did not seek redress on her commission payments. I consider that Mr Burke's evidence and Ms Holt's own actions speak strongly against her claims for commission, except for the three unpaid commissions which the respondent concedes, but at the appropriate rate of 10% for sale or listing. It is not the case, as submitted by Counsel for the applicant, that it matters not that the applicant did not pursue her claims during her employment. The evidence of what she actually claimed during her employment provides a good indication of what she may have considered the contract contained arising from the discussion in December 2001. With the exception of these properties I would dismiss Ms Holt's claim for commission. I consider that the contract entered into was for $25,000 per annum in salary and commission of 10% of the listing fee and 10% of the selling fee, if the applicant listed, or sold, or both. I will turn to the issue of telephone and fuel later.

25 The original contract of employment clearly never contained payment for additional days worked or for overtime. This was not part of the original discussion between Ms Holt and Mrs Ierace. In relation to days worked Ms Holt was to work 5 days a week, and take off Fridays and Saturdays. It is not contested that she worked additional days and hours and her diaries seem to support this, albeit it is not at all clear how much time she worked as although there are extensive diary and telephone notations, these do not amount to anything approximating a time sheet that may have been signed off. The best that can be said is that Ms Holt says that she worked Fridays as well and Mrs Ierace does not deny this, albeit she says that Ms Holt could organise her own time. I note that the salary was expressed as an annual salary. It is the case that Ms Holt considered that she deserved more money for her work. Mr Burke says that the commission was to compensate him for additional work. I consider the same applied to Ms Holt. Ms Holt now wants to be paid in precise terms for the claimed additional work. The only claim that Ms Holt made during her employment, in relation to this, was for additional salary. Her evidence was that from the beginning of the contract she told Mrs Ierace that $25,000 was not enough. She says that it was to be subject to review. It appears that it was never reviewed, was never increased and that Ms Holt finally said that it was not adequate and resigned. Against this background I have to conclude that Ms Holt has not made out her claim for payment of overtime and additional days as being a denied benefit under her contract of employment. I would therefore dismiss those claims. I note that overtime and days in lieu for additional work, are usually matters agreed between supervisor and employee prior to the work being undertaken.

26 I should add that the applicant's closing submission seems to suggest that the Commission should imply such benefits into the contract, and that the Commission, pursuant to s.26, is somehow at liberty to make a fair and equitable judgement about what should be in the contract. I will say briefly two things about this submission. It is the case that the Commission, whilst acting judicially in claims under s.29(1)(b)(ii) of course has regard to the obligations imposed under s.26 of the Act. This does not give the Commission license to place upon the parties a whole new contract. Primarily the task is to decide what the contract is between the parties, whether verbal, written or implied. The implication of terms may be guided by the conduct of the parties and the principles for implying terms are well known. They relate to whether the terms are reasonable and equitable, are capable of clear expression, necessary to give business efficacy to the contract, are so obvious as to go without saying and are not contrary to expressed terms. In short Ms Holt wanted to be paid more, was not given a positive response, or a response at all so far as I can see, continued to work in any event and then finally resigned. It is not reasonable in those circumstances to now imply into the contract the terms which she did not pursue or seek to achieve whilst employed. To do so would in my view be giving a wrong license to the power of the Commission under s.26, and a wrong construction to the contract.

27 I turn then to the claim for a trip to Bali. Ms Holt says that Mrs Ierace promised her a trip to Bali as a Christmas bonus (Transcript p.15) in a discussion between Mrs Ierace and Mr Mortimer (at which Ms Holt was present) in April 2002 (i.e around her review period). Counsel for both parties say that credibility is crucial to determining the claims and make submission rightly as to the credibility of their clients. As I have indicated, I cannot rely on Mrs Ierace's evidence and I have

reason to doubt Ms Holt's claims. It is difficult then to rely on credibility as being the deciding factor in testing the validity of the claims. More practically though I do not see why someone, involved in a three way discussion with a person not part of the real estate agency, would assume that they were given a contractual bonus of a trip to Bali or that a conversation in April settled a Christmas bonus between the parties. It strikes me more as passing and congratulatory conversation than as a binding promise. I note also that Ms Holt at no time pursued that supposed bonus during the life of her employment. She now says though that it was part of her contract.

28 The claim for telephone and fuel is slightly more complicated. I have no doubt that this matter was discussed at the initial meeting in December 2001. Mrs Ierace says she told Ms Holt that the 'phone and car' were her responsibility. However, I also have no doubt, when one considers Mrs Ierace's evidence in full, that the discussion was centred on Ms Holt receiving the same as the other personal assistant. Mrs Ierace took steps to find out what was being paid to Ms Patterson. Ms Holt says that Ms Patterson got a fuel card and had her telephone paid. Ms Patterson was never called by the applicant and so the Commission had little reliable evidence as to Ms Patterson's actual terms and conditions. Mr Burke, who was employed later, says he claimed his expenses on his taxation return; and indeed Ms Holt did likewise. Ms Holt then later sought written confirmation of the contract and included a request for fuel and telephone in her letter [Exhibit A2]. In that sense this aspect of her claim, unlike the other limbs of her claim, was clearly pursued during her employment. Except that Ms Holt admits that she never invoiced Mrs Ierace for her expenses. When I weigh this evidence carefully I consider the appropriate conclusion is that the contract initially was not made so as to include fuel and telephone expenses. Those were matters left to be pursued and settled and the terms of which were never defined or settled. In that sense they fail in a similar category as the claim for a bigger salary which was highlighted at the beginning, not agreed, raised later and never resolved. Given this conclusion I would dismiss this aspect of the claim. If the contractual obligation had been more definite and certain I have no doubt that Ms Holt would have presented an invoice or receipts to the employer for reimbursement.

29 The claims for commission on the properties of 33 Shenton Road, 9 Christopher Way and 70 Eaton Drive are not contested. These claims should be awarded using the commission formula as expressed by the respondent. The commission then due on each of these respective properties is $1,152.00 for Shenton Road, being 10% of the listing and 10% of the sale. In relation to Christopher Way, on the applicant's evidence this was a conjunctional sale and was the respondents listing. Therefore 10% of the respondent's commission of $3,901.25 due to the applicant would be $390.12. In relation to Eaton Drive there was a total commission of $5,814.00. The applicant is entitled to 10% of the listing and 10% of the sale which equates to $581.40. These figures give a total of $2,123.52. This is the amount of commission, by way of denied contractual benefit which I would award.

2005 WAIRC 00035

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHELLE JANE HOLT
	APPLICANT
	-v-
	REALTY EXECUTIVES BUNBURY & DISTRICTS
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	WEDNESDAY, 12 JANUARY 2005
FILE NO	APPL 530 OF 2004
CITATION NO.	2005 WAIRC 00035

Result	Application granted in part
Representation	
Applicant	Mr M Devlin of Counsel
Respondent	Mr G Smith of Counsel

Order

HAVING heard Mr M Devlin of Counsel on behalf of the applicant and Mr G 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:

(1) THAT the said respondent do hereby pay within 7 days of this order, as and by way of commission the amount of $2,123.52 to Michelle Jane Holt, less any taxation that may be payable to the Commissioner of Taxation.

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

(Sgd.) S WOOD,
Commissioner.

[L.S.]

2005 WAIRC 00141

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRIS DENNIS JOHNSON
	APPLICANT
	-v-
	STOTT & HOARE INVESTMENTS PTY LTD T/A STOTT & HOARE BUSINESS COMPUTERS
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 19 JANUARY 2005
FILE NO.	APPL 758 OF 2004
CITATION NO.	2005 WAIRC 00141

CatchWords	**Contractual entitlements-commission-right to commission on completion of employment-principles examined *Industrial Relations Act 1979 s 29(1) (b) (ii)***
Result	Contractual Entitlements Awarded
Representation	
Applicant	Mr G. McCorry appeared on behalf of the Applicant
Respondent	Mr D. Johnston appeared on behalf of the Respondent

Decision

1 This application was filed in the Commission on the 8 June 2004 by Chris Dennis Johnson (the Applicant) who seeks orders for unpaid contractual entitlements in the form of outstanding commissions which the Applicant says were due to him at the cessation of employment with Stott & Hoare Business Computers (the Respondent). The Respondent filed a Notice of Answer and Counterproposal (the Answer) within the required time. The Answer was brief. It admitted that the Applicant was a former employee of Stott & Hoare Investments Pty Ltd but otherwise provided no answer to the claim, pleading that there were insufficient details included in the application to enable the Respondent to provide a detailed response. The file indicates very little change by the Respondent in its attitude to the supply of information.

2 Eventually the matter was referred by the Commission, as constituted, to a Deputy Registrar for conciliation which occurred on the 13 August 2004. It is relevant to note that the report of the Deputy Registrar indicates that the discussion in the conference related to the issues of how much commission was allegedly owed in particular the Respondent's method of calculating future costs. In due course the matter became the subject of a Notice of Application by the Applicant for the Respondent to provide discovery and inspection within 48 hours of all invoices issued relating to sales listed in an attachment to the Applicant's letter of 15 April 2004. The grounds on which the application was made were that the Respondent relies in its defence to the claim on the alleged return of goods of warranty claims which were said to reduce the amounts of commission due to the Applicant. According to the Applicant the Respondent refused to provide proper evidence of that defence. This was notwithstanding the Respondent had been requested three times to provide discovery and had failed to do so. The application for discovery was heard on the 22 October 2004 and the Commission issued orders that the Respondent discover the documents which were identified in the Orders to the Applicant's agent.

3 It is relevant to note for what appears later that never during any of these interlocutory proceeding was that the claim made by the Respondent that there was a condition of employment which meant that the Applicant was not entitled to any commissions on sales made during the last month of employment.

4 This last became an issue in the proceedings which were held on 4 November 2004 and upon which the Respondent in effect then built its opposition to this claim.

5 The matter was heard on the 4 November 2004 and was adjourned after hearing the evidence to allow the parties to make written closing submissions. The last of these was filed in the Commission on or about the 8 December 2004.

6 The focus of this application is the contract of employment made between the Applicant and the Respondent on 1st October 1997. The details of the contract are contained in Exhibit M2. In general, the contract provides for an annual base salary and a car allowance plus 6% superannuation. It also provided for payment of commission. The level of commission appearing in the contract of the 1 October 1997 was later changed so that the Applicant was entitled to be paid a commission of 20% on the gross sales achieved by him less certain costs.

7 Those costs included any restocking fees charged by the Respondent's suppliers for the return of stock, any freight charges for delivery of the goods to customers and technical support for services to be sold to customers. The Applicant was entitled to be paid both his salary and car allowance for each calendar month, two weeks in advance, two weeks in arrears on the 15th day of each calendar month. He was further entitled to be paid commissions earned in one calendar month on the 15th day of the succeeding month. He was allowed to purchase goods and services from the Respondent and charge the cost to the Respondent on the understanding that the cost would be deducted from the net commission payments due to him.

8 There were flexible arrangements concerning hours of work although the hours of operations were generally to be 8.30am to 5.30pm Monday to Friday. There was an annual leave entitlement of 20 working days per year. There was an entitlement to 6 days paid sick leave.

9 Only one week's notice of termination was required and there was a covenant prohibiting the release to any person not employed by the Respondent of any information relating to the business.

10 All of those conditions and terms were agreed between the parties and the Applicant signed the letter of offer in acceptance of them.

11 The relationship continued, it seems quite happily, until 15 April 2004 when the Applicant decided to move on having obtained employment with another employer. He advised the Respondent in a letter of termination (Exhibit M1) that he would be giving his notice commencing the 15th April 2004. He expressed the expectation that all his sales orders would be processed and invoiced before his departure on 29th April 2004.

12 As it transpired the contract came to an end on the 30th April 2004. When the Applicant submitted his notice of termination he was told by the Respondent to go home, which he did and did not work for the balance of the notice period of one month.

13 Significantly he attached to his letter of resignation a spreadsheet of the orders he had processed in the month prior to his departure. In his evidence he made it clear that he knew that the 15th of the month was a key day. He timed his resignation to take account of that to ensure that he was paid his commissions and sales written for the last month of his employment. He says that he did so because it was in his knowledge that on some occasions the Respondent had failed to pay both non commission and commission to salesmen for salary and commissions they earned during the last month of employment and he did not want to risk that would to happen to him.

14 The spreadsheet that the Applicant served on the Respondent showed there were outstanding commissions owing on his gross sales of $393,839.00 for which the Respondent's calculated profit was $60,040.52. There were certain deductions to be made from the gross sales in the form of credit adjustments arising from a cancellation of orders. These were before the Commission in Exhibit M5 & M4. In total there was $8690.00 in credit adjustments. The calculation of profit after the adjustments in favour of the Respondent was said to be $58,303.52. That is $60,040.52 less 20 % of $8690.00. The Applicant conceded that the Respondent was entitled to deduct $1645.00 for technical support, $3474.00 in freight costs, and $259.00 in restocking costs giving a calculated profit of $52,924.52. The Applicant was entitled to 20% of this or $10,504.90. From this the Respondent was entitled to deduct $631.00 for private purchases paid by the Respondent on behalf of the Applicant leaving a net commission of $9953.90. During his submissions, Mr McCorry, who appeared for the Applicant, conceded that in equity a further sum of $600.00 being commissions previously paid to the Applicant for a sale for which the Respondent gave a credit after employment should be deducted. This means the Applicant's final claim is for $9353.90.

15 The Applicant says these monies are payable to him because his contract so provides. The Respondent says that is not the case because the Respondent has a policy which provides that when a salesman leaves the employ of the Respondent during a calendar month, commission is paid on sales invoiced for the previous calendar month but no commission is paid on sales invoiced by that salesman during the month on which the employment terminates. The Applicant was well aware of the method of paying commission as it was calculated as percentage of the gross profit generated from sales attributed to particular a sales representative and invoiced during the calendar month. Deductions were made from that gross profit figure in relation to credits, returns and expenses. This was consistent with the contract of employment.

16 Mr Loader, the Principal of the Respondent gave evidence that it was a long standing practice of the Respondent that it would only pay commission on complete months and not on part month invoiced sales. This was said to be supported by the evidence of the Financial Administrator, Mr Herbert, who gave evidence that monies which were due had a sales person not left the employ during a month were allocated to other sales persons who took over the management of the departed salesperson's clients.

17 It is argued that even though the written contract does not include such a term it was a long standing process, a process which was unchallenged and it must therefore be implied into the contract of employment. This is said to be impliable on the principles set out in *BP Refinery Pty Ltd v Shire of Hastings Council (1997) 52 ALJR 20 (BP Refinery* Case*)* and *Con-Stan Industries of Australia Pty Ltd v Norwich Wintehur Insurance (Australia) Pty Ltd (1986) 60ALJR 294 (Con-Stan* Case*).*

18 It is fair to say that the Respondent's substantive defence is built around the proposition that is reasonable and equitable to draw a line on the balance of commissions earned and costs incurred at a point of time which allows the employer and employee to sever the relationship cleanly. It is necessary to prevent the ongoing payment of commissions as sales are invoiced after the termination of employment and make unnecessary the ongoing efforts on part of the employer to recover from a former employee costs incurred after sales are made which in some cases can be up to three years. It is a sensible arrangement, so it is said, with fairness to both sides and meets the requirement of the *Con-Stan* Case. It is said that even if the Applicant did not know of the custom he was nevertheless bound by it. He ought to be presumed to have known of the custom because it is notorious that persons working for the Respondent could easily ascertain the nature and content of the custom. Furthermore the evidence of the Applicant indicated that he timed his resignation with that in mind.

19 The Applicant says that defence should be rejected.

20 It is argued by Mr Mc Corry that the defence relied upon by the Respondent at hearing was never raised in any of the interlocutory proceedings, nor was it the subject of the Answer, nor had it been raised in letters between the Respondent and its solicitors and it should be rejected because it had all the hallmarks of being created for the purpose of the hearing.

21 The Applicant says that the entitlement to commission should be divided into two separate periods; pre March 2004 sales and April sales. In respect to the March sales it was clear from the evidence that the Respondent had created commission reports for each sales person, including the Applicant, but those reports had not been presented during the preparation for this case or in the presentation of it. Therefore the Commission should draw an adverse inference that the production of those reports would not have assisted the Respondent's case. Further it should conclude that on the Applicant's evidence it is more probable than not that commissions claimed for the period prior to March 2004 were not paid and were owing. Concerning the April 2004 payments, there is no evidence of any contractual term, express or implied, that an employee who leaves during a particular month does not get paid any commission on sales made in that month. There was no evidence from the Respondent's own witnesses of the number or identity of employees who had been subject to this forfeiture. There was no evidence that it was notoriously known as a policy or practice by the Respondent nor were any documents produced to confirm that is was. On the contrary the evidence of Mr Herbert seems to suggest that the policy is at the best adhoc because he makes it clear that the payment for incomplete months are sometimes passed onto the salesman who is taking over clients from the departing sales person, but depending on how much work is involved and sometimes payment just stays with the Respondent.

22 The proceeding is a sufficient scan of the evidence to allow the Commission to draw conclusions from the facts on the balance of probabilities.

23 The Commission is to apply the criteria established in *Perth Finishing College v Susan Watts (1989)* 69 WAIG 2307 and *Reginald Simons v Business Computers International Pty Ltd (1985)* 65 WAIG 2039 in determining applications which are made under s29 (1) (b) (ii) of the act. Such applications can be made when it is claimed that an employee is entitled to a benefit not being a benefit under an award or order of the Commission to which he was entitled but has not been paid.

24 The Commission's task is to discover the terms of contract, decide whether or not they are the subject of an Order or Award of the Commission and if they are not, then to decide whether there was an entitlement and then if there is entitlement, whether it has been paid. If it has not been, then it may issue an order to give affect of the entitlement.

25 In this case I have heard evidence from the Applicant in person and from the principal of the Respondent, Mr Loader and from the Financial Administrator, Mr Herbert. There has been a considerable amount of documentary evidence submitted in support of the competing contentions.

26 The Applicant impressed me as a witness of truth and I have no reason to deweigh his evidence on the grounds of credibility. I have similar feelings about the evidence of both Mr Loader and Mr Herbert. They did not give me any cause of concern about the truthfulness of their evidence. In the situations where the competing witnesses are persons of credit the Commission then looks to the substance of their evidence and the documents submitted as support to reach a conclusion on the balance of probabilities about the facts of the matter.

27 It is clear from Exhibit M2 that there was a contract of employment entered into between the parties. It had extensive terms and was clearly designed to cover selling goods on commission. The Applicant would have been entitled to think that contract was all embracing and that there was little, if anything, which was not subject of that contract of employment. It is common ground between the parties that the only later variation to the contract was the increase of the sales commissioned to 20%.

28 As I have said earlier, it was asserted by the Respondent that there was an additional term to be implied which was not the subject of any debate between the parties until the date of the hearing. In other words it had not been raised. This gives cause for concern as to whether it was a matter which developed in the Respondent's mind as part of the preparation for the case and was not, as it is argued, a pre existing term of the contract implied or otherwise.

29 It is not said by the Respondent that the entitlement or in this case a non-entitlement to commissions earned in the last month of employment was a direct term of contract. They say it has to be implied.

30 I need to examine that contention.

31 As was said in the *BP Refinery* case there are five conditions which may overlap and which must be satisfied before term can be implied. These are:-

1. It must be reasonable and equitable.
2. It must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it.
3. It must be so obvious that it goes without saying.
4. It must be capable of clear expression.
5. It must not contradict any express term of contract.

32 The Respondent offers no clear evidence that the right for it to deduct the last month's commission was a part of the contract. Mr Loader asserts that it was but the Financial Administrator, Mr Herbert, who after all has control of the pays was quite equivocal in his evidence. In fact his evidence was conditional that the commission payment might go to the salesman who takes over the work if he does enough work, but it also may go to the Respondent in circumstances about which he did not elaborate. There is no clear evidence that there was a definite policy or custom in the Respondent's business that the last month's commission would be deducted. There is some evidence that there is a different treatment of the last month's commission earned pending upon the circumstances and it is certainly not in the clear terms that Mr Loader asserts. Even if it was , when one is to apply the tests set out in *BP Refinery* case the first test is that it must be reasonable and equitable It can hardly be said to be reasonable and equitable if a person makes sales that they be denied the benefit of them. The term is not necessary to give business efficacy to the contract. The contract is effective without it. It is not so obvious that it goes without saying that both the Applicant and Respondent would have realised when they started on the contract the Applicant would not get paid commissions earned in the last month of his engagement. What can be said is that the Applicant had a worry, because of what he had seen happen in the Respondent's business that he may not get paid because other people had not and that is why he timed his resignation when he did. That is, he resigned on the 15th of the month knowing the calculations for the previous month would be done by that time and that would mitigate his loss as it were. There is no indication that he took that action other than as a protective action knowing by rumour that sometimes other people had not been paid. The term sought to be implied is not capable of clear expression. It does contradict an express term of a contract in that the contract provides that the commission will be paid without deduction except in the ways specifically authorised in the contract. So the term sought to be implied is a clear contradiction to an express entitlement created under the contract of employment.

33 Similar issues to those in the instant case were examined by the Full Bench in *Conti Shefield Real Estate v Denise Brailey (1992)* 72 WAIG 1965. This was a case where the Commission, at first instance, ordered that the Applicant in that matter be paid certain sums for commission owing as contractual entitlements. There were certain other orders which are not relevant. The Applicant, in first instance, was employed as a sales person in a real estate company. The employment ended in circumstances that are not relevant, but the terms of the contract included a payment by way of remuneration plus a commission on sales of property. The commission was agreed at 55 per cent and advertising costs would be reimbursed for the first 12 months at which time the cost would be reviewed. At the end of the employment the Applicant had written to the firm confirming that she would be prepared to pay monies to the extent of $15,800 to extinguish a debt which had arisen through exceeding her advertising expenditure of a 10 per cent monthly allowance between February 1989 to June 1989. She would make such payments for advertising monies, advance and promotional expenses owing until they were repaid in full. The Commission, at first instance, found on hearing the matter that the Applicant had authorized the withholding or offsetting of an amount of commissions concerned and decided her claim for entitlements under a contract was made out. In allowing the claim, the Commission did not allow the offset of an acknowledged debt of $15,800 to the employer against the amount owed for commission. This aspect was one of the two areas that the Full Bench examined in its Reasons. It is useful for the purpose of these Reasons that I incorporate the writing of the Full Bench on this issue in some length.

34 *"The submission by Mr Crossley, who appeared for the Respondent, was that the Truck Act 1899-1904 forbade the retention by the Respondent employer of the monies due and payable for commission.*

The Truck Act, by s2, defines "wages" to:-

"include any money or thing had or contracted to be paid, delivered, or given as a recompense, reward, or remuneration for any service, work, or labour done or to be done, whether within a certain time or to a certain amount, or for a time or an amount uncertain".

The appellants submitted that the Truck Act was irrelevant.

However, s3 (1) of the Truck Act provides:-

"In every contract hereafter to be made with any workman, the wages of such workman, shall be made payable in money only, and not otherwise, and if by agreement, custom, or otherwise a workman is entitled to receive, in anticipation of the regular period of the payment of his wages, an advance as part or on account thereof, it shall not be lawful for the employer to withhold such advance or make any deduction in respect of such advance on account of poundage, discount, or interest, or any similar charge."

S2 of the Truck Act also provides by way of definition as follows:-

"Workman" means any person in any manner employed for wages in work of any kind or in manual labour, whether under the age of twenty-one years or above that age."

S5 of the Act provides that:-

"Where any provision of this Act or of an award, industrial agreement or order made or deemed to be made under this Act is contrary to or inconsistent with any provision of the Truck Act 1899 the former provision prevails and the latter provision shall have no force or effect"

Of course, the word "workman" includes women, so Ms Brailey is covered, and that is clear by virtue of the Interpretation Act 1984 (as amended).

A question therefore arises whether the Truck Act applied to the commission withheld.

Firstly, if one interprets the Truck Act, by looking at its plain meaning as one is required to do, the commission was money to be paid as a recompense, reward, or remuneration for the work done by or service done by Ms Brailey in selling houses as an employee of the appellant. That is what the plain words mean. In other words, the commission was part of the reward or remuneration she received for the work of selling which she performed.

The commission claimed can, therefore, rightly be described as "wages" as defined in s.2 of the Truck Act.

Ms Brailey was also clearly a "workman" as defined in s2 of the Truck Act, because she was employed for wages as defined "in work of any kind", the work being that of sales representative or sales person, or even sub- agent. It was not in issue, at all, that she had been an employee.

That means and meant that once the commission or "wage" had been earned, it was required to be paid. There was no evidence of any term in the contract to the contrary (see Fielding C in Day v. Atlanta Nominees Pty Ltd (1989) 69 WAIG 2156). There was no evidence of any variation of the contract to permit such a withholding of monies.

In addition, of course, there is the force of the Truck Act which would strike down such a term. An employer cannot, in any event, deduct monies for his/her/its own benefit (see Selbourne Bakeries Pty Ltd v. Tinning (1940) 39 AR 275 and Ecob v. Poletti (1989) 31 AILR 308).

Thus, as a matter of law, the commissions, which, on the evidence, were due to be paid to the Respondent, were not authorized to be deducted wither expressly by contract of impliedly by contract. We say impliedly because it was not submitted that there was such an implied term or condition of the contract of employment, nor could there be on any of the five criteria set out in BP Refinery (Westernport) Pty Ltd v. Hastings Shire Council (1978) 52 ALJR 20 at 26. That case was applied in Codelfa Construction Pty Ltd v. State Rail Authority of NSW (1982) 149 CLR 337 at 347.

In any event, as s3 of the Truck Act provides, one cannot contract out of it.

The claim of a set-off or an equitable set-off is not therefore sustainable on that basis. That is the case at law under s5 of the Truck Act (see Williams and Others v. North's Navigation Collieries Ltd [1906] AC 136 at 146 per Lord Atkinson, at page 141 per Lord Loreburn LC, and at page 142 per Lord Davey).

In any event, the suggestion in Sim v. Rotherham Metropolitan Borough Council [1986] 3 WLR 851, doubted by Lord Templeman in Miles v. Wakefield Metropolitan District Council [1987] 2 WLR 795 at 810 (but see Wiluszynski v. London Borough of Tower Hamlets [1988] IRLR 154) that the employer is entitled to make a deduction from wages on the basis of an equitable set- off, we would not follow, in the absence of cogent argument, if at all. It allows, contrary to what was said in Williams and Others v. North's Navigation Collieries Ltd (op cit), the employer to assess damages and to act as judge in his or her own cause.

Further, in award matters (and this was not one), s.114 of the Act applies and would enable such a term of contract to be struck down if it were contrary to the terms of an award.

In our opinion, the appellant here acted contrary to the Truck Act and contrary to the contract of service when withholding the amount claimed and acknowledged as commission due and payable to the Respondent."

35 The Full Bench then went on to examine the question of set-off and that too is an issue raised in these matters. The Full Bench examined the dicta in *Belo Fisheries v Dennis Terence Froggett (1983)* 63 WAIG 2394 but on page 1968 of its Reasons it concluded:

"It would, for these reasons, be beyond power. It would also be beyond power, because, insofar as any order for a counter claim was made, it would extinguish the effect of an order which the Applicant was entitled to by virtue of s.29 of the Act,

That can best be understood by our saying that a counter claim has the same effect as a cross action and is in law regarded as an action in its own right (see "Australian Civil Procedure" by Bernard C Cairns (3rd edition) at pages 204-209). Thus, on that reasoning, a counter claim for such a debt has no life under s29 (b) (ii) of the Act.

To test what we have just said, if the applicant's claim was dismissed or the Commission refrained from hearing it further under s.27 of the Act, then an order could still be made on any counter claim which would stand alone. That, we think, indicates that a counter claim, in those circumstances, would be beyond power.

What of a set-off. A set-off does not operate as a denial of the debt. It tacitly assumes the existence of the debt, and then alleges that there are reasons why the plaintiff is not entitled to payment. For a set-off to avail the defendant in common law, it must first be capable of being pleaded as a separate action. That was certainly the case here. A set-off is a defense to the plaintiff's claim, whether it exceeds the amount of the plaintiff's claim or is less than that. Once a set-off is established, then the plaintiff's claim is established, at least to the extent of the set-off.

At the heart of this matter, however, there is an illegal withholding of monies due and owing to the Respondent, contrary to the Truck Act.

In fact, no set-off could have been claimed had the appellant complied with the law and paid the commissions when they were due. The appellant's remedy would then have been to sue for the debt in the District Court, which is what it has done. It would therefore be quite contrary to equity, good conscience and the substantial merits of the case to make an order purporting to effect a set-off, which it is not certain there is power to do for the reasons which we have set out above, in any event. It would be contrary to the injunction of s.26(1)(a) of the Act, however, to allow the set-off claimed, because it would permit the appellant a remedy which would not be available to it had it complied with the law and paid out the commission instead of acting in breach of the Truck Act and contrary to the contract. It did not have and it at no time had a right to deduct the monies. Its remedy was always, therefore, properly to sue and to invoke the remedies of a court (i.e. a judicial body), and it would have been contrary to equity, good conscience and the substantial merits of the case to make any order for a set-off.

Further to that we would add this. In our opinion, an order for set-off or an order upon a counter claim, in these circumstances, would not be within the power of the Commission. This is because it would constitute the enforcement of alleged existing legal rights which can only be the subject of the exercise of judicial power, and is not conferred on the Commission in arbitral proceedings by the Act or otherwise, except insofar as such power is conferred in relation to a claim by an employee under s.29(b)(ii) (see Crewe and Sons Pty Ltd v. AMWSU 69 WAIG 2623 and Coles/Myer Ltd t/a K-Mart Discount Stores v. SDA (Appeal No 158 of 1992 (unreported) dated 23 July 1992 (FB)"

36 The issues to be decided here are very similar to those examined by the Full Bench. The Applicant has had his contractual entitlements reduced on the basis of a term which on any reasonable view of the evidence cannot be implied into his contact of employment. He is entitled to be benefits of the commission earned under his contact and it should be paid in accordance with its terms. This means he should be paid the commissions outstanding at the completion of his contact less any deduction authorized in the letter of engagement. Those commissions which are still in progress at the end of the contract should be paid less authorized deductions as and when they become completed.

37 The parties are directed to confer and produce minutes of proposed orders to give effect to these Reasons for Decision.

2005 WAIRC 00142

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRIS DENNIS JOHNSON
	APPLICANT
	-v-
	STOTT & HOARE BUSINESS COMPUTERS
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	TUESDAY 25TH JANUARY 2005
FILE NO/S	APPL 758 OF 2004
CITATION NO.	2005 WAIRC 00142

Result Compensation Awarded

Order

HAVING heard Mr G McCorry, for the Applicant and Mr D Johnston, for the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT Stott & Hoare Business Computers pay Mr Chris Dennis Johnson $9,353.90, as contractual entitlements, within 14 days of the date hereof.

(Sgd.) J F GREGOR,
[L.S.] Senior Commissioner.

2005 WAIRC 00190

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARTIN L MURRAY
	APPLICANT
	-v-
	PICKNICKS RESTAURANT
	RESPONDENT
CORAM	COMMISSIONER S.J. KENNER
DATE	THURSDAY, 14 JANUARY 2005
FILE NO.	APPL 738 OF 2004
CITATION NO.	2005 WAIRC 00190

Catchwords	Industrial law – Termination of employment – Contractual benefits claim –Entitlements under contract of employment – Application upheld – Contractual benefits ordered – *Industrial Relations Act 1979* (WA) s 29(1)(b)(ii)
Result	Order issued
Representation	
Applicant	In person
Respondent	No appearance

Reasons for Decision
(Ex Tempore)

1 The application before the Commission is one brought pursuant to s 29(1)(b)(ii) of the Industrial Relations Act 1979 ("the Act") by which the applicant seeks a denied contractual benefit from the respondent in the sum of approximately $900.00 as he has claimed it, in respect of one week's salary.

2 The respondent has failed to appear in these proceedings but the Commission, as has already been determined, was satisfied that the respondent was notified of these proceedings and no good reason has been shown why the matter should not proceed in its absence.

3 The matter is relatively straightforward. The applicant testified that he accepted an oral offer of employment from the respondent to work as a head chef at the Picknicks Restaurant. The applicant discussed his terms and conditions of employment with a Mr Skinner. The applicant testified that he accepted an offer of employment as head chef of the respondent at an annual salary of $50,000.00 per annum on the basis that he would work a 50 hour week. No other terms and conditions were discussed, according to the applicant's evidence, and the applicant said that his contract of employment with the respondent was entirely oral. The applicant commenced work on or about 2 March 2004 and the applicant testified that as the head chef he was responsible for the management of the respondent's kitchen, which included cooking meals, menu planning, rostering and the ordering of provisions, and other duties. The applicant testified that at all times he performed his duties to the best of his ability and there were no complaints from the respondent as to his work performance during the period of employment.

4 The applicant testified that he gave the respondent two week's notice of termination of employment to expire on 1 May 2004, as he had pursued other employment opportunities. He informed Mr Skinner of this, who said at the time that there was no objection given to the notice which was provided by the applicant. However, on the evidence, it seems that the applicant was only paid for one of those two weeks and he now seeks payment for the recovery of the one week due, based upon a salary of $50,000.00 per annum, which results in a weekly salary amount of $961.54 per week. The applicant testified that the respondent refused to pay him for this final week because of the cost to replace him with a new chef. However, the applicant also says that another employee commenced employment prior to him leaving in any event.

5 In the absence of any evidence of the respondent and given that the only evidence is from the applicant, the Commission is bound to accept the applicant's evidence, which I do, unless I find it to be inherently lacking credibility, which I do not. Therefore, I accept the applicant's evidence in its entirety and I find accordingly.

6 The Commission applies the principles in relation to matters of this kind as dealt with in *Ahern v The Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc)* (1999) 79 WAIG 1867. The Commission accepts that the applicant was engaged under an oral contract of employment with the respondent to work at a salary of $50,000 per annum as the respondent's head chef.

7 I am of the view that despite there being no discussion as to its terms, in all likelihood the relevant provisions of the Restaurant, Tea Room and Catering Workers Award No 48 of 1978 would apply to the applicant's employment as a chef.

8 However, the fact that the award may apply to the applicant's employment would not deprive him recovering as a single debt due to him his contractual entitlement to one week's salary in the sum claimed. If any authority is needed for that fairly trite proposition of law, I simply refer to the views expressed by Fielding C, as he then was, in the matter of *Roberts v Groom* (1984) 64 WAIG 774, with which views I agree. I also refer to a decision of the Full Bench of the Commission in *Mason v Bastow* (1990) 70 WAIG 19.

9 I am therefore satisfied that despite the application of the award, the applicant is entitled to prosecute the entire contractual amount due and owing, including any amount due under the relevant award as a contractual benefit. I therefore find for the applicant and will make an order that the respondent pay to the applicant the sum of $961.54 within 14 days of today.

2005 WAIRC 00130

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARTIN L MURRAY
	APPLICANT
	-v-
	NICK SKINNER & PICKNICKS RESTAURANT
	RESPONDENTS
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 24 JANUARY 2005
FILE NO/S	APPL 738 OF 2004
CITATION NO.	2005 WAIRC 00130

Result	Order issued
Representation	
Applicant	In person
Respondent	No appearance

Order

HAVING heard the applicant in person and there being no appearance on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby –

ORDERS the respondent to pay to the applicant the sum of $961.54 as a denied contractual benefit less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1936 and actually paid within 14 days of the date of this order.

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

2003 WAIRC 09161

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RONALD JAMES REID **APPLICANT**
	-v-
	LAURIES ELECTRICS CITY **RESPONDENT**
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 14 AUGUST 2003
FILE NO	APPLICATION 1071 OF 2003
CITATION NO.	2003 WAIRC 09161

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 not able to be exercised – Acceptance of referral out of time not granted – *Industrial Relations Act 1979* (WA) s 29(1)(b)(i),(2)&(3)
Result	Order issued
Representation	
Applicant	Mr W Game as agent
Respondent	Mr L Zani and with him Ms P Zani

Reasons for Decision
(Ex Tempore)

1 The Commission has before it application 1071 of 2003, an application by Ronald Reid against the respondent described as Lauries Electrics City. The application was filed on 11 July 2003.

2 The application has been brought on at the Commission's own motion because on the face of the materials before the Commission the application is well outside of the 28 day time limit required to bring proceedings such as these, and therefore it is for the Commission to consider under s 29(3) of the Industrial Relations Act 1979 ("the Act") whether it would be unfair or not to not accept the application out of time.

3 It is common ground that the applicant last worked for the respondent on or about 30 April 2002. For reasons that the Commission as presently constituted expressed in the matter of *Nicole Azzalini v Perth Inflight Catering* (2002) 82 WAIG 2992, came to the view that s 29(3) of the Act dealing with the ability for the Commission to extend time is not retrospective in effect, that is, the provisions do not apply to dismissals that occurred before 1 August 2002, and therefore, on any view, the applicant's termination of employment occurred well before that time in any event.

4 For all of those reasons, and whilst the applicant might find it somewhat disappointing that the circumstance he is in are thus, I am not persuaded in the circumstances that the Commission can entertain the claim and the application is dismissed for want of jurisdiction.

2003 WAIRC 09160

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RONALD JAMES REID **APPLICANT**
	-v-
	LAURIES ELECTRICS CITY **RESPONDENT**
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 14 AUGUST 2003
FILE NO	APPLICATION 1071 OF 2003
CITATION NO.	2003 WAIRC 09160

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mr W Game as agent
Respondent	Mr L Zani and with him Ms P Zani

Order

HAVING heard Mr W Game as agent on behalf of the applicant and Mr L Zani and with him Ms P Zani on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the herein application in so far as it relates to a claim of harsh, oppressive or unfair dismissal be and is hereby dismissed for want of jurisdiction.

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

2005 WAIRC 00200

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AMBA LEE STAPLES
	APPLICANT
	-v-
	BUSINESS SUCCESS CORPORATION PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	THURSDAY, 3 FEBRUARY 2005
FILE NO.	APPL 1405 OF 2004
CITATION NO.	2005 WAIRC 00200

CatchWords	Termination of Employment – Contractual benefits claim – Entitlements under contract of employment – *Industrial Relations Act 1979* (WA) s 29(1)(b)(ii).
Result	Order made that the Respondent pay the Applicant $1,460.00 (gross) and the Respondent pay to Westscheme $540.00
Representation	
Applicant	In person
Respondent	No appearance

Reasons for Decision

1 The Applicant makes a claim under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act") that she has been denied contractual benefits not being benefits under an award or industrial agreement by Business Success Corporation Pty Ltd ("the Respondent") namely:–

(a) Four days' pay being the balance of payment in lieu of notice;

(b) Accrued annual leave for the period of service from 29 January 2004 to 21 September 2004; and

(c) Payment of superannuation to the Applicant's superannuation scheme, Westscheme, at the rate of $45 per week from 1 July 2004 until 21 September 2004.

2 The Applicant appeared on her own behalf. There was no appearance on behalf of the Respondent. When the matter was called on for hearing, I was satisfied that the Respondent had been served with a notice of hearing. Accordingly, the matter proceeded in the absence of the Respondent.

3 The Applicant testified that she was employed by the Respondent from 29 January 2004 until 21 September 2004. She described her duties as office administrator and bookkeeper. She was required to carry out duties such as attending to reception, bookkeeping, administration, preparing accounts payable and receivable, organising client conferences, filing, general administration and cleaning the office.

4 The Applicant testified that when she was employed by the Respondent, she was informed by the Respondent's owner, Mr Ramzi Abboud, that she would be paid $500 a week less tax and be paid other "standard entitlements". The Applicant tendered into evidence copies of the last three payslips she received whilst employed by the Respondent. The payslips record that the Applicant was accruing holiday leave and that $45 each week was to be paid to her superannuation scheme. The Applicant testified that she has been informed by Westscheme that no superannuation payments have been received from the Respondent on her behalf for the 2004/2005 financial year.

5 The Applicant was informed that her employment was going to be terminated on Monday, 20 September 2004, when Mr Abboud and the Respondent's general manager, Mr Julian Zoitti, called her into a meeting and informed her that based on the accounts payable and receivable they were trading insolvent and consequently and they were placed in the position where they would have to terminate her employment. She was informed that her employment was not being terminated because of her performance but solely because of the financial position of the Respondent. The Applicant had prepared the accounts payable and receivable that morning. She told Mr Ziotti and Mr Abboud that she understood their position. At the end of the

following day, she was informed that she was to finish work on that day. The Applicant says that she was entitled to one week's notice and is entitled to be paid four days' pay in lieu of notice as she only received notice of one day.

6 The Applicant testified that whilst she was employed by the Respondent she had not taken any annual leave. She says that one of the "standard entitlements" that she is entitled to is to be paid accrued annual leave as a full time employee of the Respondent.

7 After her employment was terminated, the Applicant received a telephone call from Mr Abboud telling her that he had received two payments from clients which enabled him to pay a number of amounts outstanding. He told her he would pay her the amount that was left over and this would be an amount of $240. An amount of $240 was paid into the Applicant's bank account on 7 October 2004.

8 In the circumstances, I am satisfied that the Applicant is owed contractual benefits by the Respondent. In particular, I am satisfied that the Respondent owes the Applicant $400 (gross) for pay in lieu of notice and $540 in superannuation. From the beginning of the financial year until the Applicant's employment was terminated, the Applicant would have received 12 pays. If the superannuation had been paid to the Applicant's superannuation scheme an amount of $540 would have been paid into the Applicant's superannuation scheme for the 2004/2005 financial year. The Applicant's payslip for the pay period ending 21 September 2004, records that $540 was to be paid to her superannuation fund. Pursuant to s 5 of the *Minimum Conditions of Employment Act 1993,* the Applicant's entitlement to annual leave under s 23 of that Act is implied into her contract of employment. Her entitlement to annual leave accrues pro-rata on a weekly basis. She was employed for 33 weeks and 4 working days, which gives her an entitlement to 13 days' paid annual leave. Thirteen days' paid annual leave is equal to an amount of $1,300 (gross).

9 In light of the matters set out about, I will make an order that the Respondent pay the Applicant and amount of $1,460 (gross) being for pay in lieu of notice and accrued annual leave less the amount which was paid to her on 7 October 2004. I will also make an order that the Respondent pay the Applicant's superannuation scheme, Westscheme, an amount of $540.

2005 WAIRC 00220

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AMBA LEE STAPLES
	APPLICANT
	-v-
	BUSINESS SUCCESS CORPORATION
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	WEDNESDAY, 9 FEBRUARY 2005
FILE NO/S	APPL 1405 OF 2004
CITATION NO.	2005 WAIRC 00220

Result	Order made to substitute the Respondent
Representation	
Applicant	In person
Respondent	No appearance

Order

Having heard the Applicant in person and no appearance on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the name of the Respondent be deleted and that be substituted therefor the name, Business Success Corporation Pty Ltd.

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

2005 WAIRC 00221

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AMBA LEE STAPLES
	APPLICANT
	-v-
	BUSINESS SUCCESS CORPORATION PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	WEDNESDAY, 9 FEBRUARY 2005
FILE NO/S	APPL 1405 OF 2004
CITATION NO.	2005 WAIRC 00221

Result	Declaration and order made
Representation	
Applicant	In person
Respondent	No appearance

Order

HAVING heard the Applicant and no appearance on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:

(1) DECLARES that the Applicant is owed contractual benefits;

(2) ORDERS that the Respondent pay to the Applicant, within 14 days of the date of this order, the sum of $1,460.00 (gross); and

(3) ORDERS that the Respondent pay to Westscheme, within 14 days of the date of this order, the sum of $540.00 as superannuation payments owed to the Applicant.

[L.S.]

(Sgd.) J H SMITH,
Commissioner.

2004 WAIRC 13734

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GIRISH S THEKEPAT
	APPLICANT
	-v-
	DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 22 DECEMBER 2004
FILE NO.	APPL 1414 OF 2004
CITATION NO.	2004 WAIRC 13734

Catchwords	Industrial law – Termination of employment – Harsh, oppressive and unfair dismissal – Acceptance of referral out of time – Application referred outside of 28 day time limit – Relevant principles to be applied – Commission satisfied applying principles that discretion should not be exercised – Acceptance of referral out of time not granted – Industrial Relations Act 1979 (WA) s 29(1)(b)(i), s 29(2), s 29(3)
Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr D Newman and with him Mr D Barnes

Reasons for Decision

1 The substantive claim in this matter by the applicant is that on or about 28 September 2004 he was unfairly dismissed from his position as a cleaner in charge at the Western Australian Institute for Deaf Education ("WAIDE"). Given that the applicant's claim was filed outside of the 28 day time limit prescribed by s 29(2) of the Industrial Relations Act 1979 ("the Act") the Commission listed the matter of its own motion, to consider whether it should accept the application out of time pursuant to s 29(3) of the Act.

2 As there was a considerable lack of common ground between the parties on factual issues, testimony was led from both the applicant and the deputy principal of WAIDE Ms Cohen, who was the most directly involved in the circumstances leading to the dismissal of the applicant.

3 After having heard the evidence and the submissions of the parties, the Commission concluded that it would not accept the application out of time and dismissed the applicant's claim want of jurisdiction. The Commission advised the parties that short reasons for decision would follow and these are my reasons.

4 The applicant testified that he commenced employment with the respondent on 6 October 2003 as cleaner in charge at WAIDE. He was employed initially on a probationary basis which was extended to April 2004. Apparently, there were some issues raised by the respondent in relation to the applicant's performance during his initial probationary period. Indeed, the applicant received letters from the respondent in September, and December 2003 and in March 2004. Complaints were made about the applicant's treatment of some others in the workplace, his organisational skills and his failure to follow instructions. During the period from May to August 2004 it appeared that difficulties concerning the applicant's employment were continuing.

5 The applicant testified that he finally had a meeting with an officer of the department for the respondent. As a result of that meeting and earlier counselling of the applicant, the applicant's employment was terminated by the giving of notice. In his evidence, the applicant admitted that he had made mistakes in terms of his behaviour in the workplace.

6 At the time of these events, the applicant was represented by his union. Following consideration by the union of the circumstances surrounding the termination of the applicant's employment, the applicant's union declined to commence proceedings on his behalf, alleging unfair dismissal, as in its view, such a claim had no prospect of success. In a letter of 11 October 2004, the applicant's union expressed this view but also informed the applicant of the 28 day time limit within which

he must file any claim in this Commission. The applicant confirmed in his testimony that he was aware of the time limit. After speaking with his union, the applicant said he sought advice through family, friends and ultimately legal aid. By the time that occurred, the applicant was outside of the 28 day time limit by one day when the application was filed.

7 Ms Cohen outlined her involvement as the deputy principal of WAIDE, and her supervision of the applicant. She described the backgrounds of other cleaning staff at WAIDE some of whom come from a variety of cultural backgrounds and some of whom have disabilities. Ms Cohen outlined the steps she put in place to provide performance management and assistance to the applicant. She testified that she regularly met with the applicant to help him plan his work assignments and to assist him in the conflict that he was having with other employees. Anger management training was provided to the applicant. Ms Cohen testified in relation to a number of incidents in which the applicant was aggressive and rude to employees under his control and other staff. This included on at least one occasion, in a meeting with management.

8 Ms Cohen testified that she always arranged for a union representative to attend the meetings she had with the applicant, to provide assistance. Tendered as exhibit R5 was a chronology of meetings with the applicant, including counselling and correspondence, in the period April through to August 2004. It was Ms Cohen's evidence that she endeavoured as best she could, to assist the applicant in addressing his performance and conduct issues in his position as cleaner in charge.

9 Ultimately, Ms Cohen was of the view that there was no demonstrated improvement in the applicant's attitude and behaviour, rather, in her view, the applicant's attitude and behaviour seemed to continue to decline. She referred to a continuation of conflict with subordinate staff and complaints from other staff members. Ms Cohen said that the applicant's employment could not continue.

Conclusion

10 I apply the principles in *Malik v Director General Department of Education* [2004] WASCA 51 in this matter. The Commission has a discretion to accept an application claiming unfair dismissal outside of the 28 day time limit. However, it is for the applicant to positively establish that the discretion should be exercised in his favour. Irrespective of the fact that the application is only one day outside of the time limit, the application is out of time and the principles in *Malik* must be applied.

11 Having considered the evidence and submissions carefully, I was simply not persuaded that the applicant had established that his claim had any merit. I was of the view that in terms of substantive fairness, there were performance and conduct issues raised with the applicant over an extended period of time, in particular his ability to organise his and others work duties, and his management of staff. The applicant was prone to conflict in the workplace and he did not adequately respond on the evidence, to strategies to overcome these issues. I am also persuaded that the respondent adopted a very fair approach to dealing with these matters and over an extensive period of time, afforded the applicant every reasonable opportunity, through counselling and support, to address these difficulties. Events clearly came to a head in August and September 2004, in terms of the applicant's ongoing conduct in the workplace. I was far from persuaded that even on the broad brush view that I must take of the merits at this stage there was any merit to the applicant's claim.

12 Moreover, it is plain that the applicant was made well aware of the 28 day time limit when he consulted his union, at the time of his dismissal. The union wrote to him and made this quite clear. Whilst the applicant said there was some delay whilst he sought advice from a community law centre, there was no real reason advanced apart from this, as to why he could not simply have commenced the claim within time.

13 On all of what was before the Commission in these proceedings, I was simply not prepared to exercise my discretion to extend the time for filing the application, and I concluded that it would not be unfair to not accept the applicant's referral out of time. Accordingly, I dismissed the application.

2004 WAIRC 13358

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GIRISH S THEKEPAT
	APPLICANT
	-v-
	DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 19 NOVEMBER 2004
FILE NO/S	APPL 1414 OF 2004
CITATION NO.	2004 WAIRC 13358

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr D Newman and with him Mr D Barnes

Order

HAVING heard Mr G Thekepat on his own behalf, and Mr D Newman and with him Mr D Barnes on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

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

2004 WAIRC 13185

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GUANG MING WANG
	APPLICANT
	-v-
	TEN TEN PTY LTD (ACN 107 990 769)
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	THURSDAY, 28 OCTOBER 2004
FILE NO.	APPL 990 OF 2004
CITATION NO.	2004 WAIRC 13185

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 - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i), (2) & (3)
Result	Application to extend time under the *Industrial Relations Act 1979,* granted.
Representation	
Applicant	In person
Respondent	Mr G D G Tang

Reasons for Decision

1 This is an application under s 29(3) of the Industrial Relations Act 1979 ("the Act") for an extension in time for filing an application under s 29(1)(b)(i) of the Act, by Mr Guang Ming Wang ("the Applicant") that he has been harshly, oppressively or unfairly dismissed by Ten Ten Pty Ltd (ACN 107 990 769) ("the Respondent") on 8 March 2004.

2 The application was heard by the Commission on 12 October 2004. At the conclusion of the hearing I gave brief reasons for the decision and advised the parties that I was of the view that it would be unfair not to grant the Applicant an extension of time to file his application. These are the reasons why I reached that conclusion.

3 Both the Applicant and the Respondent's director, Mr Gordon Dan Ge Tang, speak very little English. Both the Applicant and Mr Tang gave evidence through a Cantonese interpreter.

4 In the application, the Applicant states that he previously lodged an application for unfair dismissal within 28 days of being dismissed but he discontinued that application because he made a mistake in naming the correct name of the company.

5 The records of the Commission show that the Applicant filed an application (APPL 360 of 2004) claiming that he was harshly, oppressively or unfairly dismissed by Gordon, Ten Ten Kitchen on 7 March 2004. That application was filed on 18 March 2004. Mr Tang, on behalf of Ten Ten Pty Ltd, filed a Notice of Answer on 25 March 2004, in that matter stating, "We are not the employer of the Applicant. Our company only started trading from the 08/03/2004." A conciliation conference was held by a Deputy Registrar on 12 May 2004. The Applicant attended the conference with an interpreter but the Respondent did not attend. The Applicant filed a Notice of Discontinuance on 1 June 2004, and on 2 June 2004, an order was made by the Commission granting the Applicant leave to discontinue the application against Ten Ten Kitchen.

6 The Applicant filed this application on 3 August 2004. The Applicant testified that he worked for Ten Ten Kitchen for 11 years. He said that he worked for Mr Tang for three and a half years. He says that on 7 March 2003, he was informed by a Mr Tam that the business had been sold to Mr Tang. The Applicant then spoke to Mr Tang, who told him not to come to work the next day. The Applicant told Mr Tang he would take him to court and that if Mr Tang wanted to dismiss him, he should give him (the Applicant) at least two weeks' notice. When cross-examined, the Applicant agreed that he had asked for a pay rise prior to being told to leave and not come back. The Applicant maintains that Mr Tang changed the name of the restaurant to Ten Ten Kitchen Pty Ltd and that at all material times he was employed by the Respondent from September 2000 to March 2004.

7 Mr Tang testified that he owned a 20% share in Ten Ten Kitchen, which was owned by Tien Tien Lei Pty Ltd. Mr Sham owned the other 80%. Mr Sham sold him the "equipment and good will" of Ten Ten Kitchen on 8 March 2004. He says the Respondent is a separate company, the Applicant was not employed by the Respondent and he had enough staff.

Conclusion

8 Having considered all the evidence, I am of the view that I should exercise my discretion to grant the application to extend time to file an application for unfair dismissal out of time. Applying the principle 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 his application, which makes it equitable to extend the time. In making this decision I observe that it would have been open to the Applicant to make an application to amend APPL 360 of 2004 (see *Rai v Dogrin Pty Ltd* (2000) 80 WAIG 1375).

2004 WAIRC 13231

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GUANG MING WANG
	APPLICANT
	-v-
	TEN TEN PTY LTD (ACN 107 990 769)
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	THURSDAY, 4 NOVEMBER 2004
FILE NO.	APPL 990 OF 2004
CITATION NO.	2004 WAIRC 13231

Result	Application to extend time under the Industrial Relations Act 1979, granted.
Representation	
Applicant	In person
Respondent	Mr G D G Tang

Order

HAVING heard Mr G M Wang, the Applicant and Mr G D G Tang 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 990 of 2004 be extended to 3 August 2004.

(Sgd.) J H SMITH,
Commissioner.

[L.S.]

2005 WAIRC 00030

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GUANG MING WANG
	APPLICANT
	-v-
	TEN TEN PTY LTD (ACN 107 990 769)
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	WEDNESDAY, 12 JANUARY 2005
FILE NO.	APPL 990 OF 2004
CITATION NO.	2005 WAIRC 00030

CatchWords	Termination of employment – harsh, oppressive and unfair dismissal – whether Applicant employed by the Respondent – offer of employment made to Applicant by Respondent – claim dismissed – *Industrial Relations Act 1979* (WA) s 29(1)(b)(i)
Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr D-G Tang

Reasons for Decision

1 Guang Ming Wang ("the Applicant") claims that he was harshly, oppressively and unfairly dismissed on 8 March 2004, by Ten Ten Pty Ltd trading as Ten Ten Kitchen ("the Respondent"). The Applicant makes a claim under s 29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act").

2 The material facts in this matter are not substantially in dispute. The Applicant was employed by Ten Ten Kitchen Pty Ltd as a cook. He commenced work at Ten Ten Kitchen on 1 December 1993. He says his employment came to an end on 8 March 2004. However, for the reasons that follow I am of the view that his employment was terminated on 7 March 2004.

3 The Applicant says that whilst he was employed by Ten Ten Kitchen the business was owned by three different owners. A business name extract certified by the Commissioner for Fair Trading for Ten Ten Kitchen records that from 1 January 1995 until 31 August 1998 Ten Ten Kitchen was owned by Limbar Pty Ltd. The business was owned by Vintage Investments Pty Ltd from 1 September 1998 until 5 September 2000. From 5 September 2000 until 8 March 2004, Ten Ten Kitchen was owned by Tientien Lai Pty Ltd. On 8 March 2004, the Respondent became the owner of Ten Ten Kitchen. As at the date of the hearing the Respondent still owns and operates Ten Ten Kitchen.

4 The company extract for Tientien Lai Pty Ltd shows that the company commenced on 21 August 2000 and was de-registered on 1 August 2004. The company extract also shows that there were three directors of the company, two of whom were Mr Dan-Ge Tang and Mr Zhong de Shan. The historical company record shows that Mr Tang held 50,000 shares and Taixing Australia Pty Ltd held 200,000 shares.

5 The Respondent was registered as a company on 13 February 2004 and the sole director and owner was Mr Tang. An agreement to purchase a business (Exhibit 5) shows that the Respondent purchased the business, which trades as Ten Ten

Kitchen, in March 2004. The agreement states that the gross purchase price was made up of an amount for goodwill, fixtures, kitchen utensils and stock in trade. The agreement also provided that the business was sold as a going concern and that upon settlement the business name of Ten Ten Kitchen would be transferred to the Respondent. The agreement provides that the date of settlement was to be on 8 March 2004.

6 On Sunday, 7 March 2004, Mr Shan spoke to the Applicant at about 11.00 pm. Mr Shan was a manager of the restaurant together with Mr Tang. The Applicant concedes that he was employed by Tientien Lai Pty Ltd on 7 March 2004, and that Tientien Lai Pty Ltd paid him wages up until 7 March, 2004. The Applicant testified that Mr Shan told him that he was going to end the business tomorrow and the restaurant would become Ten Ten Pty Ltd. Whilst the Applicant was speaking to Mr Shan, Mr Tang joined the conversation. The Applicant said he argued with Mr Tang. He said that Mr Tang said to him, "If you want to continue to work, I will give you a new timetable and a new wage rate." The Applicant said that he did not immediately respond until Mr Tang told him that he would be required to work an extra 30 minutes to an hour, five days a week but that his wage rate would not change unless he did not obtain a meal at the restaurant. Where the Applicant did not obtain a meal at the restaurant, he would be paid an extra amount of $2.00 per day. The Applicant told Mr Tang that the timetable and the wage was a lot worse than his existing conditions. He also told him that he had been working in the restaurant for ten years, his wage was very low and the increase in hours and lowering of wages was not possible. The Applicant says that Mr Tang then said to him, "If you don't want to abide by the timetable and wages, perhaps it is not necessary for you to work here." The Applicant cannot recall what else was said but they continued to argue. The conversation ended with Mr Tang telling the Applicant that he did not need to come to work the next day. When this was said to him, the Applicant said, "If you don't let me come to work, this action is unlawful and I will take legal action against you."

7 The Applicant did not return to work on 8 March 2004 and went to see a doctor. He said he was sick for a couple of days. A few days later he rang Mr Tang who told him, "The game is over. You don't need to come back."

8 The Applicant says that his employment was terminated on 8 March 2004 because Mr Tang said to him on 7 March 2004 that he was going to dismiss him and from 8 March 2004 the Respondent would be the new company operating the business.

9 When cross-examined it was put to the Applicant that he had reached an agreement with Mr Shan, whereby Mr Shan would pay the Applicant compensation. The Applicant refused to answer any questions about any agreement that he reached with Mr Shan, other than to say that he was now friends with Mr Shan.

10 Since the Applicant's employment was terminated in March 2004, he has sought work in other Chinese restaurants but he has been unable to obtain alternative employment. From October 2004 he has not been seeking work, as he has been studying.

11 Mr Dan-Ge Tang testified that he is the owner of the Respondent and he was a part owner of Tientien Lai Pty Ltd. Prior to 8 March 2004, he and Mr Shan were the managers of Ten Ten Kitchen. Mr Tang says that when he purchased the restaurant, he told Mr Shan that he would not keep all of the staff. He also says that he did not make any arrangement on behalf of the Respondent with Tientien Lai Pty Ltd about the engagement of the employees of Ten Ten Kitchen.

12 The Applicant seeks an order that he be reinstated. If the Commission finds that reinstatement is not practicable, he seeks an order for compensation. The Respondent says that reinstatement is not possible because the Applicant is not a suitable person to work at Ten Ten Kitchen.

Conclusions

13 The facts clearly establish that on 7 March 2004, the Applicant was employed by Tientien Lai Pty Ltd. The Applicant was not employed by the Respondent on that date. The Respondent commenced trading as Ten Ten Kitchen from 8 March 2004. The uncontradicted evidence of the Applicant is that he was offered employment by Mr Tang on conditions which were less favourable than the conditions he enjoyed as at 7 March 2004. I find that Mr Tang made an offer of employment to the Applicant on behalf of the Respondent. The Applicant was made an offer of employment which he rejected. In the circumstances, it cannot be said that the Applicant was dismissed by the Respondent, as at no time was he employed by the Respondent.

14 Despite the submissions made by the Applicant that the facts of this case establish a succession of employment and continuity of employment, such a submission is flawed at law. The concept of transmission or succession of business is a statutory concept that is embodied in statutory provisions such as s 6(4) of the *Long Service Leave Act 1958*. It is not part of the common law. To the contrary, at law contracts of employment are not assignable. The rule is strict. For example where a company goes into liquidation, the winding up order operates as a notice of discharge to the employees of the company (*Nokes v Doncaster Amalgamated Collieries Ltd* [1940] 3 All ER 549). Commissioner Hodder rejected a similar argument in *Frost v Newlands Coal Pty Ltd* Print Q1515 del. 3 June 1998, where a union argued that contracts of employment should travel with the transmission of a business where work previously performed continues to be performed by a new operation. He held the union's argument was flawed as it is a well established principle at law that with the personal nature of a contract of employment, a transfer or sale of a business operates to dissolve the contract.

15 It cannot be argued that just because a business is purchased by a new owner that there is a transmission or succession of employment of the employees in the business. In light of the principle established in *Nokes v Doncaster Amalgamated Collieries Ltd*, it is apparent that at law the Applicant's employment with Tientien Lai Pty Ltd came to an end on 7 March 2004. Whether he was unfairly dismissed by Tientien Lai Pty Ltd is not a matter that is before me.

16 In all the circumstances the Applicant has been unable to prove that he was employed by the Respondent. Consequently, I will make an order dismissing the Applicant's claim.

2005 WAIRC 00031

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GUANG MING WANG
	APPLICANT
	-v-
	TEN TEN PTY LTD (ACN 107 990 769)
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	WEDNESDAY, 12 JANUARY 2005
FILE NO/S	APPL 990 OF 2004
CITATION NO.	2005 WAIRC 00031

Result Section 29(1)(b)(i) application dismissed
Representation
Applicant In person
Respondent Mr D-G Tang

Order

HAVING heard Mr G M Wang, the Applicant and Mr D-G Tang on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the application be and is hereby dismissed.

(Sgd.) J H SMITH,
Commissioner.

[L.S.]

SECTION 29(1)(B)—Notation of—

Parties		File Number	Commissioner	Result
Adrian Paul Moore-Crouch	Clough Projects Ltd	APPL 1494/2004	Smith C	Discontinued
Adrian Scouller	Ultra Trace Pty Ltd	APPL 885/2004	Smith C	Discontinued
Alexander William Dorrington	Woodonga Patoral Company	APPL 781/2004	Gregor SC	Discontinued
Antonio Filipo Fazio	Marni Holdings Pty Ltd and Other	APPL 1513/2004	Wood C	Discontinued
Barrie Martin Howe	Minesite Catering	APPL 639/2004	Wood C	Discontinued
Beau Sidney Cleaver	Nova Smash Repairs Pty Ltd ATF Nova Smash Unit Trust	APPL 1436/2004	Gregor SC	Discontinued
Bernadette Lenzo	Director General of Education in the State of Western Australia	APPL 1434/2004	Harrison C	Discontinued
Bradley Raymond Meagher	Mullinyu Farms Pty Ltd	APPL 1158/2004	Kenner C	Discontinued
Brenda Jean Duncan-Smith	Australian Vital Anti-Aeging Clinic	APPL 996/2004	Smith C	Dismissed
Brian William Fenner	Soiland Pty Ltd	APPL 1075/2004	Kenner C	Dismissed
Bridget Lenore Tikey	Tramar t/as Goldfinger	APPL 1291/2004	Smith C	Discontinued
Bruce Hearne	Time Road Transport Pty Ltd	APPL 736/2004	Wood C	Discontinued
Cara Anne Mollica	Safe Effect Pty Ltd (ACN 088 129 917)	APPL 1298/2004	Gregor SC	Discontinued
Catherine Mary Edwards	WMC Resources Ltd ACN 004 184 598	APPL 1142/2004	Smith C	Discontinued
Cecily Marchant	Police and Nurses Credit Society Limited	APPL 1146/2004	Kenner C	Discontinued
Cheryl Taylor	Vivian Jones T/A Perth College of Beauty Therapy	APPL 1549/2004	Wood C	Discontinued
Christopher Robert Morris	Kimberley Distributors	APPL 268/2004	Smith C	Dismissed
Conor MacGrath	Atlas Group Pty Ltd	APPL 1306/2004	Kenner C	Discontinued
Corrine Clifton	Spirit Catering & Services Pty Ltd	APPL 1064/2004	Gregor SC	Dismissed
Daniel Leonard Neira	Toyo Tyre and Rubber Australia Limited	APPL 485/2004	Kenner C	Discontinued
Derek William Ball	Manpower	APPL 1136/2004	Kenner C	Discontinued
Duncan Gordon Kenned Pearse	Muntadgin Farming Company, Dan Kerse (Andrew)	APPL 1292/2003	Kenner C	Discontinued
Dusan Brakus	Quality Smallgoods "Mondo Doro"	APPL 1381/2004	Wood C	Discontinued
Gordon Magee	Fascine Lodge	APPL 733/2004	Smith C	Discontinued
Graeme Leslie Beale	Mining Industrial Services Australia 2000 Pty Ltd	APPL 1155/2004	Gregor SC	Discontinued
Henrietta McCarthy	Sir Charles Gairdner Hospital	APPL 488/2003	Scott C	Discontinued
Holly Anne Singleton	Sylvanas Beauty Studio	APPL 1403/2004	Smith C	Discontinued
Ian Burking	Shack & Kerr Motors Pty Ltd	APPL 1335/2004	Kenner C	Discontinued

Parties		File Number	Commissioner	Result
Iris Schomacker	The Boating Industry Association of WA Inc	APPL 1191/2003	Kenner C	Dismissed
Jason Scott Preston	Sherrin Hire Pty Ltd	APPL 1671/2004	Wood C	Discontinued
Jeanenne Slade	Australian Flying Corps and Royal Australia Air Force Association of Air Force Memorial Estate	APPL 1387/2004	Wood C	Discontinued
Jennifer Ann Revie	Alloy Steel International ABN 23 247 950 025	APPL 821/2004	Smith C	Discontinued
Jillian May McCarthy	Mounts Bay Waters Apartment Hotel	APPL 1/2005	Beech CC	Discontinued
John Edward Kosonen	Ray Hughes,Rest Point Holiday Village	APPL 227/2003	Smith C	Dismissed
Justin Andrew Reid	Don Woodcock	APPL 1474/2004	Gregor SC	Discontinued
Justin Morgan	Galcom Mechanical	APPL 1050/2004	Wood C	Discontinued
Kiatjin Lye	Sales Force	APPL 1462/2004	Beech CC	Discontinued
Kim Bryan	Leander Cabling Systems Pty Ltd	APPL 1418/2004	Smith C	Discontinued
Kimberley Van Poelgeest	Link Projects Australasia Pty Ltd	APPL 1140/2004	Kenner C	Discontinued
Kirstin Riemer	John Paul College (ABN 194 194 87905), Roman Catholic Archbishop of Perth, The Catholic Education Commission of WA	APPL 1867/2003	Kenner C	Discontinued
Kristy-Ellen Andrews	Skycharm Pty Ltd	APPL 1368/2004	Smith C	Discontinued
Kyaw Htay John Ngoon	ABC Blinds And Curtains	APPL 783/2004	Smith C	Discontinued
Kyle Jordan Pavelka	Carlisle Hotel Motel Pty Ltd	APPL 441/2004	Kenner C	Discontinued
Lee Gribben	Ian Sargent, Principal of WA Prestige Properties	APPL 1579/2004	Scott C	Dismissed
Lisa Jane Breen	Metso Minerals Australia Ltd	APPL 749/2004	Gregor SC	Discontinued
Lucrezia Santa Mesiti	Shahin Enterprises Pty Ltd	APPL 739/2004	Harrison C	Discontinued
Mandy-Lee S Kartsioukas	Win Television	APPL 1553/2004	Smith C	Dismissed
Mark Cornelius Soerink	K.W & D.C Worner t/as Renrow Park Logistics	APPL 1364/2004	Smith C	Discontinued
Mark William Radcliffe	Young River Station	APPL 1154/2004	Beech CC	Discontinued
Martin Thomas Sowerby	Stace Pty Ltd (ACN 078 120 439)	APPL 1245/2004	Gregor SC	Discontinued
Mary Margaret Daly	National Civic Council	APPL 20/2005	Beech CC	Discontinued
Matthew John Tate	WG Warren	APPL 1123/2004	Gregor SC	Discontinued
Maurice Jurand Czarniak	McKenzies Chemist	APPL 1118/2004	Kenner C	Discontinued
Meagan Cavenagh	The Tanning Salon Pty Ltd	APPL 429/2004	Smith C	Dismissed
Mervyn John Williams	CSBP Ltd	APPL 1524/2004	Wood C	Discontinued
Michael Jankowski	Belshine Pty Ltd	APPL 546/2004	Kenner C	Discontinued
Michael Keith Thomason	Safe Effect Pty Ltd (ACN 088 129 917)	APPL 1297/2004	Gregor SC	Discontinued
Michael Rea	Walfield Holdings Pty Ltd t/as J Mills Distribution	APPL 950/2004	Beech CC	Discontinued
Monique Oliveira	Foodland South Fremantle	APPL 1100/2004	Kenner C	Discontinued
Mr Behnam Samandari	Golden Focus Pty Ltd t/as Ray White - Whiteman & Associates	APPL 1578/2004	Beech CC	Discontinued
Mr Bruce Daurat	Byrnecut Mining	APPL 1609/2004	Beech CC	Discontinued
Mr Domenico Roberto	Benny's Bar & Cafe	APPL 1543/2004	Smith C	Discontinued
Mr Gregory John Wallace	Western Cellars (WA) Pty Ltd (ACN 611 047 166)	APPL 1599/2004	Gregor SC	Discontinued
Mr Jason Christopher MacMaugh	Bax Global Australia Pty Ltd	APPL 36/2005	Beech CC	Discontinued
Mr Robert Foltz	Comfort Inn Bel Eyre Perth	APPL 1680/2004	Beech CC	Discontinued
Ms Julianne Lynette Spark	Golden Focus Pty Ltd Ray White - Whiteman & Associates	APPL 1577/2004	Beech CC	Discontinued

Parties		File Number	Commissioner	Result
Nicole Cherie Bell	Community Newspaper Group Limited	APPL 1293/2004	Kenner C	Discontinued
Paul D'Amico	Travel Services Group Pty Ltd	APPL 1128/2004	Wood C	Discontinued
Paul Robert Kearns	Wemyss Group For Wemyss Seed Cleaners Pty Ltd	APPL 1320/2004	Gregor SC	Discontinued
Peter Bruce Conlon	Challenge Marine (Pty) Ltd.	APPL 1535/2004	Wood C	Discontinued
Peter Grahame Nelson Smith	Courier Australia Group Pty Ltd	APPL 1326/2004	Kenner C	Discontinued
Rebekah Susan Bibby	Terrace 105 Cafe Restaurant	APPL 1323/2004	Kenner C	Discontinued
Reece Wilson	IV Paternostro	APPL 1269/2004	Smith C	Discontinued
Rhonda Maree Ashton	Chubb Security Pty Ltd trading as (1) Chubb Security Personnel and/or (2) Chub health Services	APPL 354/2004	Kenner C	Discontinued
Richard John Taylor	Skywest Pty Ltd	APPL 1265/2004	Gregor SC	Discontinued
Robert Forrest	Teaz Pty Ltd	APPL 659/2004	Gregor SC	Dismissed
Robin Cooper	Simon Engineering (Aust) Pty Ltd	APPL 1253/2004	Gregor SC	Discontinued
Rodney Edward Pallister	Fremantle Yamaha	APPL 2047/2002	Beech CC	Discontinued
Ronald James Reid	Lauries Electrics City	APPL 1071/2003	Kenner C	Discontinued
Roy William Elliott	Cartridge World	APPL 1393/2004	Kenner C	Discontinued
Sandra Vernon	Modern Home Restoration	APPL 1071/2004	Smith C	Dismissed
Sandy Di Rocco	Integrated Accounting Group	APPL 1162/2004	Kenner C	Discontinued
Shane Chambers	Nautronix Ltd	APPL 496/2003	Harrison C	Discontinued
Sharon Hillman	Indigenous Psychological Services	APPL 809/2004	Kenner C	Discontinued
Shaun Phillip Eagles	Gardner Electronics	APPL 1907/2002	Beech CC	Dismissed
Sheryl Leanne Dorrington	Woodonga Pastoral Company	APPL 780/2004	Gregor SC	Discontinued
Sonia Kathren Magee	Fascine Lodge	APPL 734/2004	Smith C	Discontinued
Stuart Mark Penn	The Danube Cafe	APPL 206/2004	Wood C	Order Issued
Tenique Maree Pinci	South West Sports Centre	APPL 728/2004	Smith C	Discontinued
Timothy Ronald Scully	Murry McKeaggs	APPL 1460/2004	Wood C	Discontinued
Wayne Jackson	Shire of Wiluna	APPL 1210/2004	Gregor SC	Discontinued
William John Harwood	Ballpark Investments Pty Ltd (ACN 102 208 195)	APPL 1309/2004	Kenner C	Discontinued

CONFERENCES—Matters arising out of—

2005 WAIRC 00157

DISPUTE REGARDING REFUSAL TO ALLOW AN EBA NEGOTIATING COMMITTEE TO MEET DURING SCHOOL HOURS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

METHODIST LADIES' COLLEGE

RESPONDENT

CORAM COMMISSIONER J L HARRISON
DATE TUESDAY, 25 JANUARY 2005
FILE NO/S C 242 OF 2004
CITATION NO. 2005 WAIRC 00157

Result Application for joinder of party granted

Order

WHEREAS on 8 December 2004 the applicants applied to the Commission for a conference pursuant to s44 of the Industrial Relations Act, 1979 ("the Act"); and

WHEREAS by facsimile on 9 December 2004 the Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers requested the Commission join it as a party to the application as it was also in dispute with the respondent in relation to the issues raised in the application; and

WHEREAS on 14 December 2004 the Commission convened a conference for the purpose of conciliating between the parties and all parties advised the Commission that they consented to the Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers being joined as a party to the application;

NOW HAVING heard Ms K Scoble on behalf of the Construction Forestry Mining and Energy Union of Workers, Mr A Gill on behalf of the Liquor, Hospitality and Miscellaneous Workers' Union, Mr N Briggs on behalf of the Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers and Mr P McSweeney on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby –

ORDERS THAT the Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers be and is hereby joined as a party to the herein application.

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

CONFERENCES—Matters referred—

2004 WAIRC 11045

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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

APPLICANT

-v-

THE WINTER FAMILY TRUST T/AS F & J WINTER INVESTMENTS PTY LTD T/AS WESTRALIAN CARNATIONS

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE TUESDAY, 30 MARCH 2004
FILE NO/S CR 91 OF 2003
CITATION NO. 2004 WAIRC 11045

Result Order issued
Representation
Applicant Mr M Llewellyn
Respondent Mr D Jones as agent

Order

HAVING heard Mr M Llewellyn 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 orders by consent –

1. THAT the hearing dates of 30 and 31 March 2004 be and are hereby vacated.
2. THAT the application be and is hereby adjourned sine die.

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

CORRECTIONS—

2005 WAIRC 00185

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH; THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH; THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	UNITED KG ENGINEERING & CONSTRUCTION, ABB ENGINEERING CONSTRUCTION PTY LTD, TOTAL CORROSION CONTROL PTY LTD
	RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	TUESDAY, 1 FEBRUARY 2005
FILE NO	APPL 1319 OF 2004
CITATION NO.	2005 WAIRC 00185

Result Correcting Order

Correcting Order

WHEREAS on 10 November 2004 an order in this matter was deposited in the Office of the Registrar; and

WHEREAS the said order had an error in Clause 1. – Title, and

WHEREAS the order should have read:

This Order shall be known as the Metal, Electrical and Building Trades (Wagerup Alumina Refinery and Willowdale Mine Site) Construction Order No. 1319 of 2004 and, subject to its terms, shall supplement the Metal Trades (General) Award No. 13 of 1965, the Electrical Contracting Industry Award No. 22 of 1978, the Building Trades (Construction) Award 1987 (No. R 14 of 1978) and the Engine Drivers' (Building and Steel Construction) Award No. 20 of 1973 and shall replace Order No. 945 of 2003.

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

THAT the order should be corrected in Clause 1. – Title, to read:

This Order shall be known as the Metal, Electrical and Building Trades (Wagerup Alumina Refinery and Willowdale Mine Site) Construction Order No. 1319 of 2004 and, subject to its terms, shall supplement the Metal Trades (General) Award No. 13 of 1965, the Electrical Contracting Industry Award No. 22 of 1978, the Building Trades (Construction) Award 1987 (No. R 14 of 1978) and the Engine Drivers' (Building and Steel Construction) Award No. 20 of 1973 and shall replace Order No. 945 of 2003.

(Sgd.) J F GREGOR,
[L.S.] Senior Commissioner.

PROCEDURAL DIRECTIONS AND ORDERS—

2003 WAIRC 08545

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	APPLICANT
	-v-
	BHP BILLITON IRON ORE PTY LTD & OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 25 JUNE 2003
FILE NO/S	APPLICATION 1990 OF 2002
CITATION NO.	2003 WAIRC 08545

Result	Interim order issued.
Representation	
Applicant	Mr M Llewellyn
First Respondent	Mr P Quinlan of counsel
Other Respondents	Mr M Llewellyn as agent

Interim Order

WHEREAS on 18 June 2003 the first respondent applied to the Commission for a conciliation conference pursuant to s 32 of the Industrial Relations Act 1979 ("the Act") in relation to the herein proceedings;

AND WHEREAS on 20 June 2003 the Commission convened a conciliation conference between the parties pursuant to s 32 of the Act;

AND WHEREAS at the conciliation conference the Commission was advised that the parties had reached agreement in relation to the administration of the first respondent's Sickness and Accident Scheme ("the Scheme") in effect pursuant to cl 15 of the Iron Ore Production and Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002 ("the Award") until either:

(1) a determination is made by the Commission in respect of an Award variation application made by any party to the Award; or

(2) any other order is made by the Commission in relation to the Scheme.

NOW THEREFORE, in view of the advice received from the parties in respect of the agreement reached in the conciliation conference, pursuant to powers conferred on it under the Act, and by consent, the Commission hereby orders:

(1) THAT this order shall apply to the administration of the Scheme until either:

(a) a determination is made in respect of an Award variation application made by any party to the Award; or

(b) any other order is made by the Commission in relation to the Scheme;

(2) THAT on a without prejudice basis as to the parties' views in relation to the correct interpretation of the Award, employees are entitled to an aggregate of 52 weeks for each sickness and 104 weeks for each accident ("the period"), which need not be taken in one continuous period;

(3) THAT the period does not re-set if the employee returns to work and then later claims benefits in respect of the same sickness or accident;

(4) THAT the hearing dates listed for the herein application of 25 and 26 June 2003 be and are hereby vacated; and

(5) THAT the herein application be adjourned sine die.

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

2005 WAIRC 00202

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	APPLICANT
	-v-
	BHP IRON ORE LTD & OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 4 FEBRUARY 2005
FILE NO/S	APPL 1990 OF 2002
CITATION NO.	2005 WAIRC 00202

Result	Application discontinued by leave
Representation	
Applicant	Mr G Trotter as agent
Respondents	Mr R Lilburne of counsel

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2004 WAIRC 11038

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DUNCAN GORDON KENNEDY PEARSE
	APPLICANT
	-v-
	MUNTADGIN FARMING COMPANY, DAN KERSE (ANDREW)
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 1 APRIL 2004
FILE NO/S	APPLICATION 1292 OF 2003
CITATION NO.	2004 WAIRC 11038

Result	Direction issued
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr P Brunner of counsel

Direction

HAVING heard Mr K Trainer as agent on behalf of the applicant and Mr P Brunner of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs –

1. THAT each party shall give an informal discovery by serving its list of documents by 29 April 2004
2. THAT inspection of documents shall be completed by 6 May 2004.
3. THAT the matter be listed for hearing for one day.
5. THAT the parties have liberty to apply on short notice.

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

2004 WAIRC 11480

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DUNCAN GORDON KENNEDY PEARSE
	APPLICANT
	-v-
	MUNTADGIN FARMING COMPANY, DAN KERSE (ANDREW)
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 14 MAY 2004
FILE NO/S	APPLICATION 1292 OF 2003
CITATION NO.	2004 WAIRC 11480

Result	Order issued
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr P Brunner of counsel

Order

HAVING heard Mr K Trainer as agent on behalf of the applicant and Mr P Brunner of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

(1) THAT the herein application be and is hereby adjourned to a date to be fixed.

(2) THAT the hearing date of 17 May 2004 be and is hereby vacated.

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

2004 WAIRC 10918

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KIRSTIN RIEMER
	APPLICANT
	-v-
	JOHN PAUL COLLEGE (ABN 194 194 87905) & OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 18 MARCH 2004
FILE NO/S	APPLICATION 1867 OF 2003
CITATION NO.	2004 WAIRC 10918

Result	Direction issued
Representation	
Applicant	Mr S Gallacher of counsel
Respondents	Ms K Wroughton of counsel

Direction

HAVING heard Mr S Gallacher of counsel on behalf of the applicant and Ms K Wroughton of counsel on behalf of the respondents the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs –

1. THAT the applicant file and serve further and better particulars of notice of application by no later than 4.00pm 25 March 2004.
2. THAT the respondent file and serve further and better particulars of notice of answer and counter proposal by no later than 4.00pm 1 April 2004.
3. THAT the matter be listed for hearing for one day.
4. THAT the parties have liberty to apply on short notice.

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

2004 WAIRC 13164

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DANIEL LEONARD NEIRA
	APPLICANT
	-v-
	TOYO TYRE AND RUBBER AUSTRALIA LIMITED
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 27 OCTOBER 2004
FILE NO.	APPL 485 OF 2004
CITATION NO.	2004 WAIRC 13164

Result	Direction issued
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr D Rutherford of counsel

Direction

HAVING heard Mr K Trainer as agent on behalf of the applicant and Mr D Rutherford of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs –

1. THAT each party shall give an informal discovery by serving its list of documents by 15 November 2004.
2. THAT inspection of documents shall be completed by 22 November 2004.
3. THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.
4. THAT the parties file and serve upon one another any signed witness statements upon which they intend to rely no later than 21 days prior to the date of hearing.
5. THAT the parties file and serve upon one another any signed witness statements in reply no later than seven days prior to the date of hearing.
6. THAT the applicant and respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than three days prior to the date of hearing.

7. THAT the parties have liberty to apply on short notice.

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

2005 WAIRC 00105

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRISTAN PETER PERRY
	APPLICANT
	-v-
	READYMIX EMOLEUM SERVICES PTY LIMITED
	RESPONDENT
CORAM	DEPUTY REGISTRAR ROSSI
DATE	MONDAY, 17 JANUARY 2005
FILE NO.	APPL 1526 OF 2004
CITATION NO.	2005 WAIRC 00105

Result	Directions issued re informal discovery and inspection of documents
Representation	
Applicant	Mr P Perry as agent on behalf of the applicant
Respondent	Mr S Harben (of counsel) on behalf of the respondent

Direction

HAVING heard Mr P Perry as agent on behalf of the applicant and Mr S Harben of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979* hereby directs –

1. THAT each party shall give an informal discovery by serving its list of documents by 24th January 2005.
2. THAT inspection of documents shall be completed by 7th February 2005.

(Sgd.) J ROSSI,
Deputy Registrar.

2005 WAIRC 00222

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR TERENCE KEITH REGAN
	APPLICANT
	-v-
	GAVIN TRANSPORT
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 9 FEBRUARY 2005
FILE NO/S	APPL 1630 OF 2004
CITATION NO.	2005 WAIRC 00222

Result	Order

Order

WHEREAS on 15th December 2004 Terrence Keith Regan (the Applicant) applied to the Commission for an order pursuant to the *Industrial Relations Act, 1979;* and

WHEREAS on 15th December 2004, 5th and 20th January 2005 the Applicant was requested in writing to serve the application on the Respondent and file a Declaration of Service; and

WHEREAS no Declaration of Service was filed by 1st February 2005 the matter was listed For Mention on 8th February 2005; and

WHEREAS on 7th February 2005 the Applicant's partner advised the Commission by phone that the Applicant could not attend the hearing listed for 8th February 2005 as he was out of the metropolitan area and the Commission advised that the Applicant should advise the Commission in person; and

WHEREAS on 8th February 2005 the Applicant rang the Commission and advised he could not attend the hearing as he was not in Perth and that he had not served the application on the Respondent as he did not know where he would be located; and

WHEREAS at the hearing listed for 8th February 2005 the Commission decided to issue an Order in accordance with Regulation 94 of the *Industrial Relations Commission Regulations 1985* (the Regulations) that the time in which to serve the application be varied and that the Applicant now serve the Respondent with the application and lodge a Declaration of Service within 14 days of today's date.

NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act, 1979,* the Commission, hereby orders:

THAT :

1. In accordance with Regulation 94 of the *Industrial Relations Commission Regulations 1985* (the Regulations) that the time in which to serve the application be varied

2. The Applicant now serve the Respondent with the application and lodge a Declaration of Service within 14 days of today's date.

(Sgd.) J F GREGOR,
[L.S.] Senior Commissioner.

ENTERPRISE BARGAINING AGREEMENT—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
ACI Plastics Packaging Bentley Enterprise Agreement 2004 AG 272/2004	17/01/2005	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch, ACI Plastics Packaging, Bentley	Gregor SC	Agreement Registered
Airmain Pty Ltd / CFMEUW Industrial Agreement 2002-2005 AG 271/2004	17/01/2005	The Construction, Forestry, Mining and Energy Union of Workers	Airmain Pty Ltd	Gregor SC	Agreement Registered
Ausform Construction Company / CFMEUW Industrial Agreement 2002-2005 AG 139/2003	14/01/2005	The Construction, Forestry, Mining and Energy Union of Workers	Goldkey Investments Pty Ltd t/a Ausform Construction Company	Gregor SC	Agreement Registered
Botanic Gardens and Parks Authority General Agreement 2004 AG 266/2004	3/02/2005	Chief Executive Officer, Botanic Gardens and Parks Authority	The Western Australian, Municipal Roads Boards, Parks and Racecourse Employees Union	Harrison C	Agreement Registered
Dawesville Rooftiling & Maintenance Services/CFMEUW Industrial Agreement 2002-2005	17/01/2005	The Construction, Forestry, Mining and Energy Union of Workers	The Trustee for Quinn Trading Trust T/A Dawesville Rooftiling & Maintenance Services	Gregor SC	Agreement Registered
Government Services (Miscellaneous) General Agreement 2005 AG 7/2005	3/02/2005	Director General Department of Culture and the Arts, The Director General of the Department of Agriculture, Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	(Not applicable)	Harrison C	Agreement Registered
H&S Roof Tiling Service / CFMEUW Industrial Agreement 2002-2005 AG 269/2004	17/01/2005	The Construction, Forestry, Mining and Energy Union of Workers	H&S Roof Tiling Service Pty Ltd	Gregor SC	Agreement Registered
John Holland/CFMEUW Industrial Agreement 2002-2005 AG 144/2003	06/09/2004	The Construction, Forestry, Mining and Energy Union of Workers	John Holland Pty Ltd	Coleman CC	Agreement Registered
LHMU Enrolled Nurses and Nursing Assistants Department of HealthIndustrial Agreement 2004 AG 290/2004	19/01/2005	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	The Board of the Western Australia Centre for Pathology and Medical Research, The Minister for Health, Health Department of WA , The Western Australian Alcohol and Drug Authority	Scott C	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Racing and Wagering Western Australia ("RWWA") (Commuted Allowance - Computer Operators) Specific Agreement 2005 AG 291/2004	24/01/2005	Chief Executive Officer Racing & Wagering Western Australia	Civil Service Association of Western Australia Incorporated	Wood C	Agreement Registered
Therapy Focus Enterprise Bargaining Agreement 2004 AG 4/2005	21/01/2005	Health Services Union of Western Australia (Union of Workers)	Therapy Focus	Scott C	Agreement Registered
Thorn Mechanical Pty Ltd Enterprise Bargain Agreement 2004 AG 275/2004	17/01/2005	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch	Thorn Mechanical Pty Ltd	Gregor SC	Agreement Registered
Town & Country Tiling / CFMEUW Industrial Agreement 2002-2005 AG 268/2004	17/01/2005	The Construction, Forestry, Mining and Energy Union of Workers	Town & Country Tiling Pty Ltd, Town & Country Tiling Pty Ltd	Gregor SC	Agreement Registered
Voice Holdings / CFMEUW Industrial Agreement 2002-2005 AG 267/2004	17/01/2005	The Construction, Forestry, Mining and Energy Union of Workers	Voice Holdings Pty Ltd	Gregor SC	Agreement Registered
West Australian Newspapers (Christmas Agreement) 2004 AG 289/2004	3/02/2005	West Australian Newspapers Ltd	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch, The Automotive, Food, Metals, Engine	Wood C	Agreement Registered

JOINDER/CONCURRENCE OF PARTIES—Application For—

2005 WAIRC 00245

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES RESTAURANT AND CATERING INDUSTRY ASSOCIATION OF EMPLOYERS OF WESTERN AUSTRALIA INC.

APPLICANT

-v-

WESTERN AUSTRALIAN HOTELS AND HOSPITALITY ASSOCIATION INCORPORATED (UNION OF EMPLOYERS)

RESPONDENT

CORAM CHIEF COMMISSIONER A R BEECH
DATE FRIDAY, 11 FEBRUARY 2005
FILE NO/S APPL 99 OF 2005
CITATION NO. 2005 WAIRC 00245

Result Application discontinued
Representation
Applicant No appearance
Respondent No appearance

Order

WHEREAS on 27 January 2005 an application was lodged in the Commission pursuant to section 38(2) of the *Industrial Relations Act 1979* without the supporting documents required by the Regulations;

AND WHEREAS on 4 February 2005 the applicant lodged a Notice of Discontinuance in the Commission to withdraw and discontinue the application;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order -

THAT the application be discontinued.

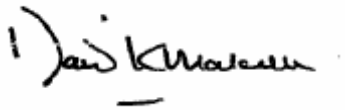
(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

NOTICES—Appointments—

Industrial Relations Act 1979

I, the undersigned, the HONOURABLE DAVID KINGSLEY MALCOLM AC, Chief Justice of Western Australia, in exercise of the powers conferred on me by section 85(6) of the *Industrial Relations Act 1979* (WA), DO HEREBY NOMINATE THE HONOURABLE CHRISTINE ANN WHEELER, a Judge of the Supreme Court of Western Australia, to be Deputy Presiding Judge of the Western Australian Industrial Appeal Court from 1 February 2005.

As witness my hand this 27th day of January 2005.

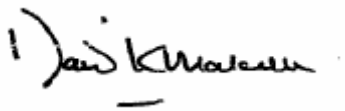


CHIEF JUSTICE OF WESTERN AUSTRALIA

Industrial Relations Act 1979

I, the undersigned, the HONOURABLE DAVID KINGSLEY MALCOLM AC, Chief Justice of Western Australia, in exercise of the powers conferred on me by section 85(6) of the *Industrial Relations Act 1979* (WA), DO HEREBY NOMINATE THE HONOURABLE LEONARD WILLIAM ROBERTS-SMITH, a Judge of the Supreme Court of Western Australia, to be an Ordinary Member of the Western Australian Industrial Appeal Court from 1 February 2005.

As witness my hand this 27th day of January 2005.



CHIEF JUSTICE OF WESTERN AUSTRALIA

NOTICES—General Matters—

CHIEF JUSTICE'S CHAMBERS, SUPREME COURT,
PERTH, WESTERN AUSTRALIA, 6000
TELEPHONE: (08) 9421 5337
FACSIMILE: (08) 92213833

25 January 2005

NOTICE FOR INDUSTRIAL GAZETTE

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

Section 85(1) of the *Industrial Relations Act 1979* (WA) provides that the Western Australian Industrial Appeal Court established under the former legislation, namely, the *Industrial Arbitration Act 1912* (WA), is continued in existence under and subject to the 1979 Act. The Court consists of four members, namely, a Presiding Judge, a Deputy Presiding Judge and two Judges who shall be Ordinary Members. The members of the Court are such Judges as the Chief Justice of Western Australia nominates, either generally or for a specified time, to be members of the Court. The Presiding Judge and the Deputy Presiding Judge of the Court are such of those members as the Chief Justice shall nominate to such offices.

In anticipation of the commencement of the Court of Appeal Division of the Supreme Court, it has been decided by the Chief Justice that the administration of Justice in the Industrial Appeal Court should be exercised by Judges of the Appeal Division.

The current Judges of the Industrial Appeal Court are the Hon Justice Steytler, Presiding Judge, the Hon Justice Hasluck, Deputy Presiding Judge, the Hon Justice Pullin and the Hon Justice Heenan, both of whom are Ordinary Members of the Court.

In order to facilitate the implementation of the proposal, the Hon Justice Hasluck has kindly agreed to resign his current appointment as Deputy President. The Hon Justice Heenan has also kindly agreed to resign his appointment as an Ordinary Member of the Industrial Appeal Court.

The Chief Justice has expressed appreciation for the work of all the Judges of the Supreme Court who in the past have acted as members of the Industrial Appeal Court at various times, all of whom have contributed to the high standing and reputation of the Court. The sole reason for these changes is the new arrangement for the exercise of the industrial appellate jurisdiction accompanying the establishment of the Court of Appeal Division.

These changes have been made in consultation with the Judges concerned as well as the Hon Jim McGinty MLA, Attorney General, who has consulted the Hon John Kobelke MLA, Minister for Industrial Relations and the Solicitor General, Mr Robert Meadows QC, each of whom supports the proposal.

The changes will be put into effect upon the commencement of the *Acts Amendment (Court of Appeal) Act 2004* which it is understood will come into effect by proclamation as from 1 February 2005.

PUBLIC SERVICE APPEAL BOARD—

2005 WAIRC 00080

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KAREN ANNE FARRELL
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT FOR COMMUNITY DEVELOPMENT
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD CHAIRMAN - COMMISSIONER P E SCOTT BOARD MEMBER – MR K TRENT BOARD MEMBER – MR P WARD
DATE	MONDAY, 17 JANUARY 2005
FILE NO	PSAB 11 OF 2004
CITATION NO.	2005 WAIRC 00080

Result	Appeal dismissed

Order

WHEREAS this is an appeal pursuant to section 80I of the Industrial Relations Act 1979; and

WHEREAS on the 2nd day of December 2004, the Public Service Appeal Board convened a conference for the purpose of discussing scheduling and interlocutory matters; and

WHEREAS at the conclusion of the conference the parties sought time to have further discussions between themselves in an attempt to resolve the matter; and

WHEREAS on the 13th day of January 2005, the Appellant's representative filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders:

THAT this appeal be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

SCHOOL TEACHERS—Matters dealt with—

2005 WAIRC 00046

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANCA FLYNN **APPLICANT** **-v-** PAUL ALBERT, DIRECTOR GENERAL DEPARTMENT OF EDUCATION AND TRAINING **RESPONDENT**
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 13 JANUARY 2005
FILE NO.	APPL 423 OF 2004
CITATION NO.	2005 WAIRC 00046

Catchwords	Reprimand of teacher - Penalty imposed on teacher - Allegations of conduct in breach of statutory obligations - Statutory scheme in relation to discipline - Whether statutory scheme complied with - Application dismissed - Penalty upheld - Industrial Relations Act 1979 (WA) s 29(1)(b); Public Sector Management Act 1994 (WA) ss 78, 80, 81, 83, 84, 85 & 86; School Education Act 1999 (WA) s 64
Result	Application dismissed.
Representation	
Applicant	Ms K Fawcett (of counsel)
Respondent	Mr D Matthews (of counsel)

Reasons for Decision

1 On 26 March 2004 Anca Flynn ("the applicant") lodged an application in the Commission against Paul Albert ("the respondent") appealing against a reprimand given to her by the respondent on 5 March 2004. As conciliation proceedings did not resolve the dispute the matter was referred for hearing and determination. Prior to the hearing the applicant filed a statement of the issue to be determined as follows:

> "1. This application is referred to the Commission pursuant to section 78(2) of the Public Sector Management Act 1994 ("PSMA") and section 29(1)(b) of the Industrial Relations Act 1979.
>
> 2. The Applicant is aggrieved by a decision made in the exercise of a power under section 86 (9)(b)(ii) of the PSMA to accept the recommendation made under section 86(8)(a) to impose a penalty pursuant to section 86(3)(b) of the Act ("the decision"). That decision was communicated to the Applicant by letter dated 4 March 2004 and received by the Applicant on 5 March 2004 (copy attached).
>
> 3. The decision is as follows:
>
> "*In all the circumstances, I have determined that the action to be taken against you in respect of the charge is a reprimand. This action is taken in accordance with sections 86(9)(b)(ii) and 86(3)(b)(i) of the Public Sector Management Act 1994 (WA). Accordingly I hereby reprimand you in respect of the above conduct, which has been found to constitute a breach of discipline as defined in Section 80(d) of the Public Sector Management Act 1994.*"
>
> 4. The decision was made on the basis of a finding:
>
> "*… that on 26 February 2003, you failed to adequately supervise students from Boyare Primary School during the excursion to the Balga Aquatic Centre for their 11 am Interm Swimming class in accordance with section 64(1)(e) of the School Education Act 1999.*"
>
> 5. Matters referred to the Commission pursuant to section 78(2) of the PSMA are not restricted to consideration by the Commission of the reasonableness of the employer's conduct, but the Commission may review the employer's decision de novo, as the circumstances warrant and determine the matter afresh and substitute its own decision for the employer's decision if that is appropriate (Johnston v Mance, 2002 WAIRC 06155).
>
> 6. Further, the Commission may, if the merits of the application warrant such action, quash the decision of the employer (Webb v Director General Department of Education 2004 WAIRC 10441) (sic)
>
> 7. The Applicant seeks to have the decision reviewed de novo and the matter determined afresh, and seeks an order that the decision be quashed."
>
> (Applicant's Statement of Issue to be Determined dated 12 August 2004)

2 After a request by the respondent for further details about the applicant's case the applicant confirmed by facsimile to the respondent dated 14 October 2004 as follows:

> "1. The Applicant challenges the substantive finding that she failed to adequately supervise students.
>
> 2. The Applicant challenges the procedure employed by the Respondent on the basis that:
>
> (a) The Wright preliminary investigation included or constituted an investigation into a breach of discipline by the Applicant and preceded any notification to the Applicant to this effect. That investigation and its outcome were relied upon in the subsequent investigation and inquiry. Further, the Inquirer failed to conduct the Inquiry independently from the preliminary investigation, or the investigation, and accordingly the conclusions of the Investigation and Inquiry are unreliable and should be found by the Commission to be invalid.

(b) (i) The allegation of a minor breach of discipline was incorrectly "upgraded" to a charge of (sic) serious breach of discipline and accordingly the inquiry, determination and penalty should be found by the Commission to be invalid.

(ii) Alternatively the appropriate standard of proof to be employed in the inquiry was that which applies to an allegation of a serious breach of discipline. This higher standard of proof was not employed by the Inquirer. The Inquirer in fact conducted the Inquiry on the basis that the Applicant bore the onus of proof in disproving the charge against her. Accordingly the inquiry, determination and penalty should be found by the Commission to be invalid. Further, the higher standard of proof is the standard which should be employed by the Commission in determining afresh whether a breach of discipline occurred.

3. The Applicant challenges the penalty issued by the Respondent."

3 At the commencement of the proceedings it became clear that the respondent had been incorrectly named. Given the respondent's consent to substituting the correct name of the respondent and the Commission's powers under s27(1) of the Act, and having formed the view that it was appropriate in the circumstances to name the correct respondent, I propose to issue an order that Paul Albert be deleted as the named respondent in this application and be substituted with Paul Albert, Director General Department of Education and Training.

4 An agreed statement of facts was tendered by the parties at the hearing and is as follows:

"**BACKGROUND**

1. The Applicant was a trained teacher in Romania.
2. The Applicant arrived in Australia on 29 November 2002.
3. The Applicant's qualifications were recognised by the Department of Education and Training ("DET") in mid January 2003.
4. The Applicant applied for employment with DET and was registered as a casual relief teacher on or about 17 January 2003.
5. The Applicant's husband, Pat Flynn, was one of two Deputy Principals at Boyare Primary school ("Boyare") at the relevant times.
6. The Applicant performed her first day of work as a relief teacher for DET at Boyare in or about mid-February 2003. She took a year 2/3 class, filling in for Ms Margaret Foster.
7. The Applicant performed her second day of work as a relief teacher for DET on Wednesday 26 February 2003 in Ms Foster's class.

THE INCIDENT

8. There are no agreed facts.

INVESTIGATIONS AND STATEMENTS FOLLOWING THE INCIDENT

9. Graeme Wright, Manager of Operations, Swan District Education Office, investigated the incident and interviewed a number of people, including the Applicant. The Applicant provided Mr Wright with a copy of the Critical Incident Report dated 26 February 2003.
10. On 27 March 2003 Mr Wright wrote to Mr Hamilton enclosing his report regarding the incident and six attachments.

PUBLIC SECTOR MANAGEMENT ACT 1994 INVESTIGATION

11. On 9 June 2003 David Price met with the Applicant and handed her a copy of a letter from Paul Albert dated 29 May 2004 (sic) advising of a suspected breach of discipline.
12. On 15 June 2003 the Applicant provided her response to the letter of Paul Albert dated 29 May 2003.
13. By letter dated 7 July 2003 from Paul Albert, the Applicant was advised that an investigation would take place into the allegation against her.
14. Joe Baskwell was directed to conduct the investigation. Mr Baskwell interviewed a number of people, including the Applicant. Mr Baskwell drafted a statutory declaration which the Applicant signed. Mr Baskwell provided Mr Albert with a report on his investigations on 8 August 2003.
15. By letter dated 28 August 2003 Mr Albert advised the Applicant that he had found she had committed a minor breach of discipline and that he proposed to issue a reprimand in respect of the breach.
16. By letter dated 2 September 2003 the Applicant advised Peter Denton, Manager, Complaints Management Unit, of her objections to the findings.
17. By letter dated 11 September 2003, Mr Albert advised the Applicant that she may withdraw her objection within 10 days.

PUBLIC SECTOR MANAGEMENT ACT 1994 CHARGE

18. By letter dated 2 October 2003 Mr Albert charged the Applicant with a serious breach of discipline.
19. On 3 November 2003 Mr Albert directed Ian Flack – Consultant to carry out an inquiry into the charge.
20. On 19 February 2004 Mr Flack provided his report of the inquiry into the charge.
21. On 4 March 2004 Mr Albert advised the Applicant that the inquirer had found that she had committed a breach of discipline and that the inquirer had recommended that Ms Flynn reprimanded (sic) and that Mr Albert accepted that recommendation."

(Exhibit 1)

Applicant's Evidence

5 Ms Flynn qualified as a teacher in Romania and has a Bachelor of Arts majoring in languages and a Master of Arts in Cultural Studies. Prior to coming to Australia at the end of 2002 she taught high school for two years and taught at a university in

Romania. After her qualifications were assessed by the Western Australian Overseas Qualifications Unit in January 2003 she was cleared to undertake work as a relief teacher and a teacher in Western Australian Government schools on 21 January 2003 (Exhibit A1.9).

6 Ms Flynn stated that she was aware that an orientation course for overseas trained teachers was scheduled to take place in January 2003 and that she anticipated undertaking this course however the course did not proceed due to a lack of participants.

7 The applicant confirmed that she undertook one day of relief teaching at Boyare Primary School ("the School") in the week ending 23 February 2003. The applicant was then requested to undertake another day of relief teaching the following week on Friday 28 February 2003. As this relief involved taking her class to a swimming lesson she had an informal discussion with her partner, Mr Patrick Flynn, on the evening of Tuesday 25 February 2003 about the requirements on her when taking students to a swimming lesson. The applicant gave evidence that during this discussion Mr Flynn told her that the year 1 children would be on a buddy system with year 6 and year 7 students and she was told to count student numbers prior to entering the bus, on the bus, before entering the swimming pool and before reboarding the bus to return to the School. On the morning of Wednesday 26 February 2003 the applicant was unexpectedly asked to undertake relief teaching for the School's year 2/3 class and when the applicant arrived at school to undertake relief duties she discovered that she would be required to take her class to a swimming lesson at Balga Aquatic Centre. The applicant stated that she had never supervised a school excursion in Australia before. The applicant gave evidence that she briefly discussed how to deal with taking the children to the pool with her colleagues, Ms Lyn Fisher and Ms Natasha Coyton, the applicant determined which children from her class were attending the swimming lesson and she then took the children to a pre-arranged meeting area. The applicant was then told by Ms Fisher to look after the male students. The applicant stated that she started counting the boys prior to boarding the bus but she was told by Ms Fisher not to worry about counting them as they would be counted as they came off the bus. During the journey to the pool the applicant was located on the upper deck of the bus with the boys and the applicant stated that she did not count the boys as she was busy supervising the students. The applicant stated that she did not have a list of children who were on the bus nor did she know all of the students as some were from other classes.

8 The applicant stated that when the bus arrived at the pool she was the last person to leave the bus. The applicant gave evidence that as she was dealing with students who were fighting at the back of the boy's line she did not count the boys when they were lined up at the entrance to the swimming pool and the applicant understood that someone else had counted the boys. Even though the applicant was concerned that the boys had not been counted as other teachers were in attendance she thought the situation was in hand.

9 After the swimming lessons finished students went to the change rooms and the applicant was told by Ms Fisher to supervise the boys. The applicant stated that when the boys came out of the change rooms they lined up ready to board the bus. After hearing noises in the change rooms the applicant investigated and discovered that contrary to instructions some boys were taking a shower and having a water fight. The applicant waited for the boys to come outside and she then asked a boy to find out how many boys were left in the change rooms. The applicant then searched the male change rooms along with Ms Jacqueline MacLeod but did not locate any other children. At the time this took place the boys had already boarded the bus to return to school. The applicant stated that after she boarded the bus the boys and girls were counted. Even though the applicant was concerned that the children had not been counted as advised by Mr Flynn the applicant understood that Ms Fisher knew the exact number of male and female students who were attending the excursion. The applicant stated that she was unaware of all of the procedures for supervising a swimming lesson and she assumed that a different method was being followed to supervise students during this excursion.

10 At approximately 5.30 pm that evening she was informed by the school's Principal Mr David Pirouet that two boys had been left behind at the swimming pool. The applicant was shocked by this as she did not see them in the change room when she checked it. The applicant completed a Critical Incident Report about the excursion (Exhibit A1.21.2) and a few days later a representative from the respondent's Swan District Office, Mr Graeme Wright, interviewed her about the incident.

11 In early June 2003, whilst the applicant was working at the School, the District Director Mr David Price told her that a formal investigation was to be undertaken into the incident that occurred on 26 February 2003 and she was handed a letter dated 29 May 2003 (Exhibit A1.14). The letter stated that she may have acted in a manner constituting a breach of discipline pursuant to s80 of the *Public Sector Management Act 1994* ("the PSM Act") in relation to the incident and reads (in part) as follows:

> "Specifically it is alleged that:
>
> - **On 26 February 2003, you failed to adequately supervise students from Boyare Primary School during the excursion to the Balga Aquatic Centre for their 11 am Interm swimming class in accordance with section 64(1)(e) of the *School Education Act 1999*. This allegation, if proven, is also in breach of the Department's *Excursions* policy; the *Water-Based Excursions Procedures and Guidelines;* principle three of the *Western Australian Public Sector Code of Ethics;* principles one and three of the *Staff Conduct* policy of the Department; and the *Duty of Care for Students* policy.**
>
> By way of further clarification, it is claimed that due to inadequate supervision during the excursion to the Balga Aquatic Centre, two students, Luke Wells and Andrew Burt, were left behind at the Centre after the bus departed back to Boyare Primary School following the Interm swimming class. It is further claimed that you did not check the names of the students in attendance against a list of all the students registered as participating in the class.
>
> If the allegation is proven, it will constitute a breach of discipline pursuant to section 80(d) of the Act and disciplinary action may be taken against you."
>
> (Exhibit A1.14)

12 The applicant was given the opportunity to submit a written explanation and did so by letter dated 15 June 2003 (Exhibit A1.21.3). The applicant was subsequently informed by letter dated 7 July 2003 that a formal investigation into the incident on 26 February 2003 would be undertaken by Mr Joe Baskwell (Exhibit A1.15). The applicant was then interviewed by Mr Baskwell and signed a statutory declaration outlining her version of events concerning the incident (Exhibit A1.21.5). When commenting on this statutory declaration during the hearing the applicant stated that her statements at paragraph 24 and paragraph 27 were incorrect as she should have stated that the counting of students should have been undertaken when the students were off the bus instead of when the students were on the bus.

13 After the Baskwell investigation was completed the applicant was informed by letter dated 28 August 2003 that the respondent had found that she had committed a minor breach of discipline in respect of the following conduct:

"• That on 26 February 2003, you failed to adequately supervise students from Boyare Primary School during the excursion to the Balga Aquatic Centre for their 11 am Intern (sic) Swimming class in accordance with section 64(1)(e) of the *School Education Act 1999*.

Proposed action:

I propose to take the following action under section 83(1)(a) of the Act:

• a reprimand"

(Exhibit A1.17)

14 The applicant was given the opportunity to object to this finding and did so by letter dated 2 September 2003 (Exhibit A1.21.4). The respondent sent the applicant a further letter dated 11 September 2003 noting her objection and giving her a further opportunity to consider her position. As the applicant continued to object to being given a reprimand an Inquirer was appointed by the respondent to inquire into the alleged breach. This inquiry was confirmed to the applicant by letter dated 2 October 2003. This letter states the following (in part):

"In my letter to you dated 11 September 2003, I advised you that if you object to the finding and action of the minor breach of discipline that I would cancel the finding and action and formally charge you with a breach of discipline.

Findings:

Pursuant to section 83(1)(b) of the *Public Sector Management Act 1994 (WA)* ("Act"), I have found that it appears you have committed a serious breach of discipline in respect of the following conduct:

• That on 26 February 2003, you failed to adequately supervise students from Boyare Primary School during the excursion to the Balga Aquatic Centre for their 11 am Interm Swimming class in accordance with section 64(1)(e) of the *School Education Act 1999.*

In accordance with the powers vested in me under section 83(1)(b) of the Act, I hereby charge you with committing the following breach of discipline:

• That on 26 February 2003, you failed to adequately supervise students from Boyare Primary School during the excursion to the Balga Aquatic Centre for their 11 am Interm Swimming class in accordance with section 64(1)(e) of the *School Education Act 1999.*

In accordance with section 86(1)(c) of the Act, you are required to state in writing, within ten (10) working days from the date of receipt of this letter, whether you admit or deny the truth of the charge. Please address your response, marked **'Private and Confidential'** to the Manager, Complaints Management Unit, Department of Education and Training, 151 Royal Street, East Perth, WA, 6004."

(Exhibit A1.21.1)

15 The Inquirer, Mr Ian Flack, interviewed the applicant on 8 December 2003 and the applicant exchanged a number of emails with Mr Flack subsequent to this interview.

16 On or about 4 March 2004 the applicant was notified by letter that the Inquirer had found that she had committed the breach as alleged and she was to be reprimanded. This letter reads as follows (formal parts omitted):

"In my letter to you to you dated 3 November 2003, I advised you that I had directed Mr Ian Flack, an independent investigator to hold a disciplinary inquiry into the charge. The inquiry has now concluded and Mr Flack has submitted his report to me.

The inquirer has found that you committed a breach of discipline in respect of the following charge:

• That on 26 February 2003, you failed to adequately supervise students from Boyare Primary School during the excursion to the Balga Aquatic Centre for their 11 am Interm Swimming class in accordance with section 64(1)(e) of the *School Education Act 1999*.

In all the circumstances, I have determined that the action to be taken against you in respect of the charge is a reprimand. This action is taken in accordance with sections 86(9)(b)(ii) and 86(3)(b)(i) of the *Public Sector Management Act 1994 (WA)*.

Accordingly, I hereby reprimand you in respect of the above conduct, which has been found to constitute a breach of discipline as defined in Section 80(d) of the *Public Sector Management Act 1994*. In reprimanding you, I remind you that as a teacher, through your contact with students, you are in a special position of trust and have obligations to protect students' interests and to ensure their safety and well being at all times.

This letter shall be placed on a confidential departmental file with all other papers regarding this matter and may be referred to in the event of future discipline matters arising against you. A repeat of the kind of behaviour that has resulted in the need for this reprimand may well have more serious repercussions. Subject to you exercising your right of appeal, described below, this matter will otherwise be considered closed.

If you feel aggrieved by this decision, you may appeal to the Western Australian Industrial Relations Commission in accordance with section 78 of the *Public Sector Management Act 1994 (WA)*.

If you have any questions in relation to this matter, please do not hesitate to contact Mr Graham Ridley, Senior Consultant, Complaints Management Unit on 9264 4614."

(Exhibit A1.23)

17 The applicant stated that as a result of being issued with a reprimand the amount of relief teaching undertaken by her with the respondent diminished significantly and a relief teaching agency that she was using stopped allocating her work in late August 2003. She is currently undertaking office duties.

18 The applicant gave evidence that she had no induction prior to commencing employment with the respondent and that she had not been provided with any policy documents from the respondent prior to the incident on 26 February 2003.

19 The applicant maintained that certain statements made in the statutory declaration given by Mr Pirouet in relation to the incident on 26 February 2003 were incorrect, specifically paragraphs referring to the applicant being aware of her responsibilities in relation to the excursion and that the applicant had been given relevant briefings and documentation (Exhibit A1.21.10). The applicant also disagreed with parts of Ms Fisher's statutory declaration which refer to the applicant's lack of control of the boys when boarding the bus (Exhibit A1.21.13). The applicant also stated that Ms MacLeod's statutory declaration was incorrect when referring to the applicant taking the boys from the pool and boarding the bus (Exhibit A1.21.15).

20 Under cross-examination the applicant confirmed that the Critical Incident Report she completed on 26 February 2003 was written when the incident was fresh in her mind. The applicant maintained that the conversation that she had with her partner on the evening of 25 February 2003 was not about supervising students attending swimming lessons the following day but was in relation to the class that she was to undertake on Friday 28 February 2003. The applicant agreed that on 26 February 2003 Ms Fisher allocated her responsibility for the boys attending the swimming excursion and she conceded that prior to the boys boarding the bus at the school she counted approximately 33 boys before this count was interrupted by Ms Fisher. The applicant understood that taking care of the students in her care involved counting the students before they boarded the bus as explained to her by Mr Flynn the previous evening. The applicant stated that even though there were about 37 boys attending the excursion the exact number of boys on the excursion was not clear to her because her counting was interrupted by Ms Fisher and the applicant claimed that the few boys at the end of the line which she had not counted were mixed in with the girls. The applicant stated that during the 10 to 15 minute journey to the swimming pool she did not count the boys on the bus as she had to deal with minor incidents. The applicant stated that if she had not been distracted in this way she would have counted the boys on the way to the pool. When asked why the applicant did not count the boys once they left the bus the applicant stated that she was dealing with a fracas at the back of the boy's line and the children then started entering the aquatic centre. The applicant agreed that she was told by Mr Flynn to count the boys before they entered the aquatic centre. The applicant also agreed that Ms Fisher told her to count the children when they arrived at the pool. The applicant stated that she did not tell anyone she had not completed the count of the boys as she assumed someone else had completed the count. The applicant agreed that Ms Fisher did not tell her that she would count the boys.

21 The applicant stated that most of the relief work she undertook in semester one of 2003 was at the School and that in term four 2003 she undertook relief work at Maylands Primary School where Mr Flynn was then Deputy Principal. The applicant agreed that she did not know why additional relief work had not been offered to her.

22 Under re-examination the applicant maintained that she was unaware that she had sole responsibility for the boys on the excursion. The applicant maintained that she was following Ms Fisher's instructions during the excursion on 26 February 2003 as the discussion she had with Mr Flynn on the evening of 25 February 2003 related to a different group of students. The applicant stated that she worked at a number of different schools during term three 2003 but she could not recall working at any other schools apart from the School in semester one 2003.

23 Jillian Neale was previously the Principal at Lake Gwelup Primary School and is currently working in the respondent's central office. Ms Neale stated that during a discussion with the respondent's West Coast District Director, Dr James Watterston, on 12 January 2004 that he discussed Mr Flynn's appointment to Lake Gwelup Primary School for 2004. Ms Neale stated that Dr Watterston told her that Mr Flynn's wife had an ongoing case with the respondent about a duty of care issue whereby children had been left behind at a swimming pool and that the applicant was reprimanded after a complaint was lodged against the applicant. Dr Watterston then stated that the applicant was difficult to understand and was not suitable to be employed at Lake Gwelup Primary School even though Mr Flynn would try to get her work at this school. Dr Watterston told Ms Neale that the applicant was not to be employed under any circumstances and to develop a policy to apply at Lake Gwelup Primary School that no relative of an existing staff member was to be employed as a relief teacher.

24 Under cross-examination Ms Neale was adamant that the discussion with Dr Watterston took place on 12 January 2004. Ms Neale stated that she made notes of this meeting after attending the meeting and that she gave a copy of her notes of this meeting to Mr Flynn approximately two weeks prior to this hearing (Exhibit R1). Ms Neale agreed that she had been subject to a grievance process whilst Principal at Lake Gwelup Primary School and that Dr Watterston was one of the two persons who conducted this investigation. Ms Neale stated that she did not have a grudge against Dr Watterston nor did she fabricate her recollection of the discussion at the meeting she had with Dr Watterston on 12 January 2004.

25 Mr Flynn is currently the Deputy Principal at Lake Gwelup Primary School. He has been a Deputy Principal with the respondent since 1989 and he was the Schools' Deputy Principal between 1997 and mid 2003. Mr Flynn confirmed that Ms Fisher is a class room teacher with 20 to 25 years experience, at the time of the incident on 26 February 2003 she had worked at the School for seven years and she was experienced in participating in excursions. Mr Flynn confirmed that Ms MacLeod started at the School in January 2003 and is a physical education graduate. Mr Flynn stated that at the end of January 2003 a substantial induction was given to the School's staff about their responsibilities when attending school swimming lessons. Mr Flynn confirmed that on the evening of 25 February 2003 he and the applicant had a discussion about the procedures for taking the School's year one class to a swimming lesson on Friday 28 February 2003. Mr Flynn told the applicant to put the children in pairs and count them in the undercover area at the School, to count them boarding the bus, count them after leaving the bus and to count them at the conclusion of the swimming lesson. Mr Flynn did not consider this discussion to be a formal induction session as he claimed that a number of relevant issues were not covered during this discussion. Mr Flynn was unaware that the applicant would be undertaking relief work on 26 February 2003.

26 Mr Flynn stated that the School's Principal had ultimate responsibility for student participation in swimming lessons. Mr Flynn understood that during the swimming lessons conducted on 26 February 2003 no teacher was designated to be in charge and he understood that student supervision was up to the individual group of teachers.

27 Mr Flynn stated that he had a number of discussions with Mr Graham Ridley from the respondent's Complaints Management Unit ("CMU") about the disciplinary proceedings against the applicant. Mr Flynn stated that when he enquired as to why the Flack Report had not been released, Mr Ridley informed him that he did not have the final report as yet, but that he had received a draft of Mr Flack's Report. Mr Flynn expressed concern to Mr Ridley about this and was advised by Mr Ridley that the respondent would only be reviewing spelling and grammatical errors in the draft of this report.

28 Under cross-examination Mr Flynn stated that the School did not give relief teachers an induction. Mr Flynn agreed that he was asked by Mr Pirouet to give information to the School's staff about the requirements when attending swimming lesson excursions and he was aware of the processes involved in undertaking an excursion of this nature. Mr Flynn confirmed that the process outlined by the applicant in her Critical Incident Report of 26 February 2003 was an acceptable process for counting students on an excursion.

29 Mr Flynn confirmed that it was possible that he wrote emails during the investigation and inquiry on behalf of the applicant in relation to this dispute. Mr Flynn stated that Ms Neale contacted him of her own volition in early October 2004 and advised him about a number of statements made by Dr Watterston about Mr Flynn and he asked Ms Neale to note her recollection of this discussion in writing. Mr Flynn stated that he has known Dr Watterston for over 20 years. When asked if he told Dr Watterston that the applicant had been reprimanded Mr Flynn stated that he recalled a conversation which took place in March or April 2004 whereby Dr Watterston telephoned him and told Mr Flynn that he was aware that the applicant had been reprimanded and asked him what he was going to do about it. Mr Flynn replied that the applicant would continue to contest the matter.

Respondent's Evidence

30 Dr Watterston is the respondent's West Coast District Director of Education and he has been employed by the respondent for 23 years. He holds a Doctorate, a Masters degree and a Bachelor of Education degree. Dr Watterston stated that he has known Mr Flynn for approximately 20 years and taught with him from 1984 to 1987. He confirmed that after a complaint was made by staff about Ms Neale he became involved in a formal grievance process against Ms Neale as he was the District Director for Lake Gwelup Primary School. Dr Watterston stated that after the investigation was finalised the grievances against Ms Neale were upheld and even though she was put on a performance agreement she did not meet the required outcomes. When Ms Neale accepted a part-time consultant's position in the respondent's head office the disciplinary process against Ms Neale was put on hold.

31 Dr Watterston stated that he attended a meeting with Ms Neale on 12 January 2004 to discuss Mr Flynn's appointment as Deputy Principal at Lake Gwelup Primary School. Dr Watterston stated that Ms Neale had been spoken to by the Principal of Maylands Primary School about Mr Flynn and she was upset that Mr Flynn was coming to Lake Gwelup Primary School as a result of these comments. Dr Watterston understood that Ms Neale was also concerned about Mr Flynn's friendship with Dr Watterston. Dr Watterston stated that he called Ms Neale and told her that as he knew Mr Flynn he would be happy to have a discussion with her about her concerns and a meeting was arranged for 12 January 2004. Dr Watterston stated that there was no compulsion on Ms Neale to attend this meeting and it was set down at her instigation. Dr Watterston stated that he discussed a number of issues with Ms Neale about how Mr Flynn could be managed and asked Ms Neale to put Mr Flynn on a specific management programme. He also advised Ms Neale that if Mr Flynn was away it was not appropriate that the applicant be employed as his personal relief. Dr Watterston stated that they then discussed issues concerning Mr Flynn's employment at Maylands Primary School and about an issue involving the applicant. Dr Watterston described the applicant in positive terms and stated that he had been her number one referee for job applications.

32 Under cross-examination Dr Watterston stated that he first knew about the applicant being investigated through Mr Flynn and Dr Watterston stated that he was aware that the applicant was involved in an incident involving two students being left behind at a swimming pool. Dr Watterston was adamant that his discussion with Ms Neale about the applicant's employment as a relief teacher was only in relation to the applicant being required to relieve Mr Flynn. Dr Watterston had only become aware in the last few days that the applicant had been formally reprimanded by the respondent.

33 Mr Wright is the Manager of Education Services at the Swan District Office and he has been employed by the respondent for nearly 30 years. In February 2003 Mr Wright was the Manager of Operations in the Swan District Office. In early March 2003 the respondent asked him to investigate the incident involving two boys who were left behind at the Balga Aquatic Centre on 26 February 2003. Mr Wright attended the School to gather information about the issue and he spoke to children, staff and employees at the Balga Aquatic Centre as part of this process. As this incident had occurred not long after the death of a student from the School at the same pool he stated that the respondent was keen to improve its procedures. Mr Wright understood his brief was to gather information about the incident so that the respondent could determine the next step to take. After finishing his investigations Mr Wright completed a report (Exhibit A1.13).

34 Under cross-examination Mr Wright stated that it was not his role to judge but to review the actions of any individual involved in the incident. Mr Wright confirmed that he interviewed the applicant and read a number of notes she provided to him. As a result of his investigation Mr Wright reached a number of conclusions which are contained in his report. Mr Wright confirmed that he provided a bundle of information to Mr Flack including some material which was not included in his report and he confirmed that he was interviewed by Mr Flack.

35 Mr Baskwell was appointed to investigate the allegation against the applicant (Exhibit A1.16). Mr Baskwell stated that he has been an independent investigator since 1996 and has conducted approximately thirty investigations under the PSM Act. When Mr Baskwell was given the brief to investigate the applicant's role in the incident which took place on 26 February 2003 the respondent gave him a file containing background information. Mr Baskwell was aware of Mr Wright's report about the incident but he stated that he did not use the information contained in this report when making his findings.

36 Mr Baskwell confirmed that he investigated Ms Fisher and Mr Pirouet's actions in relation to the 26 February 2003 incident and found that both had committed breaches of discipline. Ms MacLeod was also investigated but he did not find any breach on her part.

37 Mr Baskwell confirmed that Mr Flack contacted him about the methodology he used when compiling his report and he summarised his actions for Mr Flack. When asked if his report was the only version provided to the respondent, Mr Baskwell stated that he provided a draft report to his case manager Mr Mark Smith. Mr Smith later advised Mr Baskwell that his draft was cleared and approved for submitting. Mr Baskwell could not recall if the respondent asked for any changes to be made to his report. Mr Baskwell maintained however that when the respondent reviewed his report it was not to alter the contents of the report but to review grammar and to ensure that correct sections of the Act were referred to:

> "And you say that Mr Smith didn't make any suggestions to you in relation to your draft?---No. The - - there's no - - there's no - - there's no suggestions in regard to content. It's generally if - - sometimes you might make a - - an error in - - in the section of the Act or - - or there might be grammatical problems but not - - not in the - - not in content."
>
> (Transcript page 155)

38 Mr Flack gave evidence that he has carried out investigations under the PSM Act since 1995 and he confirmed that he completed a report into the applicant's actions on 26 February 2003 (Exhibits A1.20 and A1.21). Mr Flack stated that as part of his investigations he read background information provided to him by the respondent, determined the persons to be interviewed, prepared set questions, provided a copy of these questions to the person being interviewed, he recorded the answers and a copy of this summary was then given to each person and signed off. Mr Flack stated that the information gathered through this process was the only information he used in his inquiry. Mr Flack stated that he had read Mr Wright's report and he interviewed Mr Wright for clarification about background information. Mr Flack stated that he did not use the information contained in Mr Wright's report to reach his conclusions. Mr Flack acknowledged that he read the Baskwell Report and that he may have relied on some of the information contained in this report to determine the types of questions he asked. After the applicant raised complaints about the process used by Mr Baskwell he contacted Mr Baskwell and obtained a formal response from him in this regard. Mr Flack stated that he submitted a draft report to the CMU to review facts, spelling and layout and Mr Flack stated that he did not invite any comments from the CMU about the substance of the report. Mr Flack gave evidence that if any comments were made he would have ignored them.

> "… We heard some evidence that you provided a draft of your report to the complaints management unit at some stage. Did that occur?---Yes.
>
> Why have you provided a copy of your draft report to the complaints management unit?---Well, I've found that in terms of - - I usually attach, and I'm not sure whether it happened in this case, an email to say it's specifically on layout, matters of fact such as titles of people and those sorts of matters of fact, the spelling and general, you know, English - - I've found

that amongst all the people I do work for, the Education Department are the most fussy in - - in the spelling and layout and punctuation.

Are you inviting - - do you invite comment in relation to the substance of your report?---No.

Do you receive it?---Not - - no, not in this case, and if I did receive it, I wouldn't take any notice of it. It's my report, not anybody else's."

(Transcript page 160)

39 After Mr Flack submitted his draft report to the CMU he recalled that the CMU commented on the grammar contained in the report but not on the report's content, however he was not certain as he had not reviewed a comparison of the draft of his report and the final report. Mr Flack stated that even though he had submitted a draft report to the CMU he still may have included additional information after submitting this to the respondent. When asked if he investigated the applicant's actions on the basis that she had committed a serious breach of discipline he stated that the nature of the complaint had no impact on his inquiry.

40 Mr Flack stated that he found that the applicant had committed the breach as alleged on the basis that the applicant was aware that students were required to be counted on the excursion on more than one occasion, the applicant did not tell Ms Fisher that she had not completed the count of the children and because there were no other duties that the applicant had to perform whilst on the swimming excursion. Mr Flack stated that when making his recommendations about the penalty for the applicant's actions he took into account that the applicant had only recently arrived in Australia.

Submissions

41 The applicant challenges the respondent's finding that the children under the applicant's care at the excursion on 26 February 2003 were not adequately supervised and the way in which both the investigation and inquiry were undertaken. The applicant also maintains that even if the finding was found to be correct then the penalty is inappropriate.

42 The applicant argues that as this is a hearing de novo the respondent's decision can be quashed.

43 The applicant concedes that she was aware that there was a requirement to count the children on the excursion and that she did not count the children. The applicant argues that as the applicant was the only one to give an account of the events of the excursion her evidence should be preferred to anyone else's version of events about the excursion. When the applicant attempted to count the children before entering the bus she was told by Ms Fisher to stop counting, she did not count the children on the bus as she was told they would be counted when they were off the bus and the applicant understood that when the children were at the pool they were counted by others. On this basis the applicant maintains that the respondent was wrong to find that the applicant did not properly supervise the children under her care.

44 The applicant argues that as she was not inducted into the respondent's general procedures, even though she actively sought an induction and that the applicant may well have conducted herself differently during the excursion if she had been inducted as proposed. The applicant maintains that if the respondent had complied with its own policies (see Exhibits A1.5 and A1.6) then the incident would not have occurred as the other employees including the Principal and Ms Fisher would have behaved differently. Further, the applicant may not have even been able to attend the excursion if the proper procedures were followed by other personnel at the School. The Wright Report confirms that a number of the respondent's set processes failed in relation to this excursion, the applicant had only been in Australia for a short time, it was only the second day of relief she had undertaken with the respondent, no training was given to her about general teaching policies apart from some informal discussions and she had never supervised an excursion in Australia before.

45 The applicant argues that the procedures and processes adopted by the respondent when investigating this incident bring into question the whole process adopted by the respondent. The applicant maintains that as a result of the initial investigation into the incident the applicant was found by the investigator to have committed a minor breach however when the applicant was advised by the respondent on 2 October 2003 that the initial finding by the investigator that she had committed a minor breach had been cancelled the applicant was then charged with committing a serious breach (see Exhibit A1.21.1). The applicant argues that it was not open to the respondent to charge the applicant under s83(1)(b) of the PSM Act with committing a serious breach as the respondent should have charged the applicant under s85 of the PSM Act.

46 The applicant maintains that if a person is accused of a serious breach then this has implications for the onus of proof. The applicant maintains that as the applicant was charged with a serious breach then the test outlined in *Briginshaw v Briginshaw and Another* (1938) 60 CLR 336 should have been adopted by Mr Flack when assessing the applicant's actions in relation to this matter (see also *Registrar v Keith Byerley and Joseph Mulry* (2003) 83 WAIG 3066 and *David Leith Moylan v Chairman of Commissioners City of South Perth Council* (2001) 81 WAIG 2925). The applicant argues that Mr Flack did not view the alleged breach against the applicant as being a serious breach when making his determination even though a serious breach of discipline was alleged to have occurred. Further, Mr Flack's inquiry was compromised by considering documents from Mr Wright's investigation and by including documents from Mr Baskwell's Report. The applicant argued that an entirely new process should have been used by Mr Flack and there should have been no reliance on any of the information gathered in previous inquiries.

47 The applicant argues that it was totally inappropriate for Mr Baskwell and Mr Flack to provide drafts of their reports to the CMU for review and that it is impossible to determine what if any impact the CMU may have had on both reports as the CMU did not retain copies of the draft reports. As both reports were approved by the CMU both the Inquiry and the Investigation were not independent as required under the PSM Act. The conclusions reached in the reports are therefore unreliable.

48 The respondent maintains that there was sufficient evidence given by the applicant during the hearing and to both the Inquirer and the Investigator to demonstrate that the applicant had breached her duty of care to the children in her care on 26 February 2003. The respondent maintains that the applicant knew the children had to be counted, she was told that she had to count the boys, she had several opportunities to do so but did not and the excuses for not doing so were flimsy, inadequate and unconvincing despite knowing that it was her responsibility to do so. The respondent maintains that the applicant's credibility is in question because she changed her story over time about what transpired during the excursion even up to and including the hearing. Further, the applicant was instructed by Mr Flynn to count the children in her care at swimming lessons prior to attending the excursion and this was not overtaken by any other instruction.

49 As the applicant was given the lowest penalty available to the respondent and as the mitigating circumstances surrounding the applicant's actions were taken into account by the respondent, the respondent maintains that a reprimand was appropriate in the circumstances.

50 The respondent maintains that there was no specific evidence given by the applicant that her career prospects have diminished as a result of the reprimand being issued.

51 The respondent maintains that even though Mr Wright's investigation was used as background information and parts of the Baskwell Report were used by Mr Flack this did not taint the Flack Report because Mr Flack conducted his own discrete inquiry when reaching the conclusions he made and Mr Flack had the right to include information given to Mr Baskwell if relevant employees refused to give information to him by way of background. The respondent maintains that in any event Mr Flack gave evidence that he made his findings based on the applicant's own evidence and not on the evidence of others involved in the incident.

52 The respondent concedes that even though the respondent made a mistake when referring to the applicant committing a serious breach it argues that this error did not compromise the process used by the respondent under the PSM Act as the actual breach the applicant was charged with does not refer to it as being a serious breach and because the penalties for committing either a minor or serious breach are the same (see Exhibit A1.21.1).

53 The respondent maintains that the appropriate standard of proof in this instance was the balance of probability and that as this was the test applied by Mr Flack no error has occurred in this regard.

54 The respondent argues that as there was no evidence of any substantial changes to the draft reports given by both Mr Baskwell and Mr Flack to the CMU then this did not affect the independence of these reports.

55 The respondent argues that even if the process was flawed in parts it was not sufficiently flawed to outweigh what the respondent maintains is the merit of the facts of this case. The respondent therefore maintains that it had good reason to form the view that on 26 February 2003 the applicant breached the duty of care required of her towards the students in her care.

Findings and Conclusions

Credibility

56 I carefully observed the applicant whilst she gave evidence. Whilst I accept that the applicant gave her evidence in a forthright manner I formed the view that the applicant presented her evidence in such a way as to advance and protect her own interests. For example, the applicant revised evidence she had previously given to both the Investigator and the Inquirer about her actions during the excursion even though she had prior opportunities to clarify any omissions in the evidence that she gave to both the Inquirer and the Investigator. I was also concerned that the applicant gave evidence about her actions on the bus trip on the way to the excursion on 26 February 2003 at the hearing which she did not volunteer to either the Investigator or the Inquirer. On this basis I treat the applicant's evidence with caution. I take no issue with the evidence given by the other witnesses in these proceedings. Even though there was a discrepancy in the evidence given by Dr Watterston and Ms Neale in my view their evidence was not relevant to the issue of whether or not the applicant committed the breach as claimed by the respondent.

57 This application arises under s78(2) of the PSM Act. Under this section of the PSM Act a person aggrieved by a decision may refer this decision to the Commission as if that decision was an industrial matter mentioned in s29(b) of the Act (which should read s29(1)(b)of the Act – see *Geoffrey Johnston v Mr Ron Mance, Acting Director General Department of Education* (2002) 83 WAIG 1553). As the Act applies to and in relation to a referral of this nature in the normal manner the Commission is thus required to deal with this application as though it was an application under s29(1)(b) of the Act. The Commission is to therefore consider all of the evidence before it and based on this evidence make decisions about the evidence and if warranted quash, adjust or vary an employer's decision and the Commission is to deal with this application as a hearing de novo and assess the evidence before it to determine the application taking into account whether or not an employee has been given 'a fair go all round' as well as taking into account the principles of equity, good conscience and substantial merit. It is also the case that even if policies and procedures required of an employer when enquiring into a matter are not strictly adhered to this does not in all instances invalidate the whole process and the conclusions reached.

58 Paragraph 4 of this decision sets out the relevant background to this case.

59 When assessing the evidence given by the applicant during the hearing about her actions as a relief teacher supervising students on the excursion on 26 February 2003 and taking into account the evidence she gave to both the Investigator and the Inquirer (as amended by the applicant at the hearing) I conclude that the applicant failed in her duty of care towards the group of students she was supervising on that day.

60 It was not in dispute that the applicant was told by her partner the evening before she attended the excursion that part of her role as a teacher attending swimming lesson excursions was to count the children in her care on a regular basis. Even though the applicant maintained that this discussion with her partner was informal and related to the supervision of a different class to be taken to swimming lessons, it is my view that as a result of this discussion the applicant would have been sufficiently clear about the necessity to know student numbers whilst attending an excursion of this nature. Further, the applicant did not dispute that on the day of the excursion she was instructed to count the boys at least twice during the excursion (see Exhibit A1.21.5) and the applicant gave evidence that after she was allocated responsibility for the boys on the excursion she proceeded to count the boys before they entered the bus. However the applicant did not complete this essential task, even though just prior to stopping the count she had managed to count most of the boys. In my view, given that the applicant was aware of the importance of knowing how many students were in her care on this excursion and as the applicant was so close to finishing the count of boys, she should have taken the initiative to complete the count of the boys in her care notwithstanding being interrupted by Ms Fisher. The applicant had a further opportunity to count the boys whilst on the bus trip to the pool but did not do so. Even though the applicant claimed she had to deal with minor incidents during this trip I am of the view that the applicant should have given a higher priority to ensuring that she was aware of how many children were under her care and she should have counted the boys whilst on the bus. Further, I treat with caution the applicant's evidence that she was dealing with minor incidents during this journey given my comments about the applicant's evidence in general and because this distraction was not previously raised by the applicant when recalling her actions during the excursion. The applicant conceded that she did not count the boys prior to entering the pool even though the applicant was expressly told on the day of the excursion by Ms Fisher to count the boys when they arrived at the pool and before they entered the pool (see Exhibit A1.21.5). Again the applicant did not give this instruction the necessary priority as a result of being distracted. In my view there is a fundamental duty on all teachers to ensure the safety of all children in their care at all times and this includes a teacher knowing the number of students her or she is supervising. Despite a number of opportunities to count the boys the applicant was unaware of the exact number of students she was supervising and was therefore unable to account for the number of boys under her care. As a result of this lack of vigilance and because the exact number of boys attending the excursion was unknown to the supervising teachers two young students were left behind at the pool, which is a potentially dangerous venue for young children to be left unsupervised. Even though the applicant gave various excuses as to why the children were not counted and the applicant was keen to lay the blame for not counting the students in her care on the actions or inactions of her colleagues and pool staff it is my view that the applicant should take some responsibility for her lack of vigilance during this excursion which resulted in her and the other teachers on the excursion not knowing how many children she was supervising.

61 Even though the applicant was not formally inducted into dealing with school children attending an excursion in the Western Australian education system it is my view that no teacher can abrogate the responsibility on him or her to adequately supervise students in their care by not knowing how many students they are supervising. It is therefore my view that the applicant contributed to two boys being left behind at the pool as a result of not counting the boys attending the excursion on numerous occasions prior to the bus trip back to the school. In doing so I find that the applicant breached s64(1)(e) of the *School Education Act 1999* which requires a teacher 'to supervise students and to maintain proper order and discipline on their part'.

62 In investigating the allegation against the applicant I accept that the respondent did not comply with all of the requirements contained in Part 5, Division 3 of the PSM Act.

63 The sections of the PSM Act relevant for the purposes of these proceedings are ss 80, 81, 83, 84, 85 and 86 and the PSM Act prescribes the following procedures for dealing with an allegation concerning a breach of discipline:

1. The employing authority must have a suspicion that a breach of discipline has occurred and is to give the employee notice in writing of the nature of the suspected breach and give the employee reasonable opportunity to submit an explanation (s81(1)).
2. Section 81(2) empowers the employing authority to either investigate the suspected breach of discipline or direct another person to investigate the breach and the investigation to be undertaken into the suspected breach of discipline in relation to which notice has been given to the relevant person pursuant to s81(1). In normal circumstances a report is then generated by an independent investigator containing any findings into the suspected breaches of discipline.
3. If following the investigation a minor breach of discipline has been found to have been committed the employing authority may impose a reprimand and/or a fine of a prescribed amount (s83(1)(a)). If the breach is found to be a serious breach then the employee is charged under s83(1)(b) of the PSM Act.
4. If the employee objects to the finding or the penalty the finding or action is cancelled by virtue of s85 and the employee may be charged with having committed the alleged breach of discipline under s85.
5. If the employee then admits the charge the employing authority may impose certain penalties (s86(3)).
6. If the employee denies the charge a disciplinary inquiry into the charge may be held by the employing authority or by a person directed by the employing authority to conduct such an inquiry (s86(4)). This inquiry is to be independent of any previous investigation and the inquirer is required to make findings concerning the suspected breach of discipline.
7. If the disciplinary inquiry finds that the breach of discipline was committed the inquirer is to submit that finding to the employing authority.
8. The employing authority is then required to accept the inquirer's findings (s86(9)) and the employing authority may act according to the inquirer's recommendations and take such action that is available to the employing authority under s86(3) or decline to accept the recommendation.

64 It is my view that the intention of the statutory scheme under Part 5, Division 3 of the PSM Act is that any inquiry or investigation conducted under s81(2) or s86(4) is to be independent of any interference nor should there be any alteration of the report by the employing authority, otherwise both the Inquiry and Investigation are tainted. In this instance an inference can be drawn that the reports completed by the Investigator and the Inquirer were interfered with and influenced by the respondent as both Mr Baskwell and Mr Flack submitted drafts of their reports to the respondent for "checking" prior to issuing their final reports. As the drafts submitted to the respondent were not retained by the respondent there is therefore no way to determine the extent to which both draft reports were altered by the respondent. Mr Baskwell gave evidence that he submitted a draft of his report to the respondent for 'acknowledgement that the …. draft is okay and an approval to submit a final' copy (transcript page 154). He could not recall if the respondent asked for any changes to be made and he maintained that the respondent would not alter the contents of his draft report and would only review the grammar and efficacy of the information contained in the reports such as correct references to 'sections of the Act'. Mr Flack confirmed that after submitting a draft of his report to the CMU comments were made about grammar contained in the report. Mr Flack could not recall what if any parts of his draft report were changed as he did not have the draft and his final report to compare to confirm if any changes were made. As both Mr Baskwell and Mr Flack submitted draft reports to the respondent for comment and review prior to issuing their final reports it is my view that this constituted a significant departure from the requirement that both the Investigation and the Inquiry be conducted and concluded without interference from the respondent. Even though the submitting of draft reports completed by both the Investigator and the Inquirer to the respondent amounted to a significant procedural defect it is my view however that this lack of adherence to the required procedures had no impact on the findings made by both the Investigator and the Inquirer as I accept that they reached their findings based on the applicant's own admissions. I also accept the evidence of both Mr Baskwell and Mr Flack that the respondent did not interfere with the findings they made when it considered their draft reports.

65 During the hearing the respondent's representative conceded that prior to causing the inquiry to be conducted into the allegation against the applicant it incorrectly charged the applicant with committing a serious breach under s83(1)(b) of the PSM Act instead of charging the applicant with a minor breach under s85, in line with the Investigator's finding about the applicant's actions. In doing so I find that the respondent did not comply with the requirements under the statutory scheme. It is my view that this lack of compliance by the respondent with the statutory scheme in this instance should not render the whole process void as both the Investigator and the Inquirer found that the applicant committed the breach as alleged by the respondent and the charge against the applicant did not alter throughout the investigative and inquiry processes.

66 I find that the applicant's other complaints about the respondent not complying with the required procedures and processes are not made out. I accept that in certain circumstances evidence obtained by an Investigator and other relevant background information such as that contained in the Wright report may be reviewed by an Investigator and an Inquirer, particularly in the circumstance such as this case when the Inquirer was unable to obtain statements from Ms Fisher, Mr Pirouet and Ms MacLeod who gave evidence to the Investigator.

67 I find that Mr Flack reached his conclusions about the applicant's actions independent to that of Mr Baskwell's findings and I find that there was no evidence that Mr Wright's preliminary investigations influenced the conclusions reached by either Mr Baskwell or Mr Flack. It is also my view that Mr Wright's review of the events of 26 February 2003 did not compromise the procedural requirements outlined in Part 5 of the PSM Act. I accept that the respondent gave Mr Wright a brief to investigate the incident whereby two boys were left behind at the swimming pool on 26 February 2003 and that after completing his inquiry he made a number of findings, none of which were specific to the applicant's actions (Exhibit A1.13). It is also my view that as a result of this preliminary investigation it was open for the respondent to suspect that the applicant may have committed a breach of discipline which is an essential step in the process set out in Part 5 of the PSM Act.

68 I accept the general proposition that a person subject to a charge which has serious ramifications for their ongoing employment should be investigated taking into account the test outlined in *Briginshaw v Briginshaw and Another* (op cit). Even though the respondent maintained that the applicant was not charged with a serious breach of discipline it is clear that she was (see Exhibit A1.21.1). In this instance however, it is my view that this higher onus on the respondent to demonstrate that the applicant had committed a breach is satisfied given that the findings made about the applicant's actions on the excursion were based on clear admissions made by the applicant.

69 Notwithstanding the significant defects in the way in which the respondent conducted its investigation into the allegation against the applicant it is my view that it is appropriate in all of the circumstances that the reprimand given to the applicant as a result of her committing a breach of s64(1)(e) of the *School Education Act 1999* should not be set aside or varied as it is my view the applicant's failure to count the boys whilst on the excursion amounted to a fundamental breach of the duty of care required of the applicant. I also conclude that a reprimand is the appropriate penalty in this instance for such a serious breach when taking into account the applicant's circumstances of having had no formal induction about attending swimming excursions in Western Australia and the applicant's short work history with the Western Australian education system as at the date of the excursion.

70 An order will now issue dismissing this application.

2005 WAIRC 00047

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANCA FLYNN
	APPLICANT
	-v-
	PAUL ALBERT, DIRECTOR GENERAL DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 13 JANUARY 2005
FILE NO/S	APPL 423 OF 2004
CITATION NO.	2005 WAIRC 00047

Result Application dismissed

Order

HAVING heard Ms K Fawcett of counsel on behalf of the applicant and Mr D Matthews of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby –

1) ORDERS THAT by consent the name of the respondent be deleted and that Paul Albert, Director General Department of Education and Training be substituted in lieu thereof.

2) ORDERS THAT that the application otherwise be and is hereby dismissed.

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

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 15 of 2004	Maria Helena Boon	Workers' Compensation and Rehabilitation Commission	Scott C.	Withdrawn by Leave	14/02/05
PSA 16 of 2004	Peter Brash	Workers' Compensation and Rehabilitation Commission	Scott C.	Withdrawn by Leave	14/02/05
PSA 17 of 2004	Michelle Pontifex	Workers' Compensation and Rehabilitation Commission	Scott C.	Withdrawn by Leave	14/02/05
PSA 18 of 2004	D'arcy Spivey	Workers' Compensation and Rehabilitation Commission	Scott C.	Withdrawn by Leave	14/02/05
PSA 19 of 2004	Peter Ernest Bullen	Workers' Compensation and Rehabilitation Commission	Scott C.	Withdrawn by Leave	14/02/05