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FULL BENCH—Appeals against decision of Commission—

2005 WAIRC 02604

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GONZALO PORTILLA **APPELLANT**
	-and-
	BHP BILLITON IRON ORE PTY LTD **RESPONDENT**
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER A R BEECH COMMISSIONER S J KENNER
HEARD	TUESDAY, 23 AUGUST 2005 AND WEDNESDAY, 24 AUGUST 2005
DELIVERED	TUESDAY, 13 SEPTEMBER 2005
FILE NO.	FBA 8 OF 2005
CITATION NO.	2005 WAIRC 02604

CatchWords	Industrial Law (WA) – Appeal against decision of a single Commissioner – Alleged harsh, oppressive, unfair dismissal – Inconsistency of treatment of employees – Dishonesty – Seriousness of acts of misconduct – Substituted exercise of discretion – Reinstatement – Mitigation of loss – *Industrial Relations Act* 1979 (as amended), s23A, s23A(3), (4), (5), (5)(a), (5)(b), (7), s29(1)(b)(i), s49, s49(6) – *Mines Safety and Inspection Regulations* 1995 – *Western Australian Mines Safety and Inspection Act* 1994 , Part 4, Division 1, s44(1) and (2), s9(1)(a) and (b), s10(2)(a) and (b) – *Workplace Relations Act* 1996 (Cth), s170CH(1), (2) and (4)
Decision	Appeal upheld and decision at first instance varied
Appearances	
Appellant	Mr D H Schapper (of Counsel), by leave
Respondent	Mr A D Lucev (of Counsel), by leave, and with him Mr A G Rollnik (of Counsel), by leave

Reasons for Decision

THE PRESIDENT AND COMMISSIONER S J KENNER:

INTRODUCTION

1 This is an appeal by the above-named appellant, Mr Gonzalo Ezquerra Portilla (hereinafter "Mr Portilla"), whose full name does not appear above, against the decision of the Commission at first instance, constituted by a single Commissioner, pursuant to s49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*"). He does so on grounds to which we will refer to in more detail hereinafter in these reasons, the grounds being as amended by leave upon the hearing of this appeal. In deciding whether leave should be granted to amend, it is not necessary to consider the merits raised. The amendments properly reflect the case which Mr Portilla wished to put to the Full Bench, and there was no submission that to allow the amendments would occasion prejudice to the respondent.

2 The decision appealed against is a decision made on 5 July 2005 whereby the application made by Mr Portilla pursuant to s29(1)(b)(i) of *the Act* was dismissed.

BACKGROUND

3 Mr Portilla made application pursuant to s29(1)(b)(i) of *the Act* on 21 December 2004 claiming that he had been harshly, oppressively or unfairly dismissed from his employment by the respondent, BHP Billiton Iron Ore Pty Ltd (hereinafter referred to as "BHPB") on 2 December 2004. He was paid five weeks' wages, purportedly in lieu of notice when he was dismissed on that day.

4 Mr Portilla's application was heard and determined by the Commissioner at first instance with BHPB opposing the application.

5 There was an amount of documentary evidence at first instance. In addition, evidence for Mr Portilla was given by Mr Robert William Carter, a mineworker at Finucane Island, and by Mr Portilla himself.

6 The evidence for BHPB was given by Mr Leigh David Cook, Manager of BHPB's operations on Finucane Island. There was also evidence given by Mr Mark Leslie Swinnerton, Superintendent of Production at Finucane Island, Mr Robert David Sproule, Employee Relations Coordinator, Asset Development Project, Mr Matthew Daniel Currie, Maintenance Superintendent at Finucane Island, Mr Allen Douglas Armstrong, Resource Coordinator at Finucane Island, and Mr David John Drury, Projects Coordinator at Finucane Island. All this evidence was given on behalf of BHPB. Mr Jimmy Chomkhamsing, to whom we will refer to hereinafter, was not called by either side. Mr Chomkhamsing was a charge hand, also called a chargehand/senior production technician at BHPB, at material times, and an acting supervisor in charge of a shift on 25 November 2004. He is the stepson of Mr Murray Hunt, a friend of Mr Cook.

7 It is a well known fact that BHPB conducts and has conducted for many years iron ore mining and iron ore export operations in the Pilbara region of Western Australia. The operation at Finucane Island is part of the processing and export operations carried out at Port Hedland in the Pilbara by BHPB.

8 Mr Portilla had, at the time of his dismissal, been employed by BHPB as a Mineworker – Plant Operator for approximately 27 years. There was evidence only of his committing one other breach of safety requirements on 16 June 2004, there was no evidence of any other allegedly "poor" conduct, except for the incident which brought about his dismissal. He had a good record and was a good and experienced worker.

Tagging Regulations and Isolation of Machines and Equipment

9 (See Tab 12 of the appeal book, volume 2 (hereinafter referred to as "AB2"), exhibit R12.) There are and were, at material times, Tagging Regulations (hereinafter referred to as "the regulations") relating to the Port Hedland operations of BHPB which include and included operations at Finucane Island and Nelson Point. The regulations, as we understand what counsel for Mr Portilla said, do not have the force of other rules and regulations made by the company and as authorised by the *Mines Safety and Inspection Regulations* 1995 (see, for example, the BHP Railway Rules referred to in a number of cases in this Commission). However, it was quite clear and not in dispute that the tagging regulations consist of precise and mandatory directions by BHPB to employees for safe working on sites at Port Hedland.

10 It was common ground that, for a long time, tagging out and isolating machinery or equipment have been an important part of safe systems of work in the mining industry including BHPB sites. All BHPB employees, contractors and the contractors' employees are required to follow these regulations in accordance with paragraph i of the introduction to the regulations. It is vital that all of these persons fully understand these regulations, thereby ensuring the safety of themselves and others as the regulations prescribe.

11 In the introduction to the regulations, paragraph ii, in very clear terms, duties are cast on supervisors, described as "supervision", as follows:-

> "Supervision are responsible for ensuring that all employees and contractors under their control are fully and correctly instructed in the use of danger tags, Tagging Regulations and systems that control their use.
>
> Supervision SHALL at all times, enforce the use of the appropriate tags and the regulations set out in this document"

12 "Supervision" is defined in the BHPB tagging regulations as "a person or persons directly responsible for administering and/or overseeing an employee or group of employees as appointed under Part 4 Division 1.44(1)(2) of the Western Australian Mines Safety & Inspection Act 1994" (hereinafter referred to as "the MSI Act"). They are "responsible for deeming a person competent to carry out a task or a work instruction".

13 It is noteworthy that that regulation requires "supervision" which, on a fair reading, must mean all managers, supervisors, charge hands, senior technicians or anyone supervising employees or employees of contractors to "enforce", and that is a very strong word, the use of the appropriate tags and regulations. In other words, relevant to this appeal, Mr Chomkhamsing, who supervised at all times, was bound to enforce the tagging regulations and this meant to prevent Mr Brand, an operator, or Mr Portilla or himself, or any other person including Mr Andrews, from acting contrary to the tagging regulations. It was common ground that he was required to ensure that his subordinates worked safely and in accordance with directions, policies, regulations and procedures of BHPB related to safety. His own duty was to do so.

14 An "Isolated Device" is defined in paragraph vii Definitions of the introduction to the regulations as being:-

> "A device positively isolated and locked where appropriate and tagged by an authorised person in accordance with BHP Billiton Iron Ore Tagging Regulations."

15 "Positive Isolation" is defined as:-

> "A primary physical barrier designed to protect individuals from unwanted electrical energy or movement of plant."

16 When a piece of machinery or equipment is isolated it, of course, is not operating and cannot endanger personnel working on or near it.

17 There are danger tags which are identification tags which, when attached to a positive isolation point, identify and record the personal details of individuals working on the isolated plant.

18 What all of this means, too, is that machinery or equipment can be tagged, locked out, or isolated when they are faulty or being worked upon or likely to cause a hazard to persons. The word "shall" throughout the regulations is understood as mandatory.

19 The regulations contain also quotes from *the MSI Act* which requires an employer to provide and maintain workplaces, plant and systems of work of a kind that, so far as is practicable, the employer's employees are not exposed to hazards, and provide such information, instructions and training to the supervision of employees as necessary to enable them to perform their work in such a manner that they are not exposed to hazards. That is the clear duty of the employer under that Act.

20 The employees also have clear duties under *the MSI Act*. An employee must take reasonable care to ensure his or her own health and safety at work and to avoid adversely affecting the safety or health of any other person through any act or omission at work. The employee is also required to use such protective clothing and equipment as is provided and to comply, so far as the employee is reasonably able, with instructions given by that employee's employer or the manager of the mine for the employee's own health or safety of other persons (see s9(1)(a) and (b) in relation to employers and s10(2)(a) and (b) in relation to employees). These are statutory obligations not BHPB regulations, directions or policies.

21 In other words, to commit a breach of the obligations imposed by s9(1) and (b) and s10(2)(a) and (b) of *the MSI Act* is for BHPB or an employee to commit a breach of the statute, not merely a direction, policy or regulation of BHPB.

22 It is noteworthy that, under the regulations, "out of service" tags are required to be placed on unsafe or faulty plant to prevent injury to personnel and on an isolation device such as a switch, plug or valve, whenever the operation of the plant could cause damage or injury to personnel (see Part II, regulation 2.2). There are also "locked box" methods of isolated equipment or machinery, as we have said (see, for example, Parts VI and VII). There is also provision for safety investigations of breaches and other procedures in relation to tagging breaches.

23 Penalties are provided for under Part VIII of the regulations, including Part VIII, 8.1, which prescribes that the first penalty is a written reprimand for a first offence against regulations 1.2A and 1.2B; three days' suspension is the penalty for a second offence with a final written warning; and, for a third offence committed within 12 months of the first offence, dismissal is the prescribed penalty.

24 Regulations 1.2A and 1.2B were said to have been breached by Mr Portilla on 16 June 2004.

25 There is nothing in the regulations to prevent BHPB or the employer from using its common law rights to dismiss an employee summarily for misconduct, nor was it so contended.

The Incident of 16 June 2004

26 On 16 June 2004, Mr Portilla's supervisor for the job which he was required to do was Mr Chomkhamsing. Mr Chomkhamsing instructed Mr Portilla to clean the slew gear on the SR2 where ore had been piled up blocking the operation of the stacker. SR2 is one of a number of machines called "stackers" which, by means of a conveyor belt, carry ore from where the trains bring it, and "stack" it on the ore stockpiles. Mr Portilla asked Mr Chomkhamsing if he could lock out the machine, (ie) lock it out and isolate it while they were working, in accordance with the tagging regulations. Mr Chomkhamsing, however, said "No", saying, too, that he, Mr Chomkhamsing, had 40,000 tonnes to put through it. In other words he did not wish to stop the machine because that would delay the processing of 40,000 tonnes of ore, and thus delay production. He told Mr Portilla to do what he could to clean it. He did not tell Mr Portilla not to come out from behind the safety rail or not to complete the cleaning. Mr Portilla cleaned as much as he could off the slew gear standing behind the safety rail, but was unable to clear all of the ore away. They then had smoko, and, after smoko, Mr Portilla again asked Mr Chomkhamsing if the machine could be locked out, that is, that a lock could be placed on it and it could not be started up or used whilst they were working on it and whilst the lock was in place. Mr Chomkhamsing again replied "No".

27 When they resumed work after smoko, Mr Portilla climbed down onto the machine so that he could complete the cleaning away of the ore. There is no evidence that Mr Chomkhamsing sought to prevent him. Before he did so, he spoke to the SR2 driver operator, Mr Euan Bucknall, to tell him that he, Mr Portilla, was working on the machine and that, therefore, Mr Bucknall should not start it up without telling Mr Portilla that he was going to do so. Obviously, if the machine was operating while Mr Portilla was working on it clearing the slew gear, he could have been killed or badly injured. That was a matter not in dispute. In fact, Mr Bucknall did warn him that he was going to set the machine in operation. As a result, Mr Portilla got off the machine while it operated and then got back on again when it stopped.

28 The machine was never, on this occasion, however, locked out and/or isolated and/or tagged.

29 It was further not in dispute that Mr Portilla, while doing this work worked outside the scaffolding handrails and without a safety harness, as full protection, contrary to the working at heights policy prescribed by BHPB. This was because his attempt to clean the slew gear on SR2 by standing behind the safety rail was unsuccessful so that he came out from behind the safety rail in order to complete his task. There was no evidence that Mr Chomkhamsing sought to prevent this occurring. Obviously, too, Mr Portilla risked serious injury had he fallen from the height at which he was working without the safety gear or the protection of a safety rail.

30 It was also not in issue that Mr Portilla had breached tagging regulations 1.2A and 1.2B and placed himself in potential danger, as alleged. Regulations 1.2A and 1.2B read as follows:-

> "A A Personal Danger Tag, Hasp and Lock (where they can be fitted) shall be attached to an isolator (eg; switch, plug, decontactor valve, clamp, restraint or locking device) or any Isolation or Earth Device whenever there is a danger of personal injury to yourself from the unexpected operation or movement of plant. You SHALL ensure the APPROPRIATE isolation devices(s) are isolated correctly. If in doubt/unclear seek assistance from your supervision.
>
> B You SHALL
>
> - Place your Personal **Danger Tags, Hasp and Locks, (where they can be fitted)** before you begin work on the equipment.
> - Affix a hasp and then lock the hasp and attach a Personal Danger Tag to the **lock** and retain the key.
> - Ensure YOUR Personal Danger Tag is printed legibly with ALL details fully completed.
> - If the isolation device is of a type that cannot be locked **your Personal Danger Tag shall be affixed to the isolation device**.
> - **If you are in any doubt as to the location of the isolation device contact Supervision.**
> - **The Lock and Hasp** can only be removed after all individuals have removed their Personal Danger Tags.
>
> **IF IN DOUBT AS TO WHERE AND HOW TO ISOLATE YOU SHALL ASK FOR ASSISTANCE FROM SUPERVISION**"

31 It is not at all clear that Mr Portilla had any authority to lock the machine out, and, if he did, in any event, he was actually instructed by his superior, Mr Chomkhamsing, whom he asked to lock it out, that it would not be locked out; or tagged, we infer.

32 Mr Portilla frankly admitted all he had done, when questioned, save and except, as was also not in dispute, that he did inform Mr Cook and others that he was working at a lower height than in fact he was working. It was not disputed that Mr Cook ascertained that his boot prints going upwards led to and indicated that he had been working at a higher level. Thus, he misled

Mr Cook and other managers on that point. That he did so was not disputed. However, Mr Portilla was not disciplined for not telling the truth about the height at which he was working, as the written warning shows, by expressly referring to those things for which he was actually disciplined.

33 Mr Portilla, having performed this task in an unsafe manner, was counselled, disciplined and retrained and issued with a written warning in the following terms:-

> "**Written Warning**
>
> A disciplinary inquiry was conducted on Friday, 18 June 2004 into your actions on Wednesday, 16 June 2004 when you were cleaning on SR2.
>
> As you are aware, failure to attach a personal danger tag to an isolator, when there is a chance of personal injury from the unexpected operation or movement of plant, is a breach of BHP Billiton Iron Ore Tagging Regulations.
>
> In the inquiry, you acknowledged that you had breached tagging regulations 1.2 A and B. Your actions had the potential of placing yourself in danger and this is not acceptable practice on this site.
>
> Further, no work is to be conducted at height without fall protection such as a safety harness or scaffolding with handrails.
>
> You acknowledged that whilst attempting to clean the slew gear on SR2 by standing on the bogey arm, you were at risk of serious injury in the event that you had fallen. Again this is not acceptable practice on this site.
>
> Finally, you should follow the instructions that you are given by the Senior Production Technician or Production Supervisor on shift.
>
> In all of the circumstances and in accordance with part 8 of the BHP Billiton Iron Ore Tagging Regulations you are now issued with this written warning.
>
> Should you in future be involved in conduct of a similar nature, you may be subject to disciplinary action up to and including termination of your employment.
>
> As discussed during the inquiry you will also be required to attend a refresher briefing on the BHP Billiton Iron Ore Tagging Regulations and Steps to Zero Harm.
>
> I will advise you shortly regarding an appropriate time to attend this briefing."

34 That written warning was apparently issued in accordance with Part VIII of the regulations. After this warning was issued, Mr Swinnerton spoke to Mr Portilla and told him to change his attitude to safety matters. Mr Portilla assured him that this would not happen again.

The Incident Causing the Dismissal – 21 October 2004

35 On 21 October 2004, Mr Portilla was driving a bulldozer in the course of his employment on the top of a stockpiled heap of ore known as the primary or "western surge stockpile". It is also known as "the surge". Ore mined in the hinterland is brought by rail to Finucane Island and is then stockpiled before it is processed and shipped out. On that day, Mr Swinnerton had directed that ore be removed from the primary surge stockpile at Finucane Island to J31 South, because that stockpile was reaching its maximum capacity. The ore was being removed by a front end loader which was loading the ore onto trucks to be taken away, and working at the base of the stockpile.

36 The primary surge stockpile is fed at the bottom. There are vibratory feeders at the bottom of the stockpile which draw through the ore and deposit it onto a belt in a tunnel located beneath the primary surge. Because the feeders vibrate, they shake the ore and cause it to fall so as to be drawn through the mouths of the feeders and away from the stockpile (see the diagram at pages 9 and 10, Tab 10 (AB2)).

37 There are two ways of removing the ore from the stockpile. The first involves drawing the ore into the feeders and processing it. The second method is to remove the ore, using a front end loader and trucks and to transport it to a dead stockpile.

38 There are dead stockpiles and live stockpiles. A dead stockpile can only be accessed by mobile plant; that is front end loaders, trucks, bulldozers and the like. However, on a live stockpile ore can be removed by using fixed plant such as a feeder or reclaimer. When ore is being removed by the use of a front end loader, the front end loader operates at ground level and digs the ore from the stockpile, then loads it on another vehicle. This causes what is called "scalloping" in the stockpile, because the front end loader cannot reach the top of the stockpile. When a front end loader or loaders is/are working on the stockpile, a bulldozer works at the same time on top. The bulldozer is used to push ore from the top of the stockpile so that it falls down the side and provides quantities of loose ore for the front end loader(s) to pick up. This also prevents the scalloping getting too pronounced and potential collapses occurring. Of course, if the amount of ore on the top is pushed off by the bulldozer, more room is left to stack ore on top of the stockpiled heap of ore.

39 In this case, it was common ground that the members of the shift, including Mr Portilla, were informed before they started work that the feeders would not be working that day because they were subject to maintenance work on them. In other words, Mr Portilla knew that the feeders would not be working on that day. He also made that clear in evidence.

40 Mr Portilla, as he was directed to do, was moving the ore with the bulldozer to service a 992 loader which was filling trucks below it and below him. He was alone and unsupervised. Mr Portilla dismounted from the bulldozer and walked on the stockpile. He was seen walking on the stockpile. He was seen to do so by Mr Cook, Mr Drury and Mr Armstrong and another operator, Mr Mirsad Sulic. Mr Portilla did so in order to look over the side of the stockpile, he said, in order to see whether there was room below for him to push more ore down from the top of the stockpile. He was asked by Mr Swinnerton to demonstrate what he had done, very shortly after he was seen on the stockpile and after he had been directed to come down from the stockpile by Mr Hirini. He then went back up onto the stockpile to demonstrate. He denied that he had walked on the stockpile and was adamant that he had not got off the bulldozer. He said that, in fact, he stood on the arm of the bulldozer. He was adamant, therefore, that he had not walked on the stockpile. The photographs taken shortly after the incident of Mr Portilla's demonstration of what occurred bore out that that is what he said happened (see "MLS2", Tab 6 (AB2) – photograph 21-11:17). Mr Portilla's evidence was that, after this incident, when he got home, he decided to lie by denying that he had walked on the stockpile and, as he said also in evidence, he panicked because he was afraid he would lose his job. As a result, a process commenced which led to his dismissal.

41 Mr Portilla's actual evidence also was:-

> "When I got off the dozer and walking onto the stockpile I just wanted to get the job done. I didn't think about whether …. whether …. I should be walking on the stockpile or not. Later on I realise …. but at this time I didn't think about it. If I have thought about it, I have remember I will be …. done it. I have used the dozer on the stockpile for many, many years and it is easy to forget about not walking on it."

42 Mr Portilla's further evidence was that he had panicked and, in his panic, denied walking on the stockpile because he was afraid of losing his job. It therefore became difficult for him to say that he had, in fact, walked on the stockpile after he had denied it, he said. However, after the pressure of a number of interviews, it became too much for him and he admitted this act.

43 There was a great deal of evidence about Mr Portilla's act, the nature of it and his culpability or lack of it. We have already referred to his initial assertion that he did not walk on the stockpile, but only on the arm of the bulldozer.

44 When, on 18 November 2004, he did at last admit that he had walked on the stockpile, he said that he had stood on the stockpile near to or on the high point of it. He disputed that he had stood close to Feeder 31. He asserted that he was safe, standing on the stockpile, because the feeders were not running. He said that he wanted to look at what No 992 Loader was doing and whether there was much room. He therefore simply forgot about not walking on the stockpile but agreed that employees are not permitted to walk on top of the feeders.

45 What Mr Portilla did, as he later admitted, was to walk over to the edge of the stockpile just a few metres to see if there was enough ore down below for the front end loader which was loading from the stockpile into the trucks. The distance, on all of the evidence, which he walked was said to be five metres to 20 metres, depending on which witness gave the evidence. At all times and in evidence, Mr Portilla denied that he had walked over the feeders or the line of the feeders. However, the evidence of all of the witnesses for BHPB was that they saw him in that actual position (ie) over the stopped feeder, he having walked to a high point above the level where the bulldozer was. There was no doubt that there was no company prescribed policy, regulation or direction in writing forbidding employees or other persons to walk on live stockpiles, which it was said this one was. There was only, put at best, a general understanding. However, as Mr Portilla admitted in evidence and during the inquiry on 18 November 2004, that he was wrong in walking on the stockpile.

46 There had been signs erected on the stockpile forbidding this, it was alleged, but the only evidence of a sign on or near the stockpile was of one saying that there was no access on the stockpile except to authorised persons. Thus, as a bulldozer driver operating on the stockpile, Mr Portilla was obviously an authorised person. Mr Portilla asserted correctly that there were no written prescriptions prohibiting walking on stockpiles. Mr Swinnerton said that there was a general understanding in the workplace that one was forbidden to walk on live stockpiles because of the obvious danger.

47 It is fair to observe that a stockpile where the feeders are not working and which, one assumes has been tagged out, locked out or isolated because maintenance work is being done, is a live stockpile only in name.

48 It is clear that Mr Portilla had devised rules for himself about walking on stockpiles, those rules being for his own safety. He was and is a very experienced bulldozer operator, and very experienced in working on stockpiles. The rules that he had devised for himself were that one did not walk over the feeders, one did not walk on stockpiles at night, and one did not walk on stockpiles when the feeders were going. He certainly did not walk on stockpiles when the feeders were going, on this occasion.

49 After this incident, in December 2004, Mr Swinnerton issued, for the first time, specific written instructions which were drafted and promulgated prohibiting walking on stockpiles, and new signs were devised and installed which were not written signs, but depicted as a pedestrian crossed out to show that walking on stockpiles was forbidden.

The Investigation of the Incident of 21 October 2004

50 The investigation process consisted of a number of interviews of Mr Portilla by various company managers. In the beginning, as we have said, he maintained untruthfully that he did not walk on the stockpile, but merely walked on the arm of the bulldozer and he adhered to this version until 18 November 2004 when Mr Daniel Connors, who acted for him, contacted Mr Portilla's superintendent, Mr Swinnerton, to advise Mr Swinnerton that Mr Portilla admitted walking on the stockpile.

Disciplinary Inquiry – Meeting of 8 November 2004

51 On 8 November 2004, the first meeting of the disciplinary inquiry into the incident of 21 October 2004 took place. Present were Mr Swinnerton, Mr Sproule, Mr Portilla and his union representative, Mr Shane Swinton (see notes "RDS5", Tab 4 (AB2)). Mr Portilla acknowledged, as he was advised, that he understood that, depending on the result of the inquiry, he might be subject to disciplinary action up to and including termination of employment. He therefore ought to have known that this was a serious matter. He also admitted at that meeting that he should "never have come off from the dozer cab, not even to clean the windows". However, he said, too, that "the company doesn't put these things clear enough", in which statement there was some truth. There was no sufficient clarity until after the written policy was promulgated in December 2002. He then admitted that he had made a big mistake but referred to the fact that he was told by the supervisor that nothing was running.

52 Mr Portilla also acknowledged, as he was informed, that his conduct during the inquiry would also be taken into account in the making of any subsequent decision. He agreed that he needed permission from the supervisor to unblock the feeders and unequivocally admitted that "You must not walk on top the feeders". He also said quite clearly that he had no permission from anyone to walk on the primary surge, but that he had permission to operate the bulldozer. He identified a number of hazards which he said "you see". A number of relevant hazards were the primary stacker when it is stacking on the stockpile, risks from feeders, noting that there is no risk when one is on the bulldozer, and the creation of cavities in the stockpile by feeders, leading, as we understand it, to the risk of collapses of the stockpile.

53 In the inquiry, Mr Portilla said that it was not safe to walk on the primary surge stockpile any more. Implicit in that was a statement that it had been safe to do so in the past. He said that the "only way is to contact control and to walk". He did not contact control on this occasion before he walked on the stockpile. He did say that it is okay to walk on the stockpile and on the edge if the primary stacker boom is at 70 degrees but not over the feeders. He said that one does not have to walk on the surge to unblock the feeders. He also agreed that, before a person can walk on the primary surge, the feeders and perhaps the conveyors require to be isolated. He also admitted that it was not safe to walk on the stockpile if the feeders are working within four metres. He also said, "If you don't have to then you don't do it (walk)".

54 Mr Portilla said that he had walked on the stockpile in the past when he relieved the other bulldozer driver, but not close to the feeders. He emphasized that only if the stockpile is down and you can see the feeders do you walk close to them. He also said that you then call up and walk to the feeders, having parked back from them. He admitted that he knew of no-one else who walked on the primary surge stockpile.

55 The procedure for being able to walk on the stockpile was clearly identified by him as follows. The feeders and 326 are locked out and one must have permission from control and the supervisor "to lock out and go ahead". He said, clearly, (see question 27) that it was safe to do so when he walked on the stockpile because he was far away from the feeder on the arms of the bulldozer and that he grabbed the blade of the bulldozer. He then, when asked if he had walked on the stockpile, clearly and unequivocally said "No" (see question 33).

56 Mr Portilla said that he was outside the bulldozer for two to three minutes. He also said that he did not know why four people had put him outside the cabin of the bulldozer and on the primary surge. We refer to the evidence of Mr Armstrong, Mr Cook,

Mr Sulic and Mr Drury which put Mr Portilla where Mr Swinnerton suggested to him he was during the incident of 21 October 2004.

57 However, Mr Portilla went on to say that, on that day, there was no risk because the plant was not running and because he had run the bulldozer backwards and forwards over the stockpile for hours and the surface was packed like concrete. He denied that there was any risk of his falling. In the end, he asserted that his report was correct and that he did not know why four people had seen him walking on the surge as they said. However, he did add this, "If you want me to say that I walked on the surge then I will if it means this will go away and I can get on with my life".

58 After that meeting, Mr Portilla went away and thought about matters. Someone told him, he said, that he should tell the truth. He then instructed Mr Connors, his union representative, to telephone Mr Swinnerton and advise him that Mr Portilla admitted that he was walking on the primary surge on 21 October 2004. This admission came about one month after the incident because it was communicated to Mr Swinnerton by Mr Connors on 18 November 2004.

Meeting of 18 November 2004

59 As a result, another meeting in the disciplinary inquiry took place on 18 November 2004 (see notes "RDS8", Tab 4 (AB2)). Present were Mr Swinnerton, Mr Portilla, Mr Connors and Mr Sproule.

60 At that meeting and at its commencement, Mr Portilla admitted that he had walked on the primary surge stockpile on 21 October 2004, that he had lied in saying otherwise, and that he had so lied because he was scared of losing his job. However, he asserted that he did not walk near the feeders because he was in the corner of the stockpile, and did not walk 15 metres from the bulldozer.

61 Mr Sproule said that the purpose of the meeting was to establish where Mr Portilla was located and why on the surge stockpile. Two high points were identified on the stockpile, one over the top of the feeder line, and one in the southwest corner near the drain, and not over the feeder line, one high point being about two metres higher than the other. Mr Portilla pointed out that the bulldozer was parked in the southwest corner of the stockpile. At all times, he maintained that he was standing behind the blade of the bulldozer. He was then informed by Mr Swinnerton that the three witnesses standing to the east of the stockpile all said that he was in an elevated position in relation to the bulldozer and standing in front of the blade.

62 Mr Swinnerton asked how the bulldozer could have been in that position when the highest point of the stockpile was over the feeder line. Mr Sproule asked Mr Portilla if he understood that the bulldozer had to be on the east side of the highest point of the stockpile for the witnesses to have seen it. Mr Portilla's reply was that he did not know, but that it was where he said it was when he walked to the face of the stockpile. Mr Portilla said that he had not walked on the stockpile more than two times. (Of course, had he wanted to find out how much room there was at the base of the stockpile for more ore to be pushed down, then he could have radioed from the cab of his bulldozer and made an enquiry). Mr Sproule said that the only logical conclusion which could be drawn at that point was that the bulldozer must have been parked on the east side of the high point running across the feeders, which is the only way that the three witnesses could have seen it.

63 All of the four people then went out and inspected the surge stockpile where Mr Portilla pointed out that he was at the high point of the stockpile when standing on it. The three witnesses were located at right angles to Feeder 31 at Substation 5.

64 When the meeting reconvened, Mr Swinnerton put three conclusions to Mr Portilla and asked him to agree with them. The conclusions were:-

a) The dozer was parked to the east side of the high point.

b) Mr Portilla exited the cabin on the western side of the dozer and proceeded to a high point on foot on the surge stockpile.

c) Mr Portilla was standing on the ore close to the feeder and close to the live face.

65 Mr Portilla then specifically and clearly admitted standing on the live stockpile near the high point but he denied that he was near Feeder 31. He then said that he accepted that he should not walk on a live stockpile. When asked, he expressly admitted that, at the time of the incident, he was aware that he was not allowed to walk on a stockpile, and indeed agreed that it was not safe to walk on a stockpile because the feeders could be running. On this occasion, Mr Portilla said, he thought it was safe because the feeders were blocked and he had been bulldozing over them and the plant was not running. He agreed that safety rules must be followed and volunteered that there used to be a sign showing that you did not walk on a stockpile. He said that, when he got out of the dozer, it never crossed his mind that he was doing the wrong thing.

66 Mr Cook's evidence was that the face of the stockpile was scalloped, it being alleged that, if the face was scalloped, it was more dangerous. Mr Drury gave evidence that a loader had been working that face shortly before he saw Mr Portilla. Mr Armstrong considered that Mr Portilla's actions were dangerous, but did not consider that the stockpile would collapse.

67 Mr Swinnerton concluded, and so reported, following his investigation as follows:-

> "Mr Portilla was standing in close proximity to the edge and the witnesses had also reported that the edge was vertical with evidence of an under-mined face with a concave nature. Such an edge would be inherently (un)stable. Further, Mr Portilla had recently pushed ore to the edge, meaning that the ore was likely to be unstable and at risk of collapse." [Exhibit R6; paragraph 87].

68 Mr Portilla admitted feeling that he knew it was wrong to walk onto the live stockpile, but he forgot. He also admitted that he had seen nothing indicating any change of the rule, or that anyone had told him otherwise. He repeated that he lied because he was scared that he would be dismissed because he had done the wrong thing.

69 He admitted that he should not have walked on the stockpile. He said that after the first inquiry he checked with somebody and they told him to tell the truth.

70 There was then a conversation between Mr Swinnerton and Mr Sulic on the speakerphone in the presence of Mr Connors and Mr Portilla, as well as Mr Sproule. Mr Sulic said clearly that Mr Portilla's bulldozer was pretty much standing over the top of Feeder 31. Mr Sproule then put to Mr Portilla that, in the light of the witness statements and all of the inspections of the area, it was reasonable to conclude that:-

> "1. You walked on the Primary Surge Stockpile;
> 2. The Dozer was parked on the East side of the highest point of the stockpile;
> 3. You exited on the west side of the dozer and walked to the highest point;
> 4. You placed yourself at risk by been (sic) in close proximity to feeders and the live face;
> 5. You were aware that this was unacceptable;
> 6. You lied during the disciplinary enquiry and you maintained this lie for 3 weeks;

7. You are an experience dozer operator and you are also experienced at working on stockpiles."

71 When asked if he wishes to comment on these conclusions, Mr Portilla said "No."

72 At no time during those investigations did Mr Portilla admit that he was not in the southwest corner of the stockpile, nor did he admit that he was anywhere near Feeder 31.

73 He was reminded that his conduct during the inquiry would be taken into account. The June 2004 disciplinary breach was referred to by Mr Swinnerton and admitted by Mr Portilla. Mr Connors suggested that the appropriate outcome was that Mr Portilla be stood down for a period of time with loss of pay and a final warning.

Meeting of 29 November 2004

74 On 29 November 2004, another meeting occurred as part of the disciplinary inquiry into the incident of 21 October 2004. Mr Portilla was asked to put his case, and, in particular, to put his case why he should not be dismissed. Mr Sproule said that the stockpile was at or below the feeder level. Mr Connors informed Mr Sproule and Mr Swinnerton that they contended all along, as was later the evidence in the proceedings at first instance, that the bulldozer was parked on a high bench at the west end of the stockpile. Mr Swinnerton said that this contention contradicted the four witnesses' statements that the bulldozer was to the east of the feeder line and that Mr Portilla was standing on top of the feeder at the highest point. Mr Portilla was informed that he was to be dismissed. Contentions were made by Mr Connors, referring particularly to his undoubted good work and long record of employment with BHPB. Mr Connors referred to Mr Chomkhamsing as having created conflict since his appointment.

75 After the inquiry meeting on 29 November 2004, Mr Cook expressed himself as in agreement with Mr Swinnerton's recommendation that Mr Portilla should be dismissed because, despite his length of service, he had committed another recent safety breach where he had endangered himself. In relation to the first safety breach, he had denied standing at the height at which witnesses had placed him, which denial was untrue. Thus, he was not, in Mr Cook's opinion, a fit and proper person, Mr Cook said, to manage his safety on site. Mr Cook expressed himself as satisfied, given that Mr Portilla had lied and deliberately misled both the safety and initially the disciplinary investigation, that Mr Portilla was aware that what he had done was not permitted, particularly given that he had denied it and that "there are signposts". Further, Mr Cook was satisfied, he said, that Mr Portilla was an experienced bulldozer driver, and that there were serious safety consequences up to and including fatality, because he was on a live stockpile with live feeders and near the live working face. In short, he said that Mr Portilla placed himself in serious personal danger on two occasions within the space of a few months, and, on both occasions, had lied to the investigation. Mr Cook said that he had concerns that Mr Portilla would again repeat a serious safety breach.

76 Before 2 December 2004 Mr Sproule had a meeting on site (see paragraph 78, Tab 4 (AB2)) with Ms Joneen Scott, the Human Resources Manager, Mr Swinnerton, Mr Michael Evans, the BHPB Vice President Ports, and, by telephone, with Mr Jeffrey Stockden, Vice President Human Resources with BHPB.

77 At the end of the meeting, Mr Swinnerton emailed Mr Cook with the disciplinary inquiry's findings and recommended that Mr Portilla be dismissed for the following reasons:-

a) That he walked on the primary surge stockpile.

b) That he placed himself at risk by been in close proximity to feeders and a live face.

c) That he was aware that the risk was unacceptable.

d) That he had, during a disciplinary inquiry, maintained the lie for three weeks.

e) That he was an experienced bulldozer driver, experienced in working on stockpiles.

78 At another meeting, on 2 December 2004, attended by Mr Sproule, Mr Swinnerton, Mr Portilla and Mr Connors, the meeting at which Mr Portilla was informed that he was dismissed, Mr Portilla said that he had walked on the stockpile but not over the feeders, that the plant was not running when he did so, and that conditions were safe. This, he said, he knew from his many years of experience.

79 On 2 December 2004, Mr Portilla was actually dismissed. The letter of dismissal of 2 December 2004 reads, formal parts omitted, as follows (see "MLS18", Tab 6 (AB2)):-

> "I refer to the disciplinary inquiry conducted on 8, 18 and 29 November 2004 into your actions on 21 October 2004 when you were operating the D10 dozer on the Finucane Island primary surge stockpile.
>
> On 21 October 2001 (sic) it was alleged that you walked on the stockpile without authorisation.
>
> In the Company's safety inquiry conducted on 21, 22 and 25 October 2004 into the incident, you repeatedly denied that you had walked on the stockpile notwithstanding the fact that a number of witnesses stated that they had seen you do so. Further in the disciplinary inquiry into the incident you continued to maintain that you had not walked on the stockpile.
>
> In fact it was not until 18 November 2004, when the disciplinary inquiry was drawing to a close, that you admitted walking on the stockpile.
>
> Your actions in walking on the stockpile had the potential of placing yourself in danger, which is entirely unacceptable.
>
> Further, as you have acknowledged, your actions were in breach of the Company's safety protocols.
>
> Your actions in walking on the stockpile justify the termination of your employment particularly given that you received a written warning dated 22 June 2004 for a similar incident where you failed to comply with the Company's safety requirements and put yourself in danger.
>
> Following that incident you were given further training in relation to safety awareness and put on notice that your involvement in any further incidents of a similar nature may result in disciplinary action up to and including termination of your employment.
>
> In addition your lack of candour in responding to the questions about the incident, in both the safety and disciplinary inquiries, further justify your dismissal.
>
> In all the circumstances, including those referred to above, and having considered all matters raised by you, the Company considers that you are unsuitable for further employment and your employment is terminated in accordance with clause 9(3) of the Award with a payment in lieu of notice.
>
> Please contact HR Services to finalise those aspects of the termination of your employment."

Some Points of Evidence

80 In cross-examination at first instance, concerning the question of what height or level Mr Portilla was at when he walked on the surge stockpile, Mr Portilla answered that he was standing behind the blade of the stationary bulldozer, that is, behind the bulldozer and not in front of it. He expressly denied that he was several metres in front of the blade. He denied that he walked onto the higher level or the western side of the stockpile. He said that he walked about four steps from where he got off the bulldozer to about three metres from the edge of the stockpile. He said that it was easy to see where he stood and that he was on the same level as the bulldozer. He said that he did not walk up the ore that was piled up at the end where the highest point was and he walked up no embankment. Where he walked was flat, he said (see pages 37 to 43 of the transcript).

81 Mr Portilla said in evidence that he walked to a point about three to four metres from the edge to see how much material was down at the bottom and whether there was room below to push more down. From the top down, there was an incline of 35^{o} to 40^{o}. He said that he was looking to see how much material was in the cavity below. He just had a look and walked back to the bulldozer. Mr Murray Hirini then contacted him because he had been seen walking on the stockpile and told him to remove the bulldozer from the stockpile.

82 When he was cross-examined, Mr Portilla maintained that he remained roughly on the same level as the bulldozer, that he did not pass the blades of the bulldozer and was about three metres from the edge, having moved a matter of only one metre from the body of the bulldozer. He did not move any further than that. Further, Mr Portilla's evidence was that he was standing in a safe position on the stockpile and that it was packed like concrete. He admitted that he knew that it was not safe to stand on the stockpile in certain circumstances. He asserted that what he was doing that day was safe.

83 Mr Cook, in evidence, said that, on 21 October 2004, he was standing between CN45 and the hopper with Mr Drury and Mr Armstrong when the former pointed out to him a man standing on the surge pile. He said that Mr Drury asked if you were allowed to do that. They were then standing about 100 metres away, directly parallel to the edge of the stockpile, side on to and in line with the bulldozer operator. Mr Cook looked over and saw the bulldozer parked some distance away from the live working face edge of the stockpile. At a distance from the bulldozer on the stockpile, he saw a person who was walking up to the edge of the stockpile at the top level at the leading edge. The stockpile was almost full and the person was about 17 to 20 metres up. This person appeared to be looking down at the loader operator on the ground who was working at the live working face of the stockpile. He also appeared to be above the undermined working face of the stockpile. That is the protruding edge caused by the face having been "eroded" from underneath. Mr Cook also said that he, Mr Armstrong and Mr Drury were standing in line with the bottom draw down feeders which were located at the bottom of the stockpile and into which the ore is drawn. Thus, Mr Cook was able to opine that the person whom he saw walked in a direct line over some of the feeders.

84 The ICAM Report put the height of the stockpile at 10 metres, not 17 to 20 metres.

85 Mr Armstrong gave evidence that they had just come out of Substation 5 and were approximately 80 to 100 metres away from the stockpile at the time. He, Mr Armstrong, also saw a person standing on the primary or west surge stockpile. This was a live stockpile which meant that there were live feeders at the base of the stockpile through which the ore is fed. His view of the person was partly obstructed, but he was located towards the southern end of the stockpile. He and the other two men moved 10 metres closer to the stockpile and parallel with it. Mr Armstrong then had a clearer view of what was happening. He said that it was clear to him that the person was not near the dozer on top of the stockpile, but was standing on top of the ore on the edge or tip of a face which had been worked on by a loader. However, no loader was working at the time. The person was 15 to 20 metres from the loader at a higher elevation. This evidence given by Mr Armstrong was not challenged or shaken.

86 Mr Drury said that, on the same date, he was standing with Mr Armstrong and Mr Cook near the stop sign at the rail crossing next to CN45A discussing matters relating to the operations in the area. He was facing the area of the primary surge stockpile and noticed someone standing in front of a bulldozer when they were 80 to 90 metres away. This person appeared to be standing on a bench of ore which was slightly higher than the tracks of the dozer. This person appeared to be 10 to 15 metres from the dozer and 2 to 3 metres from the stockpile face. The person was facing outwards. There had been a front end loader working at the bottom of the stockpile, but it was not doing so at that time. Mr Drury did not recognise the person. He confirmed that he said to Mr Cook, "that's not right, he should not be doing that." He also said that Mr Cook appeared to be astonished at what was happening and confirmed that that was not the right thing to be doing. Mr Drury was not shaken in cross-examination.

Comparison of the Treatment of Mr Portilla with that of Mr Jimmy Chomkhamsing

The incident involving Mr Chomkhamsing – 30 September 2002

87 On 30 September 2002, Mr Jimmy Chomkhamsing, then a charge hand or senior production technician, and Mr R Brand, an operator and his subordinate, were instructed by Mr Michael Regan, their supervisor, to rectify a problem of overloading with ore on conveyor belts 35 and 39. It is the duty of a charge hand or senior technician to supervise operators under them and to ensure compliance with safety regulations and requirements, and that that was the case was accepted in the course of these proceedings. They cleared conveyor belt 35 by reversing the belt. Conveyor 39, however, it was noticed, was "bogged out" (ie) they were not able to clear it. Mr Regan then attempted to jog the belt to free the ore but this was unsuccessful. They then decided to hose the ore off the belt. After Mr Reagan arrived at the tail end of Conveyor 39, a Mr J Purdy, presumably a BHPB employee, asked Mr Regan if the belt had been isolated, Mr Regan then asked the operators, Mr Chomkhamsing and Mr Brand, if the belt had been isolated. The evidence does not reveal Mr Chomkhamsing's reply or whether he did reply (see exhibit R5, Tab 5 (AB2)).

88 In any event, there was no evidence that Mr Chomkhamsing had isolated the belt where he and Mr Brand worked. Indeed, it was clear and not contested that Mr Chomkhamsing had not isolated the belt as required by the tagging regulations.

89 Mr Purdy advised Mr Regan that he had seen Mr Chomkhamsing removing a wedge from the eastern side of the flap on Conveyor 39. He also reported that Mr Brand had also removed a wedge from the western side of the flap and then climbed onto the guard over the tail pulley of Conveyor 39, to hold up the flap.

90 This incident was investigated and, after the investigation, Mr Chomkhamsing and Mr Brand were taken through the isolation and tagging procedures and instruction on the newly revised isolation and tagging procedures was given to the whole of that shift, on or about 14 November 2002. They were not warned in any written form or even orally, as Mr Portilla was warned in written from in relation to the incident of June 2004. They were not suspended or subject to any real penalty.

91 There was, on all of the evidence, a deliberate breach of the tagging regulations and by that breach Mr Chomkhamsing exposed Mr Brand and himself to a risk of death or injury. Again, Mr Chomkhamsing did so when he had an added responsibility being in charge of the crew as a senior production technician to ensure safe working practices.

The incident involving Mr Chomkhamsing – 25 November 2004

92 On 25 November 2004, Mr Chomkhamsing was in charge of a crew clearing a blockage on the primary stacker. He was not only a senior production technician in charge of the crew, but he was acting supervisor in charge of the whole shift that night because of the absence of the supervisor. Before the shift commenced, Mr Swinnerton, at a pre-shift meeting or tool box meeting, specifically instructed Mr Chomkhamsing not to go on the conveyor belt without it being tagged and locked out or isolated. That is, he should not go on it whilst there was a risk that it could be operating or might commence to operate. As Mr Swinnerton agreed in evidence (see page 191 of the transcript), when a person is in charge and that person fails in respect of his duty to work safely with the effect that that person and those with him are exposed to risk, then that is an aggravated feature of that person's conduct. That was an aggravated feature of Mr Chomkhamsing's conduct.

93 In particular, Mr Chomkhamsing was in charge of Mr Anthony Colerio, a new employee, but someone with a scaffolder's ticket, and Mr Steven Andrews, the employee of a contractor to BHPB, on this occasion and during this incident.

94 Before they went to clear a blockage on the primary stacker, Mr Chomkhamsing took no steps to have it locked out, tagged or isolated. Indeed, it was not tagged by him or anyone. There is no evidence that he even considered that question. He called up Mr Colerio, a new employee, to assist with the breakdown in the conveyor belt 31 chute (CN31). Mr Chomkhamsing opened the chute and hosed through the grid to release ore from the wings of the boom gate. However, although conveyor belt 30 (CN30) was clear, the chute on CN31 blocked up again and Mr Chomkhamsing called Mr Andrews to assist in the clearing of the blockage. They all climbed down onto the belt to clear the blockage. Mr Chomkhamsing passed down the hose and they proceeded to remove the "produce" from the sides of the chute. This, they continued to do for approximately 30 minutes or as much as one hour. Mr Andrews and Mr Colerio were then told by Mr Chomkhamsing to clear the belt so that he could start the conveyor to see if the blockage was cleared. All in all, they worked on the belt whilst it was not isolated, for approximately 30 minutes to one hour.

95 Mr Chomkhamsing then told them to have smoko. Whilst on smoko, Mr Andrews and Mr Colerio discussed the danger of the machine not being tagged and locked out and Mr Andrews said that he was going to report it.

96 When this matter was investigated, Mr Colerio received a written warning and was required to attend a refresher briefing on the BHPB Tagging Regulations (see "RDS15", Tab 4 (AB2)). His actions in failing to attach a personal danger tag to an isolator when there was a chance of personal injury from the unexpected operation or movement of the plant was said to be and was a breach of the tagging regulations. His actions were characterised in the written warning to him of 1 December 2004 as having placed himself in danger. He also, on this occasion, as he admitted, conducted work at height without adequate fall protections such as a safety harness which was, as admitted, to put him at risk of serious injury, and contrary to the BHPB safe working at heights policy.

97 When he was interviewed about the incident by Mr Swinnerton on 27 November 2004, Mr Chomkhamsing admitted that they were all down on the belt for 30 minutes to one hour jumping on the belt, hosing it and throwing rocks off the belt, that is, without the belt being isolated or tagged and without safety harnesses. Thus, the machinery could start up at any time and all three of them were exposed to the risk of serious injury or even death. Mr Chomkhamsing also admitted that he knew that he was required to lock the belt before getting onto it. However, as he admitted at the interview, "The first time I just wanted to get the train happening ASAP" (see page 20, Tab 7 (AB2)). He admitted, too, that this incident could have caused a fatality. This was the second time that he gave this sort of reason for failing to lock out machinery or equipment (see his answer to Mr Portilla on 20 June 2004).

98 Having said that, however, he then denied that he placed production ahead of safety. However, his next explanation for not following the safety regulations was "I just wanted to get the train happening, I should have got the boys to lock out and follow the procedure". That constituted, as his first answer did, a clear statement that he was putting production ahead of safety, having first denied that that was what, in fact, he was doing.

99 Mr Chomkhamsing then went on to admit that, because he got down onto the belt first, the others had to follow him. That is as his subordinates they were under his direction. He said that they did not talk about safety because they "just wanted to get the job done". He also said in the interview that he did not report his tagging regulation breach on the primary stacker as he was required to do, because he forgot about it. This was because there was another and later incident on that shift. He admitted that there was potential for him to have fallen on the night of the incident. He also admitted to Mr Swinnerton that, as senior technician and acting supervisor, he had additional responsibilities to manage risk on the shift, saying, "Yes, 100 per cent. I need to set a good example for the boys". He further admitted, "I stuffed up".

100 However, he gave an untruthful answer in the following exchange with Mr Swinnerton (see page 21, Tab 7 (AB2)):-

> "HS. Is the lockout rule the only rule you broke on the night of the incident?
>
> JC. Yes. That is all.
>
> HS. Are you aware of the working at heights policy?
>
> JC. Yes. You need a safety harness.
>
> MS. Did you wear a safety harness?
>
> JC. No
>
> MS. did you break the WAH policy rules?
>
> JC. Yes"

101 That was his second untruthful answer in the same meeting. Both, he recanted from at the meeting.

102 Mr Swinnerton said that some of the factors taken into account in determining what disciplinary action to take in relation to Mr Chomkhamsing were as follows:-

a) Mr Chomkhamsing admitted the incident immediately and took full responsibility for his actions and was cooperative and truthful during the investigation.

b) Mr Chomkhamsing had no disciplinary action, notes on file or any other form of safety or work related issues in the last 12 months prior to the incident.

c) Mr Swinnerton also said that Mr Chomkhamsing had received a written warning for a safety breach on 30 September 2002, but that the time which elapsed was deemed to be significant enough "to remove its relevance in this case" (see paragraph 129, page 20, Tab 6 (AB2)).

103 Mr Cook's evidence of the reasons for the penalty imposed in Mr Chomkhamsing's case was as follows:-

"51 In respect of the Jimmy Chomkhamsing incident that occurred on 25 November 2004, a number of discussions were held as to whether his employment should be terminated given the seriousness of what had occurred.

52 As part of this process Mr Swinnerton spoke to his supervision past and present and reviewed these comments. However, the decision was made not to terminate Mr Chomkhamsing's employment on the basis of:

(a) his previous work record and ethic;

(b) his honesty in dealing with the Company during the course of the inquiries; and

(c) that he was in an acting position at the time.

53 However, given the seriousness of this matter he was demoted from the position of responsibility as senior production technician to production technician. This also involved a monetary penalty with a loss of income." [Exhibit R8]

104 Mr Chomkhamsing was issued a written warning also dated 6 December 2004 in the following terms (see Tab 13, page 35 (AB2)):-

"**Written Warning**

A disciplinary inquiry was conducted on Tuesday, 30 November and Wednesday, 1 December 2004 into your actions on Thursday, 25 November 2004 when you were in charge of the crew clearing a blockage on the Primary Stacker.

As you are aware, failure to attach a personal danger tag to an isolator, when there is a chance of personal injury from the unexpected operation or movement of plant, is a breach of the BHP Billiton Iron Ore Tagging Regulations.

In the inquiry, you acknowledged that you had breached the tagging regulations. Your actions had the potential of placing yourself and others in danger and this is not acceptable practice on this site.

Further, no work is to be conducted at height without adequate fall protection such as a safety harness. You acknowledged that by standing on the boom belt and directing others to stand on the boom belt to clear the obstruction placed yourself and others at risk of serious injury or death in the event of a fall. Again this is not acceptable practice on this site.

Your actions in this regard were entirely unacceptable given that as the Senior Production Technician you are required to ensure that your actions and those of any employees and contractors under your control are carried out safely and in accordance with site standards and procedures.

In light of all of the circumstances you have been removed from the position of Senior Production Technician and will be reclassified to a Production Technician on "C' Shift effective from Thursday, 2 December 2004. Your rate pay will be adjusted accordingly.

Should you in future be involved in conduct of a similar nature, you may be subject to disciplinary action up to and including termination of your employment.

You will also be required to attend a refresher briefing on the BHP Billiton Iron Ore Tagging Regulations prior to conducting any activities on site that require you to isolate plant and/or equipment.

I will advise you shortly regarding an appropriate time to attend this briefing.

Please sign and complete the attached Contract of Employment detailing your changed role and salary details."

105 Mr Chomkhamsing was moved from B shift to C shift. He had been spoken to on multiple occasions because there had been complaints about certain terms which he had used in conversation which irritated his fellow employees. On the evidence, that fact may have played a part in the transfer.

FINDINGS AT FIRST INSTANCE

106 The Commissioner at first instance found as follows:-

a) That it was improbable that Mr Portilla was standing in the position which he said that he was standing.

b) That three other persons, Mr Armstrong, Mr Cook and Mr Drury, saw him standing in a position near the edge of the stockpile and in a higher position to the bulldozer. Mr Swinnerton entertained the possibility of a parallax error but discarded the idea.

c) That Mr Swinnerton's conclusion referred to above was the right conclusion.

d) That because that finding was correct, Mr Portilla's actions were inherently dangerous and put his life at risk.

e) That Mr Portilla, who lied earlier to the investigation, then told the truth, had now been untruthful to the Commission as well in relation to what actually did occur on that day.

f) That he knew when he walked on the stockpile that what he did was dangerous.

g) That he did not tell the truth because he was worried about losing his job.

h) That his action occurred in proximity to the feeders.

i) That, at all times, Mr Portilla agreed that standing over the feeder was dangerous and that on this occasion it was probable that he walked over the feeders.

j) That he was not truthful in his evidence.

k) That he did what he did because it did not enter his mind that it was unsafe to do so.

l) That his actions since had been efforts to justify his actions to save his job.

m) That he potentially put his life at risk and was untruthful in an attempt to regain his job.

n) That, thus, the employer's decision to dismiss Mr Portilla should not be overturned and was not unfair.

o) That there must be a residual concern that Mr Portilla had previously lied about his behaviour involving matters of safety and has been prepared to do so again.

p) That this can legitimately engender aspects of doubt and mistrust in the mind of an employer.

q) That, in June 2004, Mr Portilla had failed to comply with safety procedures and was disciplined and retrained.

Findings – Comparison of Treatment of Mr Portilla and Mr Chomkhamsing

a) That the actions of Mr Chomkhamsing were more culpable and dangerous than those of Mr Portilla.

b) That there was no evidence to suggest that Mr Portilla was discriminated against because he was an award covered employee.

c) That there was evidence that Mr Chomkhamsing received more favourable treatment than he deserved, especially if one made a comparison between his treatment and the treatment of Mr Portilla, and having regard to the seriousness of the breaches.

d) That there was one very serious difference between the employees and that related to the issue of truthfulness.

e) That Mr Chomkhamsing was given more lenient treatment than he deserved.

f) That Mr Cook and Mr Chomkhamsing's father-in-law were on friendly terms, and, in fact, dined together in Perth.

g) That Mr Cook did not bear the blame for Mr Chomkhamsing's actions because he put him in a supervisory position when he did not have the ability to adequately perform in it.

h) That the seriousness of the first breach was not lessened by a lax safety culture at Finucane Island.

i) That, in relation to the second breach, Mr Chomkhamsing was an experienced senior production technician who should have known that his actions were dangerous and potentially fatal.

j) That Mr Chomkhamsing had ignored or forgotten the instruction given to him less than an hour before the event about isolations.

k) That this contrasted with Mr Portilla's case in that Mr Portilla had at no time received any instruction about walking on the stockpile, although this was known by Mr Portilla and generally known.

l) That Mr Portilla's action jeopardised himself both times, but Mr Chomkhamsing's actions jeopardised other employees.

m) That, therefore, the potential seriousness of Mr Chomkhamsing's lack of attentiveness or disregard for safety could then have been much more serious.

n) That Mr Chomkhamsing lied during the inquiry process, but that he soon corrected it.

o) That, thus, his conduct in that regard was not of the same magnitude of that of Mr Portilla.

p) That Mr Chomkhamsing's incidents were about two years apart and Mr Portilla's were four months apart.

q) That Mr Chomkhamsing's incidents were not dissimilar breaches for which originally the whole team was retrained.

r) That Mr Portilla's two incidents were of a different character and he was originally retrained.

s) That Mr Chomkhamsing's style of safety breach was the subject of regular update or reminder within work groups.

t) That Mr Portilla's second breach was not subject to regular provision of information.

u) That Mr Portilla's work record and ethic were good and he had worked for BHPB for 27 years.

v) That Mr Chomkhamsing was in a responsible position, should have known that his actions were wrong, was effectively forewarned an hour previously and put at serious risk the lives of three people.

w) That his actions were more serious than Mr Portilla's and were capable of relevant comparison.

x) That the factors which weighed against Mr Portilla in comparison were that his earlier breach was fairly recent, and his lack of candour.

y) That Mr Chomkhamsing's treatment was more lenient than Mr Portilla's but he, the Commissioner, was determining Mr Portilla's dismissal and it was not unfair, given that his lack of candour was the decisive factor in reaching that conclusion.

ISSUES AND CONCLUSIONS

Principles

107 The decision appealed against is a discretionary decision, as that term is defined in *Coal and Allied Operations Pty Ltd v AIRC and Others* [2000] 203 CLR 194 and *Norbis v Norbis* [1986] 161 CLR 513. Accordingly, the appellant must establish that the exercise of the discretion by the Commission at first instance miscarried, applying the principles laid down in *House v The King* [1936] 55 CLR 499 (see also *Gromark Packaging v FMWU* (1992) 73 WAIG 220 (IAC)) in order to succeed on the appeal. Whilst, also, an appellate court should be slow to overturn a primary judge's discretionary decision on grounds which only involve conflicting assessments of weight, an appellate court is not prohibited from so doing when it ought to (see *Gronow v Gronow* (1979) 29 ALR 129 (HC)).

108 Further, there is no warrant in the Full Bench to interfere with the exercise of the discretion at first instance or to substitute the exercise of its discretion for that of the Commission at first instance, unless it is so established.

109 Insofar as the findings in this matter are based on the credibility of witnesses, they may only be set aside upon appeal where incontrovertible facts or uncontested testimony demonstrate that the judge's conclusions are erroneous or where it is concluded that the decision at the trial was glaringly improbable or contrary to compelling inferences in the case.

110 That does not, of course, mean that the Full Bench is not required to carry out its statutory duty upon appeal as that duty is imposed by s49 of *the Act* (see *Fox v Percy* [2003] 214 CLR 118).

111 We would also add this. Inconsistency in the treatment of employees where one is dismissed for misconduct and the other is not may render a dismissal harsh, oppressive or unfair, within the meaning of s23A of *the Act* (see *CFMEU v BHP Billiton Iron Ore Pty Ltd* (2004) 84 WAIG 3787 at 3796 (FB) per Sharkey P and Coleman CC).

112 Since this appeal turns in part on the question of lack of candour or honesty on the part of Mr Portilla, it is necessary to consider some principles relating to dishonesty. At common law, there is no duty on employees to volunteer information concerning their own misconduct (see *Bell v Lever Bros Ltd* [1932] AC 161 at 228 per Lord Atkin and *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312 at para 37 per Gleeson CJ, Gaudron and Gummow JJ; see also *Hollingsworth v Commissioner of Police* (1999) 47 NSWLR 151 and *Bank of Credit and Commerce International SA v Ali* [1999] 2 All ER 1005 per Lightman J).

113 However, where an employer makes a reasonable request for information from the employee concerned, refusal to provide the information may well be disobedience justifying dismissal (see *Associated Dominion Assurance Society Pty Limited v Andrew and Haraldson* (1949) 49 SR (NSW) 351 at 357-358 per Herron J). Lying to the employer is dishonesty which might justify dismissal (see *Kerr v Goulburn Valley Region Water Authority* (County Court of Victoria) per Morrow J, delivered 20 August

1999; see also the discussion of these matters by McCarry (1983) 57 ALJ 607 at 608-609). At page 357 of the report of *Associated Dominion Assurance Society Pty Limited v Andrew and Haraldson* (op cit), Herron J said this:-

> "Furthermore, a duty lies upon an employee in general terms to give information to his employer such as is within the scope of his employment and which relates to the mutual interest of employer and employee. If an employee is requested at a proper time and in a reasonable manner to state to his employer facts concerning the employee's own actions performed as an employee, provided that these relate to the master's business, the employee is bound, generally speaking, to make such disclosure.
>
> Most of these questions involve matters of degree. It could not be said that every act above described would, if it stood alone, of necessity justify instant dismissal.
>
> …….
>
> The matter is essentially one for the trial Judge to decide on the facts. He would not be bound to find that all such interviews amounted to misconduct any more than he would be bound to find that they were justified. The party carrying the onus would need to prove affirmatively that, more probably than not, misconduct existed."

114 It was conceded on this appeal that Mr Portilla and Mr Chomkhamsing were required to answer honestly questions put to them by their employer about the incidents, the subject of the proceedings at first instance. Having regard to the above authorities that might not be so in every case. However, it was not necessary to consider that in this matter because of the way in which the case went.

Mr Portilla's Understanding and Expression – The English Language

115 One matter which received a lot of attention from counsel upon this appeal and which was considered by the Commission at first instance was Mr Portilla's ability to understand, read and speak English. It was common ground that, although Mr Portilla had spent many years in this country, having worked for about 27 years, at that time at Port Hedland for BHPB, he was, in fact, a native of Spain and his first language was Spanish, English his second language. He has, however, worked and lived in this country amongst English speaking people and was so doing at the time of these incidents. His evidence was given in English and he was examined by his own counsel in English and cross-examined in English. At no time did his counsel seek to use an interpreter or suggest that such a course should be taken.

116 It is not a point of appeal in this matter that the Commissioner at first instance erred in failing to let him give evidence through an interpreter when it was not sought to do so. Of course, we should add that, in several cases to which these proceedings are akin, whether the question is, "Should the whole of the evidence be interpreted for a party with poor English?", or "Should the evidence of a particular witness be given through an interpreter?" rests in the court's discretion (see *Dairy Farmers Co-Operative Milk Company Limited v Acquilina* [1963] 109 CLR 458; *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414 at 423-424, 425 and 427 (NSWCA); and *Adamopoulos and Another v Olympic Airways SA and Another* (1991) 25 NSWLR 75 at 77-78, 80 and 84 per Kirby P, Mahoney and Handley JJA).

117 In any event, that was not the point. Rather, the point was that Mr Portilla had difficulty comprehending matters and expressing himself and that, by implication, this might have affected his giving evidence and his ability to deal with the inquiries. We should add that, during the inquiries, he had a union representative with him at all times. That gentleman made no intervention on the basis that Mr Portilla did not understand or could not express himself adequately, nor did Mr Portilla at any time.

118 The Commissioner, at paragraph 27 of his reasons for decision (see page 22 (AB1)), dealt with this question. We have read all of the transcript and all of the records of discussions by BHPB managers with Mr Portilla. We agree with the findings of the Commissioner. We agree with them in the particular observations made by the Commissioner. We note that the Commissioner himself raised with counsel whether Mr Portilla needed an interpreter and he did not. From his understanding of the matters in evidence and during the safety and disciplinary investigations, as we have read the transcript of all of these, we agree with the Commissioner that Mr Portilla had a reasonable and, indeed, sufficient facility in reading English and in understanding what was said to him for the most part. Sometimes, he did not understand what was said to him but that was never the case when he was asked about or spoke about his walking on the stockpile, his lying about it, what the dangers were, and his fear of losing his job, as well as matters involving the layout of the stockpile and the location of the feeders, for example. The same could also be said about the main and essential ingredients of the incident of June 2004.

119 In the main, as the Commissioner found, Mr Portilla did understand the questions put to him. On occasions, too, he was intent on answering the questions in a manner which suited his purpose. The Commissioner also found correctly, on a fair reading of the material, that his ability to express himself was less than his understanding. Overall, however, Mr Portilla knew what he was asked and answered in all material respects comprehensively. The Commissioner correctly found, in our opinion, that Mr Portilla's ability to express himself in English was less than his ability to understand spoken English.

Observations

120 We wish to make some general observations about the findings made by the Commissioner at first instance. In essence, these were the final findings determinative of the claim.

121 First, the Commissioner found that the records of both Mr Chomkhamsing and Mr Portilla were the records of long serving employees and were good records. Mr Chomkhamsing had about 18 years' service with BHPB and Mr Portilla, about 27 years' service. The Commissioner also found that Mr Portilla's work record and ethic were good and were not under challenge. That was correct. The Commissioner made no actual finding about Mr Chomkhamsing's record, but seems to have, by implication, accepted (see paragraph 56) that Mr Chomkhamsing had a good work record and ethic. There was no evidence of anything but a good work record until the misconduct of Mr Chomkhamsing in September 2002.

122 The Commissioner found that the organisation should not accept blame, as Mr Cook purported to do, for erroneously putting Mr Chomkhamsing in a supervisory position. That was correct. His appointment to the position did not and could not absolve Mr Chomkhamsing of blame for his own actions. The Commissioner also found that Mr Chomkhamsing was in a responsible position, should have known his actions were wrong in November 2004 and was effectively forewarned one hour previously about against doing what he actually did and, by his act, put at serious risk the lives of three people. Thus, the Commissioner found that Mr Chomkhamsing's actions were more serious than those of Mr Portilla.

123 However, he then found that the factors which weighed against Mr Portilla in comparison to Mr Chomkhamsing were that his earlier breach, that of June 2004, was fairly recent and, importantly, there was his lack of candour (see paragraph 57, pages 30 and 31 (AB1)). Earlier, the Commissioner had observed that there was "one very clear and important difference between the two employees and that relates to the issue of truthfulness" (see paragraph 52, page 29 (AB1)).

124 Importantly, too, the Commissioner found that there was no evidence to suggest that Mr Portilla was discriminated against in that he was dismissed and Mr Chomkhamsing was not because he was an award covered employee, which he was, and Mr Chomkhamsing was an Australian Workplace Agreement employee.

125 He then went on to say that there was evidence to find that Mr Chomkhamsing received more favourable treatment than he deserved, "especially if one makes a comparison to the treatment afforded Mr Portilla, and this goes to the seriousness of the actual breaches". This, of course, was correct. The Commissioner then observed that, while the two incidents were not directly comparable, they could be compared.

126 The Commissioner also referred to the evidence of the friendship between Mr Cook and Mr Chomkhamsing's stepfather, Mr Hunt. We quote hereunder the relevant portions of the reasons (see paragraph 53, page 29 (AB1)):-

> "There is no evidence to suggest that Mr Portilla was discriminated against as he was an award covered employee. There is evidence to find that Mr Chomkhamsing received more favourable treatment than he deserved, especially if one makes a comparison to the treatment afforded Mr Portilla, and this goes to the seriousness of the actual breaches. The two incidents are not directly comparable but the seriousness of Mr Chomkhamsing's actions was readily apparent. Mr Schapper would have the Commission draw the conclusion that this was due to a relationship which Mr Cook had with Mr Chomkhamsing's step-father. This allegation was put to Mr Cook and strongly denied. However, when one looks at the evidence of Mr Cook in its totality there are sufficient reasons to conclude that Mr Chomkhamsing was given more lenient treatment than he deserved. Mr Cook says that Mr Hunt was a colleague, not a friend. Mr Cook dined with Mr Hunt and his family in Perth, so it would seem they were on friendly terms."

127 We note, however, as Mr Schapper submitted, that the Commissioner made no finding that favouritism arising from that friendship was the cause of the more lenient treatment of Mr Chomkhamsing, nor did he find that it was not. In fact, he made no finding one way or the other. The Commissioner also contrasted the misconduct of Mr Portilla to that of Mr Chomkhamsing to the latter's disadvantage (see paragraph 55, page 30 (AB1)).

The Nature of the Misconduct

128 It is worth recalling, for the purposes of this matter, considering the seriousness of the various acts of misconduct that summary dismissal is a common law remedy available because:-

> "…. a contract of service is but an example of contract in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service."

(See *North v Television Corp Ltd* (1976) 11 ALR 599 at 600 where the judges quote what was said in *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285 at 287 and 289).

129 Then there is the well known dictum of the High Court in *Blyth Chemicals Limited v Bushnell* [1933] 49 CLR 66 at 81, where it was said:-

> "Conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal……But the conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found. It is not enough that ground for uneasiness as to its future conduct arises."

130 The lawful exercise of the power to summarily dismiss depends upon, first, determining whether there has been a breach by the employee of the express or implied terms of the contract or a demonstrated intention not to be bound by those terms, and secondly, an assessment of whether the breach is sufficiently serious to allow summary termination of the contract (see *Bruce v AWB Ltd* (2000) 100 IR 129 at paragraph 15; and Macken, O'Grady, Sappideen and Warburton, *"The Law of Employment"* (5th edition) pages 196 to 199).

131 No rule of law defines the degree of misconduct which would justify summary dismissal without notice. This is a matter which turns on the facts and circumstances of each case. However, whilst it is only in exceptional circumstances that an ordinary employer is entitled at common law to dismiss an employee summarily, as Kirby J said in *Concut Pty Ltd v Worrell* (op cit), but Gillard J in *Rankin v Marine Power International Pty Ltd* [2001] 107 IR 117 at 142, suggested that the authorities, in particular *Blyth Chemicals Limited v Bushnell* (op cit), do not support the proposition that summary dismissal is available only in exceptional circumstances. His Honour said:-

> "The authorities do establish that the employee's breach of contract of employment must be of a serious nature, involving a repudiation of the essential obligations under the contract or actual conduct which is repugnant to the relationship of employer-employee, before an employer may terminate the contract summarily. Isolated conduct usually would not suffice. Each case must be considered in the light of its particular circumstances, but nevertheless, the seriousness of the act of termination and the effect of summary dismissal are factors which place a heavy burden on the employer to justify dismissal without notice. The circumstances do not have to be exceptional, but nevertheless, must establish that the breach was of a serious nature."

132 We respectfully agree with His Honour Gillard J's opinion of what the authorities say.

133 We should add that an employer does not have to accept an act of such a nature as to warrant summary dismissal and act on it by effecting summary dismissal. If the employer does not act, the act of misconduct is then said to be condoned but may then be revived by subsequent misconduct (see Macken, O'Grady, Sappideen and Warburton, *"The Law of Employment"* (op cit) at pages 219-220), that is, previously and waived misconduct may be taken into account in determining whether fresh misconduct justifies summary dismissal (see *John Lysaght (Australia) Ltd v Federated Iron Workers; York Industry Commission* (1972) 14 AILR 517; and *McCasker v Darling Downs Co-operative Bacon Association Ltd* (1988) 25 IR 107).

134 Mr Portilla's act can be characterised this way. He was an experienced bulldozer driver and employee of BHPB for 27 years. He said that he knew that the stockpile was 100% safe. There was no written prohibition upon walking on a stockpile if it were live. There was a general understanding amongst employees and he knew and eventually admitted that it was wrong to walk on a live stockpile away from the protection afforded by the cabin of his bulldozer. That he had undoubtedly evolved a practice of walking on live stockpiles, but not at night, and not over the feeder line, was the case. However, he knew of no-one else who did and this fact was of some consequence. He eventually unequivocally admitted, having lied about it before, and he admitted that he knew that he ought not to walk on the stockpile and was contrite. His lying commenced from the very discovery of his action when he deliberately and falsely denied walking on the stockpile and, indeed, demonstrated to the BHPB witnesses who saw him, that he had not got off the bulldozer and allowed them to photograph him in that position. He

also denied this in the first meeting of the disciplinary inquiry. He clearly did this, as he explained, because he was afraid of losing his job. However, his concealment was evidence, too, of his awareness that the act which he performed was forbidden and he knew the seriousness and therefore the possible consequences of such an act. He admitted to doing this twice. He also knew of signs which had been placed on stockpiles in the past forbidding walking on them. No-one had ever told him that he was at liberty to walk on a stockpile.

135 However, it is necessary to consider that act further. It lasted two to three minutes and Mr Portilla took only a few steps on the stockpile. He was exposed to whatever danger there was for a very short time as compared to Mr Chomkhamsing and the two employees who were exposed to danger for a very long time on 25 November 2004. Mr Portilla knew, having been informed earlier that the feeders were not working and the feeders were not therefore creating cavities which might cause the stockpile to slide away and endanger him; nor were the feeders likely to suck him down off the stockpile, because they were not operating. Indeed, he was told that they were not working that day because they were being subjected to maintenance, and he might safely have presumed that they were isolated and locked out, as was would have been the normal procedure for maintenance on equipment.

136 Mr Portilla acted unsafely also because he could have discovered what he needed to know by radioing from the safety of his cab, rather than going to the high point of stockpile to look over the side. He gave no satisfactory explanation why he did not radio. What he did do was to assist in the task of bulldozing. It is fair to observe that, because the feeders were not working and, even if the feeders had not been tagged and isolated, it was not a live stockpile in reality because the ore was being loaded or had been loaded into trucks to be taken away the front end loaders whilst the feeders were inoperative. Mr Portilla was entitled to assume that they should remain inoperative because they were being serviced for the day and that was the information that was given to him. That being so, too, it was unlikely, according to the evidence, that cavities would remain after the feeders stopped working which would cause ore to slip away. Certainly, no ore had slipped away while the bulldozer was working.

137 It is also noteworthy that Mr Portilla maintained, and it was open to find, that because of those facts, the bulldozer had tamped down the ore where he had walked, so that what he did was not unsafe or at least not imminently unsafe. There was, in fact, no evidence of any imminent danger in this situation.

138 Mr Portilla did not admit during the investigation that he was over the feeders, and denied that on oath in the witness box. He was not summarily dismissed for this incident because his entitlements were paid out. It was not argued that the dismissal was actually summary, so it is not necessary to consider that point. However, he was dismissed because he was guilty of misconduct in his employer's eyes. He did eventually admit that he had acted contrary to the prohibition upon walking on the stockpile which was a known prohibition, even if not a formal and prescribed one, but not to act in breach of any formal company safety "protocols", there being none until after he was dismissed. He certainly, as alleged, did not admit to walking on the stockpile until 18 November 2004, when the incident actually occurred on 21 October 2004.

139 His employer, because of the eye witnesses to his act, was not misled. Mr Portilla, however, did not report the act. His action had, without doubt, as alleged, the potential to place him in danger but not, on the evidence, to expose him to a high risk or to imminent danger because the stockpile was not actually live, even if it were characterised as such because the feeders were in fact shut down. He certainly exposed no-one else to danger by his act, and that is very important. Of course, it was also serious that he had exposed himself to danger. It is doubtful that there were cavities because the feeders had not been working for some time, on the evidence.

140 Mr Portilla himself took some care on the stockpile and explained how he did this.

141 Because of his dishonesty or lack of candour, as well as his acts, what he did might justify a dismissal but not a summary dismissal.

142 The next question is whether, having regard to the incident in June 2004 when Mr Portilla received a written warning, it could be considered with this incident and a summary dismissal might have been justified. On that occasion, he had walked without a safety harness and outside the safety handrail, contrary to BHPB's height and safety procedures. He also worked on machinery when the same had not been isolated. He was only partly careless of his safety because he twice asked Mr Chomkhamsing to lock out the machines but, as was the uncontradicted evidence, Mr Chomkhamsing refused to do so, saying that he had 40,000 tonnes of ore to put through. There was no good reason in safety why Mr Chomkhamsing refused to lock out the machine and every reason as the employee in charge of the crew why he should have done so. Mr Portilla took his own steps to arrange for his safety by asking the operator, Mr Bucknall, to tell him if he was going to set the machine in motion. Mr Bucknall did in fact tell him when he was going to set the machine in motion. That enabled Mr Portilla to stop cleaning and get off the machine.

143 Mr Portilla at no time imperilled anyone but himself, serious as that was, during either of the two relevant incidents in which he was involved.

144 It was not possible to clear away the blockage to the machine properly and safely without Mr Portilla getting onto the machine by leaving the area behind the handrail to complete the cleaning which he was doing. Thus, he came from the safe area behind the handrail to the unsafe area where he completed the cleaning without any safety harness. This, of course, demonstrated that, in order to completely unblock the machine, it was necessary to get down onto the machine. That meant, of course, that the machine should have been tagged or isolated and locked out so that the slew gear was completely safe whilst the unblocking occurred. Further, Mr Portilla was not stopped from getting down on the machine or ordered to wear a safety harness so by Mr Chomkhamsing at any time.

145 At all material times, the work was being done under Mr Chomkhamsing's supervision and he was responsible for the safety of Mr Portilla and Mr Bucknall, the other operator. His conduct was aggravated by that fact. That does not mean that Mr Portilla was not responsible for his own safety but he was in fact prevented from taking the required steps to correctly preserve his own safety in order to complete the cleaning task, by the refusal of his own charge hand.

146 Mr Chomkhamsing, on this occasion, put production ahead of safety, although it is fair to observe that Mr Chomkhamsing did not require Mr Portilla to go from behind the safety rail to clean the whole of the blockage out. He merely failed to prevent him. Mr Portilla took it upon himself to work at heights in an unsafe manner and then was untruthful about the actual height at which he had worked. However, he was not criticised or disciplined for that on that occasion. He received a written warning and retraining for breach of the tagging regulations. He also assured Mr Swinnerton that he would improve his attitude to safety and would not offend again when Mr Swinnerton discussed these matters after the event. There is no evidence of Mr Chomkhamsing being disciplined or being spoken to by Mr Swinnerton about his failure to ensure that safety standards were properly complied with on this occasion by Mr Portilla or failing to lock out the machine when requested to do so; it is difficult to understand why he, as the supervisor, was not disciplined for his misconduct. Nor was there evidence that he received any warning about this matter himself. Again, cogently, no-one was placed in danger by Mr Portilla's act except himself, serious as that might be.

147 The question is whether, having regard to Mr Portilla's conduct, on that occasion, summary dismissal was warranted after the events of 21 October 2004. In our opinion, given the nature of the offences and, although there were two of them, they were not so blatant or deliberate or serious as to warrant summary dismissal. Both were compounded by dishonesty and all two acts of dishonesty or lack of candour were the subject of recantation by both Mr Portilla, as were Mr Chomkhamsing's acts of lack of candour and dishonesty during the November 2004 investigation.

148 Whether a dismissal would then be fair is an entirely different question.

Mr Chomkhamsing's Conduct

149 We now turn to make some observations about Mr Chomkhamsing's conduct. We turn first to the misconduct of 30 September 2002. That involved Mr Chomkhamsing as charge hand working on the tail end of Conveyor 39 with Mr Brand without locking it out. Mr Chomkhamsing removed a wedge from the eastern side of the flap on the Conveyor 39 and Mr Brand did so on the western side, climbing over the tail pulley of the conveyor to hold the flap. Mr Brand was working under Mr Chomkhamsing's supervision. No steps were taken to isolate or lock out the machinery when it should have been. Again, Mr Chomkhamsing and Mr Brand were exposed to great danger if the belt started up. The long standing and strict tagging procedures were just ignored. Afterwards, Mr Chomkhamsing and Mr Brand were taken through the procedures. So seriously was this incident regarded by BHPB that the whole shift was informed of this breach of isolation and tagging procedures and a full presentation of the newly revised isolation and tagging procedures was conducted on or about 14 November 2002. However, there is no record of any written warning to Mr Chomkhamsing and Mr Brand and no evidence of anyone in Mr Swinnerton's position informing Mr Chomkhamsing or Mr Brand that his or their attitude to safety was unsatisfactory; nor were they required to give an assurance that their attitudes would change, as Mr Portilla was after the June incident.

150 This was an incident where there was clearly a risk of serious injury to Mr Brand and Mr Chomkhamsing if the belt was to start up and Mr Chomkhamsing did nothing to prevent it by tagging or isolation when he was the person in charge. The penalty in this case did not even include a written warning. There is no evidence that any counselling, warning or penalty applied to Mr Chomkhamsing who was Mr Portilla's supervisor in relation to the June 2004 incident. There was evidence of the sort of oral warning given by Mr Swinnerton to Mr Portilla in June 2004 after he had already received his written warning. We would also observe that there was no evidence that an operator such as Mr Portilla had any right to overrule a charge hand if the latter did not consider that a piece of machinery should be tagged, locked out or isolated.

151 The importance of compliance with tagging rules and regulations has been referred to by this Commission and other industrial tribunals on a number of occasions (see *Ortuzar v Newcrest Mining Ltd* (1997) 77 WAIG 2379 per Fielding C).

The Incident of 16 June 2004 Involving Mr Portilla

152 That was another incident involving Mr Chomkhamsing and his failure to properly supervise those in his charge or to adhere to safety regulations himself. It was not denied, and it should be accepted, that when they were working in a dangerous situation under his charge and when Mr Chomkhamsing clearly had a responsibility in the course of his supervision to ensure that Mr Portilla worked in accordance with safety regulations, he created a situation where Mr Portilla breached the regulations by working on or near machinery or equipment which was not locked out. He did this notwithstanding that he was twice asked to lock the machine out and twice refused when it was clear that it was his duty to do so or to permit Mr Portilla to do so.

153 Mr Portilla, in order to complete the job, was forced to do the next best thing, namely to ask Mr Bucknall to forewarn him if the machine and belt were to start up.

154 As to working at a height outside a safety rail and with no safety harness, that was Mr Portilla's initial responsibility too, but, as his superior, Mr Chomkhamsing did nothing to prevent him so doing as he had done nothing to prevent it in the past and did so again in November 2004. He put production before safety and allowed Mr Portilla to expose himself to the risk of injury or death.

The Incident of 25 November 2004

155 The incident of 25 November 2004 involving Mr Chomkhamsing, Mr Colerio and Mr Andrews requires some discussion also. That was an incident in many respects similar to the incident of 30 September 2002 involving Mr Chomkhamsing and, in some respects, to the incident of June 2004 in respect of which Mr Portilla was disciplined when Mr Chomkhamsing declined to lock out the machinery on which Mr Portilla was working.

156 On this occasion, Mr Chomkhamsing was not just the senior production technician or charge hand. In fact, he was acting supervisor in charge of the whole shift. His responsibility for the safe working of the shift was therefore even greater. On that occasion, he was responsible for Mr Andrews, Mr Colerio and himself working on the machinery which could have started at any time and seriously injured or caused the death of any or all of them. Further, none of them were working behind a safety rail and/or wearing safety harnesses to stop them falling from the height at which they were working. They were in an exposed and very dangerous position, not for just a few minutes but for 30 minutes to one hour, a very significant length of time to expose them to this danger. Importantly, too, Mr Chomkhamsing did not complete a JSA, as he was required to do, before commencing on that job and he offered no reason for so failing.

157 Further, and very significantly, in disobedience of a specific warning or instruction given to him one hour before this incident at the pre start meeting, Mr Chomkhamsing did what he did. He did not even ask the operator not to start up the machinery without letting him know, as Mr Portilla had done in June. That part of the belt and its machinery was locked out and isolated only after Mr Andrews and Mr Colerio had discussed the hazards and complained to him. He filled no JSA form in and did not report his failure to comply with the tagging regulations because he said that he forgot. This was very serious indeed, given that he was the acting supervisor of the while shift. Mr Andrews and Mr Colerio were disciplined, Mr Andrews by his employer and Mr Colerio by BHPB. Mr Chomkhamsing was not dismissed, even though Mr Swinnerton, who inquired into the matter, reported to Mr Cook that this was a borderline matter (ie) borderline whether he should be summarily dismissed.

158 It was said, in relation to the incident of 25 November 2004, in Mr Chomkhamsing's favour, that he admitted the incidents immediately, took full responsibility for his actions and was co-operative and truthful during the investigation, when in fact he was not at all truthful on two serious matters, as we have observed above. It was also said that he had no disciplinary actions, notes or files, or any other form of safety or work related issues in the twelve months prior to the incident although he had received a written warning for a safety breach on 30 September 2002, the elapsed time was deemed to be significant enough to remove its relevance in this case. In our opinion, such a view was entirely wrong and, as Mr Swinnerton did observe, an event of unacceptable risk had occurred when Mr Chomkhamsing was well aware of the relevant isolation and safety regulations and the obligations upon him as a supervisor and as an employee. This incident was similar to what had occurred on 30 September 2002 which showed the same sort of disobedience and lack of care for himself and others, and a lack of obedience to the directions, regulations and policies of his employer. It bore similarities, too, to the Portilla incident of June 2004.

159 Mr Chomkhamsing was, however, quite severely dealt with, being demoted with loss of income as a result. He was also stood aside and required to undergo retraining as well as move shifts. The incident was treated by BHPB as a mitigating matter that he had been acting as supervisor. That consideration could bear no weight. He had been a charge hand and used to supervising other employees for three years or so. He was the acting supervisor as well. Further, he had been specifically reminded one hour beforehand about his duty in the very matter where he later that day committed such serious misconduct.

160 Further, his honesty was taken into account in deciding his penalty. However, as the Commissioner found, he lied in the course of the investigation of the incident. He did so, not once but twice. He asserted that he was not putting production before safety when he had already stated that he wanted to get things happening again.

161 Further, and more seriously, Mr Chomkhamsing categorically denied that he had broken any rules other than the tagging regulations. It was only when he was asked the direct question whether he had complied with the safe working at heights policy at BHPB that he admitted that he had not been. He contradicted himself and admitted that that policy had been broken. Contrary to what his employer said, he was not honest and it was wrong to allege that he was as a basis for not dismissing him.

162 Further, he acted contrary to well known and express regulations about tagging and isolation and deliberately acted in breach of them, procuring others for whom he was responsible to do so twice. He was not only in charge of the crew in November 2004 but of the whole shift. It mattered not that he was acting because he was a supervisor who had been in charge of crews as a charge hand and senior production technician since 2001 at least. He also took no steps to comply with the safe height working policy in relation to himself or his subordinates. This was an incident in which he demonstrated reckless disregard for and deliberately acted in breach of the tagging regulations and the safe height working policy of his employer. It was not the first time that he had done so. He deliberately acted in breach of the regulations within one hour of being warned not to and not to in a particular matter. Within the tests laid down for what constitutes conduct justifying a summary dismissal, this conduct was such as to constitute a serious breach of the contract of employment including the strict safety directions of the employer and the requirement of honesty, so as to constitute a serious breach of the contract, justifying summary dismissal.

163 Such a finding, although one does not need to make it, is further justified by the similar manner in which he acted on 30 September 2002 and the manner in which he acted in relation to the safety of Mr Brand on that occasion and in relation to Mr Portilla's acts in June 2004, which he could have prevented from occurring. He could have prevented these acts from occurring. Such a summary dismissal could not be found to be unfair, for those reasons.

164 Further, since Mr Chomkhamsing's good record was not in fact a good record since 2002, it might be said that that was an added factor in considering his summary dismissal. There was also the suggestion of his inability to correct behaviour or language which upset his workmates, although it was not necessary to have regard to that in considering whether he ought to be summarily dismissed or not.

165 A dismissal which was not a summary dismissal would also, for those reasons, not be unfair. What we are observing here is that his conduct was so bad that it warranted a summary dismissal according to proper principles. That was the nature of it. Of course, as we have already said, whether an employer summarily dismisses or otherwise dismisses an employee or does not dismiss an employee is a matter for the employer. We will come to the significance of our observations about the nature of Mr Chomkhamsing's conduct later in these reasons.

Comparison of Incidents and Treatment

166 The dismissal of an employee may be unfair if one employee is dismissed for misconduct when another employee guilty of similar or the same misconduct and without other mitigating features to differentiate, is not dismissed (see *CFMEU v BHP Billiton Iron Ore Pty Ltd* (FB) (op cit) at page 3796 per Sharkey P and Coleman CC). This inconsistent treatment of employees can constitute unfairness. If an employee is treated so inconsistently that, on an objective consideration of the matter, he/she ought to be and feel aggrieved, then the dismissal may be unfair.

167 The Commissioner at first instance weighed the two incidents but found by way of comparison, having regard to Mr Portilla's lack of candour and that his earlier misconduct was more recent, that the matters were capable of relevant comparison. That is, with respect, not the point. The point is whether the treatment of both employees was so unjustifiably inconsistent that Mr Portilla was therefore unfairly treated.

168 Determining whether Mr Portilla was treated unfairly or fairly in the end depended on a number of factors including any inconsistency in treatment. The Commissioner correctly found that Mr Chomkhamsing's conduct was more serious and, indeed, it was far more serious than Mr Portilla's and followed a consistent line of disobeying procedures and failing to carry out his duties over three incidents, although the November 2004 incident alone warranted summary dismissal, in our opinion, for the reasons which we have expressed above. It mattered not that the incident of 30 September 2002 was over two years before the November incident because it was part of a pattern of incidents repeated by Mr Chomkhamsing in his attitude to Mr Portilla's conduct in June 2004 and his grave misconduct in November 2004 which was also compounded by his dishonesty in the course of the investigation.

169 Mr Chomkhamsing's acts were deliberate breaches committed contrary to BHPB's express written and long standing regulations and procedures causing imminent danger of death or fatal injury to himself or others, at least in September 2002 and November 2004. That exposure to danger lasted, significantly, for 30 minutes to an hour, a very long time. He also permitted or required people under his supervision to expose themselves to danger on three occasions as a result of his disobedience and/or failure to carry out his duties and was guilty of dishonesty to his employer when he lied during the investigation of the incident of 20 November 2004.

170 Further, he deliberately committed an act of disobedience after he had been specifically and expressly reminded by his immediate supervisor, Mr Swinnerton, on 25 November 2004, before he commenced work, not to work in the manner in which he did work and which resulted in his being disciplined. This was a most serious and grave act of disobedience. It was wrong for his employer and for the Commissioner, for those reasons, not to consider all of these factors in making the decisions which they did.

171 However, the nature of the November incident, where Mr Chomkhamsing did not even prepare a JSA, alone was sufficient to warrant dismissal, and summary dismissal at that.

172 That the incident of two years before was less recent than Mr Portilla's conduct of June 2004, for all of those reasons, was not to the point. It was so serious and so similar to what he did in September 2002 that it was entirely relevant and rendered Mr Chomkhamsing even more culpable when he committed his misconduct on 25 November 2004. Further, no-one took into account Mr Chomkhamsing's exposure of Mr Portilla to danger because he failed to isolate the machine on which they were working in June 2004 and failed to actually prevent him working on or near the machine when it was not isolated, and working at height without protection. This incident was part of a series of three incidents in which he conducted himself in a not dissimilar manner. We would also add that it was wrong to justify the decision not to dismiss Mr Chomkhamsing on the basis that he was acting only. He may have been acting as a supervisor only temporarily, but he was an experienced senior

production technician or charge hand, having held that position for three years or so and should have been used to supervising other employees. He was also an acting supervisor reminded of his duties an hour before he disobeyed a warning or direction and the tagging regulations.

173 Mr Portilla, in the first incident in June 2004, was guilty of lying but exposed no-one but himself to danger. He himself was not in imminent danger. On neither occasion was he in a position of leadership nor had he received any direction before the incident, as Mr Chomkhamsing had before the November 2004 incident. Further, he was exposed for only a few minutes to danger on 21 October 2004, not 30 minutes to an hour. Next, he was treated harshly compared to the treatment of Mr Chomkhamsing who exposed others as well as himself to danger in situations of palpable and imminent danger. Further, he was not a person appointed as a supervisor and was required to work, at least on the second occasion, on his own. He had no duty of supervision and was not required to enforce safety regulations, policies or procedures, as Mr Chomkhamsing was.

174 In the October 2004 episode, Mr Portilla was in no imminent danger and exposed no-one else to any danger because the feeders were not working. There was no-one else there. There was, as he had been informed, no evidence either that they were not in fact tagged or isolated. Further, there was only a general understanding about not walking on a stockpile, there was no express written instruction or policy, as there was in relation to working at heights and tagging regulations. He broke no express rule, although what he did was wrong, unlike Mr Chomkhamsing, who breached the long standing, well known, precise tagging regulations.

175 Further, whilst Mr Chomkhamsing's good record as an employee stretched over 18 years, Mr Portilla's stretched over 27 years, which is half as much again and was, in our opinion, a relevant factor if a comparison were to be made between them.

176 There was a lack of candour on the part of Mr Portilla which lasted from 21 October 2004 to 18 November 2004, but he corrected this himself. He was also guilty of some dishonesty in June 2004, which he did not correct, but was not disciplined for it. However, his lack of candour did not render his conduct, which did not occur until after nearly 26 years of a good record, comparable with the conduct of Mr Chomkhamsing, which was deliberate flouting of safety regulations and exposure of himself and others to danger, and the failure to properly exercise his obligations as a supervisor and, on the second occasion, lasted for 30 minutes to an hour, instead of a few minutes in the case of Mr Portilla. Mr Chomkhamsing's conduct was even more serious because he was in a position of trust as a "superior" and had been warned about the actual breach which he committed one hour before he committed it. He was, on each occasion, in a leadership position which imposed responsibility on him to work safely and in accordance with rules, procedures, directions and policies and to ensure his subordinates for whom he was responsible, did so too.

177 In the case of Mr Portilla, he was in breach of a general understanding, not a black and white regulation, and he was not warned about it beforehand, nor was he in a supervisory or superior position with subordinates. He was on his own in both instances as an ordinary operator.

178 The Commissioner also failed to take into account that Mr Portilla was, on his conduct, at much less risk than Mr Chomkhamsing, who was irresponsible in exposing himself and others to danger. Put simply, Mr Chomkhamsing's conduct was so much worse, for the reasons which we have expressed, as to make it clear that Mr Portilla had grievance and he was very unfairly dismissed because he was dismissed when the more serious conduct of his superior warranted no dismissal.

179 As to the question of dishonesty, whilst serious, it was lacking in comparison with Mr Chomkhamsing's own dishonesty of which there were two instances and which related to a much more serious breach, even though he also recanted and did so during the same interview as that in which he had been untruthful. In any event, the cumulative incidents of disobedience and serious exposure of himself and other persons to risk of death or serious injury were far more significant in the case of Mr Chomkhamsing, together with his own dishonesty, compared to the acts of lesser disobedience, and lack of imminent danger, by a person not a supervisor, namely Mr Portilla.

180 This was also to be taken into account, along with his clean record of almost 26 years which was longer than Mr Chomkhamsing's record of about 16 years and should have been taken into account in his favour.

181 The Commissioner failed to take into account all of these factors in determining that the dismissal was not unfair. He erred in so finding.

182 Insofar as insufficient weight was applied to Mr Chomkhamsing's record and conduct and the gravity of the latter, and too much weight was attached to Mr Portilla's, the Commissioner erred.

183 For all of those reasons, applying the principles in *House v The King* (op cit), the discretion at first instance miscarried.

Grounds 1 to 5

184 For all of those reasons, grounds 1 to 5 are made out.

Ground 6 and 7

185 It is quite clear that the Commissioner at first instance erred in taking into account Mr Portilla's alleged lying to the Commission and that is irrelevant to the question of whether the dismissal was unfair. Further, it is not at all clear that he did, in his version of the events, lie in the witness box and it was not put to him that he had. It is not clear from the reasons in what respect he is alleged not to have been honest in the Commission. It was submitted that this was in relation to his location on the stockpile, but he always adhered to what he said there. Further, it was not put to him that he was lying and it should not contaminate a decision whether the dismissal was unfair or not. For those reasons, we are satisfied that grounds 6 and 7 were not made out.

Grounds 8 and 9

186 As to grounds 8 and 9, there is some explanation why the two decisions which were made were made contained in the evidence of Mr Cook and Mr Swinnerton about the reason for Mr Chomkhamsing not being dismissed and Mr Portilla being dismissed. There is also evidence that Mr Cook is a friend of Mr Hunt, Mr Chomkhamsing's stepfather.

187 There was also evidence, uncontroverted, that BHPB preferred to engage employees on Australian Workplace Agreements rather than on award coverage. Mr Cook denied that that played any part in his decision and he was not shaken in that evidence. However, it was not directly put to him that he had favoured Mr Chomkhamsing because of his friendship with Mr Hunt. There was no evidence at all, other than that Mr Hunt was a friend of Mr Cook and Mr Chomkhamsing was the former's stepson.

188 There was also evidence from Mr Cook, not accepted by the Commissioner, that Mr Cook was responsible for Mr Chomkhamsing's errors because he had erroneously promoted him. That evidence, however, is entirely irrelevant to any question of favouritism.

189 The question is whether there was sufficient evidence from which to infer, on the balance of probabilities, that there was favouritism for Mr Chomkhamsing as a friend's stepson and disapproval of Mr Portilla because he was not on an Australian

Workplace Agreement but on the award, contrary to the position of Mr Chomkhamsing. The Commissioner certainly directed his mind to this matter but made no finding on either point.

190 In our opinion, given the reasons expressed and notwithstanding the manifestly and significant lenient treatment of Mr Chomkhamsing, without any justification compared to that of Mr Portilla, there was not sufficient evidence to draw an inference on the balance of probabilities that his treatment was brought about by his being on an Australian Workplace Agreement and/or Mr Cook's friendship with Mr Hunt.

191 There was no sufficient evidence to draw either inference on the balance of probabilities. For those reasons, grounds 8 and 9 fail.

Dismissal Unfair – Substituted Exercise of Discretion

192 Thus, for the reasons which we have expressed, applying the principles laid down in *House v The King* (HC) (op cit), we would find that the exercise of the discretion at first instance miscarried and that the Commissioner erred in failing to find that Mr Portilla had been unfairly dismissed. It is therefore open, in accordance with those principles, to the Full Bench to substitute the exercise of its discretion for that of the Commissioner at first instance. In our opinion, for the reasons expressed and on the findings which we have said above should have been made, the Full Bench should now find that Mr Portilla was harshly, oppressively or unfairly dismissed from his employment by BHPB on 2 December 2004. We would so declare.

Reinstatement

193 The appellant seeks an order for reinstatement to his employment without loss of wages or continuity of employment. This was opposed by BHPB through its witnesses. Mr Cook said that he was opposed to any reinstatement because, in the June and October 2004 incidents, there was demonstrated a difficulty in identifying potential hazards or associated risks and because Mr Portilla had been prepared to lie. Thus, he did not have any confidence that he would act safely in the future.

194 Mr Swinnerton said that, if Mr Portilla was reinstated, he would most likely require constant and permanent supervision which would reduce their ability to proactively manage safety for the remainder of the workforce and would increase the risk to safety of all the employees on site. He expressed the opinion that, if Mr Portilla was reinstated to an operational area, he would present a potentially fatal risk to himself and/or to other employees. Given the nature of his two serious incidents, Mr Swinnerton believed that Mr Portilla is not capable of adequately assessing risk in the workplace and he further believed that he would be capable of gaining such skills through any form of rehabilitative programme.

195 Mr Sproule was also opposed to any reinstatement of Mr Portilla because he said it was possible, given his lack of awareness of safety, he could be involved in a serious incident, again that could have devastating consequences. This was because, as Mr Sproule expressed it, the two incidents which they had taken into account in determining to terminate Mr Portilla's employment were both serious and involved his placing himself at risk. Further, both of those incidents only came to their attention after being reported by witnesses and otherwise would have remained unknown. He also said that, clearly, based on the findings of the disciplinary inquiry into the October incident, he had serious reservations about whether Mr Portilla would be honest in any further dealings with BHPB. Had there not been witnesses, of course, Mr Portilla's initial explanation of what occurred would have remained undisputed. Mr Portilla was not cross-examined on the question of reinstatement, nor were Mr Cook, Mr Sproule or Mr Swinnerton.

196 The statute prescribes that the Commission may order the employer to reinstate the employee to the employee's former position on conditions at least as favourable as the conditions on which the employee was employed immediately before the dismissal (s23A(3) of *the Act*).

197 The Commission also has the power, if it considers reinstatement impracticable, and only then, to order the employer to re-employ the employee in another position that the Commission considers the employee has available and is suitable. No such remedy is or was sought (s23A(4) of *the Act*). If and only if the Commission considers reinstatement or re-employment would be impracticable, may the Commission order an employer to pay to the employee an amount of compensation for loss or injury caused by the dismissal.

198 "Impracticable" does not mean impossible, but means more than inconsistent or difficult. As Anderson J said (Franklyn J agreeing) in *FDR Pty Ltd and Another v Gilmore and Others* (1998) 78 WAIG 1099 (IAC) (see also *Gilmore and Another v Cecil Bros and Others* (1996) 76 WAIG 4434 at 4446 (FB)):-

> "In ordinary language, the difference between "impossible" and "impracticable" is that the former is a definite concept, while the latter is not. As Veale J said in ***Jayne v National Coal Board*** [1963] 2 All ER 220 at 223-
>
> > "'Impracticability' is a conception different from that of 'impossibility'; the latter is absolute, the former introduces, at all events, some degree of reason and involves, at all events, some regard for practice."
>
> Here we are considering impracticability in the context of reinstatement to particular employment. In that context Wilcox J said in ***Nicolson v Heaven & Earth Gallery Pty Ltd*** (1994) 126 ALR 233 at 244-
>
> > "The word 'impracticable' requires and permits the court to take into account all the circumstances of the case, relating to both the employer and employee, and to evaluate the practicability of a reinstatement order in a commonsense way. If a reinstatement order is likely to impose unacceptable problems or embarrassments, or seriously affect productivity, or harmony within the employer's business, it may be 'impracticable' to order reinstatement, notwithstanding that the job remains available."

199 One must have in mind in considering this issue that reinstatement is the primary remedy for harsh, oppressive or unfair dismissal.

200 Practicality is not dependent upon loss of confidence (see per Gray J in *Liddell v Lembke (t/as Cheryl's Unisex Salon); Gibson v Bosmac Pty Ltd* (1994) 56 IR 447; and see also the comments of the Judicial Registrar in *Savvidis and Beteramia v Privilege Clothing Pty Ltd* (1994) 59 IR 136).

201 In this case, there is a loss of confidence in Mr Portilla on the part of his employer. Equally because of the inconsistency and unfairness in treatment of Mr Portilla, he is entitled to have a loss of confidence in his employer. It is not necessarily the case, on the evidence, that there is animosity between them. Given that Mr Portilla lied on two occasions and that he had been in breach of safety requirements, whether unwritten or prescribed, but had not endangered anyone else and given that he had, lied on two occasions but recanted on the second occasion and explained that he had done so out of fear of losing his job, a fear that was well founded; and, given that his dismissal in the circumstances was unfair, then we are not persuaded that it is impracticable to order his reinstatement.

202 Indeed, although the case is borderline, it must be said that Mr Portilla, not having offended in almost 26 years of his 27 years of employment and given his previous good record, then he should, for those reasons also, be reinstated. Unfortunately, too, it is difficult to find that there can justifiably be any real loss of confidence or impracticability given the failure of BHPB to attribute to Mr Chomkhamsing the flaws incorrectly attributed to Mr Portilla when Mr Chomkhamsing's misconduct in matters

of safety were so manifestly worse and were also a betrayal of trust as a supervisor or leader. It also should be said that it was wrong for Mr Cook to characterise Mr Portilla as being likely to cause a fatality given the nature of his misconduct and the facts, or being a major problem in relation to safety, unlike Mr Chomkhamsing who was a supervisor, not a mere operator, and admitted he did cause imminent danger of fatality to three people, including himself, and was guilty of previous misconduct and dishonesty, too, and for the reasons which we have expressed above.

203 Mr Portilla's uncontroverted evidence was that he was, at the time of the hearing, working about 20 hours per week in a cleaning job where he "only did a little bit from time to time to help out"; he did not look for other work pending the decision in this case and it was not put to him at all that there was any other work open to him to seek in his circumstances. There was no evidence adduced that he did not act reasonably. There was no challenge to his evidence in this respect and it was not contradicted in any way.

204 It is necessary to further consider the orders which should be made.

205 S23A(5) of *the Act* is the section which empowers the Full Bench in this case to make an order maintaining the continuity of Mr Portilla's employment (s23A(5)(a)), and/or confers the power to order the employer to pay the remuneration lost or likely to have been lost by the employee because of the dismissal (s23A(5)(b)).

206 In our opinion, s23A(5)(a) and (b) orders are designed, unequivocally, to put an employee back in the position in which she or he would have been, had she or he not been unfairly dismissed, both by actual reinstatement or re-employment and/or by restoring the remuneration lost. Such an order is very different from an order to pay compensation for loss caused by an unfair dismissal. There is no requirement to mitigate loss where an order is made to the employer to pay to an employee "the remuneration lost or likely to have been lost by the employee because of the dismissal". Such an order is required by s23A(5)(b), in its actual words, to require the payment of the remuneration lost; that is, the actual remuneration lost or, alternatively, the remuneration which is likely to have been lost. There is no requirement to mitigate or take any act of mitigation into account in the section, unlike s23A(7) which expressly requires mitigation to be taken into account in awarding an amount of compensation (see also the *Workplace Relations Act* 1996 (Cth), s170CH(1), (2) and (4)).

207 If we are wrong in that opinion, and the amount ordered to be paid under s23A(5)(b) of *the Act* constitutes compensation, then we would find fair compensation for loss during the time when Mr Portilla remained dismissed and was awaiting the outcome of proceedings was the whole amount of remuneration not paid to him (see the principles expressed in *Growers Market Butchers v Backman* (1999) 79 WAIG 1313 (FB)).

208 It is to be noted that Mr Portilla worked a lesser wage for part of the time that he was off work after his dismissal and it was months before this order could be made. Accordingly, we would not be of opinion that he would be compensated, were compensation applicable, which it is not, according to equity, good conscience and substantial merits of the case, if he were not paid the total amount of his remuneration lost. That would mean that the amount earned in other employment during this time, which employment he was forced to take, should not be taken into account in assessing the amount to be ordered.

209 In any event, if any mitigation were required, Mr Portilla did mitigate by working as he did, and there was no evidence that the steps taken to mitigate were not reasonable or that there was a failure to mitigate. It was never put to Mr Portilla that he had not "mitigated his loss", or that he was required to mitigate it, or that he had not taken reasonable steps to mitigate it. Mr Portilla, after all, was a man who was dismissed for unsafe conduct in the mining industry and was awaiting the outcome of an application for reinstatement following an alleged unfair dismissal. There could be no proper finding at first instance or by this Full Bench that he failed to mitigate. The matter of mitigation, in any event, was not raised as a live issue on this appeal, even when the Full Bench was required, as it has been required to do to embark on the exercise of making findings of its own. At first instance, too, no evidence was adduced by BHPB, and its onus was not discharged by BHPB (see *Growers Market Butchers v Backman* (FB) (op cit)).

210 For those reasons, there is sufficient evidence to enable the Full Bench to make a finding under s49(6) of *the Act* and no other good reason which should prevent that occurring. We would order the reinstatement of Mr Portilla as and from 2 December 2004 and we would order that he be paid by his employer, BHPB, the whole of the remuneration, not merely wages, lost by him as a result of his unfair dismissal. We find, for those reasons, that the amount of lost remuneration should not and cannot be reduced by the amount which Mr Portilla earned whilst he was in other employment after he was unfairly dismissed.

FINALLY

211 For all of those reasons, we would uphold the appeal. We would vary the decision at first instance. We would declare that Mr Portilla was harshly, oppressively or unfairly dismissed on 2 December 2004. We would order that Mr Portilla be reinstated without loss of wages in the job which he held as and from 2 December 2004 and, indeed, that he be paid all of the remuneration lost by him as a result of his unfair dismissal, within 14 days of the date hereof. In the event that an amount cannot be agreed by the parties, then there should be liberty to apply by either party within seven days of the date hereof, by written notice to the Commission and the other party for an order fixing the quantum of remuneration to be ordered to be paid to Mr Portilla.

CHIEF COMMISSIONER A R BEECH:

212 The appellant's first ground of appeal is that the Commission erred in that it failed to determine whether Mr Portilla's dismissal was unfair having regard to the circumstances of the Chomkhamsing misconduct and the treatment administered by BHPB for that misconduct.

213 In the Reasons for Decision at first instance, the Commission set out the circumstances leading to Mr Portilla's termination, the closing submissions of both the appellant and BHPB, a summary of the evidence of Mr Portilla and, commencing at [38] the Commission's analysis of the evidence. The Commission concluded at [50] that the lack of truthfulness of the part of Mr Portilla was very important in determining the matter. The Commissioner concluded that Mr Portilla had not been honest before the Commission as to his actual behaviour and that, in those circumstances, the Commission considered it should not act to overturn the decision of the employer to dismiss Mr Portilla. The Commission noted:

> "There must be a residual concern that Mr Portilla has lied previously about his behaviour involving safety issues and has been prepared to do so again. This can legitimately engender aspects of doubt and mistrust in the mind of an employer. I do not then consider that the employer has acted in a manner in dismissing Mr Portilla that can be characterised as an abuse of that right".

214 Having reached that conclusion, the Commission at first instance then referred to an earlier safety-related incident in June 2004 for which Mr Portilla had been disciplined and retrained. The Commission referred to "the comparison of the consistency of treatment between Mr Portilla and Mr Chomkhamsing". The Commission agreed "mostly" with the submissions of the appellant that the actions of Mr Chomkhamsing were more culpable and dangerous than the actions of Mr Portilla. He noted that one "very clear and important difference" between the two employees relates to the issue of truthfulness.

215 The Commission noted at [53] that there is evidence to find that Mr Chomkhamsing received more favourable treatment than he deserved if one makes the comparison with the treatment afforded to Mr Portilla. While the two incidents are not directly comparable, the seriousness of Mr Chomkhamsing's actions was readily apparent. The Commission noted the appellant's submission that Mr Chomkhamsing's more favourable treatment was because of a relationship which Mr Cook, the Manager, Finucane Island had with Mr Chomkhamsing's stepfather. The Commission noted Mr Cook's strong denial but noted, however, that the evidence in its totality gave sufficient reason to conclude that Mr Chomkhamsing was given more lenient treatment than he deserved and that Mr Cook was on friendly terms with Mr Chomkhamsing's stepfather; the Commission did not make an express finding that Mr Chomkhamsing received more favourable treatment because of this relationship, but rather stated the proposition as being one open on the evidence.

216 At [54] the Commission at first instance further examined the reason why Mr Chomkhamsing was given more favourable treatment than he deserved. The Commission rejected a suggestion of blame by Mr Cook and also that there had previously been a lax safety culture at Finucane Island. The Commission at first instance noted:

1. Mr Chomkhamsing was an experienced safety production technician who should have known his actions were dangerous and potentially fatal.
2. He had been instructed less than an hour before the event about isolations.
3. He had completely ignored or forgotten this.
4. Mr Chomkhamsing's actions jeopardised other workers.
5. The potential seriousness of his lack of attentiveness or disregard for safety could then have been much more serious.
6. Mr Chomkhamsing had lied during the inquiry process however the lie had been a denial which Mr Chomkhamsing soon corrected and that this conduct was not of the same magnitude as Mr Portilla's conduct.
7. Mr Chomkhamsing's two incidents were about two years apart.
8. Mr Chomkhamsing's incidents were not dissimilar breaches for which originally the whole team was retrained. Mr Chomkhamsing's style of safety breach was the subject of regular update or reminder within work groups.

217 In relation to Mr Portilla, the Commission at first instance noted from [54]:

1. That Mr Portilla at no time received any specific instruction about walking on the stockpile.
2. It was simply generally known and known by Mr Portilla.
3. His actions jeopardised his own safety on both occasions.
4. Mr Portilla's conduct in lying during the inquiry process was of a greater magnitude than Mr Chomkhamsing even taking into account some leniency as to whether Mr Portilla correctly understood all that was put to him.
5. Mr Portilla's two incidents were four months apart.
6. His incidents were of a different character and he was originally retrained.
7. Mr Portilla's second breach was not subject to regular provision of information.
8. Mr Portilla's work record and ethic were good.
9. He has worked for the respondent for 27 years.
10. That the factors that weigh against Mr Portilla in comparison with Mr Chomkhamsing are that his earlier breach was fairly recent and, importantly, his lack of candour.

218 The Commission at first instance then noted the Full Bench decision in *Construction, Forestry, Mining and Energy Union of Workers v BHP Billiton Iron Ore Pty Ltd* (2004) 84 WAIG 3787 at 3796. In that matter, at [119] the President and then Chief Commissioner concluded that the dismissal of Mr Burtenshaw when others were not dismissed was an inconsistency which was conclusive evidence of unfairness and that the Commissioner at first instance in that matter had failed to make any finding on that point; therefore the discretion at first instance miscarried. The President and then Chief Commissioner held that:

> "Whether because they were treated leniently it was inconsistent and unfair to dismiss Mr Burtenshaw is the question on which a finding should have been made, and in relation to which a finding must now be made."

219 The issue of whether or not Mr Portilla's dismissal was fair by comparison with the punishment given to Mr Chomkhamsing was squarely raised before the Commission at first instance. Ultimately, the issue before the Commission was whether or not Mr Portilla's dismissal was fair not just by reason of his own conduct but by comparison with the treatment of Mr Chomkhamsing in not dissimilar circumstances. As the Commission recognised, that is a question on which a finding should have been made. Ground 1 of the appeal alleges that the Commission at first instance did not do so.

220 The Commission had already concluded at [50] that Mr Portilla's dismissal was not unfair. This conclusion was reached prior to considering whether Mr Portilla's dismissal was unfair by reason of comparative treatment. The Commission then embarked upon a comparison of the treatment of both Mr Portilla and Mr Chomkhamsing stating at [59] that although the facts in both matters are different, they are capable of relevant comparison, and that Mr Chomkhamsing's treatment by BHPB has indeed been more lenient than that afforded to Mr Portilla. In relation to then making a finding on the comparative treatment the Commission at first instance recognised that is question upon which a finding should be made. The Commission, however, did not make a finding and stated:

> "However, the matter I am determining is Mr Portilla's dismissal. I would issue an order dismissing the application."

221 Thus, the conclusion of the Commission at first instance that Mr Portilla's dismissal was not unfair related only to the circumstances of Mr Portilla and did not result from a finding whether Mr Portilla's dismissal was unfair in comparison to the circumstances, and the more lenient treatment, of Mr Chomkhamsing. Accordingly, the Commission fell into error and Ground 1 of the appeal is made out.

222 Grounds 2, 3 and 3A are predicated upon the presumption that the Commission did determine that Mr Portilla's dismissal was unfair comparative to Mr Chomkhamsing's circumstances. I consider these Grounds in the event that I am wrong in my conclusion above and, contrary to my reading of the Reasons for Decisions at first instance, paragraphs [51]–[57] are indeed the comparison which the Commission at first instance was obliged to undertake.

223 Ground 2 alleges that the Commission did not give Reasons for its decision. In paragraph [59], the Commissioner noted that he would not overturn the employer's decision and reinstate Mr Portilla; he noted in respect of Mr Chomkhamsing that whereas the facts are different, they are capable of relevant comparison and that Mr Chomkhamsing's treatment has indeed been more lenient than that afforded Mr Portilla. The Commission goes no further, however, because he concludes that the matter he is determining is Mr Portilla's dismissal. I consider that if paragraphs [51]–[57] are indeed the comparison which the Commission at first instance was obliged to undertake, he did not given reasons, or sufficient reasons, in paragraph [59] for the decision reached given the range of factors to be balanced in the comparative process. I find that Ground 2 is made out.

224 Grounds 3 and 3A allege that the Commission's discretion miscarried by not taking certain matters into account in making the comparison. A number of matters are set out in Ground 3 and other matters were highlighted in the submissions made during the appeal. Mr Chomkhamsing's incident lasted nearly one hour and thus the endangerment of his own life, and those of the employees he was supervising (which itself is referred to at [54]), was for a period far greater than the period Mr Portilla walked on the stockpile. Mr Chomkhamsing was in a supervisory or charge hand experience when Mr Portilla was not. (I note, however, that the Commission at first instance referred to Mr Chomkhamsing being in a supervisory position when dealing with Mr Cook's evidence at [57].) While the fact that Mr Chomkhamsing lied during the inquiry process was recognised at [55], he lied on two occasions during his interview; while these two occasions were soon corrected, given that no action was taken against Mr Chomkhamsing for having lied, and given the emphasis on the lack of candour seen by the Commission at first instance in Mr Portilla's conduct, that fact is a matter of considerable relevance.

225 The Commission recognised at [55] that the incident which led to Mr Portilla's dismissal was not a repeat of the June 2004 safety incident. However, in relation to the June 2004 incident, Mr Portilla had, correctly, asked if he could lock out the machine. This demonstrated his safety awareness. Permission to do so had been denied by Mr Chomkhamsing. This is significant because it casts a different light on Mr Portilla's first safety incident and apart from that incident, there was no other safety incident in Mr Portilla's 27 years' service. Although Mr Portilla lied during the interview, and maintained the lie, he recanted prior to the decision being made by BHPB. Further, BHPB was misled by Mr Portilla's lack of candour only in the early stages of the inquiry. Mr Chomkhamsing was obliged to have completed a Job Safety Analysis prior to the start of the job and failed to do so; there was no such requirement upon Mr Portilla and thus Mr Chomkhamsing's failure is greater than Mr Portilla's by that measure. Mr. Portilla's length of service was considerably longer than Mr Chomkhamsing's length of service.

226 The role of an appellant court is well known, and has frequently been stated by Full Benches in this jurisdiction. The correctness of a decision at first instance can only be challenged by showing an error in the decision making process (*Norbis v Norbis* (1986) 161 CLR 513 at 518-519, per Mason and Deane JJ). The errors that may be identified in relation to the exercise of discretion by a Commissioner who necessarily has some latitude as to the decision to be made are those identified in *House v The King* (1936) 55 CLR 499 at 505 and which have been so frequently stated (and see too *Coal and Allied Operations Pty Ltd v AIRC* [2000] HCA 47; (2000) 74 ALJR 1348 at [21]). The requirement on Mr Chomkhamsing to complete a JSA, and his failure to do so, and the comparative lengths of service of both were essential to a proper comparison and I consider Grounds 3 and 3A are made out.

227 I am therefore of the view that the decision of the Commission at first instance should be reviewed and the Full Bench may exercise its own discretion in substitution for the Commission at first instance if the Full Bench has the materials for doing so.

228 In my view, the Full Bench does have the material for doing so. In this matter, the facts are largely not in dispute; the dispute, at least as put before this Full Bench, goes more to the weight to be attached to those facts. With the exception of the finding of the Commission at first instance that Mr Portilla lied during the Commission proceedings itself, it is not necessary in order to fairly dispose of this matter to disturb any of the findings of fact of the Commission at first instance.

229 The essential point remains: Was the dismissal of Mr Portilla harsh, oppressive or unfair? In deciding the point the Full Bench is to take into account all of the circumstances including the fairness of Mr Portilla's dismissal in comparison to the treatment of Mr Chomkhamsing for a not dissimilar occurrence.

230 In my view, the exercise of the Full Bench's discretion in substitution for the Commission at first instance should proceed as follows. In principle, a dismissal of an employee which is otherwise not harsh, oppressive or unfair may be so if another employee of the same employer, at a contemporaneous point in time, having committed similar acts of conduct or misconduct, are not dismissed. The principle is one of consistency of treatment (*Capril Aluminium Ltd v Sae* (1997) 75 IR 65 at [68]). Notions of fairness necessarily include whether the employee has received a "fair go all round" when compared to others in a similar position employed by the same employer.

231 It should be acknowledged that care must be taken in effecting a comparison because there may well be circumstances such as long service, the reasons for the conduct or misconduct or other circumstances which may justify more lenient treatment in one case than in the other. It is significant in this case that the Commission at first instance found that the two safety breaches committed by Mr Portilla and Mr Chomkhamsing respectively are breaches which are capable of relevant comparison (at [59]). That being the case, it is far more likely that the Full Bench has before it a comparison of "apples with apples" as Lawler VP referred to in *Sexton v Pacific National (ACT) Pty Ltd* (14 May 2003, Print PR931440 at 36) and I proceed on that understanding.

232 In this case, there are no reasons to do with length of service, the reasons for their conduct, or any other factors other than the issue of truthfulness, which on their face suggest a valid reason for the more lenient treatment of Mr Chomkhamsing; indeed, the opposite appears to be more likely given the finding at first instance that his conduct was, for the most part, more culpable and dangerous than Mr Portilla's conduct.

233 The Commission at [43] and [48] placed importance upon a finding that Mr Portilla lied during the hearing; at [50] the issue of lack of truthfulness was stated to be very important in determining the matter before the Commission. Is this a valid reason for the more lenient treatment of Mr Chomkhamsing? Whether a witness is, or is not, truthful is of limited relevance only in deciding whether or not a dismissal many months earlier was harsh, oppressive or unfair. In *Jupiter General Insurance Co v Shroff* [1937] 3 All ER 67 the Privy Council considered the circumstances where an insurance salesman gave false evidence in the course of contesting his dismissal. Lord Maugham observed at p. 73:

> "Their Lordships do not take the view that the outrageous conduct of the respondent at the trial, including his inventions of interviews, his false charges, and the tissues of falsehoods of which the trial judge has found him guilty, has any direct bearing, other than an evidential one on the question whether he was properly dismissed, but they must observe that, in so far as anything turns on the correctness of the view formed by Mr. Mody and Mr. Iyer as to whether it was reasonably possible for the company any longer to employ the respondent, his behaviour in the witness-box makes it exceedingly difficult to conclude that their view was a wrong one."

234 The task of the Commission, where there is evidence which is in conflict and which requires resolving in order to deal with the issue before it, is not always straightforward. Assessing the credibility of a witness is never a simple task. It includes not only

the veracity of witnesses but the accuracy of their recollection. It is always open to a Commissioner to believe part of what a witness has said in the witness box and to reject another part of that evidence: *Cousins v YMCA* (2001) 82 WAIG 5 at [43].

235 Findings of fact are not overturned unless the appeal bench is satisfied that the Commission misdirected itself or that any advantage enjoyed by the Commission by reason of having seen and heard the witnesses could not be sufficient to explain or justify the Commissioner's conclusions. An appellate court may itself decide on the proper inferences to be drawn from facts which are undisputed or established by the findings of the Commission but shall give full weight and respect to the conclusions of the Commission. An inference properly open on such facts is only to be overturned if considered wrong: *Garbett v Midland Brick* [2003] WASCA 36; (2003) 83 WAIG 893 at [30]; and see also *Gromark Packaging v The FMWU WA Branch* (1992) 73 WAIG 220 at [224].

236 I have reviewed the evidence of Mr Portilla from the transcript. I give due weight to the Commission's conclusion (at [41]) that it was improbable that Mr Portilla was standing in the position that he said he stood and he therefore concluded that Mr Portilla was being untruthful as a witness and that he had not been honest before the Commission (at [50]). However, it was never put to Mr Portilla at that time that he was being untruthful in his evidence and the Commission should be slow to make such a finding in the absence of it being put to the witness. To find that a witness lied under oath in proceedings before the Commission, as distinct from rejecting a part of his evidence, is a most serious matter: perjury is a criminal offence.

237 A review of the evidence of Mr Portilla in relation to this, and his cross examination, shows that he was adamant as to where he walked, and that he was not going to change his evidence under cross examination. That, in my respectful observation, falls short of evidence that he was lying. If I am wrong, and the Commission at first instance was correct, for the reason given in *Jupiter General Insurance Co v Shroff* (above) I consider this to be of limited relevance to issue of the fairness of his dismissal.

238 I have set out earlier in these Reasons the comparative factors taken into account by the Commission at first instance, and also the factors which I consider are relevant and which were not taken into account. In my view, the Commission at first instance was manifestly correct in finding that Mr Chomkhamsing was treated more leniently than Mr Portilla. What Mr Portilla did in walking on the stockpile and then denying it to the inquiry was wrong. However, did he really deserve to be dismissed with its attendant loss of income and its stigma when Mr Chomkhamsing's more serious lack of attentiveness and disregard for safety resulting in more culpable and dangerous actions, a repeat of a safety incident two years' earlier for which he had been retrained and warned about less than one hour prior to the event, did not result in dismissal?

239 BHPB's treatment of Mr Chomkhamsing's wrongdoing is an illustration of the current standards of justice and fair play between BHPB and its employees. Upon a proper comparison of the treatment received, Mr Portilla's dismissal was unfair given that Mr Chomkhamsing's conduct was intentional and wilful, over a period of up to one hour, by a supervisor in charge of other employees, whose actions endangered his own and the other employees' lives, whose actions were the subject of an instruction one hour beforehand and was not dissimilar for the breach two years earlier for which the whole team had been retrained and which had been the subject of a regular update or reminder within work groups and where he, too, initially and briefly lied on two occasions when interviewed. Mr Portilla has considerably longer service than Mr Chomkhamsing and should be given credit for his safe working during that time. I therefore find that Mr Portilla's dismissal was unfair by reason of the more lenient treatment given to Mr Chomkhamsing.

240 I turn to consider the relief to be ordered. The appellant argues for Mr Portilla's reinstatement. In his evidence, Mr Portilla expressed his regret for what occurred and said he hoped to have another chance. By s.23A(3) the Commission may order the employer to reinstate the employee to the employee's former position on conditions at least as favourable as the conditions on which the employee was employed immediately before dismissal.

241 The decision whether or not to reinstate Mr Portilla is an exercise of discretion. I take into account his length of service; twenty-seven years is a considerable period of time. During that time, and to a period four months prior to his dismissal, there is no suggestion that Mr Portilla was other than a good and satisfactory employee. He was not primarily at fault in his first safety incident four months before he was dismissed and he demonstrated a safety awareness on that occasion even if it was inadequate. The conduct for which he was dismissed, while not quite a single act, cannot be fairly described as a pattern over the time of his employment.

242 The evidence of Mr Sproule at [89] of his statement of evidence and when cross-examined at page 139 of the transcript, of Mr Swinnerton at [135] and [136] and of Mr Cook at [56] contain a common theme: Mr Portilla showed a lack of awareness of safety and may possibly be involved in a serious incident again; they lacked confidence in him and he would require constant and permanent supervision.

243 This evidence, however, is to be seen in context. While I understand the sentiment given Mr Portilla's conduct, I note that there was not the same reservation in BHPB in relation to Mr Chomkhamsing who, to a greater extent, showed a lack of awareness of safety and who may possibly be involved in a serious incident again. Any lack of confidence in Mr Chomkhamsing was not such that he should be dismissed. I conclude that the reservations in the evidence referred to above similarly are not sufficient to lead to the conclusion that, after 27 years' employment, there cannot again be a proper working relationship between Mr Portilla and BHPB. As to whether he would require constant and permanent supervision, I note the evidence that Mr Portilla's employment as a bulldozer driver means that he is not directly supervised. Given that BHPB has now made a rule regarding not walking on the stockpile, and Mr Portilla's experience of having been dismissed for doing so, there is room for doubt that constant and permanent supervision will be required.

244 BHPB's lack of confidence also relates to the fact that Mr Portilla lied during his interview. It is important that his employer has trust in him. The finding that Mr Portilla lied during the hearing is a relevant consideration. Mr Portilla's lying, which cannot be condoned by the Commission, is nevertheless to be seen in context. This is not dishonesty of the type considered in *Concut Pty Ltd v Worrell* [2000] HCA 64; (2000) 75 ALJR 312 where an employee used his employer's property for his own private purposes. The facts of this matter are very different (compare the similar observation of Scott J about *Concut* when His Honour referred to it in the context of Mr Robinson's conduct in *BHP Billiton Iron Ore Pty Ltd v CFMEU* [2002] WASCA 172; 82 WAIG 1188 at [37] and following).

245 Nor was Mr Portilla's conduct within the category of acts of dishonesty or similar conduct found by the Full Bench to be destructive of mutual trust between employer and employee in *Sargant v Lowndes Lambert Australia Pty Ltd* (2001) 81 WAIG 1149 at [98] to which BHPB referred the Full Bench.

246 The context also includes the latitude that was given by BHPB to Mr Chomkhamsing's lying. Mr Portilla panicked when questioned and lied in order to preserve his job. Mr Chomkhamsing also lied. Mr Portilla subsequently found it difficult to recant from his original lie. Mr Chomkhamsing did not. While Mr Portilla's conduct is unacceptable, it is also understandable: Mr Portilla did not want to lose his job of 27 years. The words of Lord Maugham (in *Jupiter General Insurance v Shroff* (op. cit. at p.74) which were said in a different context) that one must apply the standards of men and not those of angels, are not inappropriate here also. While I do not make light of Mr Portilla's conduct, in the context of Mr Chomkhamsing also having lied, although for a lesser length of time, of Mr Portilla's 27 years' service and given his

proficiency as a bulldozer driver and his complete familiarity with the work that he has done on the stockpile, and in the context of Mr Chomkhamsing not having been dismissed, the equity and substantial merits of the matter lead me to conclude that Mr Portilla should be reinstated.

247 I agree with the order to issue.

THE PRESIDENT:

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

Order accordingly

2005 WAIRC 02617

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GONZALO PORTILLA
	APPELLANT
	-and-
	BHP BILLITON IRON ORE PTY LTD
	RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
DATE	TUESDAY, 13 SEPTEMBER 2005
FILE NO/S	FBA 8 OF 2005
CITATION NO.	2005 WAIRC 02617

Decision	Appeal upheld and decision at first instance varied
Appearances	
Appellant	Mr D H Schapper (of Counsel), by leave
Respondent	Mr A D Lucev (of Counsel), by leave, and with him Mr A G Rollnik (of Counsel), by leave

Order

This appeal having come on for hearing before the Full Bench on the 23rd and 24th days of August 2005, and having heard Mr D H Schapper (of Counsel), by leave, on behalf of the appellant and Mr A D Lucev (of Counsel), by leave, and with him Mr A G Rollnik (of Counsel), by leave, on behalf of the respondent, and the Full Bench having heard and determined the matter, and reasons for decision having been delivered on the 13th day of September 2005, it is this day, the 13th day of September 2005, ordered and declared that the order made at first instance by the Commission in application No 1656 of 2004 on the 5th day of July 2005 be and is hereby varied as follows:-

(1) By deleting the order to dismiss the said application.

(2) By substituting □herefore the following declaration and order:-

"(1) THAT the above-named respondent, BHP Billiton Iron Ore Pty Ltd, did harshly, oppressively or unfairly dismiss Gonzalo Portilla on the 2nd day of December 2004.

(2) THAT the above-named respondent, BHP Billiton Iron Ore Pty Ltd, do reinstate the said Gonzalo Portilla without loss of remuneration in the job from which he was dismissed namely Mine Worker – Plant Operator as and from the 2nd day of December 2004.

(3) THAT the above-named respondent, BHP Billiton Iron Ore Pty Ltd, do pay the said Gonzalo Portilla all the remuneration lost by him as a result of his unfair dismissal, within 14 days of the date hereof.

(4) THAT in the event that an amount cannot be agreed by the parties, then there shall be liberty to apply within seven days of the date hereof, by either party on written notice to the Commission and the other party, for an order fixing the quantum of remuneration lost ordered to be paid to the said Gonzalo Portilla."

By the Full Bench

(Sgd.) P J SHARKEY,
President.

[L.S.]

FULL BENCH—Procedural Directions and Orders—

2005 WAIRC 02597

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DINO PAUL SEBASTIAN TOMASI
	APPELLANT
	-and-
	PUBLIC TRANSPORT AUTHORITY
	RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY SENIOR COMMISSIONER J F GREGOR COMMISSIONER S M MAYMAN
DATE	MONDAY, 12 SEPTEMBER 2005
FILE NO/S	FBA 31 OF 2004
CITATION NO.	2005 WAIRC 02597

Decision	Appeal dismissed
Appearances	
Appellant	No appearance by or on behalf of the appellant
Respondent	Mr R Bathurst (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on the 12th day of September 2005, and notice of these proceedings having been given to both parties on the records of the Commission, and there being no appearance by or on behalf of the appellant, and Mr R Bathurst (of Counsel), by leave, having been heard on behalf of the respondent,

AND WHEREAS the Full Bench was satisfied that the appellant had been duly served with the notice of the proceedings on the 1st day of September 2005 and proceeded to hear and determine the matter in the absence of the appellant pursuant to s27(1)(d) of the *Industrial Relations Act* 1979 (as amended) ("*the Act*");

AND WHEREAS no steps were taken by the appellant to prosecute the appeal after the 23rd day of September 2004;

AND WHEREAS no steps were taken in the appeal proceedings after the 23rd day of September 2004 when a declaration of service of an application to amend the notice of appeal herein was served on the respondent;

AND WHEREAS the appellant did not oppose the motion by the respondent that the appeal herein be dismissed;

AND WHEREAS no prejudice to the appellant was established;

AND WHEREAS there was an inordinate delay in the prosecution of the appeal which was unexplained;

AND WHEREAS it was open to the Full Bench to find and the Full Bench found that it was due to the appellant's own actions that the delay occurred;

AND WHEREAS it was not established that the appeal had any merit;

AND WHEREAS the Full Bench found that there would be no prejudice to the appellant if the appeal were now dismissed and prejudice to the respondent if an appeal were permitted to proceed so long after it was instituted;

AND WHEREAS it is in the public interest and in accordance with the objects of *the Act* that the appeal be dealt with expeditiously and this appeal was not;

AND WHEREAS the Full Bench found that the equity, good conscience and the substantial merits of the case therefore lay with the respondent;

AND WHEREAS the Full Bench also found that the interests of the respondent should prevail pursuant to s26(1)(c) of *the Act*;

AND WHEREAS power is vested in the Commission pursuant to s27(1)(a)(ii) and s49 of *the Act* to dismiss the appeal;

AND WHEREAS the Full Bench determined that the appeal should be dismissed for want of prosecution, no steps having been taken since the 23rd day of September 2004;

AND WHEREAS after the Full Bench had risen at 9.15am on the 12th day of September 2005 a person purporting to be the appellant telephoned the Commission to seek an adjournment;

AND WHEREAS a Deputy Registrar of the Commission caused to be forwarded by courier to the last known address of the appellant a letter informing him that unless by 5.00pm on the 12th day of September 2005 an application to reopen the proceedings had been filed, served and its service proven by declaration, an order would issue, and the appellant not having done any of those things;

AND WHEREAS no such application has been filed;

AND the Full Bench having determined that the appeal should be dismissed, it is this day, the 12th day of September 2005, ordered that appeal No FBA 31 of 2004 be and is hereby dismissed.

By the Full Bench

(Sgd.) P J SHARKEY,
President.

[L.S.]

COMMISSION IN COURT SESSION—Matters dealt with—

2005 WAIRC 02714

METAL TRADES (GENERAL) AWARD 1966

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	(COMMISSION'S OWN MOTION)
	APPLICANT
	-v-
	DARDANUP BUTCHERING CO AND OTHERS
	RESPONDENTS
CORAM	CHIEF COMMISSIONER A R BEECH SENIOR COMMISSIONER J F GREGOR COMMISSIONER J H SMITH
HEARD	FRIDAY, 16 JANUARY 2004, TUESDAY, 16 MARCH 2004, TUESDAY, 30 MARCH 2004, TUESDAY, 6 APRIL 2004, WEDNESDAY, 14 APRIL 2004, THURSDAY, 15 APRIL 2004
DELIVERED	WEDNESDAY, 28 SEPTEMBER 2005
FILE NO.	APPL 44 OF 2004
CITATION NO.	2005 WAIRC 02714

Catchwords	Award Review – Commission in Court Session – Retirement of member before proceedings concluded – Reconstitution of Commission - Parallel proceedings occurring – Industrial Relations Act 1979 (WA) s.27(1)(a)(iv)
Result	Hearing discontinued
Representation	
	Mr P Wilding on behalf of the Minister for Consumer and Employment Protection
	Ms C Ozich (as Counsel) on behalf of the Trades and Labour Council
	Mr A Caccamo on behalf of the Australian Mines and Metals Association
	Mr G R Blyth on behalf of the Chamber of Commerce and Industry of Western Australia acting in its capacity under s 40B(2)
	Mr T Pope on behalf of the Shop, Distributor's and Allied Employees' Association of Western Australia
	Mr L Edmonds on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch
	Ms J Freeman on behalf of the Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch
	Mr P G Robertson on behalf of employers bound by the Cleaners' and Caretakers' Award, Cleaners, Contract Cleaners Award 1986, and the Contract Cleaners (Ministry of Education) Award 1990 and the Bakers' (Metropolitan) Award 1987, and Pastry Cooks' Award 1981
	Mr M Borlase on behalf employers bound by the Metal Trades (General) Award 1966
	Ms N Thomson on behalf of employers bound by the provisions of the Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977
	Mr L Joyce on behalf of employers bound by the provisions of the Children's Services (Private) Award
	Mr P Moss on behalf of employers who are bound by the Clerks', (Commercial, Social and Professional Services) Award and the Clerks (Wholesale and Retail Establishments) Award
	Ms M Kuhne on behalf of employers bound by the Hospital Salaried Officers (Nursing Homes) Award 1976, Enrolled Nurses and Nursing Assistants (Private) Award No 8 of 1978, Hospital Salaried Officers (Private Hospitals) Award 1980, Aged and Disabled Persons Hostels Award 1987, Hospital Salaried Officers (Silver Chain) Award 1980 and the Private Hospital Employees' Award 1972
	Ms S Thorp on behalf of employers bound by the Restaurant, Tearoom and Catering Workers' Award, 1979, Hotel and Tavern Workers' Award, 1978 and the Clerks' (Hotels, Motels and Clubs) Award 1979

Reasons for Decision

1 Following the issuance of the Statement in this matter [2004] WAIRC 12690; (2004) 84 WAIG 2739, the proceedings were adjourned to allow the parties to consider their respective positions. The Statement served the purpose of providing to the parties an outline of the Commission's likely position in respect of each of the elements of s.40B for the purposes of application to the awards to which they are party. This gave an opportunity to the parties to the four awards the subject of this application to consider their positions in relation to the Statement and take the initiative to apply for variations to the awards to reflect the Commission's views expressed in the Statement.

2 It is a matter of record that Chief Commissioner W S Coleman retired on 30 November 2004. The now Senior Commissioner J F Gregor has been appointed to this Commission in Court Session and the parties have been requested to advise the Commission in Court Session in writing their views whether or not it is appropriate for the Commission in Court Session to continue to deal with this application.

3 All parties who responded to the Commission in Court Session's request expressed the view that the application should not proceed any further and it should be discontinued.

4 We have taken those views into account. We also note that the Commission has of its own motion created two separate applications to review the *Metal Trades (General) Award 1966* and the *Cleaners and Caretakers' Award No. 12 of 1969* in Applications 555 and 556 of 2005 respectively. The Commission considers it appropriate in the circumstances of this matter, particularly where there are now separate and parallel proceedings in relation to two of the four awards the subject of this application, to discontinue the hearing of this application. An Order to that effect now issues which discontinues the application by discontinuing each of the four parts into which it was divided.

2005 WAIRC 02716

CHILDREN'S SERVICES (PRIVATE) AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	(COMMISSION'S OWN MOTION)
	APPLICANT
	-v-
	DARDANUP BUTCHERING CO AND OTHERS
	RESPONDENTS
CORAM	CHIEF COMMISSIONER A R BEECH SENIOR COMMISSIONER J F GREGOR COMMISSIONER J H SMITH
DATE	WEDNESDAY, 28 SEPTEMBER 2005
FILE NO/S	APPLB 44 OF 2004
CITATION NO.	2005 WAIRC 02716

Result	Hearing discontinued
Representation	

Mr P Wilding on behalf of the Minister for Consumer and Employment Protection

Ms C Ozich (of counsel) on behalf of the Trades and Labor Council

Mr A Caccamo on behalf of the Australian Mines and Metals Association

Mr G R Blyth on behalf of the Chamber of Commerce and Industry of Western Australia acting in its capacity under s 40B(2)

Mr T Pope on behalf of the Shop, Distributive and Allied Employees' Association of Western Australia

Mr L Edmonds on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch

Ms J Freeman on behalf of the Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch

Mr P G Robertson on behalf of employers bound by the Cleaners' and Caretakers' Award, Contract Cleaners Award 1986, Contract Cleaners (Ministry of Education) Award 1990, Bakers' (Metropolitan) Award 1987 and the Pastry Cooks' Award 1981

Mr M Borlase on behalf employers bound by the Metal Trades (General) Award 1966

Ms N Thomson on behalf of employers bound by the Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977

Mr L Joyce on behalf of employers bound by the Children's Services (Private) Award

Mr P Moss on behalf of employers bound by the Clerks', (Commercial, Social and Professional Services) Award and the Clerks (Wholesale and Retail Establishments) Award

Ms M Kuhne on behalf of employers bound by the Hospital Salaried Officers (Nursing Homes) Award 1976, Enrolled Nurses and Nursing Assistants (Private) Award No 8 of 1978, Hospital Salaried Officers (Private Hospitals) Award 1980, Aged and Disabled Persons Hostels Award 1987, Hospital Salaried Officers (Silver Chain) Award 1980 and the Private Hospital Employees' Award 1972

Ms S Thorp on behalf of employers bound by the Restaurant, Tearoom and Catering Workers' Award 1979, Hotel and Tavern Workers' Award 1978 and the Clerks' (Hotels, Motels and Clubs) Award 1979

Order

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

THAT this hearing be discontinued.

(Sgd.) A R BEECH,
[L.S.] Commission In Court Session.

2005 WAIRC 02717

CLEANERS AND CARETAKERS AWARD 1969

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION (COMMISSION'S OWN MOTION) **APPLICANT**
	-v-
	DARDANUP BUTCHERING CO AND OTHERS **RESPONDENTS**
CORAM	CHIEF COMMISSIONER A R BEECH SENIOR COMMISSIONER J F GREGOR COMMISSIONER J H SMITH
DATE	WEDNESDAY, 28 SEPTEMBER 2005
FILE NO/S	APPLC 44 OF 2004
CITATION NO.	2005 WAIRC 02717

Result	Hearing discontinued
Representation	
	Mr P Wilding on behalf of the Minister for Consumer and Employment Protection
	Ms C Ozich (of counsel) on behalf of the Trades and Labor Council
	Mr A Caccamo on behalf of the Australian Mines and Metals Association
	Mr G R Blyth on behalf of the Chamber of Commerce and Industry of Western Australia acting in its capacity under s 40B(2)
	Mr T Pope on behalf of the Shop, Distributive and Allied Employees' Association of Western Australia
	Mr L Edmonds on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch
	Ms J Freeman on behalf of the Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch
	Mr P G Robertson on behalf of employers bound by the Cleaners' and Caretakers' Award, Contract Cleaners Award 1986, Contract Cleaners (Ministry of Education) Award 1990, Bakers' (Metropolitan) Award 1987 and the Pastry Cooks' Award 1981
	Mr M Borlase on behalf employers bound by the Metal Trades (General) Award 1966
	Ms N Thomson on behalf of employers bound by the Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977
	Mr L Joyce on behalf of employers bound by the Children's Services (Private) Award
	Mr P Moss on behalf of employers bound by the Clerks', (Commercial, Social and Professional Services) Award and the Clerks (Wholesale and Retail Establishments) Award
	Ms M Kuhne on behalf of employers bound by the Hospital Salaried Officers (Nursing Homes) Award 1976, Enrolled Nurses and Nursing Assistants (Private) Award No 8 of 1978, Hospital Salaried Officers (Private Hospitals) Award 1980, Aged and Disabled Persons Hostels Award 1987, Hospital Salaried Officers (Silver Chain) Award 1980 and the Private Hospital Employees' Award 1972
	Ms S Thorp on behalf of employers bound by the Restaurant, Tearoom and Catering Workers' Award 1979, Hotel and Tavern Workers' Award 1978 and the Clerks' (Hotels, Motels and Clubs) Award 1979

Order

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

THAT this hearing be discontinued.

(Sgd.) A R BEECH,
[L.S.] Commission In Court Session.

2005 WAIRC 02715

METAL TRADES (GENERAL) AWARD 1966

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	(COMMISSION'S OWN MOTION)
	APPLICANT
	-v-
	DARDANUP BUTCHERING CO AND OTHERS
	RESPONDENTS
CORAM	CHIEF COMMISSIONER A R BEECH SENIOR COMMISSIONER J F GREGOR COMMISSIONER J H SMITH
DATE	WEDNESDAY, 28 SEPTEMBER 2005
FILE NO/S	APPLA 44 OF 2004
CITATION NO.	2005 WAIRC 02715

Result	Hearing discontinued
Representation	
	Mr P Wilding on behalf of the Minister for Consumer and Employment Protection
	Ms C Ozich (of counsel) on behalf of the Trades and Labor Council
	Mr A Caccamo on behalf of the Australian Mines and Metals Association
	Mr G R Blyth on behalf of the Chamber of Commerce and Industry of Western Australia acting in its capacity under s 40B(2)
	Mr T Pope on behalf of the Shop, Distributive and Allied Employees' Association of Western Australia
	Mr L Edmonds on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch
	Ms J Freeman on behalf of the Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch
	Mr P G Robertson on behalf of employers bound by the Cleaners' and Caretakers' Award, Contract Cleaners Award 1986, Contract Cleaners (Ministry of Education) Award 1990, Bakers' (Metropolitan) Award 1987 and the Pastry Cooks' Award 1981
	Mr M Borlase on behalf employers bound by the Metal Trades (General) Award 1966
	Ms N Thomson on behalf of employers bound by the Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977
	Mr L Joyce on behalf of employers bound by the Children's Services (Private) Award
	Mr P Moss on behalf of employers bound by the Clerks', (Commercial, Social and Professional Services) Award and the Clerks (Wholesale and Retail Establishments) Award
	Ms M Kuhne on behalf of employers bound by the Hospital Salaried Officers (Nursing Homes) Award 1976, Enrolled Nurses and Nursing Assistants (Private) Award No 8 of 1978, Hospital Salaried Officers (Private Hospitals) Award 1980, Aged and Disabled Persons Hostels Award 1987, Hospital Salaried Officers (Silver Chain) Award 1980 and the Private Hospital Employees' Award 1972
	Ms S Thorp on behalf of employers bound by the Restaurant, Tearoom and Catering Workers' Award 1979, Hotel and Tavern Workers' Award 1978 and the Clerks' (Hotels, Motels and Clubs) Award 1979

Order

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

THAT this hearing be discontinued.

(Sgd.) A R BEECH,
[L.S.] Commission In Court Session.

2005 WAIRC 02718

SHOP AND WAREHOUSE (WHOLESALE AND RETAIL ESTABLISHMENTS) STATE AWARD 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	(COMMISSION'S OWN MOTION)
	APPLICANT
	-v-
	DARDANUP BUTCHERING CO AND OTHERS
	RESPONDENTS
CORAM	CHIEF COMMISSIONER A R BEECH SENIOR COMMISSIONER J F GREGOR COMMISSIONER J H SMITH
DATE	WEDNESDAY, 28 SEPTEMBER 2005
FILE NO/S	APPLD 44 OF 2004
CITATION NO.	2005 WAIRC 02718

Result	Hearing discontinued
Representation	
	Mr P Wilding on behalf of the Minister for Consumer and Employment Protection
	Ms C Ozich (of counsel) on behalf of the Trades and Labor Council
	Mr A Caccamo on behalf of the Australian Mines and Metals Association
	Mr G R Blyth on behalf of the Chamber of Commerce and Industry of Western Australia acting in its capacity under s 40B(2)
	Mr T Pope on behalf of the Shop, Distributive and Allied Employees' Association of Western Australia
	Mr L Edmonds on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch
	Ms J Freeman on behalf of the Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch
	Mr P G Robertson on behalf of employers bound by the Cleaners' and Caretakers' Award, Contract Cleaners Award 1986, Contract Cleaners (Ministry of Education) Award 1990, Bakers' (Metropolitan) Award 1987 and the Pastry Cooks' Award 1981
	Mr M Borlase on behalf employers bound by the Metal Trades (General) Award 1966
	Ms N Thomson on behalf of employers bound by the Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977
	Mr L Joyce on behalf of employers bound by the Children's Services (Private) Award
	Mr P Moss on behalf of employers bound by the Clerks', (Commercial, Social and Professional Services) Award and the Clerks (Wholesale and Retail Establishments) Award
	Ms M Kuhne on behalf of employers bound by the Hospital Salaried Officers (Nursing Homes) Award 1976, Enrolled Nurses and Nursing Assistants (Private) Award No 8 of 1978, Hospital Salaried Officers (Private Hospitals) Award 1980, Aged and Disabled Persons Hostels Award 1987, Hospital Salaried Officers (Silver Chain) Award 1980 and the Private Hospital Employees' Award 1972
	Ms S Thorp on behalf of employers bound by the Restaurant, Tearoom and Catering Workers' Award 1979, Hotel and Tavern Workers' Award 1978 and the Clerks' (Hotels, Motels and Clubs) Award 1979

Order

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

THAT this hearing be discontinued.

(Sgd.) A R BEECH,
[L.S.] Commission In Court Session.

AWARDS/AGREEMENTS—Application for—

2005 WAIRC 02297

PROSPECTOR AND AVONLINK ON TRAIN CUSTOMER SERVICE OFFICERS AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	DELRON CLEANING PTY LTD TRADING AS "DELRON HOSPITALITY MANAGEMENT"
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	FRIDAY, 5 AUGUST 2005
FILE NO.	A 10 OF 2003
CITATION NO.	2005 WAIRC 02297

CatchWords	New Award - Relevant principles to be applied - Principle 11 - Statement of Principles June 2005 - Whether award to apply to award free work - Common Rule Award made to apply to On Train Customer Service Officers - *Industrial Relations Act 1979* (WA) s 6(af), (c), (ca) and (d); s 26(1)(a), (c), (d)(iii) and (d)(vi); s 36A; s 37(1); s 40; s 40B; s 48A; s 49H; s 49I; s 49N.
Result	New award made.
Representation	
Applicant	Mr G Ferguson
Respondent	Mr P Robertson (as agent on behalf of the Respondent)

Reasons for Decision

1 The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch ("the Union") makes an application under s 36A of the *Industrial Relations Act 1979* ("the Act") for a new award which it says is to apply to employees to whom no award currently extends. The terms of the award sought by the Union are to apply to persons that it refers to as Passenger Assistants and the Respondent refers to as Customer Service Officers engaged in the provision of customer service on rail services between Perth and Kalgoorlie, known as the Prospector Rail Service ("the Prospector"), and between Perth and Northam, known as the AvonLink Service. It is common ground that insofar as the award is sought to apply to the AvonLink Service it will also apply to the Merredin Shopper Service, which forms part of the AvonLink Service, which runs between Perth and Merredin. The terms of the award are to operate as a common rule award. There is currently only one employer who employs Customer Service Officers on these rail services and that is Delron Cleaning Pty Ltd trading as Delron Hospitality Management ("the Respondent"). As the current title of the employees in question in this matter is Customer Service Officers and Senior Customer Service Officers I shall refer to them by those titles in these reasons for decision.

2 Although the Respondent does not oppose the making of an award by this Commission, the terms of the award sought by the Respondent are in some material respects substantially different to terms sought by the Union. The Respondent contends that the terms of the award sought by either party do not extend to employees to whom no award currently extends. The Respondent contends that the terms of the *Restaurant, Tearoom and Catering Workers' Award 1979 No. R 48 of 1978* apply to the employees in question. Alternatively, it says that the terms of the *Hotel and Tavern Workers' Award 1978 No. R 31 of 1977* apply to the Customer Service Officers. Further it says any award made by the Commission in this matter should reflect the classification structure found in those awards.

Background

3 The Respondent has provided on-train customer services to TransWA on the Prospector and AvonLink Services since Westrail first called for tenders for the contract in the mid 1990s. It is common ground that prior to the work being contracted out by the Western Australian Government Railway Commission ("Westrail") the terms of employment of persons employed to provide on-train customer services were regulated by the *Railway Employees' Award No. 18 of 1969* ("the REA Award") as the employees who provided the services in question were employed by Westrail. The Government, however, has not contracted out on-train services on the Australind. Consequently the terms and conditions of employees who provide on-train services on the Australind continue to be covered by the REA Award.

4 The Respondent first won the contract in August 1997 to provide on-train services on the Prospector and AvonLink Service and has continued to retain the contract following a partial re-tender and a full re-tender on another occasion. The partial re-tender in 1997 occurred after wage increases handed down by this Commission. At the beginning of 2001 Westrail's State urban rail and country passenger functions were vested in the Public Transport Authority ("the PTA") and its regional rail services began operating through TransWA. The application for a new award in this matter was filed by the Union on 18 November 2003. The Respondent was the preferred tenderer and formally re-tendered for the contract in approximately October 2003. The tender the Respondent submitted in October 2003 took account of new trains and new timetables coming on line for the Prospector and for the AvonLink Services. During the tender process the Respondent was required to submit tenders to TransWA in competition with other tenderers. The Respondent became the successful tenderer in March 2004.

5 When submitting a tender the Respondent was free to use any instrument they chose to regulate the terms and conditions of employment of their employees. The Union seeks that the Commission issue a new award that substantially reflects the provisions of the REA Award. It says that it will provide for an "even playing field" in the industry. Further it says that the tendering out of work by Government should not be based upon the reduction of employees' wages in the rail industry.

6 The Respondent says that after making enquiries through various organisations including the Chamber of Commerce and Industry it was advised that the relevant award to apply to the work in question was the *Restaurant, Tearoom and Catering Workers' Award*. Since 1997 the Respondent says it has applied either the terms of the *Restaurant, Tearoom and Catering Workers' Award* or terms and conditions through individual Workplace Agreements or through Federal Australian Workplace

Agreements which do not disadvantage the employees in relation to which they would otherwise receive under the the *Restaurant, Tearoom and Catering Workers' Award.* Mr Ron Doughty, the Respondent's Managing Director, says that the Respondent does not object to properly set rates of pay using the minimum rates adjustment process. In particular, he points out that the *Hotel and Tavern Workers' Award,* which reflects the same classifications and rates of pay as the *Restaurant, Tearoom and Catering Workers' Award* has already been through the minimum rates adjustment process.

7 The contract the Respondent has with the PTA requires the Respondent to supply staff to man the AvonLink Service and Prospector, to supply the customers with food and articles from a buffet and generally look after the wellbeing of customers. This includes assisting passengers to board, depart and to assist them with their luggage.

8 Customer Service Officers do not prepare any food, it is all pre-prepared. Purchasing is part of the contract that the Respondent has with the PTA. There is a buffet on each train. The staff man the buffet and sell soft drinks, alcohol and food. The Respondent has contractors that supply food and beverages to the respective stations prior to the train's departure. It is the Respondent's responsibility to receive and store the items in their storerooms. The storerooms have fridges and freezers where they keep meals, food, beverages and other goods. Porters employed by the Respondent get food ready and put it in trolleys, and deliver it to the train for the on-train staff. The porters then take supplies off the trolley and put it in the buffet for the staff, and the on-board staff then put it away in the fridges on board the train.

9 In relation to luggage, before the new Prospector trains came on-line, passengers had to load their own luggage on board the trains. Since October 2004 TransWA requires the Respondent to provide porters in Perth and in Kalgoorlie. The porters can store all passenger luggage although passengers are still responsible for their own hand luggage. The Customer Service Officers assist elderly people, pregnant women, mothers with children and disabled people with their luggage at intermediate stations, for example Midland is an intermediate station between Perth and Kalgoorlie, as is Tammin, Meckering, Kellerberrin. At every station on the Prospector line the Senior Customer Service Officer together with one of the other Customer Service Officers greets passengers and assists them to depart. The Senior Customer Service Officer then locks the door and notifies the driver that the train can depart.

10 Usually the only staff apart from the Respondent's employees on each train is an engine driver who is employed by the PTA. The number of the Respondent's employees on each train varies depending on how many carriages are on the train. On the Prospector there is a spare driver between Perth and Merredin and Merredin return. When there is only one driver on the train during the course of the journey the driver does not leave the driver's seat, so if any matters arise which require a person to leave the train and attend to operation of the train such as setting of signals on the line, these duties must be carried out by the Senior Customer Service Officer on the Prospector and the Customer Service Officer on the AvonLink Service under the direction of the driver.

The Evidence

11 Both the Union and the Respondent called witnesses to give evidence on their behalf. The witnesses substantially gave their evidence in chief in written witness statements. It is common ground that the Respondent employs a total of 17 Customer Service Officers and each is employed in a part-time capacity. Customer Service Officers who work on the Prospector are usually rostered each week to work as a Senior Customer Service Officer.

12 The Union called four employees of the Respondent to give evidence. Each one is employed in a part-time capacity as a Customer Service Officer. The Respondent also called two employees who work for the Respondent as Customer Service Officers. Customer Service Officers Ms Jade Rose, Ms Pauline Holmes, Ms Jo Easterbrook and Ms Keryn Calder gave evidence on behalf of the Union and Ms Sandra Jones and Ms Corrine Catalano gave evidence on behalf of the Respondent. Mr Rocco Catalano, the Respondent's Contracts Manager, Mr Doughty, the Respondent's Principal and Mr Stanley Burke, the Respondent's Manager of Corporate Services, gave evidence on behalf of the Respondent. Mr Catalano is responsible for communicating with TransWA representatives about on-train services. On a day-to-day basis he deals with the TransWA train co-ordinator regarding what train is working out of Perth on the Prospector line, what train is working out of Kalgoorlie, any faults on the trains and general business about the running of the trains daily. Mr Catalano is told of the staff number changes by TransWA and the Respondent has to fit in with TransWA's requirements.

13 The Commission conducted an inspection of the Prospector on Tuesday, 18 May 2005 whereby the roles of Customer Service Officers and the Senior Customer Service Officer were observed prior to departure from the East Perth Terminal and during the journey to a point on the track north of Merredin and return to East Perth Terminal. During the inspection the Commission spoke to the driver of the railcar and observed the procedure when the two Customer Service Officers, who travelled from Perth to Merredin together with the engine driver, detrained the Prospector travelling east cross the track and boarded the Prospector travelling west where they continued their shift back to Perth.

(a) Rosters

14 TransWA advises Mr Catalano a week in advance (Wednesday of the week before) what staff is needed on each train and the number of carriages that are going to be on each train. The roster is posted on Thursday or Friday of each week. The number of staff required and the number of carriages on each train is dependent upon the number of passengers booked for the next week. As a rule of thumb a two-car set on the Prospector requires three staff and a three-car set requires four staff. Mr Catalano says TransWA's requirements for staff used to change regularly when they ran the old Prospector (prior to June 2004) because of the different arrangements of the trains, but since the new Prospector has been running, staff requirements have become more stable. Now TransWA has three new Prospector trains available. TransWA is currently running a three-car set between Kalgoorlie and Perth on Mondays, Fridays and Saturdays. Consequently, the Respondent only needs full staff on these days. The Respondent is not able to negotiate with TransWA over roster changes.

15 Because TransWA provides information to the Respondent each week as to how many railcars will be used on the services and how many Customer Service Officers are required for each of the services, a weekly roster is drawn up. However, the parties agree that for flexibility it would be appropriate that rosters be posted for a two weekly period. Further, the Respondent at the time of the hearing was currently investigating a proposal to introduce a seven week dropdown roster.

16 Despite being notified on Wednesday before the roster commences Mr Catalano sometimes has to change the rosters at short notice. This may occur three or four times a week, or only every two to three weeks. Mr Catalano testified that in relation to the new Prospector he had looked at his rosters in the last month or so, and it appears he had to change the staff roster three times. As a general rule, he considers this to be an average occurrence for the new Prospector. Sometimes breakdowns result in TransWA using buses to transport passengers. When this occurs TransWA requires the Respondent's staff to be on the bus with the passengers. Sometimes in arrangement with TransWA changes occur everyday, but not always in a way that Mr Catalano has to change the roster.

17 Mr Catalano says that when setting the roster, he tries to equalise hours for all employees. In particular he says he tries to give everybody a turn at having a weekend off and to spread the shifts evenly by giving most employees four shifts each a week. One or two might, however, have five shifts each. But if one person has five shifts one week, the next week he will give another person five shifts so over a period of a month the number of shifts each employee works evens out.

18 At the time of the hearing of this application each staff member did not know exactly what hours they were going to work from week to week until the roster is posted. However, the Respondent is looking at implementing a seven-week cycle, as a master roster with a seven-week rotation on a drop down roster. They have engaged a consultant to assist. If any extra staff are required on any particular day or staff need to be cut, then obviously Mr Catalano will need to make changes to the roster. It is anticipated however that a seven-week cycle will give the staff the ability to make plans for their days off within each seven-week cycle.

19 If a Customer Service Officer calls in sick or TransWA make an unexpected change that they have not notified Mr Catalano of, Mr Catalano's practice is to look at the roster to see who is free (not rostered on). He then telephones that person and asks them if they would like to work an extra shift. He testified that if that person cannot fill that shift for any reason he telephones someone else who is not rostered on.

20 In relation to the rostered hours of employment, Ms Rose and the other Customer Service Officers gave evidence on behalf of the Union stated in their witness statements as follows:

> "My hours of employment are not rostered on a regular weekly basis. My hours of employment range from as low as twenty-two –(22) hours a week to a high of forty –(40) hours per week and some times higher.
>
> I am normally required to work daily overtime of approximately 30 minutes per shift on average.
>
> My roster, setting out the days of the week my employer requires me to work, providing information on my commencement time and the expected completion time, is posted weekly, on a Thursday and occasionally on a Friday.
>
> Normally my start time would be X-Perth 6.10 a.m. –(Monday – Friday inclusive)
>
> My usual finish time would be R-Perth 1.30 p.m. –(Monday & Wednesday) 1.40 p.m. (Tuesday & Thursday) 1.30p.m.
>
> Normally my Saturday start time would be X-Perth 6.25 a.m. R-Perth 1.40 a.m. [sic]
>
> Normally my Sunday start time would be X-Perth 1.20 p.m. Kalgoorlie finish 9.15 pm.
>
> It would be of assistance to my self and family if my roster was posted providing a greater period of notice – two weeks in advance would be beneficial as it is very hard to organise family activities when you can not predict when you may be required to work.
>
> My roster can be changed on short notice – short notice being - on returning from a trip - and are advised you are required to work the following shift. This is very disruptive to my personal and family life style. I, like other workers feel compelled to work the additional un-rostered shift as advised by my employer. I and other workers are instructed to check the roster on a daily basis for changes.
>
> I am also required by my employer to be contactable and available to return to work when I am not rostered for duty- I receive no payment for being on call and my availability out of rostered hours of employment."

21 Similar comments were made by Ms Jones about her hours of work ex-Kalgoorlie who gave evidence on behalf of the Respondent. She did not, however, state how much overtime she regularly works but simply said that she is required to work overtime from time to time if the train is late. Her rostered start and finish times are as follows:

> "My start time on Monday to Friday am is ex Kalgoorlie 6.05 am Finish 1.40 pm
>
> Monday pm ex Kalgoorlie 1.55 pm Finish 10.15 pm
>
> Friday pm ex Kalgoorlie 2.20 pm Finish 10.15 pm
>
> Sunday pm ex Kalgoorlie 1.05 pm Finish 9.15 pm
>
> Saturday am ex Kalgoorlie 6.05 am Finish 2.00 pm."

Ms Jones also added that she is required to be contactable at all times because a shift may be cancelled and if she turns up to work when the Respondent has been unable to contact her to inform her shift has been cancelled she will not be paid. Mr Catalano testified if the Respondent has to cancel a shift at the last moment and there is insufficient time to contact the staff member concerned prior to reporting for work they pay the employee two hours' pay. When the employees work on the Prospector the person who is rostered to work as the Senior Customer Service Officer for the trip travels from Perth to Kalgoorlie, stays overnight and returns the following day as the Senior Customer Service Officer. However, the Customer Service Officers who travel on the Prospector from Perth to Merredin or from Kalgoorlie to Merredin change over to the other train with each engine driver when the Prospector travelling from Kalgoorlie reaches the same point on the track as the Prospector travelling from Perth. Employees who work on the Prospector are rostered to work seven days a week. The Prospector runs everyday of the year except for Christmas Day. The rostered hours of work, however, are different for the AvonLink Service. The AvonLink Service only runs Monday to Friday and does not run on public holidays. The following rosters in relation to the two services were tendered into evidence on behalf of the Respondent. Exhibits B and H provide:

PROSPECTOR ROSTER EX PERTH

PASSENGER SERVICES HOSTS WEEKLY ROSTER WEEKENDING 14-May-04[sic]																
ROSTER	SUNDAY		MONDAY		TUESDAY		WEDNESDAY		THURSDAY		FRIDAY		SATURDAY	
	08-May-05		09-May-05		10-May-05		11-May-05		12-May-05		13-May-05		14-May-05	
1 JADE			PER-MER-PER		PER-MER-PER		PERTH-KAL		KAL-PERTH		PER-MER-PER			
			6.10-1.30	7.25	6.10-1.40	7.5	6.10-1.30	7.25	6.05-1.40	7.5	2.40-9.50	7.25		
					BUFFET		SCO		SCO					

PASSENGER SERVICES HOSTS WEEKLY ROSTER WEEKENDING 14-May-04[sic]														
ROSTER	SUNDAY		MONDAY		TUESDAY		WEDNESDAY		THURSDAY		FRIDAY		SATURDAY	
	08-May-05		09-May-05		10-May-05		11-May-05		12-May-05		13-May-05		14-May-05	
2 JO	PERTH-KAL		KAL-PERTH		T-ACCESS		*7.45*				PERTH-KAL		KAL-PERTH	
	1.20-9.15	8	1.55-9.25	7.5	REFRESH		*AM*				6.10-1.30	7.25	6.05-1.40	7.5
	SCO		SCO		8-AM START		*MEDICAL*				SCO		SCO	
3 PAULINE	PER-MER-PER		PER-MER-PER				PER-MER-PER				PER-MER-PER		PER-MER-PER	
	1.20-9.15	8	6.10-1.30	7.25			6.10-1.30	7.25			6.10-1.30	7.25	6.25-1.40	7.25
	BUFFET												BUFFET	
4 CHAD			PER-MER-PER		PER-MER-PER				PER-MER-PER		PER-MER-PER			
			6.10-1.30	7.25	6.10-1.40	7.5			6.10-1.40	7.5	2.40-9.50	7.25		
			BUFFET								SCO			
5 DIXIE	PER-MER-PER		PER-MER-PER				PER-MER-PER				PER-MER-PER		PER-MER-PER	
	1.20-9.15	8	2.30-9.25	7			6.10-1.30	7.25			6.10-1.30	7.25	6.25-1.40	7.25
			BUFFET				BUFFET							
6 KERYN	PER-MER-PER		PER-MER-PER						PER-MER-PER		PER-MER-PER			
	1.20-9.15	8	2.30-9.25	7					6.10-1.40	7.5	2.40-9.50	7.25		
									BUFFET					
7 CORRINE			PERTH-KAL		KAL-PERTH						PER-MER-PER		PER-MER-PER	
			6.10-1.30	7.25	6.05-1.40	7.5					6.10-130	7.25	6.25-1.40	7.25
			SCO		SCO						BUFFET			
8 KATE											PER-MER-PER			
											2.40-9.50	7.25		
											BUFFET			
PLEASE NOTE…ROSTERS ARE SUBJECT TO CHANGE AT SHORT NOTICE														

AVONLINK – MERREDIN SHOPPER ROSTER

PASSENGER SERVICES HOSTS WEEKLY ROSTER WEEKENDING 21-May-05														
ROSTER	SUNDAY		MONDAY		TUESDAY		WEDNESDAY		THURSDAY		FRIDAY		SATURDAY	
	15-May-05		16-May-05		17-May-05		18-May-05		19-May-05		20-May-05		21-May-05	
LEAH		A-LINK-SHOPPER			A-LINK	A-LINK-SHOPPER			A-LINK	A-LINK-SHOPPER				
			6.15-2.40	8.25	AM	5	6.15-2.50	8.5	AM	5	6.15-2.35	8.25		
			AM				AM				AM			
KATE		SHOPPER-A-LINK			A-LINK	SHOPPER-A-LINK			A-LINK	SHOPPER-A-LINK				
			2.40-7.15	4.5	PM	6.25	2.50-7.15	4.5	PM	6.25	2.30-7.15	4.75		
			PM				PM							
PLEASE NOTE…ROSTERS ARE SUBJECT TO CHANGE AT SHORT NOTICE														

22 It is not in dispute between the parties that these rosters are a representative sample of the rosters that the employees are required to work.

23 It is apparent from the Prospector roster that the Customer Service Officers whose home base is in Perth usually spend from one to three nights in Kalgoorlie each fortnight and the Customer Service Officers, whose home base is in Kalgoorlie, spend between one to three nights in Perth.

24 It is apparent from the evidence given by all the witnesses in these proceeding that the rosters change on short notice because of passenger numbers and because of the change in requirements of TransWA which may result in Customer Service Officers working back to back shifts. Consequently, it is common ground that the Respondent requires that each one of the Customer Service Officers be contactable at all times so as to be contacted and asked if they are available to undertake an additional shift. They are also required to check the roster each day. One of the principal issues in dispute between the parties is whether the Respondent requires employees to work extra shifts or they are requested to work extra shifts.

25 Ms Rose testified that prior to the implementation of the new Prospector she had been informed by Mr Catalano she had to work an additional shift as there was no one else and she had to cancel her plans. She says this direction was given to her approximately three hours before the commencement of the additional shift. She also said on occasions she has not been available to work a shift, but she does not usually refuse extra work because she thinks she may be disadvantaged in terms of

the hours she is rostered, when times are quiet. Ms Rose did not say whether this had occurred but simply that Mr Catalano had given her the impression that if you do not take the hours you do not need the money that much, so when it is quieter you are not given as many hours. She also testified that on one occasion she left her mobile telephone at home, when she visited Mandurah. While away from home she missed a call from Mr Catalano, who later made it very plain to her that she was required to have her mobile telephone with her 24 hours a day. Similar evidence was given by Ms Holmes and Ms Calder on behalf of the Union. Ms Holmes testified that she had recently been required to work a shift straight after an evening shift. She said however that she is usually given the option whether she wishes to work an extra shift. Ms Calder said in particular, she feels that she cannot say no to an extra shift as she feels she would be letting the side down. She said she knows when she is asked there is no one else to do the shift because she would be a last resort as she has been on a return to work program for some time after having suffered a serious injury. Ms Catalano, on behalf of the Respondent, testified that she is always willing to take additional shifts and in fact works for the PTA as a Customer Service Officer on the Australind Service on her rostered days off.

26 Mr Catalano testified that the Respondent has eight staff based in Kalgoorlie, seven staff are based in Perth and two staff are based in Northam. He says that the Customer Service Officers are required to check the roster on a daily basis as the roster may change unexpectedly and the changes may need to be made to the roster whilst they are working on the train. He said that they often have a change to the rosters on a daily basis and when this is necessary employees are asked if they can work extra shifts and they can decline if they have prior arrangements or other things they have to do but most of the time his experience is that most Customer Service Officers say, "Yes".

(b) Recruitment and Training

27 When staff are recruited Mr Catalano places an advertisement in Saturday's The West Australian under the hospitality section asking for people with some experience in hospitality to apply. Once he receives written resumes he goes through them and picks out the ones that have the most experience. An appointment is made for an interview. During the interview process for a trainee Customer Service Officer, the job requirements, the offer of an Australian Workplace Agreement and the requirement to pass a medical examination for track access is explained. The passing of a medical is a TransWA requirement. After new employees pass the medical then they have to do a four and a half day course which gives them track access. This includes "electrical awareness" training. The Track Access Course is run for TransWA by a company called Skilled Rail in Guildford. The initial course is for four and a half days which is valid for three years. It is a requirement from TransWA that they have to pass. TransWA controls the content of the courses, and Skilled Rail delivers the courses. Staff are notified that they must pass and if they do not pass it does not necessarily mean they will not be employed. It means that they will need to do the course again. Only after passing the course will TransWA issue Track Access. Then they are allowed to work on a train. After three years employees must complete a one-day refresher course which includes employees having to re-do a medical examination. The Respondent pays for staff to attend the courses.

28 Once staff are able to work on the trains, they commence learning the job on a train. The Senior Customer Service Officer on the Prospector is responsible for training all new employees on the job. When training a new employee, the Respondent rosters extra staff on the train to allow new employees to familiarise themselves with the train, to see what the staff do, to ask questions, to see how they feel with the job, observe how they are to deal with passengers and how food is dealt with. Once they have demonstrated that they are competent and if they are happy to continue, they receive Senior First Aid training which takes two days and is run by Chubb. The Respondent also pays for employees to attend all courses, and for the cost of the courses. The First Aid Certificate needs to be renewed every two years. The Senior First Aid course is for two days. A Fire Extinguisher Course is also conducted by Chubb. That course runs for between two and three hours and a certificate is issued to employees if they successfully complete it. The Fire Extinguisher Course has to be refreshed every two years. Then there is a one-day Ticketing Course that is run by TransWA. It is recommended by TransWA that the Ticketing Course be repeated every 12-16 months. New employees also have to complete emergency evacuation procedure training. The emergency evacuation procedure is a written procedure that is issued to staff by TransWA. It is a controlled document, where in case of an emergency employees follow the procedure set for looking after their passengers and how to get them off the train, including what access to use. The emergency evacuation procedure training essentially is a two to three page procedure. Employees are required to read the procedure and familiarise themselves with the procedure by practising it.

29 All the Respondent's new staff are engaged on three months' probation. In those three months they cannot work as a Senior Customer Service Officer. After three months' probation the Respondent revisits their performance. If the performance of a new staff member is at least adequate they become on-train staff and they are rostered normal shifts along with other staff. It takes a Customer Service Officer usually 12 months to become a senior. During the first three months when they are on probation they are expected to become proficient in on-train work. There is also other training they may need to do which is not a requirement from TransWA, such as Customer Service Training. That is a two-day course which is run by the Respondent. Consequently, staff are rostered to take turns at being the Senior Customer Service Officer providing they are capable of doing so.

(c) Tasks, Duties and Responsibilities

30 Each Customer Service Officer who gave evidence on behalf of the Union and Ms Jones on behalf of the Respondent gave evidence that the tasks, duties and responsibilities of a Customer Service Officer are as follows:

* Prepare stock
* Prepare manifest
* Prepare drivers list
* Prepare float
* Board train and stow equipment
* Perform pre-departure check
* Organise Galley – putting stock away
* Greet on Board Passengers
* Depart Station
* Check manifest for changes
* Check drivers list with driver
* Open Buffet

* Make announcements
* Serve at buffet (hot beverages, foods, snacks, cold drinks including alcohol)
* Assist passengers with hot beverages and food depending on their capabilities – (in seat service)
* Board and detrain en route
* Assist with Luggage
* Rubbish collections
* Housekeeping
* Keep buffet clean and tidy
* Carriage checks
* Assist passengers with enquires
* Continuing serving passengers in buffet
* Continuing making announcements
* Stock takes – before and after trip. Between 10 to 50 minutes.
* Clean coffee machine
* Make up change float
* Close buffet
* Clean buffet
* Clear register
- Complete paperwork as required
- Assist with luggage (according to Passenger's capabilities)
- Disembark – Float in company safe – Manifest to Station Masters Office

Each Customer Service Officer commences work on the Prospector one hour before the departure of the train. Consequently the duties in first dot points are performed prior to the departure of the train. To cover the period of disembarkation and depositing of the float the Customer Service Officers who work on the Prospector are paid for 15 minutes after the train arrives at its final destination and Customer Service Officers who work on the AvonLink are paid for 10 minutes after the train reaches its final destination.

31 The differences in duties for on-train Customer Service Officers between the AvonLink and the Prospector relate primarily to days of trips and the duties required to be performed. On the AvonLink there is only one rail car and one Customer Service Officer.

32 The AvonLink runs five days a week, Monday to Friday, morning and afternoon. The service currently on the train is a buffet, but it is in-seat service. Passengers press the 'call' button and passengers are served in their seats with beverages including beverages containing alcohol and food. The maximum number of passengers the train can carry is 45. When the new AvonLink comes into service, there will be no buffet service. Staff will only be required to greet passengers and write out any tickets, if there are any tickets to be written out. If there is nothing to do they will be able to sit for the rest of the trip. For the AvonLink Service the Respondent employs two people who are Northam based and they run the AvonLink, unless one of them is sick or going on holidays. When that occurs the Perth crew help out on those duties. The staff for the AvonLink are separate from the staff on the Prospector. The staff on the AvonLink usually work the AvonLink and the staff on the Prospector usually work the Prospector. Mr Catalano only swaps staff between the AvonLink and the Prospector when there is a need to relieve someone on leave.

33 The new Prospector runs a buffet service. Except for Gold Service passengers it is not in-seat service of food or beverages. There is a menu in the back of each chair which tells the passengers what is available for purchase and the passengers go to the buffet to be served. In consideration to the elderly or disabled if they are unable to walk into the buffet the staff serve them in their seats. The Respondent always rosters one person as a buffet staff to work in the buffet and the other two staff walk up and down the train, do rubbish runs and help in the buffet. Of the other two staff, one is the Senior. If there are Gold Service passengers on the trip, the Senior is mainly responsible for them, but in between, the Senior helps out in the buffet and helps out with other duties. The buffet staff get a break when one of the other staff looks after the buffet.

34 Gold Service passengers are met by the Senior Customer Service Officer at the Gold Service lounge either at Perth or Kalgoorlie. The Senior assists those passengers to board ten minutes prior to departure and explains to them what Gold Service entails. The Senior Customer Service Officer then assists the Customer Service Officers who are boarding other passengers and get ready to lock and secure the doors. The Senior Customer Service Officer does a final check through the train before going to Gold Service. After they depart from Midland or 15 minutes out of Kalgoorlie the Senior Customer Service Officer takes drink orders from the Gold Service passengers and orders for morning/afternoon tea as well as their orders for lunch/dinner. The Senior Customer Service Officer serves the morning/afternoon teas to the Gold Service passengers and clears their trays and the same applies to their lunch/dinner. In between the Senior Customer Service Officer is responsible for the updating of the time of arrivals into Perth or Kalgoorlie. They are also responsible for everything that happens on the train including giving directions to the Customer Service Officers. At the end of the journey the Senior Customer Service Officer is responsible to make up the float and balance the takings. Once East Perth or Kalgoorlie is reached then it is the responsibility of the Senior Customer Service Officer to disembark the Gold Service passengers.

35 Mr Catalano prepares the floats and has them ready in the safe for the staff to get out of the safe. The Senior Customer Service Officer takes the float to the train, puts it in the till and at the end of the day the Customer Service Officers round off the till and put the float in a special bag and place it back in the safe with the paper work of takings. The Senior counts the till at the end of the day. It generally takes about five minutes. On the AvonLink, they also carry a float.

36 On the Prospector the driver communicates with the Senior through a PA system located in the buffet which is connected to the driver's cabin. If the driver wants to communicate when they are coming to a stop, just before they arrive the driver rings the buffet and says, "We're coming into Northam." The staff will then make an announcement, "Ladies and Gentlemen, we're coming into Northam. Passengers, please make sure you have all your belongings."

37 Rubbish collection occurs mainly after the morning or lunch rush. The staff go down the train with a rubbish bag and collect rubbish from the tables and from passengers or in the back of the seats and take it back to the buffet. Housekeeping involves staff periodically going into the toilets to make sure there are plenty of hand towels, toilet rolls, to tidy and pick up any papers on the floor. Stock needs to be checked at the beginning and the end of each trip. When stock is put on the trains for staff to put away, they need to do a stocktake so the opening and closing stock is recorded. They count the stock in the morning and at the end of the day. The recorded amounts go with the statement collections so the Respondent can check outgoing stock against incoming revenue. The change float is a bag of change each employee has and at the end of the day when they do their till they write down what change is needed for the next trip.

38 It is common ground between the parties that the Prospector regularly runs late because of delays caused for various reasons which include mechanical, track, signals, crossing, passengers and other matters. The Respondent tendered into evidence TransWA's on time running reports for the Prospector from 7 February 2005 until 1 May 2005, which shows that the majority of services run late. After receipt of these reports the Customer Service Assistants are paid for the period of time from when they commence their shift until 10 or 15 minutes after the TransWA reported actual arrival time of the train. Some of the Customer Service Officers who gave evidence in this matter were not aware that they were paid for 15 minutes after the train arrived and made vague claims about discrepancies in the hours they recorded in their own records and the hours set out in their pay slips. Estimates by the witnesses of how long it takes for the Customer Service Officers and Senior Customer Service Officer to complete their duties after the Prospector arrived varied from 5 minutes to 20 minutes. They testified the time depends upon the requirements of passengers, such as those in wheel chairs who may require assistance to obtain a taxi. All, however, conceded that a reasonable average to complete duties after arrival of the Prospector was 15 minutes.

39 Senior Customer Service Officers have responsibilities if there is an incident on a trip and the train comes to a halt. Part of those procedures may involve the deploying of detonators on the track under the direction of an engine driver which involves getting off the train and walking two kilometres to set detonators. Senior Customer Service Officers are taught this procedure in the Track Access Course. As every new employee completes the Track Access Course, every employee is trained to be a Senior Customer Service Officer. The setting of the detonators along the track is to protect the train and warn oncoming trains. Since the Respondent has had the contract to provide the on-train services employees of the Respondent have never had to practise this.

40 It is a requirement of a Senior Customer Service Officer that they are to be responsible for safe working practises that may be necessary if there is a train failure or train incident. To carry out their employment duties it is a requirement of each of the Customer Service Officers that they attend regular training and fully understand the following:

- Safe working
- Emergency evacuation procedures
- Senior first aid and advanced resuscitation
- Ticketing courses
- Use of Fire extinguishers
- Customer service training
- Electrical Awareness

41 Each of the Customer Service Officers who gave evidence on behalf of the Union testified:

> "In the event of a Train failure and/or a rail incident that would bring the train to a stop on the tracks it would be my responsibility as a Senior Customer Service Officer to leave the Train and carry out 'safe working' procedures to secure the safety of the Train and its passengers under the direction of the Train Driver. This may involve the laying of detonators on the track at pre-determined distances from the train and then proceed to walk the rail track either forward or toward the rear to secure assistance for the Train and its passengers. This duty cannot be completed by the Train Driver, as the driver should remain with the Train though the driver is the person to make all necessary decisions in such a situation."

42 None of the witnesses gave any evidence that they had personally been required to carry out these tasks. Ms Rose testified that she has never had to carry out the train failure procedures whilst on a train with passengers. She, however, personally has had to deal with a fatality and evacuated passengers.

43 The essential difference between a Senior Customer Service Officer and a Customer Service Officer is that the Senior Customer Service Officer is responsible for any Gold Service passengers as well as the passengers manifest, the drivers list, the overall running of the train and safety procedures in the event of a train failure.

44 Each of the Customer Service Officers testified in carrying out their duties, either as a Customer Service Officer or a Senior Customer Service Officer, they are from time to time required to deal with passengers who may be affected by alcohol or illicit drugs and passengers suffering from mental illness. This may require calling the police to remove passengers from the train.

45 As to the frequency of such incidents Mr Catalano testified that he had reviewed the trip reports of train incidents over a period of the last six months. He explained that after every trip the Senior Customer Service Officer has to complete a trip report, which is a TransWA requirement. The trip report must record anything out-of-the-ordinary that happened on that trip including faults on the train, rowdy passengers, breakdowns etc. Each trip report is provided to TransWA.

46 As to the trip reports for the last six months Mr Catalano testified:

> "It appears that there have been 17 incidents related to alcohol of varying degrees of significance.
>
> They usually relate to people bringing their own alcohol on-board and staff having to warn them that consumption of [sic] is not allowed. If they continue to consume on-board their alcohol is taken away from them and returned to them at the end of the trip. They can be refused alcohol from the buffet if it appears they are intoxicated or under the influence of alcohol and as a last resort they can be detrained with or without the assistance of the police.
>
> Passengers smoking in the toilets are often an associated problem.
>
> Delron provides a customer service training course that goes into how these kinds of incidents are best managed. Passengers can sneak their own alcohol on board and sometimes they get on the train already intoxicated and the situation needs to be managed the best way we can. If a passenger gets too rowdy or too abusive staff can always ask the driver to radio ahead and call for police assistance and the police will remove them off the train – staff are not required to touch them.

> In terms of the overall running of the train, if a passenger's got queries of [sic] if there is a rowdy passenger, usually the Senior will deal with it. Usually the Senior boards and disembarks passengers at intermediate stations, however a Customer Service Officer can do that if, for example, the Senior is busy with gold service and there's a stop coming up."

47 Ms Rose and Ms Holmes say they have been instructed never to detrain a passenger without the assistance of the police.

48 Ms Jones who resides in Kalgoorlie and who gave evidence on behalf of the Respondent has additional duties. In her witness statement she says:

> "Besides being a Passenger Assistant and Senior Passenger Assistant, I am also supervisor of on-train staff in Kalgoorlie. This position was offered to me in September 2003 at which time I accepted. My responsibilities in this position are as follow:
>
> Administration duties
>
> All banking
>
> Making up of rosters for Kalgoorlie staff
>
> Daily running sheets and reconciling of takings
>
> Making up floats
>
> Ordering of stock
>
> Ensuring all memos and procedures are passed onto all staff members."

49 Ms Catalano has worked for the PTA on the Australind as a Passenger Assistant and Senior Passenger Assistant. When cross-examined, Ms Catalano was asked whether the positions on the Australind and the Prospector were similar she said there was more "detail" working for the Respondent, meaning there was more work on the Prospector. She also said that the role of the Senior Passenger Assistant on the Australind was comparable to the role of the Senior Customer Service Officer on the Prospector except that the Australind does not have Gold Service.

(d) Allowances and Rest Breaks

50 In relation to accommodation, away from home and meal allowances, when the Customer Service Officers are required to stay overnight in Kalgoorlie or Perth the Respondent provides accommodation and $30.00 to purchase an evening meal and breakfast the following morning. Each of the Customer Service Officers who gave evidence on behalf of the Union and Ms Jones on behalf of the Respondent testified that the $30.00 provided by the Respondent is not adequate to meet all meals and incidental expenses. When cross-examined about this issue Ms Rose was asked to look at a menu from Carriages Restaurant, which is a restaurant attached to the Railway Hotel where the Customer Service Officers stay in Kalgoorlie. It was pointed out to her that if she made certain choices set out in the menu that she would be able to purchase a meal together with a continental breakfast for less than $30.00. Ms Rose and Ms Holmes said that they were not aware that they could have breakfast at the hotel prior to 6:00 am which is their rostered start time when returning to Perth from Kalgoorlie in the morning. Ms Rose also said that she chooses not to eat at Carriages Restaurant because she does not like their food. She agreed that she could purchase an evening meal for less than $30.00 at Carriages Restaurant but pointed out the options on the menu would be limited. She also pointed out that if you made certain choices that were available on the menu you would pay more than $30.00 for dinner. Further, she testified that whilst in Kalgoorlie she has to make telephone calls to her home to deal with issues that arise at home with her fiancé and her step-children and that she also has to purchase additional toiletries such as, shampoo, conditioner, make-up and moisturisers. It is her practice to bring her breakfast from home. At night she usually walks to one or two restaurants near the Railway Hotel. She testified that when she purchases an evening meal in Kalgoorlie she usually spends $25.00 to $30.00 on food and up to $15.00 on one or two glasses of wine. Ms Holmes pointed out that the Carriages Restaurant closes at 9:00 pm each night. If she travels to Kalgoorlie on Sunday the train does not arrive until after 9.00 pm. Consequently, when in Kalgoorlie on a Sunday night she does not have an evening meal because the restaurant is not open and she feels uncomfortable walking anywhere in Kalgoorlie at night. She, however, leaves the hotel the following morning to purchase a cooked breakfast. When Mr Catalano was cross-examined about this issue, he agreed that if he was to eat at Carriages Restaurant and purchased a meal of steak together with bread and salad that the cost of the meal would be about $34.00, plus breakfast could cost $13.60 which is approximately $47.00. He also conceded it is reasonable for staff to catch a taxi at night to a restaurant to purchase a meal.

51 In relation to meal and rest breaks, each witness testified that the Respondent does not provide a formal rest break during the rostered hours of employment. In relation to the AvonLink Service, the Respondent says that the service does not run long enough to require a break as the service from Perth to Northam only runs one way for one and a half hours and the Merredin Shopper for six hours return. In relation to both, they say there is sufficient time for a break during services. In relation to rest breaks when working on the Prospector, the witnesses for the Union testified that depending upon the number of passengers and their travel requirements, occasionally they are able to take a break and a rest from their duties but it depends not only on the number of passengers on board but the number of staff on board. Ms Rose and the other Union witnesses testified that they usually try to have something to eat on the train prior to the buffet opening. The buffet usually opens after the train has been running for about 15 minutes. Ms Rose says that she does not always take a break on the train and she has never sat down for a break for 30 minutes. She testified that the day on which the Commission conducted its inspection a two carriage train set was running. On that day she sat down for a total of five minutes to eat. She also said that sometimes she can sit down for a longer period but it depends very much on the number of passengers on the train. Similar evidence was given by Ms Holmes, Ms Easterbrook and Ms Calder. Ms Jones testified in her witness statement on behalf of the Respondent that she was aware that there is no specific times or places for meal breaks which is due to the working conditions on the train. However, meal breaks are taken one at a time. If there are no seats available outside the buffet area a meal can be eaten on the staff seat inside the buffet area and on some occasions the driver's cab can be made available. Ms Catalano testified that in her experience since the new Prospector has been in service they usually find time to have a break and to have a meal. She says that she has never worked on a shift where they have run out of time to have something to eat. Ms Jones and Ms Catalano did not, however, say how long a break they are usually able to take. Mr Catalano testified in relation to meal breaks:

> "When staff are working on the Prospector, there are opportunities for them to have a break on the trip to have a meal or a rest. In the buffet train, at the end of the buffet, there is a seat made available for the on-train staff. It's a fold down seat where they can sit there and have their break. Or if the disabled passenger seats are not booked they often use those seats to have a break and if they can't have a break in the morning rush and lunch rush then in-between there is ample time to have a break.
>
> At times they could have up [sic] a half an hour break if they want to.

There could be times when they have a longer break because the trains aren't that full all the time. I mean we left Kalgoorlie the other day with 28 passengers on board, with 3 staff on."

52 When cross-examined Mr Catalano said when time permits on-train staff can take a break which may vary from five minutes to ten minutes or up to an hour. He agreed that there may be a need for a break to be broken if customer requirements require it.

53 In relation to travelling time, Customer Service Officers who work on the Prospector are not usually required to travel otherwise than in the course of working on the train, unless there is a breakdown and they are bussed back to their home base. However, in relation to the AvonLink, if an employee from the Prospector line is rostered to work on the AvonLink in the morning they drive a car to Northam to start work, or in the afternoon they catch a train from Midland. When they are travelling they are paid ordinary time rates of pay.

54 When each of the Customer Service Officers who gave evidence on behalf of the Union were cross-examined, all conceded that when they accepted an offer of employment with the Respondent, they understood the rate of pay that was offered, the hours of work and that they would be required to work on weekends and public holidays.

Cost of the Union's claim

55 Mr Doughty testified that he had calculated the cost to the Respondent of the following claims made by the Union:

(a) Shift Allowance

(i) For 18 shifts on the Prospector $289.44 per week or $15,050 per annum.

(ii) For 5 shifts on the AvonLink $40.00 per week $2,080 per annum.

(b) Held Away from Home Allowance

8 shifts at 5 hours = $800 per week or $41,600

(c) Away from Home Meal Allowance

$640 per week or $33,280

This amount does not, however, account for the $30 meal allowances which the Respondent currently pays to its employees.

(d) An Additional One Week's Annual Leave

For 17 employees (including AvonLink employees) the cost would be $10,000 per annum plus on-costs.

The Terms of the Award sought by the Parties

56 It is common ground that the PTA employs Passenger Assistants on the Australind Service, which is also a country rail service that runs between Perth and Bunbury. The terms of employment of the Passenger Assistants are regulated by the terms of the REA Award. In this matter, the Union seeks that the Commission issue an award that substantially reflects the terms and conditions of the REA Award with some modifications to take into account the needs of the specific enterprise. In particular, the Union says that the classification structure in the REA Award should be applied as the classification structure in the REA Award was implemented as a result of an arbitrated broadbanding review, which applied the decision given by Nolan C, in *Australian Railways Union v State Transport Authority of Victoria* Australian Industrial Relations Commission matter Print H9715 and was approved by the Full Bench in *Western Australian Government Railways Commission v Australian Railway Union of Workers, West Australian Branch* (1990) 71 WAIG 5 ("the Passenger Assistants' case").

57 The Respondent says that the terms of the award issued by the Commission should in part reflect existing terms and conditions of the employees in question and should substantially reflect the classification structure retained in the *Restaurant, Tearoom and Catering Workers' Award* and the *Hotel and Tavern Workers' Award*. Currently employees who have not signed an Australian Workplace Agreement are paid $15.05 or $15.20 per hour if they have signed an Australian Workplace Agreement as a flat rate of pay for each hour worked. When they are required to travel to return to their home base they are paid the same rate per hour. They receive no additional payments for working shift work or for working on public holidays or weekends. The only allowance they receive is $30.00 when they stay away from their home base overnight at Kalgoorlie or Perth.

58 The proposed clauses in dispute between the parties are as follows:

(a) Proposed clause 1.6 – Right of Entry

The Union seeks to reflect s 49H and s 49I of the Act, in proposed clause 1.6. Whilst the Respondent does not oppose the insertion of such a clause they seek that the right of entry to any premises where relevant employees work, be limited to the time after the employees cease duty for the day, so that the rights of an authorised Union representative to enter should be restricted in that they should not be able to board the Prospector or the AvonLink Service. The basis for the restriction sought by the Respondent is that the Respondent says that time is of the essence in relation to running time and scheduling of the Prospector and AvonLink Services.

The Respondent says that the restriction it seeks is authorised under the Act and points out that in *The Most Reverend B Hickey, Archbishop of Perth v The Independent School Salaried Officers' Association of Western Australia, Industrial Union of Workers* (2003) 83 WAIG 3953 an order made by the Commission was upheld by the Full Bench, in which the right of entry for discussion with employees was to be exercised at a particular place.

The Respondent seeks a restriction on the Union's right of entry because pursuant to the contract it has with the PTA it is liable for delays caused by its staff. In the alternative, the Respondent says that if the place is not restricted in the manner set out above, the right of entry should be exercised by agreement between the Union, the employer and the PTA and, if no agreement can be reached, the dispute could be referred to the Commission for conciliation and, if necessary, arbitration.

(b) Proposed clause 2.2 – Contract of Employment

Both parties agree that a permanent full-time employee should be defined as an employee engaged for a minimum of 76 hours per fortnight. Further, the parties agree in relation to trainees, they should be employed on 3 months' probation which can be extended by a further 3 months if a trainee is informed by the employer that there are areas of performance which require improvement within the extended period of probation. The parties also agree that trainees be engaged for a minimum of 30 hours per fortnight and a maximum of 76 hours per fortnight.

As to permanent part-time employees, the Union says that those employees should be defined as an employee engaged for a minimum of 48 ordinary hours per fortnight and to a maximum of 64 hours per fortnight.

The Respondent seeks that a permanent part-time employee be defined as an employee engaged for a minimum of 42 hours per fortnight to a maximum of 76 hours per fortnight, except in exceptional circumstances where the stand down clause applies. Whilst at this point in time rosters are set on a weekly basis the Respondent says a guarantee of 42 hours each fortnight rather than 21 hours each week will enable flexibility in rostering employees for work. Because of TransWA requirements, the Respondent may only be able to roster an employee 15 hours in one week. If guaranteed hours run over a fortnight, the Respondent will have the flexibility to provide the additional hours in the second week to make up the minimum. Except for the minimum number of guaranteed hours the Union agrees that when regard is had to all rostering issues this arrangement is appropriate.

(c) Proposed clause 2.2.7 – Stand Down

The Respondent seeks a stand down clause whereby the Respondent would be entitled to stand down an employee on any day or part of a day, for any cause outside the employer's control where it is unable to provide useful work for an employee. When that occurs the employee shall not be entitled to be paid in respect of the day or part of the day they are stood down. The Respondent says that such a clause is necessary as the train services are occasionally disrupted for reasons such as a derailment or a break in signals. When such an event occurs there may be no work available for two to three days. The Respondent says that it is not fair on it to bear the cost of paying employees who are not providing the Respondent with any reward. Further, it says that such clauses are common in private sector awards. The Union opposes the clause and says that employees do not have the capacity to sustain losses because of operational breakdowns. Further, the Union says that if such a clause is made it should be restricted to industrial action carried out by other members of the industry.

(d) Proposed clause 3 – Hours of Duty and clause 4.3.2 – Overtime Payments

As set out above, the Union agrees that the spread of hours should be averaged over a fortnight. The Union, however, seeks that the ordinary hours of employment within that fortnight be worked between 6:00 am and 6:00 pm on any five days, Monday to Saturday inclusive. If any time is worked outside of ordinary hours the Union seeks that these hours be paid as overtime. In particular, they say that if a shift commences at 5.00 am the employee should be paid for the first two hours at time and a half and for the remainder of the shift they should be paid double time. In the event the Respondent introduces a seven week roster cycle the Union seeks liberty to apply in respect of rostering arrangements. The Union seeks in proposed clause 3.1.2 that any ordinary hours of employment worked on a Saturday be paid at the rate of 50% in addition to the employee's hourly rate. They also seek in clause 4.3.2 that employees be paid time and a half for the first two hours of overtime worked on Saturdays and double time thereafter. As to overtime worked on Sundays they say employees should be paid at the rate of double time and be provided with a minimum payment of four hours. They say employees required to work on a Public Holiday should be paid at the rate of double time and a half for all hours worked and be provided with a minimum payment of four hours. The Union also seeks that any hours worked in excess of 7.6 hours should be paid at overtime rates and that because of fatigue an employee should not remain on duty longer than 10 hours. The Union says the overtime payments it seeks reflect a standard which applies, not only in the rail industry, but across all industries.

The Respondent says that ordinary hours of work should be confined to a maximum length of 10 hours per day, except that a total of 12 hours could be worked in any one day where a shift is worked in two starts per day by agreement with the employee. The Respondent points out that it cannot guarantee the length of a shift as trains usually run late. They reject the Union's contention that when a train runs late to the extent that an employee is required to work longer then 7.6 hours the remaining time should be paid as overtime. Further, the Respondent seeks that the minimum length of any shift be two hours or one hour by agreement. The Respondent also seeks that all hours worked on a Saturday except for overtime be paid at ordinary hours. The Respondent proposes that the current practice of paying an employee 15 minutes (or 10 minutes in the case of the AvonLink Service) beyond the actual arrival of a train be maintained. As to overtime the Respondent proposes that overtime be defined as all hours worked outside of ordinary hours work (being in excess of 10 hours) whereby from Monday to Friday employees be paid for any overtime at time and a half for the first two hours and double time thereafter and if overtime is worked on a Saturday or Sunday they be paid at double time. The Respondent says this is a standard in place in the *Restaurant, Tearoom and Catering Workers' Award* and the *Hotel and Tavern Workers' Award*.

(e) Proposed clause 3.2 – Meal and Rest Breaks

The Union seeks two paid rest breaks on each shift, one of 20 minutes and the other 10 minutes. Initially the Union sought an unpaid break of 30 minutes together with two rest breaks of 10 minutes. The Union also seeks the inclusion of a clause requiring the employer to pay an employee double time after six hours until such time as a meal break is made available to the employee.

After some debate the Respondent says that employees should be provided with a cumulative paid break of up to 20 minutes per trip. The Respondent also says that paid breaks should only apply to the Prospector as the AvonLink Service runs for an insufficient length of time to require a break during the service. In particular the Merredin Shopper is in Merredin for 1 hour so employees have 40 minutes to take a break and are paid for this time. The Union agrees that there is a sufficient time for a break except when the train breaks down and is replaced with a bus which may result in the break being as short as 7 to 10 minutes. In the case of the service from Northam to Perth they have a half hour paid break prior to travelling back to their home base on the bus as a passenger.

(f) Proposed clause 4.2 – Classification Structure and Rates of Pay

The Union seeks a classification structure which reflects the classification structure and rates of pay found in the REA Award being the classification for Passenger Assistant Level 1 (Trainee) to be paid at 84.2% of the Metal Tradesperson's rate and the Passenger Assistant Level 3 to be paid at 93.6% of the Metal Tradesperson's rate. They also seek the Passenger Assistant Level 5 to be paid at 105% of the Metal Tradesperson's rate and Senior Passenger Assistant Level 6 to be paid at 110% of the Metal Tradesperson's rate. The Union also seeks an additional classification of Passenger Assistant Level 7 AvonLink – Merredin Shopper to be paid at 115% of the Metal Tradesperson's rate.

The Union says in 1990 the Full Bench of this Commission in the Passenger Assistants' case dismissed an appeal against a broadbanding exercise which rationalised the classifications for country on-train passenger services and put in place in the REA Award a structure that recognised the historical value of that work. In that matter it was agreed by the parties that there should be four classifications which were Trainee Passenger Assistant, Passenger Assistant Level 2, Passenger Assistant Level 1 and Senior Passenger Assistant. The parties were in dispute as to the level of the rates to be applied and the status of a $10.00 allowance. The four classifications agreed by the parties was the broadbanding of the four classifications set out above together with the classifications of Conductor, Senior Conductor and Stewardess. The positions were on the Indian Pacific, the Australind and the Prospector. Commissioner Kennedy at first instance determined that the Passenger Assistant Level 1 should be set at 96% of the highest rate on the basis of the supervisor function and safe working requirements and Passenger Assistant Level 2 should be set at 86% of the highest rate. The word "Senior" was adopted rather than the word "Supervisor" to recognise the significant supervisory function for the person concerned. Further the responsibilities for safe working was given to the position of Senior Passenger Assistant together with accounting for ticket sales and other monies from sales before ceasing duty. Passenger Assistant Level 2 was devoted to passenger assistance, safety and comfort which more closely followed the work of a Stewardess. Passenger Assistant Level 1 had some extra items of passenger service to perform. The $10.00 allowance was rejected. After considering all of the evidence the Full Bench found that the new position of Senior Passenger Assistant had Conductor, Guard and other responsibilities. They also found that the Guard's wage had historically always equated to above tradesmen's rates in Western Australia and it was appropriate to compare the position with the Guard's position so no error was made in applying Nolan C's decision in Print H9715 in respect of a Guard/Conductor review of classification and wages rates in Victoria. They also held that the lower positions should be related for internal relativity purposes to the Senior Passenger Assistant position which because of safe working responsibility made it a more responsible position than Chief Conductor.

The Union seeks to apply this decision and says the:

(i) Level 5 Passenger Assistant classification considered in the Passenger Assistants' case was a Level 1 in 1990 as 96% of the Senior Passenger Assistant rate which was 105% of the Metal Tradesperson's rate of pay.

(ii) Level 2 Passenger Assistant later became Level 3 under the REA Award.

(iii) Trainee Passenger Assistant rate at 75% of the highest rate equated to 84.2% of the Metal Tradesperson's rate of pay.

The Union says that the employee's rate of pay should reflect the burden and responsibilities of their role. In particular the burden of train safety responsibilities should be paid for irrespective of how often these responsibilities are exercised.

In support of its argument to reflect the REA Award rates of pay the Union relies upon the evidence of Ms Catalano that the roles, tasks and responsibilities of Passenger Assistant and Senior Passenger Assistant on the Australind are similar to the roles, tasks and responsibilities on the Prospector. The Union also says that the rail industry is, like the airline industry unique. Further, Union says that the PTA contracts with the Respondent to deliver to railway patrons the same standard of service that the PTA delivers to its own patrons.

The Respondent says the provisions of the *Restaurant, Tearoom and Catering Workers' Award* applies to the Customer Service Officers because of the operation of clause 4 of that Award. Clause 4 provides:

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

In particular the Respondent says Customer Service Officers come within the calling "Food and Beverage Attendant Grade 3" which is defined in clause 6(5) of *Restaurant, Tearoom and Catering Workers' Award* to mean an employee who has the appropriate level of training and is engaged in any of the following:

"(a) supplying, dispensing or mixing of liquor including the sale of liquor from the bottle department;

(b) assisting in the cellar or bottle department, where duties could include working up to four hours per day (averaged over the relevant work cycle) in the cellar without supervision;

(c) undertaking general waiting duties of both food and liquor including cleaning of tables;

(d) receipt and dispensing of monies;

(e) engaged on delivery duties; or

(f) in addition to the tasks performed by a food and beverage attendant grade 2 the employee is also involved in:

  (i) the operation of a mechanical lifting device; or

  (ii) attending a wagering (e.g. TAB) terminal, electronic gaming terminal or similar terminal.

(g) and/or means an employee who is engaged in any of the following:

  (i) full control of a cellar or liquor store (including the receipt, delivery and recording of goods within such an area);

  (ii) mixing a range of sophisticated drinks;

  (iii) supervising food and beverage attendants of a lower grade;

  (iv) taking reservations, greeting and seating guests;

  (v) training food and beverage attendants of a lower grade."

Further that a "Restaurant and/or Tearoom" means in clause 6(1) of the *Restaurant, Tearoom and Catering Workers' Award*:

> "any meal room, dining room, grill room, coffee shop, tea shop, oyster shop, fish cafe, cafeteria or hamburger shop and includes any place, building, or part thereof, stand, stall, tent, vehicle or boat in or from which food is sold or served for consumption on the premises and also includes any establishment or place where food is prepared and/or cooked to be sold or served for consumption elsewhere."

It is contended that a buffet "on a train" is a "place" or a "vehicle" within the meaning of clause 6(1) of the *Restaurant, Tearoom and Catering Workers' Award*.

Alternatively the Respondent says the provisions of the *Hotel and Tavern Workers' Award* apply as the Respondent holds a Special Facility licence. Clause 4 of this Award provides:

> "This award shall apply to all employees employed in the callings described in Clause 21. – Wages of this award, in any establishment, or part thereof licensed pursuant to the Liquor Licensing Act, 1988 with a Hotel Licence, Hotel Restricted Licence, Tavern Licence, or a Special Facility Licence granted pursuant to regulation 9A(1), paragraphs (c), (g), (h) and (i) of the Liquor Licensing Regulations 1989 (as amended)."

Clause 6 of the *Hotel and Tavern Workers' Award* provides for the same classification of Grades 1, 2, and 3 of Food and Beverage Attendants as the *Restaurant, Tearoom and Catering Workers' Award.*

The Respondent says the Passenger Assistants' case should not be applied as the decision is based on the outdated principle of comparative wage justice. In answer to the Union's case the Respondent relies upon the principles enunciated by the Full Bench in *Bunbury Cleaning Service & Others and Hon Minister for Education v The Cleaning, Security and Allied Employees Union* (1983) 63 WAIG 385 where the making of a private sector award was considered where the service is provided to Government. In *Bunbury Cleaning Service & Others and Hon Minister for Education v The Cleaning, Security and Allied Employees Union* (op cit) the Federated Miscellaneous Workers Union of Australia, Hospitals, Service and Miscellaneous, WA Branch, made an application for an award to apply to employees engaged in cleaning in educational facilities. The scope of the proposed award sought was to apply to employees directly employed by Government and to contractors. A preliminary issue was heard as to whether the Commission should make an award to apply to both Government employers and private contractors. The Commission at first instance determined that there should be a single award with an area and scope in the terms claimed by the Union and concluded that there had been in effect, a separate Government school cleaning industry for many years and a distinction ought not be drawn in that industry on the basis of differing employers. The Commission also held that the work and standards required were substantially the same regardless of which employees were used. The Full Bench dismissed the appeal because they found they were in no position to assume that each of the provisions or prescriptions in an award finally issued would necessarily be the same for Government and private employees or that in a particular case different provisions may not be introduced. In the decision they referred to the long standing practice that, generally speaking, separate awards issue to cover employees of the Government and private employers even though they are engaged in the same vocation. In their decision at 386 the Full Bench observed:

> "That practice was reviewed at some length by the Commission in Court Session in 1976 in Hospital Employees Industrial Union of Workers, W.A. *v.* Braemar Presbyterian Home for the Aged and Others (1976) (56 W.A.I.G. 1106) where it received the unanimous endorsement of that bench. The reasons for the practice were explained in that case and some of those reasons are reflected in this passage from the Judgment of Johnson C.
>
> > Workers in Government hospitals enjoy conditions different from those applying in private hospitals not because they are hospitals but because they are Government.
> >
> > For reasons which are not specified the Government has chosen to grant its employees certain benefits in excess of what might be called standards, an action open to any employer. It would be wrong in my opinion to force private employers to provide conditions similar to those in Government when the factors giving rise to those benefits in Government service may have no relevance in private industry.
>
> ... In essence as was recognised in the Braemar Case, there are factors which affect the basis on which the Government employs personnel because it has a dual role as employer and as administrator of the State. The same factors are not relevant to and ought not therefore bind private employers. For example Government is often required to provide an essential service irrespective of the cost but the same considerations do not and could not apply in respect of private employers. Furthermore, Governments sometimes settle upon contracts of employment for political as distinct from commercial considerations. Apart from the general rule endorsed by the Commission in Court Session in the Braemar Case and consistently followed in the Commission, there are particular reasons why in the present case the general rule should not be departed from."

The Respondent says that the REA Award is a standard that applies to the Government and should not necessarily be directly translated to the private sector as there needs to be an examination of the merit of the Union's claims. Although the Respondent concedes that the Commission should have cognisance of other awards where similar work is performed, it says the Commission should also have regard to the award that legally applies and the contractual arrangements that are in place.

The Respondent points out that clause 2D of the REA Award is a paid rates award and as such it contends that traditionally paid rate awards tended to contain higher rates and conditions than minimum rates awards.

The Respondent seeks a classification structure that reflects the classifications and rates of pay set out in the *Restaurant, Tearoom and Catering Workers' Award* and the *Hotel and Tavern Workers' Award,* which it says are properly set rates, which have undergone a minimum adjustment process. The Respondent recognises, however, that the Senior Customer Service Officer on each Prospector service has an additional role to that of hospitality and that is a role in the safety procedures of the train. It says that role should be recognised by a flat payment to the Senior Customer Service Officer on the Prospector and the Customer Service Officer on the AvonLink at the rate of $20.00 for each shift they work where they are required to implement emergency safety procedures on the perway. The Respondent points out that in the seven and a half years it has held the contract to provide on-train services, safety procedures have not had to be performed by the Senior Customer Service

Officer. In addition the Respondent says Senior Customer Service Officers on the Prospector should be paid $10.00 for each shift in recognition for the coordinating/supervisory/in charge duties.

Both parties agree that Customer Service Officers who work the AvonLink Service should have a separate classification level and be paid a different rate of pay than the Customer Service Officers who work on the Prospector Service.

The Respondent proposes the following four level classification structure:

(i) Trainee to be paid at 84% of Metal Tradesperson's rate.

(ii) AvonLink Customer Service Officer to be paid at 89% of Metal Tradesperson's rate.

(iii) Prospector Customer Service Officer to be paid at 94% of Metal Tradesperson's rate.

(iv) Senior Customer Service Officer to be paid at 94% of Metal Tradesperson's rate plus $10.00 per shift (which they say is equal to 103% of Metal Tradesperson's rate if it assumed each shift is for 7.5 hours).

The Respondent puts forward these rates on the basis that a Food and Beverage Attendant Grade 3 in the *Restaurant, Tearoom and Catering Workers' Award* is equivalent to the duties and responsibilities of a Customer Service Officer who works on the Prospector.

The Respondent says the duties and responsibilities for a Customer Service Officer working on the new AvonLink will be less than those who work on the Prosector as there will be no buffet on the train and the role will primarily be that of a conductor. Nor do they have coordinating/supervisory in-charge duties. Consequently, they say that the AvonLink Customer Service Officer should be paid less than a Food and Beverage Attendant Grade 2. The Union refutes this contention and says the Customer Service Officers who work on the AvonLink have added responsibilities when compared to the role and responsibilities of Customer Service Officers who work on the Prospector. The Union says the Commission when determining an appropriate classification and rate of pay should have regard to the fact that Customer Service Officers on the AvonLink work alone, sell tickets and they have to carry out safety procedures under the direction of the engine driver if there is a train failure or an emergency.

The Union and the Respondent propose different generic descriptions of the major indicative tasks of each classification. However there is no dispute between the parties in respect of the duties required to be performed in each proposed classification.

The classification descriptions sought by the Union are:

Passenger Assistant Level 1 (Trainee)

Key Responsibilities

This is a position for a new recruit to the Passenger Services. Can be called upon to perform the role of a Passenger Assistant during initial training.

Trainee assessed during probation period.

Indicative Tasks

An employee at this level may be required to perform all or some of the following tasks:

- Passenger assistance and information.
- Passenger comfort and safety.
- Collection of revenue.
- Serving meals and drinks to passengers.
- Train Cleanliness.
- Effecting emergency procedures as directed.
- Completing necessary documentation as required.
- Dealing with customer complaints and problems.

Passenger Assistant Level 3

Key Responsibilities

To ensure that the quality of service provided to passengers reflects the overall standard necessary to meet passenger requirements.

Can be called upon to relieve in a lower or higher designated position.

Indicative Tasks

An employee at this level may be required to perform all or some of the following tasks:

- Passenger assistance and information.
- Passenger comfort and safety.
- Collection of revenue.
- Serving meals and drinks to passengers.
- Train Cleanliness.
- Effecting emergency procedures as directed.
- Completing necessary documentation as required.
- Dealing with customer complaints and problems.
- Supervision of Passenger Assistants as required.

Passenger Assistant Level 5

Key Responsibilities

To ensure that the quality of service provided to passengers reflects the overall standard necessary to meet the employer's passenger requirements.

Can be called upon to relieve in a lower or higher designated position.

Indicative Tasks

An employee at this level may be required to perform all or some of the following tasks:

- Passenger assistance and information.
- Passenger comfort and safety.
- Collection of revenue.
- Serving meals and drinks to passengers.
- Train Cleanliness.
- Effecting emergency procedures as directed.
- Completing necessary documentation as required.
- Dealing with customer complaints and problems.
- Supervision of Passenger Assistants Level 3 as required.

Senior Passenger Assistant Level 6

Key Responsibilities

To ensure that the quality of service provided to passengers reflects the overall standard necessary to meet the employer's passenger requirements.

Supervise Passenger Assistants.

Perform safe working duties in accordance with the Book of Rules and General Appendix as required.

Can be called upon to relieve in a lower designated position.

Indicative Tasks

An employee at this level may be required to perform all or some of the following tasks:

- Passenger assistance and information.
- Passenger comfort and safety.
- Collection of revenue.
- Train Operation.
- Ensuring on-train facilities are operational and equipment and amenities meet standards.
- Supervision of passenger assistants.
- Interact with locomotive crew for train operation.
- Train Cleanliness.
- Effect emergency procedures or delegates as required.
- Complete necessary documentation.
- Dealing with customer complaints and problems.
- Maintaining a high personal profile with regular train patrol.

Senior Passenger Assistant Level 7 AvonLink – Merredin Shopper Services – 115%

Key responsibilities

To ensure that the quality of service provided to passengers reflects the overall standard necessary to meet passenger requirements.

Can be required to work alone and perform safe working duties in accordance with the Books of Rules and General Appendix as required.

An employee at this level may be required to perform all or some of the following tasks:

- Passenger assistance and information.
- Passenger comfort and safety.
- Deal with customer complaints and problems.
- Ticket sales.
- Collection of revenue.
- Train operation.
- Ensuring on-train facilities are operational and equipment and amenities meet standards.
- Interact with locomotive crew for train operation.
- Effect emergency procedures.
- Maintaining a high personal profile with regular train patrol.
- Reconciliation of revenue collected with ticket sales and deposit the same.
- Complete necessary documentation.

The classification descriptions sought by the Respondent are:

CSO on the Prospector

- Pre-departure train set-up.
- Buffet operation - pre-departure set-up.
  - sales/service/revenue collection.
  - end-of-trip closure and stocktake.
- Provide comfort, assistance and information to passengers.
- Maintain train tidiness.
- Complete required paperwork.
- Ticket sales if required.
- Provide guidance to trainees as required.
- Other duties as directed by the SCSO within their skill, competence and training.

SCSO on the Prospector

Most if not all of the tasks for a CSO on the Prospector as well as:

- Coordinate/supervise/be in-charge of CSO's on the same train.
- Provide specific services, using specific procedures, to Gold Service passengers.
- Deal with unresolved passenger problems.
- Other duties as directed by the driver within their skill, competence and training.

CSO on the current AvonLink

- Pre-departure train and buffet set-up.
- Buffet operation - pre-departure set-up.
  - sales/service/revenue collection.
  - end-of-trip closure and stocktake.
- Provide comfort, assistance and information to passengers.
- Maintain train tidiness.
- Complete required paperwork.
- Ticket sales if required.
- Other duties as directed by the driver within their skill, competence and training.

CSO on the new AvonLink

- Provide comfort, assistance and information to passengers.
- Complete required paperwork.
- Ticket sales if required.
- Other duties as directed by the driver within their skill, competence and training.

Trainee CSO

- A new, untrained CSO.
- Their task is to learn CSO tasks.
- They may be called upon to assist CSO's during their training and assessment period.
- They are trained and assessed during their 3 month probationary period.

(g) Proposed clause 4.3.2. – Higher Duties

The Union seeks that employees who perform higher duties for more than two hours be paid the higher rate for the whole shift. The Respondent says that employees should only be paid the higher rate for the hours that they perform the higher duties.

(h) Proposed clause 5.1 – On-call Allowance

The Union seeks a payment of an allowance to employees who are on-call outside their ordinary hours of duty of $3.07 per hour for all time on-call. To be eligible for payment, the employee must be contactable and available for return to duty within one and a half hours. This provision reflects a provision in the REA Award. The Union says this allowance is to compensate employees for disruption to their personal life and family responsibilities.

The Respondent says that it requires its employees to be contactable at all times to deal with requests to work extra shifts. It however opposes a payment of an on-call allowance as the request can be refused, but says that if the Respondent directs an employee to undertake an additional shift the employee should be paid an additional 25% of their rate of pay for working ordinary hours for that particular shift.

(i) Proposed clause 5.2 – Away from Home and Meal Allowance

Employees who are based a Kalgoorlie are from time to time within each fortnight required to stay overnight in Perth and employees who are based in Perth are from time to time each fortnight are required to stay overnight in Kalgoorlie. It is common ground that the employer pays for the accommodation provided to employees who are required to stay away from their home depot. It appears from the rosters that when they stay overnight, the employees are away for an evening meal and breakfast. The Union proposes that the employees be paid an allowance to be reimbursed for the cost of meals and incidental expenses when required to stay overnight from

their home depot. They say the allowance should be calculated on the basis of the time between booking on and booking off from the home depot at the rate of $20.00 for each 8 hours period and where less than 8 hours is worked they should be paid at a rate of $5.00 for each two hour period or part there of. The Union says the allowance sought reflects the allowance paid to rail car drivers. Further, the Union says that the evidence of Mr Catalano establishes that the costs of an evening meal and a cooked breakfast, without incidentals, in Kalgoorlie would be about $45.00 to $46.00.

The Respondent rejects this claim and says that these employees should continue to be remunerated at the rate that they are currently paid, which is the $30.00 for an overnight stay. It also says when the evidence is carefully considered $30.00 is a reasonable compensation for the purchase of two meals as an evening meal and a continental breakfast can be purchased for less than $30.00.

Following the hearing the Commission sought written submissions from the parties in respect of the Commissioner of Taxation Rulings TD 2004/19 and TR 2004/6 which relate to reasonable allowance for meals, accommodation and incidentals. The Union in its written submissions does not depart from its claim which it says reflects the allowance paid to country railcar drivers but says that if their claim exceeds the amount allowable by the Australian Taxation Office ("the ATO") the allowances allowed by this Commission should reflect the maximum allowed by the ATO. The Respondent in its written submissions points out that paragraph 33 of TR 2004/6 states:

> "In setting the reasonable amount for the purposes of this Ruling the Commissioner does not determine the amount of allowance an employee should receive or an employer should pay their employees. The amount of an allowance is a matter to be determined between the payer and the payee. The Commissioner determines the reasonable amount of travel and meal allowance expenses only for the purposes of the tax law, that is the amount that will be accepted for exception from the requirement to obtain and keep written evidence for substantiation purposes. It is not provided for the purpose of being used for employment or industrial relations purposes in setting the amount of allowances paid. The Commissioner is not entitled under the tax law to have any specific regard to the fairness or appropriateness of the allowance paid as part of any remuneration arrangement."

The Respondent contends the Commission should have not regard to the level of allowances prescribed by the ATO. The Respondent points out that there is no explanation as to how the ATO arrived at the amounts it has determined as reasonable whereas the Commission has heard direct evidence of and submissions from the parties on, the nature (dinner, breakfast and incidentals) and level of the expenses incurred by employees.

(j) Proposed clause 5.3 – Held Away From Home Allowance

The Union seeks a held away from home allowance to be paid to an employee who is required to stay away from their home depot for any period of time exceeding 12 hours at the employees ordinary rate of pay. The Union however says that any time paid in excess of 12 hours can count towards the payment of minimum ordinary hours in any fortnight. The Union says this clause reflects rail industry standards in the private sector awards across Australia. The Union referred the Commission to two awards that apply to on-train services made by the Australian Industrial Relations Commission that contain such a provision. One of these awards applies to Serco Australia Pty Ltd and its employees who work on the Indian Pacific, the Ghan and the Overland in South Australia, Western Australia, Victoria, New South Wales and the Northern Territory (AW797846). The other applies to Government and private employers in New South Wales and Victoria (AW817741).

(k) Proposed clause 5.4 – Payment for Travelling Time

The Union seeks that employees be paid at ordinary rates for travelling and waiting time for the first 7.6 hours and thereafter at half the ordinary rates in any one period of 24 hours. The Union also seeks payment for travelling time on Saturdays and Sundays to be paid at the rate of time and a half and on the same conditions as on weekdays. Further, they seek that any employee travelling as a passenger going out to act in a higher capacity or returning after acting in a higher capacity should be paid travelling and waiting time at the rate of the higher capacity. The Respondent says that employees should be paid for travelling time at ordinary rates of pay which reflects the current practice and decisions which apply to the *Metal Trades (General) Award 1966 No. 13 of 1965*.

(l) Proposed clause 5.5 – Shift and/or Night Work

In the alternative to paying employees overtime for work outside ordinary hours beyond 6.00 am or 6.00 pm, the Union says the Respondent could utilise shift work provisions. In such a case they propose that where an employee works an afternoon shift that is a shift, which commences before 6.00 pm and the ordinary time which concludes at or after 6.30 pm the employee should be paid an allowance of $2.01 per hour for all time paid at the ordinary rate (which is approximately a 15% loading). In relation to a night shift that is a shift which commences at or between, 6.00 pm and 3.59 am, they propose the employee be paid an allowance of $2.33 per hour for all time paid at ordinary rates (which is approximately a 20% loading). In relation to an early morning shift, that is a shift which commences at or between 4.00 am and 5.30 am, they propose the employee be paid an allowance of $2.01 per hour for all time paid at ordinary rates. Further, the Union seeks payment to employees of $2.33 for any shift where the ordinary time commences or finishes at or between 1.01 am and 3.59 am.

The Respondent opposes the payment for shift work sought by the Union, and says that ordinary hours should be able to be worked on any day of the week from Monday to Sunday. They say that the effect of the Union's proposal is that employees will be paid a penalty on a penalty on weekends as they will be paid a shift loading and a weekend penalty. The Union rejects this submission and says one payment sought is an allowance and the other is a penalty payment. Further, the Respondent says that for every ordinary hour worked before 6.00 am and after 7.00 pm Monday to Friday, a 10% loading should apply. In relation to ordinary hours worked on Saturday or Sunday, they say a 50% loading should apply and for ordinary hours worked on a public holiday, a 150% loading should apply.

(m) Proposed clause 5.7 – District Allowance

Both the Respondent and the Union propose that in relation to employees who reside in Kalgoorlie they should be paid a district allowance. However, the Union proposes that the amount be stated as $3.50 per week, whereas the Respondent says for administrative purposes it would be more appropriate if the amount was calculated per hour which is 10 cents an hour.

(n) Proposed clause 6.1 – Public Holidays

The Union seeks ten public holidays to be observed each year and for each part-time employee to be entitled to the benefit of the ten days. The Respondent says part-time employees should not be entitled to ten public holidays as they work less than five days each week. Further, the Respondent says that if an employee works a public holiday they propose the employee is to be paid double time and a half.

(o) Proposed clause 6.2 – Annual Leave

The Union proposes that shift workers who work shifts other than regular day shifts should be entitled and allowed an additional week's leave on full pay inclusive of leave loading of 17½%. The Union says this reflects a test case standard established in (1949) CAR 509 and (1972) AR (NSW) 633. This standard is reflected in the REA Award, AW797846 and AW817741. The Union seeks liberty to apply in relation to the percentage of leave loading.

The Respondent opposes the additional week's leave, and says that it does not form part of the employees' current terms of employment. They say that what applied to conditions of employment in the 1940's to the 1970's has no relevance today. In particular, one of justifications for an additional week's leave was to compensate seven-day shiftworkers for working on the Sabbath. Further that the standard was set at a time when the hospitality industry did not generally work 24 hours a day, seven days a week. They also say that the conditions of these employees can be distinguished. Firstly, they are part-time employees and secondly, it is proposed that they be paid penalties for working on weekends. In the alternative, the Respondent says that even if the extra week's leave is allowed for employees who work the Prospector, the additional week's leave should not be allowed for the employees who work the AvonLink Service as they are not rostered to work on weekends or public holidays.

(p) Proposed clause 6.4.5 – Sick and Carer's Leave

The Union proposes that employees shall be required, where reasonably practicable, to advise the employer of their inability to attend for work, the nature of their illness or injury and the estimated duration of their illness. The Respondent seeks a requirement that an employee notify the employer as soon as possible of the matters set out above and no later than eight hours before the employee is required to commence work except in circumstances where it is not reasonably possible to do so.

(q) Proposed clause 6.7 – Leave to Attend Union Business

The Union seeks a clause granting paid leave to employees to attend Union business whereby the leave shall only be approved when particular conditions are satisfied. One condition is when the operation of the organisation is not being unduly affected or the convenience of the employer impaired. The Union says it is important when negotiations are being entered into with the employer that employees participate in that process without having to suffer a monetary disadvantage.

The Respondent opposes the clause and says that paid leave to attend union business is not a community standard nor is it usually a condition found in private sector awards including the *Restaurant, Tearoom and Catering Workers' Award* or the *Hotel and Tavern Workers' Award.* Alternatively, if such a clause is granted the Respondent says it should be subject to the condition that the leave be unpaid.

(r) Proposed clause 7 – Dispute Resolution Procedure

The Union proposes the inclusion of a dispute resolution procedure to apply to all disputes whereas the Respondent says the dispute resolution procedure should only reflect the requirements of s 48A of the Act.

(s) Proposed clause 8 – Superannuation

The Union seeks in its proposed clause 8.3 that the nominated funds be Westscheme Superannuation Fund, West State Super Fund and Superannuation Trust of Australia. The Respondent says that its longstanding practice for the past 16 years is to make contributions into the AMP Superleader Fund until such time as the employee nominates a complying nomination fund or scheme. Consequently, the Respondent says the AMP Superleader Fund should be stated as the nominated fund in clause 8.3. Further, the Respondent points out that its employees are not eligible to contribute to the West State Super Fund as they are not engaged by a public sector organisation. The Union opposes the inclusion of the AMP Superleader fund because of reports in the newspaper about losses by AMP in the past few years.

Wage Fixing Principles

59 Principle 11(a) of the Statement of Principles (2004) 84 WAIG 1521 – June 2004 provides:

> "In the making of a new award, the main consideration shall be that the award meets the needs of the particular industry or enterprise while ensuring that employees' interests are also properly taken into account. Structural efficiency considerations shall apply in the making of such an award."

60 The Structural Efficiency Principle was set out in full by the Commission in Court Session in its State Wage Case decision given on 24 December 1993 (1993) 74 WAIG 198 at 200. The Structural Efficiency Principle provides a framework through which it is intended that the parties to an award co-operate positively in a fundamental review of that award with a view to implementing measures to improve the efficiency of industry and provide employees with access to more varied, fulfilling and better paid jobs. The measures should include but not be limited to:

- establishing skill-related career paths which provide an incentive for employees to continue to participate in skill formation;
- eliminating impediments to multi-skilling and broadening the range of tasks which an employee may be required to perform;
- creating appropriate relativities between different categories of employees within the award and at enterprise level;
- ensuring that working patterns and arrangements enhance flexibility and the efficiency of the industry;
- including properly fixed minimum rates for classifications in awards relate appropriately to one another, with any amounts in excess of these properly fixed minimum rates being expressed as supplementary payments;
- updating and/or rationalising the list of respondents to awards; and

- addressing any cases where award provisions discriminate against sections of the workforce.
- examining both award and non-award matters to test whether work classifications and basic work patterns and arrangements are appropriate - the examination to include specific consideration of -
  - (i) the contract of employment including the employment of casual, part-time, temporary, fixed term and seasonal employees,
  - (ii) the arrangement of working hours,
  - (iii) the scope and incidence of the award;
- inserting facilitative provisions in relevant clauses of the award;
- establishing a consultative mechanism and procedures appropriate to their size, structure and needs for consultation and negotiation on matters affecting their efficiency and productivity;
- providing in awards, in order ensure increased efficiency and productivity at the enterprise level, while not limiting the rights of either an employer or union to arbitration, a process whereby consideration can be given to changes in award provisions; any agreement reached under this process would have to be formally ratified by the Commission and any disputed areas should be subject to conciliation and/or arbitration; and
- providing in an award a provision to the effect that an employer may direct an employee to carry out such duties as are within the limits of the employee's skill, competence and training.

Section 36A of the *Industrial Relations Act*

61 Section 36A(1) of the Act provides:

> "In any proceedings in which the Commission is considering the making of an award ("the new award") that extends to employees to whom no award currently extends ("the employees"), the onus is on any party opposing the making of the new award to show that it would not be in the public interest."

62 I do not accept that s 36A(1) of the Act has application in this matter. Even if I was to reject the submission on behalf of the Respondent that the terms and conditions of the *Restaurant, Tearoom and Catering Workers' Award* or the *Hotel and Tavern Workers' Award* currently extend to the employees, I do not accept that s 36A(1) of the Act applies. Pursuant to s 36A(1) of the Act an onus is imposed on any party opposing the making of a new award. In this matter no party opposes the making of a new award so as to invoke the provisions of s 36A(1). The Respondent simply proposes a new award in terms which are in substance in many material respects different to the terms of the award proposed by the Union.

63 Where the Commission makes a new award it is required to apply the provisions of the Statement of Principles (*Robe River Iron Associates v The Amalgamated Metal Workers and Shipwrights' Union of Western Australia and Others* (1993) 73 WAIG 1993 at 1999). To that extent I do not accept that the onus lies on either party in this matter as the Commission must satisfy itself that when making a new award that the terms of a new award comply with the Statement of Principles and the requirements of the Act.

Conclusion

64 Having carefully considered all of the evidence and the submissions made by the parties I am not satisfied that I should make an award that reflects the REA Award. The REA Award has not applied to the work of persons employed to carry out on-train passenger services work for the past seven and a half years. If the application for a new award had been made shortly after the Respondent won the tender for the work in 1997, the Union would have had a strong argument in favour of the making of a new award that substantially reflects the terms and conditions of the REA Award. Further, I am not satisfied the limited evidence given by Ms Catalano about working conditions on the Australind addresses the matters the Commission must be satisfied of when applying Principle 11 of the Statement of Principles.

65 Further, I note that whilst in 1990 the REA Award applied to employees engaged in providing on-train services on the Indian Pacific, some time later the employees who provided these services on the Indian Pacific became covered by awards of the Federal Commission. The current award which applies to these employees was made on 30 October 1998 (AW797846). I note in particular that the classifications set out in clause 12.1 of that award do not reflect classifications or rates of pay found in the REA Award.

66 In relation to the Respondent's argument that the *Restaurant, Tearoom and Catering Workers' Award* or the *Hotel and Tavern Workers' Award* currently applies to the employees, whilst I have reservations about the argument it is probably technically correct. Section 37(1) of the Act provides:

> "An award has effect according to its terms, but unless and to the extent that those terms expressly provide otherwise it shall, subject to this section —
>
> (a) extend to and bind —
>
> (i) all employees employed in any calling mentioned therein in the industry or industries to which the award applies; and
>
> (ii) all employers employing those employees;
>
> and
>
> (b) operate throughout the State, other than in the areas to which section 3(1) applies."

67 I accept that the employees in question can be said to be "workers" employed within a Restaurant and/or Tearoom as defined in clause 6(1) of the *Restaurant, Tearoom and Catering Workers' Award* as the employees can be said to work in a "place" or a "vehicle" from which food is sold. Pursuant to clause 4 of the *Restaurant, Tearoom and Catering Workers' Award* the award only extends to workers employed in the callings described in clause 21 of the award. Whilst it can be said that the duties of a Customer Service Officer are described in the calling of Food and Beverage Attendant Grade 3, I do not accept that all of the duties of a Customer Service Officer are adequately described in the classification of Food and Beverage Attendant Grade 3 or that the rate of pay for a Food and Beverage Attendant Grade 3 adequately reflects the proper evaluation of skills, responsibilities and work of a Customer Service Officer, that is the work value of the positions.

68 Section 6(af) and (ca) of the Act provide:

"The principal objects of this Act are –

…

(af) to facilitate the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises;

…

(ca) to provide a system of fair wages and conditions of employment;"

69 Section 26(1)(a), (c), (d)(iii) and (vi) of the Act provide:

"(1) In the exercise of its jurisdiction under this Act the Commission —

(a) shall act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms;

…

(c) shall have regard for the interests of the persons immediately concerned whether directly affected or not and, where appropriate, for the interests of the community as a whole; and

(d) shall take into consideration to the extent that it is relevant —

…

(iii) the capacity of employers as a whole or of an individual employer to pay wages, salaries, allowances or other remuneration and to bear the cost of improved or additional conditions of employment;

(vi) the need to facilitate the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises;"

70 In applying Principle 11(a) of the Statement of Principles and s 6(af) and (ca), s 26(1)(a), (c), (d)(iii) and (vi) of the Act, I make the following findings:

(a) In relation to the employer's capacity to pay I note that if the Union's claim is granted or if the costs of the new award varies from the rates submitted in the Respondent's tender, the Respondent will have to renegotiate its contract with the PTA. Pursuant to clause 39.3 of the Respondent's contract with the PTA (Exhibit P), the PTA is obliged to assess whether the cost of a new award will incur more or less cost to the Respondent and add to or deduct from the rates contained in the Schedule of Prices.

(b) In relation to objects 6(af) and (ca) and s 26(1)(d)(vi) and Principle 11(a) I note that the Commission must when considering the provisions of the award apply the principle that the main consideration is that the award meets the needs of the particular industry or enterprise whilst ensuring that employees' interests are also properly taken into account. In my opinion the industry comprises the organisations from time to time who provide Customer Services on the Prospector and the AvonLink Service. At this point in time the only organisation who does so is the Respondent.

(c) Neither party argued their case on the basis that the terms of the award sought by each were a "package" of terms and conditions which should be accepted in their entirety. Both parties dealt with each condition in dispute separately. Consequently, I intend to deal with the merits of each clause separately.

Right of Entry

71 Sections 49H and 49I of Division 2G of Part II of the Act provide:

"49H. Right of entry for discussions with employees

(1) An authorised representative of an organisation may enter, during working hours, any premises where relevant employees work, for the purpose of holding discussions at the premises with any of the relevant employees who wish to participate in those discussions.

…

49I. Right of entry to investigate breaches

(1) An authorised representative of an organisation may enter, during working hours, any premises where relevant employees work, for the purpose of investigating any suspected breach of this Act, the *Long Service Leave Act 1958*, the MCE Act, the *Occupational Safety and Health Act 1984*, the *Mines Safety and Inspection Act 1994* or an award, order, industrial agreement or employer-employee agreement that applies to any such employee."

72 Section 49N(1) of the Act provides:

"(1) The Commission does not have jurisdiction to make an award or order or register an agreement conferring, or making provision for the exercise of, powers of entry and inspection that are additional to, or inconsistent with, the powers of entry and inspection under Division 2F and this Division and the provisions as to the exercise of those powers."

73 Sections 49H(1) and 49I(1) plainly contemplate that an authorised representative of a Union has the power to exercise the right of entry, not only at a place where employees work, but to exercise the right during working hours. To restrict the right of entry in the manner contemplated by the Respondent would in my opinion be inconsistent with the powers of entry in ss 49H and 49I. What the Respondent seeks in this matter was effectively sought by the Appellant and rejected at first instance and on appeal in *The Most Reverend B Hickey, Archbishop of Perth v The Independent School Salaried Officers' Association of Western Australia, Industrial Union of Workers* (op cit), that is the Archibishop was of the opinion the union in that matter should not be entitled to exercise its right to enter school staffrooms. What is proposed by the Respondent in this matter in my opinion plainly alters and restricts the right of entry conferred by ss 49H and 49I of the Act and will not be included in the new award.

Contract of Employment

74 The rosters in Exhibits B and H were tendered by the Respondent as rosters which depict a typical weekly roster. Exhibit B (Prospector) shows that in the week ending 14 May 2005, one employee was rostered to work one shift only for 7.25 hours and the other seven employees were rostered to work hours which ranged from 29.25 hours to 36.75 hours. Exhibit H (AvonLink)

shows that one employee was rostered to work 35 hours in the week ending 21 May 2005 and the other was rostered to work 26.25 hours.

75 When regard is had to the rosters and the evidence that trainees cannot be rostered to work as a Senior Customer Service Officer on the Prospector, to provide for flexibility to the industry and whilst taking into account the interests of the employees, except for trainees, the minimum number of hours for a permanent part-time employee will be 48 hours per fortnight and maximum will be 76 hours per fortnight. The reason why I have reached this conclusion is that the rosters show that the majority of employees are rostered to work 26.25 or more hours a week. In light of this evidence I am not satisfied that the Respondent has the need to roster employees for less than 48 hours per fortnight. In relation to trainees, the Respondent will be entitled to roster them for a minimum of 30 hours per fortnight and a maximum of 76 hours per fortnight and provision will be made for 3 months' probation with an extension of a further 3 months as agreed by the parties.

Stand Down

76 The nature of the country rail network is that breakdowns, derailment and disruptions to service from time to time occur, which are not caused by the employer, that may result in rail services being cancelled thus causing the Respondent on some occasions to not be able to provide employees with work. The current practice is to not pay employees when a breakdown occurs. I note that when a breakdown occurs which results in an employee being away from their home base that it is agreed the employee will be paid travelling time to their home base. Breakdown or stand down clauses are commonly found in many private sector awards. These include the *Metal Trades (General) Award 1966 No. 13 of 1965* (clause 6(9)) and the *Restaurant, Tearoom and Catering Workers' Award* (clause 41). When the consideration that breakdowns and disruptions to service will cause a burden on employees if unpaid is balanced against the nature of the industry, in that disruptions to service do occur which are not the fault of the employer and the fact that the essence of the clause sought by the Respondent reflects current conditions of employment, it is my opinion that a stand down clause should be included in the award. The clause, however, proposed by the Respondent will not be replicated in the award as in my opinion it contains lengthy and unnecessary verbiage. Further the stand down clause in the award will make it clear that employees who are away from their home base at the time they are stood down are to be paid travelling time to return and for waiting time, Held Away from Home Allowance and, if applicable, Away from Home and Meal Allowance until they commence their journey to their home base. In addition, the clause will provide that if employees are unable to be contacted to be stood down prior to reporting to work they will be paid for a minimum of two hours work.

Hours of Duty and Overtime

77 The Union's proposal in respect of hours of duty would have the result that a substantial number of shifts each week worked by employees on the Prospector and the Avon link would be worked as overtime. The arrangement sought by the Respondent reflects the terms contained within the *Restaurant, Tearoom and Catering Workers' Award* and reflects hours found generally in the hospitality industry, that is the spread of hours is not restricted. Having considered the existing patterns of work, the nature of the industry in this matter and the interests of the employees, I am satisfied that the clauses in respect of hours of work and overtime proposed by the Respondent should in substance be adopted. Overtime will be payable for all hours worked in excess of an employees rostered shift. As meal breaks will be paid, they will not be counted for the purpose of ordinary time to calculate overtime. Further, the maximum number of hours an employee is to work will be restricted to 10 hours except when a delay occurs. As the rosters show the shortest shift is 4.5 hours, the minimum length of a shift for part-time employees shall be 4 hours. I am not satisfied that the Union's proposal should overweigh the needs of the industry. However, I do accept that the employees should be remunerated for working shift work as it is a well known principle that working shift work has disabilities which require special remuneration. This is particularly so in this matter where the employer cannot guarantee the length of a shift because the services in this matter often run late. I note the Union's proposal in respect of shift work only partially reflects what is contained in the REA Award. Having considered the provisions of the Union's proposed clause carefully whilst I note that the majority of shifts worked on the Prospector will not attract a shift payment, whereas 50% of the AvonLink shifts will attract a shift payment, I am satisfied that the Union's proposed clause for shift work payments in its proposed clause 5.5 should be adopted.

Meal and Rest Breaks

78 Whilst in other workplaces what the Union proposes in relation to meal and rest breaks would be appropriate, I am not satisfied that the Respondent would be able to comply with an award obligation that requires each employee to be provided with a continuous meal break of 20 minutes duration. The evidence given by the witnesses who are employees of the Respondent, establishes that a continuous break of 20 minutes cannot on occasions be taken on the Prospector without customer service being disrupted. Having regard to the needs of the industry and the interests of the employees I will include a provision in the new award that requires the Respondent to provide to employees who work on the Prospector a paid break of 30 minutes that can be taken in cumulative periods. Further, the award will provide if no break of a sufficient length to enable a meal to be eaten is provided by the expiration of six hours, the employer will be required to pay the employee double time until such a break is taken.

79 In relation to employees who work the AvonLink Service, as the train service only runs for one and a half or three hours each way, I accept that an employee who works on the AvonLink receives a sufficient paid break each shift. However, in the event that an employee who works on the AvonLink after working 8 hours is not able to take a break of a sufficient length to consume a meal they will be entitled to overtime.

Classification Structure and Rates of Pay

80 Both parties agreed that the position of Senior Customer Service Officer should be set as the key classification and that the rates for the other classifications should be set relative to the skills, duties and responsibilities to the Senior Customer Service Officer position.

81 I accept the submission made on behalf of the Union that the duty to carry out emergency train procedures under the direction of the driver is a duty of the kind in past which was traditionally carried out by a guard and that rates of pay for guards were set above the tradesmen's rate.

82 It is a well known principle that the degree of responsibility is not lessened because the requirement to exercise it is not invoked by the circumstances at a particular time. Supervisory duties may be also be placed in this category as supervision only occurs when the circumstances for it arises. However, I also accept that as a Senior Customer Service Officer may be called upon to exercise supervisory duties each shift and may rarely be called upon to exercise emergency procedures and this should be reflected in the work value given to this position. I do not agree that these duties should be compensated by an allowance as they form part of the work value of the position.

83 If regard is had to the classifications under the *Restaurant, Tearoom and Catering Workers' Award* the position of Senior Customer Service Officer can best be described by the classification of Food and Beverage Supervisor which is a level 5 position. The calling of Food and Beverage Supervisor is described in clause 6 of the *Restaurant, Tearoom and Catering Workers' Award* to mean "an employee who has the appropriate level of training including a supervisory course and who has responsibility for supervision, training and coordination of food and beverage staff, or stock control for a bar or series of bars."

84 The rate of pay for a Food and Beverage Supervisor is set at 107.43% of the Metal Tradesperson's rate. Having regard to the skills, duties and responsibilities of a Food and Beverage Supervisor and the skills and duties and responsibilities of a Senior Customer Service Officer, it is plain that the latter calls for higher skills, duties and responsibilities than the former. The reason why I have reached this conclusion is that Senior Customer Service Officers have additional duties to a person who works as a Food and Beverage Supervisor being:

(a) emergency train procedures and train safety procedures under the direction of the engine driver;

(b) train cleanliness, including collecting rubbish;

(c) assisting with luggage; and

(d) selling tickets.

85 Having regard to all of these matters I will set the rate of pay for Senior Customer Service Officers at a 110% of Metal Tradesperson's rate.

86 I agree that separate rates of pay should be struck for Customer Service Officers who work on the Prospector and the AvonLink.

87 In relation to the skills, duties and responsibilities of the Customer Service Officers who work on the Prospector, I have taken the following into account:

(a) they do not have responsibility for Gold Service;

(b) they are trained to act as Senior Customer Service Officers;

(c) they are required to carry out emergency procedures under direction of the Senior Customer Service Officer;

(d) when their skills, duties and responsibilities are contrasted to a Grade 3 Food and Beverage Attendant it is clear that they carry out the following additional duties:

(i) train cleanliness, including collecting rubbish;

(ii) assisting with luggage; and

(iii) making announcements; and

(e) they assist in the training and supervision of trainees.

88 Having regard to all of these matters I will set the rate of pay for Customer Service Officers who work on the Prospector at 105% of Metal Tradesperson’s rate.

89 The duties and responsibilities of a Customer Service Officer who works on the AvonLink Service differ in the following way to that of a Customer Service Officer who works on the Prospector and a Senior Customer Service Officer. The Customer Service Officer when working on the AvonLink:

(a) works alone;

(b) has the same duties in relation to emergency procedures and train safety procedures under the direction of the engine driver as a Senior Customer Service Officer;

(c) once the new AvonLink Service is introduced will not be required to man a buffet or have any duties associated with the running of a buffet; and

(d) has no coordination, supervision or training duties.

As to working alone, it is apparent, that given the level of incidents related to intoxicated or rowdy passengers and the fact that unduly disruptive passengers can only be detrained at a station, that the responsibility of working alone is greater on the AvonLink Service than other places of work in the hospitality industry. I have taken all of these matters into account and will set the rate of pay for a person who works the AvonLink Service (with a buffet) at 110% of a Metal Tradesperson's rate of pay and 105% (without a buffet) of a Metal Tradesperson's rate of pay.

90 As there is no dispute about the rate of pay to be paid to a trainee, the trainee's rate of pay will be set at 84.2% of the Metal Tradesperson's rate of pay.

91 A trainee will be described as Customer Service Officer level 1. A Customer Service Officer who works on the Prospector will be described as level 2. A Customer Service Officer who works on the AvonLink and whose duties do not include maintaining a buffet will be described as level 3. A Senior Customer Service Officer will be described as level 4. A Customer Service Officer who works on the AvonLink with a buffet will be described as level 5. The classification descriptions will be as follows:

Customer Service Officer Level 1 (Trainee)

Key Responsibilities

This is a position for a trainee Customer Service Officer. Can be called upon to perform the role of a Customer Service Officer during their training and assessment period.

Trainee assessed during probation period.

Indicative Tasks

- Their task is to learn Customer Service Officer tasks.

Customer Service Officer Level 2 (Prospector)

Key Responsibilities

To ensure that the quality of service provided to passengers reflects the overall standard necessary to meet passenger requirements.

Can be called upon to relieve in a designated position.

Indicative Tasks

An employee at this level may be required to perform all or some of the following tasks:

- Pre-departure train set-up.
- Provide comfort, assistance and information to passengers.
- Buffet operation
  - pre-departure set-up
  - sales/service/revenue collection
  - end-of-trip closure and stocktake.
- Maintain train cleanliness and tidiness.
- Ticket sales if required and collect revenue.
- Carry out emergency procedures as directed.
- Complete documentation as required.
- Deal with customer complaints and problems.
- Supervision of level 1 (Trainees) as required.
- Other duties as directed within their skill, competence and training.

Customer Service Officer Level 3 (AvonLink – without buffet)

Key Responsibilities

To ensure that the quality of service provided to passengers reflects the overall standard necessary to meet the employer's passenger requirements.

Can be required to work alone and perform safe working duties in accordance with the Books of Rules and General Appendix as required.

Indicative Tasks

An employee at this level may be required to perform all or some of the following tasks:

- Pre-departure train set-up.
- Provide comfort, assistance and information to passengers.
- Sell tickets, collect revenue, and reconcile revenue with ticket sales.
- Maintain train cleanliness and tidiness.
- Carry out emergency procedures as directed by the engine driver.
- Complete documentation as required.
- Deal with customer complaints and problems.
- Other duties as directed within their skill, competence and training.

Senior Customer Service Officer Level 4

Key Responsibilities

To ensure that the quality of service provided to passengers reflects the overall standard necessary to meet the employer's passenger requirements.

Supervise Customer Service Officers.

Perform safe working duties in accordance with the Book of Rules and General Appendix as required.

Can be called upon to relieve in a lower designated position.

Indicative Tasks

An employee at this level may be required to perform all some of the following tasks:

- Most, if not all, of the tasks for Customer Service Officer on the Prospector.
- Co-ordinate/supervise/be in charge of Customer Service Officers on the same train.
- Provide services using specific procedures to special classes of passengers such as Gold Service.
- Train Operation.
- Ensure on-train facilities are operational and equipment and amenities meet standards.
- Interact with locomotive crew for train operation.
- Carry out emergency procedures as directed by the engine driver or delegate as required.
- Deal with unresolved passenger problems.
- Responsible for revenue collection.
- Other duties as directed within their skill, competence and training.

Customer Service Officer Level 5 (AvonLink – with buffet)

Key responsibilities

To ensure that the quality of service provided to passengers reflects the overall standard necessary to meet passenger requirements.

Can be required to work alone and perform safe working duties in accordance with the Books of Rules and General Appendix as required.

Indicative Tasks

An employee at this level may be required to perform all or some of the following tasks:

- Pre-departure train set-up.
- Provide comfort, assistance and information to passengers.
- Buffet operation
  - pre-departure set-up
  - sales/service/revenue collection
  - end-of-trip closure and stocktake.
- Sell tickets, collect revenue, and reconcile revenue with ticket sales.
- Maintain train cleanliness and tidiness.
- Carry out emergency procedures as directed by the engine driver.
- Complete documentation as required.
- Deal with customer complaints and problems.
- Other duties as directed within their skill, competence and training.

92 I have not adopted the proposal in relation to each classification that other duties as directed are to be by the engine driver, as the description of this duty should comply with the Structural Efficiency Principle and encompass not only directions given by the engine driver but directions given by the employer which are not restricted to train operation or emergency procedures.

Employees Performing Higher Duties

93 The clause sought by the Union, is a clause commonly found in awards of this Commission. A similar provision is contained in the *Restaurant, Tearoom and Catering Workers' Award.* As the Respondent has put forth no material to support its opposition to the clause sought by the Union, the Award will reflect the terms sought by the Union.

On-call Allowance

94 Because the nature of the industry only enables the employment of a small number of employees to provide on-train customer services on the Prospector and the AvonLink and because the number of employees required to work regularly changes, the Respondent is unable to provide certainty to its employees in relation to the shifts each employee is required to work. When employees are contacted to work an extra shift I accept on occasions they decline but on other occasions, because of the small number of employees, it may be the case they are the only person who can be asked. I do not accept that the employees should be remunerated by an on-call allowance as proposed by the Union as on occasions employees will have the option to decline the extra shift. Having considered the needs of the Respondent, the industry and the interest of the employees the award will provide that if an employee is rostered to work an additional shift within a fortnight and the roster for that fortnight had been published prior to the request, the employee shall be paid an additional 25% of their rate of pay for working ordinary hours for that shift.

Away from Home and Meal Allowance

95 The Respondent points out that the cost of the Union's proposal is that each employee who stays overnight away from their home base in Kalgoorlie or in Perth will be $80.00 per employee for each stay. The Respondent says this amount is excessive.

96 Having heard the parties and considered the evidence that on each occasion an employee stays overnight they stay one night only and are away from home for two meals prior to starting their next shift, namely dinner at night and breakfast the following morning, I am not satisfied that the Union's claim is justified. Whilst I am satisfied that the amount currently paid to employees is inadequate, it appears clear that the amount sought by the Union exceeds the amount the ATO prescribes as reasonable. Whilst that does not preclude the Commission from determining the amount sought by the Union to be reasonable I note that the consequence of an award of an amount equal to $80 per overnight stay for two meals could render part of that amount taxable. In any event I accept the Respondent's submission that this Commission should determine this matter solely on the evidence before it. The evidence of the witnesses and Exhibit A establishes that the median cost of purchasing dinner in Kalgoorlie can be assessed at $30.00 and breakfast at $14.00. I am satisfied that it is reasonable for employees to purchase a cooked breakfast prior to starting work at 6.05am. In relation to overnight stays in Perth when regard is had to the evidence of the witnesses and Exhibit M the median cost of purchasing dinner can be assessed at $32.00 and breakfast at $17.00. As I have not heard any evidence about the cost of lunch I am unable to assess the cost of lunch. However, I will give liberty to apply in the event of a change to the rosters. I am also satisfied that an allowance should be made for incidentals. Whilst no evidence was given as to the average cost of additional purchases of toiletries and telephone calls I will allow an amount of $5.00 per overnight stay.

Held Away from Home Allowance

97 Employees who act as the Senior Customer Service Officer are regularly held away from their home base, and whilst held away they are away from their families and are not provided with any work by the employer whilst held away for periods that may extend beyond 12 hours. While recognising the nature of working patterns in the industry require this to be done and the interests of the employees affected I am satisfied that the employees who are required to stay away from their home base for longer than 12 hours prior to returning to duty should be compensated for that disability as proposed by the Union in its proposed clause 5.3.

Travelling Time

98 Because of the nature of the rosters, if the Union's claim is granted, unless there is a breakdown or stoppage, the employees' travelling time payments are likely to be unaffected. This is because:

(a) the employees who work the AvonLink Service do not work on weekends;

(b) the employees who work the Prospector return to their home base at the end of a shift or at the completion of the following shift; and

(c) the employees who work the AvonLink Service complete travelling and waiting time during the week in a period substantially less than 7.6 hours.

Having regard to the nature and needs of the industry, the matters set out above and the principle that being away from home may interfere with family responsibilities on a weekend the award will provide for travelling time as proposed by the Union in its proposed clause 5.4.

District Allowances

99 To be consistent with the Location Allowance General Order (2005) 85 WAIG 1893 this allowance will be called Location Allowance. I note that the allowance prescribed for full-time employees in the *Restaurant, Tearoom and Catering Workers' Award* is currently $7.20 per week and was $7.10 at the time of hearing this matter. As the parties have agreed that the allowance should be $3.50 per week for part-time employees who reside in Kalgoorlie I will allow that amount. I do not agree that the amount should be specified as an hourly amount.

Public Holidays

100 Although each employee may be rostered to work less than five days a week, employees rostered to work on the Prospector can be rostered to work on any day from Monday to Sunday and employees who work on the AvonLink are rostered to work on any day from Monday to Friday. AvonLink Services do not run on public holidays. Although the practice of the Respondent is to only engage employees to work part-time, it is apparent from the rosters (Exhibits B and H) that the five out of eight employees who were rostered to work the Prospector (ex Perth) were rostered to work five days in the week ending 14 May 2005 and both employees who work the AvonLink Service were rostered to work five days in the week ending 21 May 2005. I note that the terms of the clause sought by the Union reflects clause 17(1) of the *Restaurant, Tearoom and Catering Workers' Award*. As the employees' working patterns in this matter do not differ from full-time employees (other than the total number of hours worked each week) it follows that the employees should be entitled to pay in lieu for public holidays or time off in lieu. As their hours of work vary each week, their entitlement to time off or pay of a public holiday should be calculated by averaging the number of hours an employee has worked in the preceding seven weeks prior to the date of the public holiday or in the preceding seven week roster cycle. This entitlement also takes into account the statutory entitlement that arises under s 30 of the *Minimum Conditions of Employment Act 1993* in relation to the employees who work on the AvonLink Service. These employees are not rostered to work public holidays. Employees who work on a public holiday will be paid double time and a half.

Annual Leave

101 The Respondent has put nothing before the Commission to justify its view that an entitlement to an extra week's leave is not relevant or appropriate in 2005. Because the rostered cycle for employees who work on the Prospector cycle runs over seven days each week including public holidays, they should be entitled to an extra week's leave for the disability of working continuous shift work. As their hours of work vary each week, their entitlement to payment of annual leave and leave loading should be calculated by averaging the number of hours an employee has worked in the preceding seven weeks prior to taking holidays or in the preceding seven week roster cycle. As employees who work on the AvonLink Service do not work weekends or public holidays they will not be entitled to an extra week's leave.

Sick and Carer's Leave

102 In my opinion there is little difference between the wording proposed by the Union and the Respondent in relation to proposed clause 6.4.5. Except for the requirement to notify no later than eight hours prior to commencing a shift, the Respondent agrees that the obligation to notify no later than eight hours be subject to exception of where it is not reasonably possible to do so. Because of the same number of employees who are available to fill a shift this requirement is not unreasonable. Consequently, the award will substantially reflect the wording sought by the Respondent in relation to this matter. However, I do not agree the words "it is a condition of employment" should be contained in an award clause. If an employer wishes to make an award condition a condition of an employee's contract, it is open for them to take steps to do so.

Leave to Attend Union Business

103 The Respondent's submission that paid leave to attend Union business is not a community standard or not usually found in private sector awards is correct. The Union has put no evidence or material before the Commission to justify its claim for paid leave except to make a submission that employees should be able to engage in negotiations without being financially disadvantaged. As the Respondent does not object to employees taking unpaid leave to attend Union business, the award will include the clause sought by the Union except that there will be no entitlement to pay when taking the leave.

Dispute Resolution Procedure

104 Pursuant to s 6(c) of the Act it is a principal object of the Act to provide means for preventing and settling industrial disputes not resolved by amicable agreement, including threatened, impending and probable industrial disputes, with the maximum of expedition and the minimum of legal form and technicality. It is also a principal object of the Act pursuant to s 6(d) to provide for the observance and enforcement of awards made for the prevention or settlement of industrial disputes.

105 Although, s 48A of the Act only imposes a mandatory requirement that all awards are to contain dispute resolution procedures to be followed in connection with questions, disputes or difficulties arising under the award, objects s 6(c) and s 6(d) impose an obligation on the Commission to provide means to prevent or settle industrial disputes that go beyond questions, disputes or difficulties arising under an award. I note that historically, dispute resolution clauses in most awards of the Commission have extended to all industrial matters. Further, it is in the interests of industrial harmony if industrial disputes can be resolved at the workplace without the intervention of the Commission. In light of these matters, the award will contain a dispute resolution clause that is not restricted to the matters in s 48A of the Act.

Superannuation

106 The Respondent has made superannuation contributions on behalf of its employees to the AMP Superleader Fund for the past 16 years. The Union opposes this fund being named as the nominated fund until an employee nominates a complying superannuation fund or scheme. The Union does not dispute that the AMP Superleader Fund is a complying superannuation fund. As the Union has not produced any evidence or material on which inference can be drawn that the employees have been disadvantaged by having their superannuation contributions paid into the AMP Superleader Fund, the AMP Superleader Fund will be the nominated fund in the award. The Commission notes that if employees wish to have their superannuation contributions paid into Westscheme Superannuation Fund, the Superannuation Trust of Australia or any other complying fund, it will be open to the employees to nominate that fund.

Liberty to Apply

107 There will be liberty to apply in respect of the following clauses and matters:

(a) Away from Home and Meal Allowance;

(b) Hours of Work and Rostering;

(c) Contract of Employment;

(d) Annual Leave Loading.

Operative Date

108 Mr Doughty says that even if the Union's application for the award is successful it would be best for the Respondent if the award only came into operation at the end of the current contract because the Respondent tendered for the work on the basis of the timetables and the current rates of pay which are now in place. He says that if there is to be a change in rates of pay and conditions as sought by the Union there will be a negative cost impact upon the Respondent. Alternatively, the Respondent says that if the Commission makes a new award in the terms sought by the Union then the terms of the award should not come into effect until two months after the date of the decision as that would provide the Respondent with an opportunity to renegotiate the terms of their contract with the PTA. Pursuant to clause 39.3 of the contract the Respondent has with the PTA, the Respondent is able to renegotiate the rates payable under the contract if this Commission makes an award that contains different conditions to the conditions the Respondent anticipated would apply at the date of entering into the contract with the PTA.

109 The Union seeks an order that the award is to have effect from the date of the order.

110 Having heard the parties and taking into account the interests of the employees and the employer, in particular that the Respondent will have to calculate the cost of the proposed changes and renegotiate the terms of its contract with the PTA, I am of the opinion that the award should take effect six weeks from the date of the order. Minutes of a proposed order will issue within 7 days of the publication of these reasons for decision.

2005 WAIRC 02611

PROSPECTOR AND AVONLINK ON TRAIN CUSTOMER SERVICE OFFICERS AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH **APPLICANT** **-v-** DELRON CLEANING PTY LTD TRADING AS "DELRON HOSPITALITY MANAGEMENT" **RESPONDENT**
CORAM	COMMISSIONER J H SMITH
DATE	WEDNESDAY, 14 AUGUST 2005
FILE NO/S	A 10 OF 2003
CITATION NO.	2005 WAIRC 02611

Result	New award registered
Representation	
Applicant	Mr G Ferguson
Respondent	Mr P Robertson (as agent on behalf of Respondent)

Order

Having heard Mr G Ferguson on behalf of the Applicant and Mr P Robertson, as agent 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 Prospector and AvonLink on Train Customer Service Officers Award be made in accordance with the following schedule and that such award shall have effect from the beginning of the first pay period commencing on or after 26 October 2005.

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

SCHEDULE

1. AWARD STRUCTURE

1.1 TITLE

This Award shall be known as the "Prospector and AvonLink on Train Customer Service Officers Award".

1.2 ARRANGEMENT

1. Award Structure

1.1 Title

1.2 Arrangement

1.3 Area and Scope

1.4 Term

1.5 Definitions

1.3 AREA AND SCOPE

This Award shall apply to On Train Customer Service Officers engaged in the provision of Customer Service on rail services between Perth and Kalgoorlie, commonly known as the Prospector Rail Service, and between Perth and Northam and Merredin, commonly known as the AvonLink Service.

1.4 TERM

This Award shall operate for a period of twenty four (24) months from and including the operative date and will remain in force until cancelled, suspended or replaced.

1.5 DEFINITIONS

1.5.1 "Commission" means the Western Australian Industrial Relations Commission.

1.5.2 "Union" means the Australian Rail Tram and Bus Industry Union of Employees West Australian Branch.

2. CONTRACT OF EMPLOYMENT

2.1 CONTRACT OF EMPLOYMENT

2.1.1 The employer shall advise each employee, prior to the time of engagement, if they are to be employed as a permanent full time, permanent part time or casual employee.

2.1.2 A trainee is an employee engaged:

(a) for a minimum of thirty (30) ordinary hours a fortnight and a maximum of seventy six (76) ordinary hours per fortnight; and

(b) on three (3) months' probation which may be extended up to another three (3) months provided that prior to expiration of the initial period of probation the employee was informed which areas of performance that have to be improved within the extended period.

2.1.3 A permanent full time employee is an employee engaged for a minimum of seventy six (76) hours ordinary hours per fortnight.

2.1.4 A permanent part- time employee is an employee engaged for a minimum of forty eight (48) ordinary hours per fortnight and up to a maximum of seventy six (76) hours per fortnight; and except as provided otherwise shall be entitled to all the conditions of employment as a full time employee on a pro rata basis.

2.1.5 A casual employee is an employee who is engaged by the hour and paid as such and has no entitlement to paid leave, except bereavement leave and who is informed of these conditions of employment before they are engaged.

(a) The service of a casual employee may be terminated by one (1) hour's notice, given by either side, on any day.

(b) A casual employee shall be paid the ordinary rate prescribed for the classification of work performed with the addition of twenty percent (20%).

2.1.6 Notice of Termination by Employer

(a) The employment of any employee (other than a casual employee) may be terminated by the following notice period, provided that an employee has not been dismissed on the grounds of serious misconduct in which case the employee 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 (1) year	At least one (1) week
More than one (1) year but not more than three (3) years	At least two (2) weeks
More than three (3) years but not more than five (5) years	At least three (3) weeks
More five (5) years	At least four (4) weeks

(b) An employee who at the time of being given notice is over forty five (45) years of age and has completed two (2) years' continuous service with the employer, shall be entitled to one (1) weeks' additional notice.

2.1.7 Payment in lieu of the notice prescribed in 2.1.6 (a) and (b) shall be made if the appropriate notice period is not given. The employment may be terminated by part of the period of notice specified and part payment in lieu thereof.

2.1.8 In calculating any payment in lieu of the notice the employer shall pay the employee the ordinary wages for the period of notice had the employment not been terminated.

2.1.9 The period of notice an employee must give to their employer is the same as applies to the employer, except the extra week for being forty five (45) years of age; provided the employer and the employee may agree to a shorter period of notice.

2.2 STAND DOWN

2.2.1 Where on any day or part of a day the employer, for any cause outside of the employer's control, including as a result of industrial action by the Union party to this Award, or by any other association or union, or any disruption to work, is unable to provide useful work to an employee, the employee shall not be entitled to pay in respect of any such day or part of a day except where 2.2.4 or 2.2.5 applies. Provided that an employee may elect to have such a day or part of a day paid as annual leave where there is an adequate entitlement to such leave.

2.2.2 The employer shall be entitled not to pay the employee in respect of any day or part of a day where an employee is stood down or suspended under the Public Transport Authority's "Safe Working Infringement Demerit System". Such absence shall not count as continuous service for the purposes of this Award.

2.2.3 On the days following a disruption to work, the employer may continue to stand down the employee if circumstances prevent the employee being usefully employed.

2.2.4 Where an employee is stood down away from their home base, until they return to their home base they shall be entitled to Away from Home and Meal Allowance in accordance with 5.2, Held Away from Home Allowance in accordance with 5.3 and Payment for Travelling Time in accordance with 5.4.

2.2.5 Where an employee reports for work, without being notified prior to travelling to work for commencement of their shift that they are to be stood down, they shall receive a minimum of two (2) hours' pay.

2.3 EMPLOYEES PERFORMING HIGHER DUTIES

2.3.1 An employee engaged on duties carrying a higher rate of wage than the employee's ordinary classification shall be paid the higher rate of wage for the time the employee is so engaged, but if so engaged for more than two (2) hours of one (1) day or shift, the employee shall be paid the higher rate for the whole day or shift.

3. HOURS OF WORK

3.1 HOURS OF DUTY

3.1.1 The maximum ordinary hours of employment shall be seventy six (76) hours per fortnight and may be worked at any time from Monday to Sunday.

3.1.2 Employees who work on the Prospector shall be paid from the nominated commencement of their shift until fifteen (15) minutes after the arrival of the train at its final destination. Employees who work on the AvonLink Service shall be paid from the nominated commencement of their shift until ten (10) minutes after the arrival of the train at its final destination.

3.1.3 An employee shall not be required to remain on duty for more than ten (10) hours except where a delay to train services causes the train not to reach its final destination until after the expiration of ten (10) hours.

3.1.4 Any hours worked in excess of the rostered ordinary hours of work shall be paid at the overtime rates provided for in 3.3. Any paid meal break shall not count as time worked for the purposes of the payment of overtime.

3.1.5 A minimum shift length of four (4) hours shall apply to all categories of employment, excluding full time employees.

3.2 MEAL AND REST BREAKS

3.2.1 When an employee is rostered to work on the Prospector they shall be entitled to a paid meal break of at least thirty (30) minutes cumulative.

3.2.2 An employee who, for operational reasons as determined by the employer, may require an employee to work longer than six (6) hours without taking a break of sufficient length to consume a meal. In such circumstances the employee shall be paid at double time rates until time for a break is made available to the employee concerned to consume a meal/or up to the conclusion of the employee's rostered hours for the day.

3.3 OVERTIME PAYMENTS

3.3.1 Employees shall be paid at the rate of time and a half for the first two (2) hours worked in excess of their rostered ordinary hours of work and double time thereafter. Each day shall stand alone.

4. RATES OF PAY

4.1 MINIMUM ADULT AWARD WAGE

4.1.1 No Adult employee shall be paid less than the Minimum Adult Award Wage unless otherwise provided by this clause.

4.1.2 The Minimum Adult Award Wage for full time adult employees is $484.40 per week payable on and from 7th July 2005.

4.1.3 The Minimum Adult Award Wage of $484.40 per week is deemed to include all arbitrated safety net adjustments from State Wage Case decisions.

4.1.4 Unless otherwise provided in this clause adults employed as casuals, part time employees or pieceworkers or employees who are remunerated wholly on the basis of payment by result shall not be paid less than pro rata the Minimum Adult Award Wage according to the hours worked.

4.1.5 Juniors shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this Award to the Minimum Adult Award Wage of $484.40 per week.

4.1.6

(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.

4.1.7 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.

4.1.8 Minimum Adult Award Wage

The rates of pay in this Award include the minimum weekly wage for adult employees payable under the 2005 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 enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required. Increases under the previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the Minimum Adult Award Wage.

4.1.9 Adult Apprentices

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

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

(c) Where in this Award an additional rate is expressed as a percentage, fraction or multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this Award for the actual year of the apprenticeship.

(d) Nothing in this subclause shall operate to reduce the rate of pay fixed by this Award for an adult apprentice in force immediately prior to 5 June 2003.

4.2 CLASSIFICATION STRUCTURE

4.2.1 Customer Service Officer Level 1 (Trainee)

(a) Key Responsibilities

(i) This is a position for a trainee Customer Service Officer. Can be called upon to perform the role of a Customer Service Officer during their training and assessment period.

(ii) Trainee assessed during probation period.

(b) Indicative Tasks

Their task is to learn Customer Service Officer tasks.

4.2.2 Customer Service Officer Level 2 (Prospector)

(a) Key Responsibilities

(i) To ensure that the quality of service provided to passengers reflects the overall standard necessary to meet passenger requirements.

(ii) Can be called upon to relieve in a designated position.

(b) Indicative Tasks

An employee at this level may be required to perform all or some of the following tasks:

(i) Pre-departure train set-up.

(ii) Provide comfort, assistance and information to passengers.

(iii) Buffet operation – pre-departure set-up:

- sales/service/revenue collection.
- end-of-trip closure and stock take.

(iv) Maintain train cleanliness and tidiness.

(v) Ticket sales if required and collect revenue.

(vi) Carry out emergency procedures as directed.

(vii) Complete documentation as required.

(viii) Deal with customer complaints and problems.

(ix) Supervision of level 1 (Trainees) as required.

(x) Other duties as directed within their skill, competence and training.

4.2.3 Customer Service Officer Level 3 (AvonLink – without buffet)

(a) Key Responsibilities

(i) To ensure that the quality of service provided to passengers reflects the overall standard necessary to meet the employer's passenger requirements.

(ii) Can be required to work alone and perform safe working duties in accordance with the Books of Rules and General Appendix as required.

(b) Indicative Tasks

An employee at this level may be required to perform all or some of the following tasks:

(i) Pre-departure train set-up.

(ii) Provide comfort, assistance and information to passengers.

(iii) Sell tickets, collect revenue, and reconcile revenue with ticket sales.

(iv) Maintain train cleanliness and tidiness.

(v) Carry out emergency procedures as directed by the engine driver.

(vi) Complete documentation as required.

(vii) Deal with customer complaints and problems.

(viii) Other duties as directed within their skill, competence and training.

4.2.4 Senior Customer Service Officer Level 4

(a) Key Responsibilities

(i) To ensure that the quality of service provided to passengers reflects the overall standard necessary to meet the employer's passenger requirements.

(ii) Supervise Customer Service Officers.

(iii) Perform safe working duties in accordance with the Book of Rules and General Appendix as required.

(iv) Can be called upon to relieve in a lower designated position.

(b) Indicative Tasks

An employee at this level may be required to perform all some of the following tasks:

(i) Most if not all of the tasks for Customer Service Officer on the Prospector.

(ii) Co-ordinate/supervise/being in charge of Customer Service Officers on the same train.

(iii) Provide services using specific procedures to special classes of passengers such as Gold Service.

(iv) Train Operation.

(v) Ensure on-train facilities are operational and equipment and amenities meet standards.

(vi) Interact with locomotive crew for train operation.

(vii) Carry out emergency procedures as directed by the engine driver or delegate as required.

(viii) Deal with unresolved passenger problems.

(ix) Responsible for revenue collection.

(x) Other duties as directed within their skill, competence and training.

4.2.5 Customer Service Officer Level 5 (AvonLink – with buffet)

(a) Key responsibilities

(i) To ensure that the quality of service provided to passengers reflects the overall standard necessary to meet passenger requirements.

(ii) Can be required to work alone and perform safe working duties in accordance with the Books of Rules and General Appendix as required.

(b) Indicative Tasks

An employee at this level may be required to perform all or some of the following tasks:

(i) Pre-departure train set-up.

(ii) Provide comfort, assistance and information to passengers.

(iii) Buffet operation – pre-departure set-up:

- sales/service/revenue collection.
- end-of-trip closure and stock take.

(iv) Sell tickets, collect revenue, and reconcile revenue with ticket sales.

(v) Maintain train cleanliness and tidiness.

(vi) Carry out emergency procedures as directed by the engine driver.

(vii) Complete documentation as required.

(viii) Deal with customer complaints and problems.

(ix) Other duties as directed within their skill, competence and training.

4.3 WAGE RATES

4.3.1 The following rates of pay shall apply to the classifications contained in 4.2 – Classification Structure:

Classification Levels	Base Rate – per week (Full time)
Customer Service Officer Level 1 (Trainee)	$486.80
Customer Service Officer Level 2 (Prospector)	$607.10
Customer Service Officer Level 3 (AvonLink – without buffet)	$607.10
Customer Service Officer Level 4	$636.00
Customer Service Officer Level 5 (AvonLink – with buffet)	$636.00

4.4 SUPPORTED WAGE SYSTEM

4.4.1 This clause defines the conditions, which will apply to employees who, because of the effects of a disability are eligible for a supported wage under the terms of this Award. In the context of this clause the following definitions will apply:

(a) "Supported Wage System" means the Commonwealth Government system to promote employment for people who cannot work at full Award wages because of a disability, as documented in "Supported 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 assessments 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,* 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.

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

(c) This clause does not apply to employers in respect of their facility, program, undertaking, services 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, and such employees.

(d) Provided that this exclusion shall not prevent services funded under s 10 or s 12A of the *Disability Services Act 1986,* 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 and all other criteria are met.

4.4.3 Supported Wage Rates

(a) 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 (4.4.4)	% Of prescribed award rate
10%	10%
20%	20%
30%	30%
40%	40%
50%	50%
60%	60%
70%	70%
80%	80%
90%	90%

(b) Provided that the minimum amount payable shall not be less than the Disability Support Pension "ordinary income free area", as varied, or any such scheme as defined in the *Social Security Act 1991*.

(c) Where a person's assessed capacity is ten (10%) percent, they shall receive a high degree of assistance and support.

4.4.4 Assessment of Capacity

For the purpose of establishing the percentage of the Award rate to be paid to an employee under this Award, the productive capacity of the employee will be assessed in accordance with the Supported Wage System and documented in an assessment instrument by either:

(a) The employer and the Union, in consultation with the employee; or

(b) The employer and an accredited assessor agreed to by the employer and the Union and the employee.

4.4.5 Lodgement of Assessment Instrument

(a) All assessment instruments under the conditions of this clause, including the appropriate percentage of the Award wage to be paid to the employee, shall be lodged by the employer with the Registrar of the Commission.

(b) All assessment instruments shall be agreed and signed by the parties to the assessment, provided that where the Union 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 with ten (10) working days.

4.4.6 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 accordance with the procedures for assessing capacity under the Supported Wage System.

4.4.7 Other Terms and Conditions of Employment

Where an assessment has been made, the applicable percentage shall apply to the wage rate only. Employees covered by the provisions of the clause will be entitled to the same terms and conditions of employment as all other employees covered by this Award, but be paid at the rate of wage as determined in accordance with this clause.

4.4.8 Workplace Adjustment

An employer wishing to employ a person under the provisions of this clause shall take reasonable steps to make changes in the workplace to enhance the employee's capacity to do the job. Changes may involve redesign of job duties, working time arrangements and work □rganization in consultation with other employees in the area.

4.4.9 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 provisions of this clause for a trial period not exceeding twelve (12) weeks, except that in some cases additional work adjustment time (not exceeding four (4) weeks) may be needed.

(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 not be less than the amount prescribed in 4.4.3.

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

(e) Where the employer and employee wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment shall be entered into based on the assessment under 4.4.4.

4.4.10 The conditions of employment to apply during a 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.

5. ALLOWANCES AND FACILITIES

5.1 ADDITIONAL SHIFT ALLOWANCE

5.1.1 If an employee is requested to work an additional shift within a fortnight and the roster for that fortnight has been published prior to the request the employee shall be paid an allowance of twenty five percent (25%) of their ordinary rate of pay for working ordinary hours on that shift.

5.2 AWAY FROM HOME AND MEAL ALLOWANCE

5.2.1 The employer will pay for suitable accommodation for the employee when required to stay away from their home station.

5.2.2 The employee will be paid the following amounts when required to stay overnight and when they are away from their home station for an evening meal and/or breakfast:

	Perth	Kalgoorlie
Breakfast	$17.00	$14.00
Dinner	$32.00	$30.00
Incidentals	$5.00	$5.00

5.3 HELD AWAY FROM HOME ALLOWANCE

5.3.1 An employee, who books off duty away from the employee's home station, for more than twelve (12) hours will be paid a held away from home payment. The payment, per hour, for any time that exceeds the twelve (12) hours shall be paid at the employee's ordinary rate of pay.

5.3.2 Time paid in accordance with the provisions of 5.3.1 will not count towards working time but may be used, to the extent necessary, toward payment of the ordinary hours.

5.3.3 Payment will be calculated from the time the employee books off duty until the time the employee books back on duty. All hours in excess of twelve (12) hours will be paid at ordinary time rates, including public holiday duty.

5.4 PAYMENT FOR TRAVELLING TIME

5.4.1 An employee travelling as a passenger going to work away from or returning to the employees' home station shall be paid at ordinary rates for the actual travelling time or waiting time for the first seven hours thirty six minutes (7.6 hours), and thereafter at half the ordinary rates in any one (1) period of twenty four (24) hours.

5.4.2 Any employee travelling as a passenger going out to act in a higher capacity or returning after acting in a higher capacity shall receive payment for travelling and waiting time at the rate for such higher capacity.

5.4.3 Saturday and Sunday travelling time shall be paid at the rate of time and a half on the same conditions as on week days.

5.5 SHIFT WORK

5.5.1 The employer shall pay an employee who works:

(a) On an afternoon shift which commences before 1800 hrs and the ordinary time of which concludes at or after 1830 hours will be paid an allowance of $2.01 an hour on all time paid at the ordinary rate.

(b) On a night shift which commences at or between 1800 hours and 0359 hours an allowance of $2.33 an hour on all time paid at the ordinary rate.

(c) On an early morning shift which commences at or between 0400 hours and 0530 hours an allowance of $2.01 an hour for all time paid at the ordinary rate.

(d) In addition to the hourly shift work allowance an employee an allowance of $2.33 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.

5.6 UNIFORMS AND PERSONAL PROTECTIVE EQUIPMENT

5.6.1 Uniforms

(a) Employees shall be issued with sufficient uniforms appropriate to their work requirements. All such issues are to be worn as required by the employer and maintained by the employee in a clean and serviceable condition.

(b) Replacement uniforms will be either periodic or on a fair wear and tear basis as determined by the employer in consultation with the employee/s.

5.6.2 Personal Protective Equipment

(a) Employees shall be issued with the relevant personal protective equipment as is appropriate to their work requirements.

(b) Employees shall ensure that all such issues are worn and maintained in accordance with the employer's (or applicable *Occupational Safety and Health Act 1984*) requirements.

(c) The employer shall issue personal protective equipment on either a periodic or fair wear and tear basis, as determined by the employer, having regard to the occupational safety and health obligations or any specific product requirements.

(d) Any changes proposed to personal protective equipment shall be managed through appropriate occupational safety and health processes.

5.7 LOCATION ALLOWANCE

5.7.1 A part time employee who lives and works at Kalgoorlie will be paid a location allowance of $3.50 per week.

5.7.2 Where a dependent resides with an employee who lives and works at the location of Kalgoorlie, the employee will be paid a district allowance at double the rate provided for in 5.7.1.

5.7.3 For the purpose of this clause a dependant is:

(a) A spouse; or de facto partner;

(b) Where there is no spouse, a child or any other relative of the employee who relies on the employee for their main support; and who does not receive a location allowance of any kind.

6 LEAVE

6.1 PUBLIC HOLIDAYS

6.1.1 The following days or days observed in lieu shall, subject to 6.1.5 be allowed as holidays without deduction of pay, namely:

(a) New Years Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Labour Day, Foundation Day, Sovereign's Birthday, Christmas Day and Boxing Day;

(b) 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.

6.1.2 When any of the days mentioned in 6.1.1 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 on 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.

6.1.3 When any of the days mentioned in 6.1.1 above falls on an employee's rostered day off the employer and the employee may agree that the employee receive:

(a) An additional day's wage; or

(b) Another day off may be allowed within twenty eight (28) days of the award holiday; or

(c) An additional day off may be taken in conjunction with a period of annual leave.

6.1.4 "Pay", "days off" and "days in lieu" shall be calculated by averaging the number of hours an employee has worked in seven (7) completed weeks immediately prior to the date of the public holiday.

6.1.5 Employees required to work on a public holiday shall be paid at the rate of double time and a half for all hours worked, provided that a minimum payment of four (4) hours shall be paid to the employee concerned.

6.2 ANNUAL LEAVE

6.2.1 Except as hereinafter provided a period of four (4) consecutive weeks leave with payment at the employee's ordinary rate of wage as set out in 3.1 shall be allowed annually to an employee by the employer. Entitlements to annual leave accrue pro rata on a weekly basis.

(a) Shift workers who work on the Prospector other than regular day shift shall be entitled and allowed an additional week's leave on full pay inclusive of leave loading of seventeen and a half percent (17.5%).

(b) This provision shall also apply to any other employee whose regular ordinary hours of work are over Saturdays, Sundays and public holidays and whose hours of duty vary throughout the twenty four (24) hours of the day.

(c) Notwithstanding anything elsewhere contained herein this subclause shall not apply to any employee whose ordinary hours of work must be completed between Monday and Friday inclusive and not on public holidays.

6.2.2

(a) During a period of annual leave an employee shall receive a loading of seventeen and a half percent (17.5%) calculated on the employee's ordinary wage.

(b) The loading prescribed by this subclause shall apply to proportionate leave on termination.

6.2.3 Pay for annual leave and loading for part time employees shall be calculated by averaging the number of hours an employee has worked in seven (7) completed weeks immediately prior to taking leave.

6.2.4 If any public 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.

6.2.5 An employee whose employment terminated and who has not taken the leave prescribed under this clause shall be given payment in lieu of that leave:

(a) For employees to whom 6.2.1 (a) and (b) do not apply at the rate of 2.923 hours of pay for each completed week of service for a full time employee, and pro rated for a part time employee. The pro rata entitlement for part time employees shall be calculated in the manner set out in 6.2.3 and shall be one thirteenth (1/13) of a week's pay for each completed week of service.

(b) Where 6.2.1 (a) and (b) apply at the rate of 3.654 hours of pay for each completed week of service for a full time employee, and pro rata for a part time employee. The pro rata entitlement for part time employees shall be calculated in the manner set out in 6.2.3 and shall be 1/10.4 of a weeks pay for each completed week of service.

6.2.6 Any time in respect of which an employee is absent from work except time for which the employee is entitled to claim paid leave as prescribed by this Award shall not count for the purpose of determining the employee's right to annual leave.

6.2.7 Subject to 6.2.8, annual leave may be taken in more than one (1) period of leave. No employee shall be required to take annual leave unless four (4) weeks' prior notice is given by the employer.

6.2.8 Where an employer and employee have not agreed when the employee is to take their 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 twelve (12) months before that time; provided the employee provides at least two (2) weeks' notice.

6.3 BEREAVEMENT LEAVE

6.3.1 Subject to 6.3.3 on the death of:

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

(b) The child or stepchild of an employee;

(c) The brother, sister, step brother or sister of an employee;

(d) The parent step-parent or grandparent of an employee; or

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

an employee, including a casual, is entitled to leave up to and including the day of the funeral of such person and be paid bereavement leave of up to two (2) days.

6.3.2 The two (2) days need not be consecutive.

6.3.3 Bereavement leave is not to be taken during a period of any other kind of leave.

6.3.4 An employee who claims to be entitled to paid leave in accordance with 6.3.1 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 the subject of the leave sought and the relationship of the employee to the deceased person.

6.4 SICK LEAVE

6.4.1 An employee who is unable to attend or remain at their place of employment during the ordinary hours of work by reason of personal ill health or injury shall be entitled to payment during such absence in accordance with the following provisions.

6.4.2 An employee is entitled to payment pursuant to this clause for seventy six (76) hours per annum accrued pro rata on a weekly basis.

6.4.3 If in the first or successive years of service with the employer a employee is absent on the ground of personal ill health or injury for a period longer than their entitlement to paid sick leave, payment may be adjusted at the end of

that year of service, or at the time the employee's services terminate, if before the end of that year of service, to the extent that the employee has become entitled to further paid sick leave during that year of service.

6.4.4 Unused portions of paid sick leave shall accumulate from year to year.

6.4.5 An employee shall notify the employer and not later than eight (8) hours before the employee is required to commence ordinary rostered working hours (except where it is not reasonably possible to do so) of their inability to attend for work, the nature of the illness or injury and the estimated duration of the absence.

6.4.6 Where the employee knows in advance that they cannot attend ordinary rostered working hours then notification should be given to the employer as soon as this is known and preferably at least two (2) days in advance of the absence.

6.4.7 An employee claiming entitlement under this clause must provide to the employer evidence that would satisfy a reasonable person of the entitlement.

6.4.8 Where an employee is ill during the period of annual leave and produces at the time or as soon thereafter medical evidence to the satisfaction of the employer that the employee was a result of the employee's illness, confined to their place of residence or a hospital for a period of seven (7) days, the employee may with the consent of the employer, be granted at a time convenient to the employer additional leave equivalent to the period during which the employee was so confined.

6.5 CARER'S LEAVE

6.5.1 An employee is entitled to use up to five (5) days of sick leave per year to be the primary care giver for the employee's spouse or de-facto partner, child including adult child, parent, sibling or grandparent or member of the employee's household who is injured or ill and in need of immediate care and attention. If requested, the employee must provide evidence that would satisfy a reasonable person of the entitlement to such leave.

6.6 PARENTAL LEAVE

6.6.1 In this clause:

(c) "Adoption", in relation to a child, is a reference to a child who:

(i) is not the natural child or the stepchild of the employee or the employee's partner;

(ii) is less than (five) 5 years of age; and

(iii) has not lived continuously with the employee for six (6) months or longer;

(d) "Continuous service" means service under an unbroken contract of employment and includes:

(i) any period of parental leave; and

(ii) any period of leave or absence authorised by the employer;

(e) "Expected date of birth" means the day certified by a medical practitioner to be the day on which the medical practitioner expects the employee or the employee's partner, as the case may be, to give birth to a child;

(f) "Parental leave" means leave provided for by 6.6.2;

(g) "Partner" means a spouse or *de-facto* partner.

6.6.2 Entitlement to Parental Leave

(a) Subject to 6.6.4, 6.6.5(a) and 6.6.6(a), an employee, other than a casual employee, is entitled to take up to fifty two (52) consecutive weeks' of unpaid leave in respect of:

(i) the birth of a child to the employee or the employee's partner; or

(ii) the placement of a child with the employee with a view to the adoption of the child by the employee.

(b) An employee is not entitled to take parental leave unless the employee:

(i) has, before the expected date of birth or placement, completed at least twelve (12) months' continuous service with the employer; and

(ii) has given the employer at least ten (10) weeks' written notice of the employee's intention to take leave.

(c) An employee is not entitled to take parental leave at the same time as the employee's partner but this paragraph does not apply to one (1) week's parental leave:

(i) taken by the partner parent immediately after the birth of the child; or

(ii) taken by the employee and the employee's partner immediately after a child has been placed with them with a view to their adoption of the child.

(d) The entitlement to parental leave is reduced by any period of parental leave taken by the employee's partner in relation to the same child, except the period of one (1) week's leave referred to in (c) hereof.

6.6.3 Maternity Leave Six (6) Weeks Before and After Birth

A female employee who is pregnant and who has given notice of the employee's intention to take parental leave, other than for adoption, is to start the leave six (6) weeks before the expected date of birth, unless in respect of any period closer to the expected date of birth a medical practitioner has certified that the employee is fit to work.

6.6.4 Medical Certificate

An employee who has given notice of the employees' intention to take parental leave, other than for adoption, is to provide to the employer a certificate from a medical practitioner stating that the employee or the employee's partner, as the case may be, is pregnant and the expected date of the birth.

6.6.5 Notice of Partner's Parental Leave

(a) An employee who has given notice of the employee's intention to take parental leave or who is actually taking parental leave is to notify the employer of particulars of any period of parental leave taken or to be taken by the employee's partner in relation to the same child.

(b) Any notice given under (a) hereof is to be supported by a statutory declaration by the employee as to the truth of the particulars notified.

6.6.6 Notice of Parental Leave Details

(a) An employee who has given notice of the employee's intention to take parental leave is to notify the employer of the dates on which the employee wishes to start and finish the leave no less than four (4) weeks before the proposed commencement date.

(b) An employee who is taking parental leave is to notify the employer of any change to the date on which the employee wishes to finish the leave.

(c) The starting and finishing dates of a period of parental leave are to be agreed between the employee and the employer.

6.6.7 Return to Work after Parental Leave

(a) An employee shall confirm the employee's intention of returning to work by notice in writing to the employer given not less than four (4) weeks prior to the expiration of the period of parental leave.

(b) On finishing parental leave, an employee is entitled to the position the employee held immediately before starting parental leave.

(c) If the position referred to in (b) hereto is not available, the employee is entitled to an available position:

(i) for which the employee is qualified; and

(ii) that the employee is capable of performing, most comparable in status and pay to that of the employee's former position without loss of income.

(d) Where, immediately before starting parental leave, an employee was acting in, or performing on a temporary basis the duties of the position referred to in (b) hereof, that paragraph applies only in respect of the position held by the employee immediately before taking the acting or temporary position.

6.6.8 Effect of Parental Leave on Employment

Absence on parental leave:

(a) does not break the continuity of service of an employee; and

(b) is not taken into account when calculating the period of service for the purpose of this Award.

6.6.9 Any absence from duty during a pregnancy for medical reasons relating to that pregnancy and certified by a suitably qualified medical practitioner will not be debited against the fifty two (52) week maternity entitlement.

6.6.10 Transfer to a Safe Job

Where in the opinion of a duly qualified medical practitioner, illness or risks arising out of the pregnancy or hazards connected with the work, assigned to the employee make it inadvisable for the employee to continue at her present work, the employee shall, if the employer deems it practicable, be transferred to a safe job at the rate and on the conditions attaching to that job until the commencement of parental leave.

If the transfer to a safe job is not practicable, the employee may, or the employer may require the employee to, take leave for such period as is certified necessary by a duly qualified medical practitioner. Such leave shall be treated as maternity leave.

6.6.11 Variation of Period of Parental Leave

(a) Provided the addition does not extend the parental leave beyond fifty two (52) weeks, the period may be lengthened once only, save with the agreement of the employer, by the employee giving not less than fourteen (14) days' notice in writing stating the period by which the leave is to be lengthened.

(b) The period of leave may, with the consent of the employer, be shortened by the employee giving not less than fourteen (14) days' notice in writing stating the period by which the leave is to be shortened.

6.6.12 Cancellation of Parental Leave

(a) Parental leave, applied for but not commenced, shall be cancelled when the pregnancy of an employee or the employee's partner, as the case may be, terminates other than by the birth of a living child.

(b) Where the pregnancy of an employee or an employee's partner, as the case may be, then on parental leave terminates other than by the birth of a living child, it shall be the right of the employee to resume work at a time nominated by the employer which shall not exceed four (4) weeks from the date of notice in writing by the employee to the employer that the employee desires to resume work.

6.6.13 Special Maternity Leave

(a) Where the pregnancy of an employee not then on parental leave terminates after twenty eight (28) weeks other than by the birth of a living child she shall be entitled to such period of unpaid leave (to be known as special maternity leave) as a duly qualified medical practitioner certifies as necessary before her return to work.

(b) For the purpose of 6.6.8 and 6.6.14 maternity leave shall include special maternity leave.

(c) An employee returning to work after the completion of a period of leave taken pursuant to this subclause shall be entitled to the position which she held immediately before proceeding on such leave or, in the case of an employee who was transferred to a safe job pursuant to 6.6.10, to the position the employee held immediately before such transfer.

6.6.14 Parental Leave and Other Leave Entitlements

Provided the aggregate of leave including leave taken pursuant to this clause does not exceed fifty two (52) weeks:

(a) An employee may, in lieu of or in conjunction with parental leave, take any annual leave or long service leave or any part thereof to which the employee is then entitled.

(b) Paid sick leave or other paid authorised award absences (excluding annual leave or long service leave), shall not be available to an employee during absence on parental leave.

6.6.15 Termination of Employment

(a) An employee on parental leave may terminate the employee's 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 the employee's absence on parental leave or, in the case of a female employee, her pregnancy, but otherwise the rights of an employer in relation to termination of employment are not hereby affected.

6.6.16 Replacement Employees

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

(b) 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.

(c) Before an employer engages a person to replace an employee temporarily promoted or transferred in order to replace an employee exercising 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.

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

(e) A replacement employee shall not be entitled to any of the rights conferred by this clause except where the employee's employment continues beyond the twelve (12) months' qualifying period.

6.7 LONG SERVICE LEAVE

6.7.1 Employees covered by this Award shall be entitled to Long Service Leave in accordance with the *Long Service Leave* General Order of the Commission, as published in part 1 (January) of each year of the Western Australian Industrial Gazette.

6.8 LEAVE TO ATTEND UNION BUSINESS

6.8.1 The employer shall grant unpaid leave during working hours to an employee:

(a) Who is required to give evidence before an Industrial Tribunal;

(b) Who as a Union nominated representative of employees is required to attend negotiations and/or conferences between the Union and employers;

(c) When prior agreement between the Union and the employer has been reached for the employee to attend official meetings preliminary to negotiations or industrial hearings; or

(d) Who as a Union nominated representative of employees is required to attend joint Union/management consultative committees or working parties.

6.8.2 The granting of leave pursuant to 6.8.1 shall only be approved:

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

(b) For the minimum period necessary to enable the Union business to be conducted or evidence to be given;

(c) For those employees whose attendance is essential; and

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

6.8.3 The employer shall not be liable for any expenses associated with an employee attending to Union business.

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

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

7 DISPUTE RESOLUTION PROCEDURE

7.1 Subject to the *Industrial Relations Act 1979* in the event of a problem, grievance, question, dispute, claim or difficulty that affects one or more employees, or arises from the employee's work or contract of employment, including any question, dispute or difficulty arising under this Award the following procedure shall apply:

(a) At first instance the matter shall be raised with the employer's supervisor/manager/ as appropriate.

(b) In the event that the matter is unresolved it may be raised with the employer by the individual concerned (or their representative), or the Union delegate or Union official involved.

(c) The parties will attempt to resolve the matter prior to either party referring the matter to the Commission.

(d) If the matter is still not resolved it may be referred to the Commission for determination, and if necessary arbitration.

8. REGISTERED ORGANISATION MATTERS

8.1 RIGHT OF ENTRY FOR DISCUSSIONS WITH EMPLOYEES

8.1.1 An authorised representative of an organisation may enter, during working hours, any premises where relevant employees work, for the purpose of holding discussions at the premises with any relevant employees who wish to participate in those discussions.

8.1.2 An "authorised representative" means a person who holds an authority in force under Part II of Division 2G of the *Industrial Relations Act 1979*.

8.1.3 A "relevant employee" means an employee who is a member of an organisation or who is eligible to become a member of the organisation.

8.1.4 The authorised representative shall give at least twenty four (24) hours' notice to the employer.

8.1.5 Notwithstanding 8.1.4, the Union may apply to waive the requirement to give the employer concerned notice of an intended exercise of a power if the Commission is satisfied that to give such notice would defeat the purpose for which the power is intended to be exercised.

8.2 RIGHT OF ENTRY TO INVESTIGATE BREACHES

8.2.1 An authorised representative of an organisation may enter, during working hours, any premises where relevant employees work, for the purpose of investigating any suspected breach of the *Industrial Relations Act 1979*, the *Minimum Conditions of Employment Act 1993*, the *Occupational Safety and Health Act 1984*, or an award, order, industrial agreement or employer-employee agreement that applies to any such employee.

8.2.2 An authorised representative in this clause has the same meaning as in 8.1.2.

8.2.3 For the purpose of investigating any breach, the authorised representative may:

(a) Subject to 8.2.4 and 8.2.6, require the employer to produce for the representative's inspection, during working hours at the employer's premises or at any mutually convenient time and place, any employment records of employees or other documents, other than workplace agreements or employer-employee agreements, kept by the employer that are related to the suspected breach;

(b) Make copies of the entries in the employment records or documents related to the suspected breach; and

(c) During working hours, inspect or view any work, material, machinery, or appliance that is relevant to the suspected breach.

8.2.4 The employer is not required to produce an employment record of an employee if the employee is a party to an employer-employee agreement and has made a written request to the employer that the record not be available for inspection by an authorised representative.

8.2.5 An authorised representative is not allowed to enter premises where relevant employees work for the purposes of investigating a suspected breach of an employer-employee agreement to which a relevant employee is a party unless the authorised representative is authorised in writing by that relevant employee to carry out the investigation.

8.2.6 An authorised representative is not entitled to require the production of employment records or other documents unless, before exercising the power, the authorised representative has given the employer concerned:

(a) If the records or other documents are kept on the employer's premises, at least twenty four (24) hours' written notice; or

(b) If the records or other documents are kept elsewhere, at least forty eight (48) hours' written notice.

8.2.7 An authorised representative shall, upon request of the occupier of the premises, show their authority before entering the premises.

9. SUPERANNUATION

9.1 The employer will make contributions on the employee's behalf, as provided by the *Superannuation Guarantee (Administration) Act 1992* into a complying Superannuation fund or scheme nominated by the employee.

9.1.1 The employer shall advise the employee of their entitlement to nominate a complying Superannuation fund or scheme.

9.1.2 The employer shall make contributions into the AMP Superleader Fund until such time as the employee nominates a complying Superannuation fund or scheme.

9.1.3 The employee and employer shall be bound by the nomination of the employee unless the employee and the employer agree to change the complying Superannuation fund or scheme to which contributions are to be made. Provided that an employer shall not unreasonably refuse to agree to a change of complying Superannuation fund or scheme requested by an employee.

10. LIBERTY TO APPLY

10.1 There will be liberty to apply in respect of the following matters:

(a) Away from Home and Meal Allowance;

(b) Hours of Work and Rostering;

(c) Contract of Employment; and

(d) Annual Leave Loading.

11. NAMED PARTIES TO THE AWARD

11.1 The named parties to this Award are:

(a) The Australian, Rail Tram and Bus Industry Union of Employees, West Australian Branch.

(b) Delron Cleaning Pty Ltd trading as "Delron Hospitality Management".

12. WHERE TO GO FOR FURTHER INFORMATION

The Australian, Tail Tram Bus Industry Union of Employees, West Australian Branch
2/10 Nash Street, PERTH WA 6000
Telephone: 9225 6722
Facsimile: 9225 6733
Email: general@rtbuwa.asn.au

Chamber of Commerce and Industry of Western Australia
180 Hay Street, EAST PERTH WA 6004
Telephone: 9365 7555
Facsimile: 9365 7550
Email: info@cciwa.com

Department of Consumer and Employment Protection
Labour Relations, 3rd Floor
Dumas House, 2 Havelock Street, WEST PERTH WA 6005
Telephone: 9222 7700
Facsimile: 9222 7777
Email: labourrelations@docep.wa.gov.au
Wageline: 1300 655 266

13. OTHER LAWS AFFECTING EMPLOYMENT

Industrial Relations Act 1979 (WA)
Minimum Conditions of Employment Act 1993 (WA)
Workplace Relations Act 1996 (Cth)
Superannuation Guarantee (Administration) Act 1992 (Cth)
Occupational Safety and Health Act 1984 (WA)
Equal Opportunity Act 1984 (WA)

2005 WAIRC 02624

PROSPECTOR AND AVONLINK ON TRAIN CUSTOMER SERVICE OFFICERS AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	DELRON CLEANING PTY LTD TRADING AS "DELRON HOSPITALITY MANAGEMENT"
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	FRIDAY, 16 SEPTEMBER 2005
FILE NO/S	A 10 OF 2003
CITATION NO.	2005 WAIRC 02624

Result	Correction order issued
Representation	
Applicant	Mr G W Ferguson
Respondent	Mr P G Robertson (as agent on behalf of Respondent)

Correcting Order

WHEREAS on Wednesday, 14 September 2005, an order in A 10 of 2003 was deposited in the office of the registrar;

AND WHEREAS the schedule attached to the said order contained an error;

NOW THEREFORE the Commission, pursuant to powers conferred on it under section 27 of the *Industrial Relations Act 1979*, hereby orders that –

1. 6.2 <u>ANNUAL LEAVE</u>: Delete 6.2.1 and insert the following in lieu thereof:

6.2.1 Except as hereinafter provided a period of four (4) consecutive weeks leave with payment at the employee's ordinary rate of wage as set out in 4.3.1 shall be allowed annually to an employee by the employer. Entitlements to annual leave accrue pro rata on a weekly basis.

(a) Shift workers who work on the Prospector other than regular day shift shall be entitled and allowed an additional week's leave on full pay inclusive of leave loading of seventeen and a half percent (17.5%).

(b) This provision shall also apply to any other employee whose regular ordinary hours of work are over Saturdays, Sundays and public holidays and whose hours of duty vary throughout the twenty four (24) hours of the day.

(c) Notwithstanding anything elsewhere contained herein this subclause shall not apply to any employee whose ordinary hours of work must be completed between Monday and Friday inclusive and not on public holidays.

(Sgd.) J H SMITH,
Commissioner.

[L.S.]

2005 WAIRC 02858

PROSPECTOR AND AVONLINK ON TRAIN CUSTOMER SERVICE OFFICERS AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	DELRON CLEANING PTY LTD TRADING AS "DELRON HOSPITALITY MANAGEMENT"
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	FRIDAY, 21 OCTOBER 2005
FILE NO/S	A 10 OF 2003
CITATION NO.	2005 WAIRC 02858

Result	CORRECTION ORDER ISSUED
Representation	
Applicant	Mr G W Ferguson
Respondent	Mr P G Robertson (as agent on behalf of Respondent)

Correcting Order

WHEREAS on Wednesday, 14 September 2005, an order in A 10 of 2003 was deposited in the office of the registrar;

AND WHEREAS the schedule attached to the said order contained an error;

NOW THEREFORE the Commission, pursuant to powers conferred on it under section 27 of the *Industrial Relations Act 1979*, hereby orders that –

1. **6.6 PARENTAL LEAVE: Delete 6.6.1 and insert the following in lieu thereof:**

6.6.1 In this clause:

(a) "Adoption", in relation to a child, is a reference to a child who:

(i) is not the natural child or the stepchild of the employee or the employee's partner;

(ii) is less than (five) 5 years of age; and

(iii) has not lived continuously with the employee for six (6) months or longer;

(b) "Continuous service" means service under an unbroken contract of employment and includes:

(i) any period of parental leave; and

(ii) any period of leave or absence authorised by the employer;

(c) "Expected date of birth" means the day certified by a medical practitioner to be the day on which the medical practitioner expects the employee or the employee's partner, as the case may be, to give birth to a child;

(d) "Parental leave" means leave provided for by 6.6.2;

(e) "Partner" means a spouse or *de-facto* partner.

(Sgd.) J H SMITH,
Commissioner.

[L.S.]

PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

2005 WAIRC 02637

HOSPITAL SALARIED OFFICERS' AWARD NO. 39 OF 1968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS) **APPELLANT** **-v-** THE HONOURABLE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER SECTION 7 OF THE HOSPITALS AND HEALTH SERVICES ACT (WA) **RESPONDENT**
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER S J KENNER
DATE	FRIDAY, 16 SEPTEMBER 2005
FILE NO	P 17 OF 2005
CITATION NO.	2005 WAIRC 02637

Result	Award varied. Order issued.
Representation	
Applicant	Mr G Bucknall
Respondent	Mr J Ross

Order

HAVING heard Mr G Bucknall on behalf of the applicant and Mr J Ross on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby –

(1) ORDERS that the Hospital Salaried Officers' Award No. 39 of 1968 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period on or after 1 July 2005.

(2) NOTES that the district allowances in Clause 30(7) was amended in accordance with the following calculation:

ABS Catalogue No. 6401.0 – Table 1: CPI All Groups Index Numbers Perth.

March - 05	March - 04
144.4.1	139.6

$$\% \text{ Increase} = \frac{144.4 - 139.6}{130.6} \times 100 = 3.44\%$$

(Sgd.) S J KENNER,
Commissioner,
Public Service Arbitrator.

[L.S.]

SCHEDULE

1. Clause 30. - District Allowance: Delete subclause (7) of this clause and insert in lieu thereof the following:

(7) DISTRICT ALLOWANCES

(a) Officers without dependants [Subclause (2)(a)]

COLUMN I DISTRICT NO.	COLUMN II STANDARD RATE $ p.a.	COLUMN III EXCEPTIONS TO STANDARD RATE TOWN OR PLACE	COLUMN IV $ p.a
6	3,569	Nil	Nil
5	2,920	Fitzroy Crossing	3,933
		Halls Creek	
		Turner River Camp	
		Nullagine	
		Liveringa (Camballin)	3,655
		Marble Bar	
		Wittenoom	
		Karratha	3,438
		Port Hedland	3,199
4	1,471	Warburton Mission	3,952
		Carnarvon	1,385
3	927	Meekatharra	1,471
		Mount Magnet	
		Wiluna	
		Laverton	
		Leonora	
		Cue	
2	665	Kalgoorlie	222
		Boulder	
		Ravensthorpe	878
		Norseman	
		Salmon Gums	
		Marvel Loch	
		Esperance	
1	Nil	Nil	Nil

(b) Officers with dependants [Subclause (2)(b)]

Double the appropriate rate as prescribed in (a) above for officers without dependants.

The allowances prescribed in this subclause shall operate from the beginning of the first pay period commencing on or after July 1, 2005.

2005 WAIRC 02395

PUBLIC SERVICE AWARD 1992

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DEPARTMENT OF INDIGENOUS AFFAIRS AND OTHERS
	RESPONDENTS
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 18 AUGUST 2005
FILE NO	P 10 OF 2005
CITATION NO.	2005 WAIRC 02395

Result	Award varied

Order

HAVING heard Mr M Sims on behalf of the applicant and Mr D Spivey 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. PSA A 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 1st day of July 2005

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

SCHEDULE

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

(a) Officers Without Dependants (subclause 43(3)(a)):

COLUMN I	COLUMN II	COLUMN III	COLUMN IV
DISTRICT NO	STANDARD RATE $ p.a.	EXCEPTIONS TO STANDARD RATE TOWN OR PLACE	RATE $ p.a.
6	3,569	Nil	Nil
5	2,920	Fitzroy Crossing	3,933
		Halls Creek	
		Turner River Camp	
		Nullagine	
		Liveringa (Camballin)	3,655
		Marble Bar	
		Wittenoom	
		Karratha	3,438
		Port Hedland	3,199
4	1,471	Warburton Mission	3,952
		Carnarvon	1,385
3	927	Meekatharra	1,471
		Mount Magnet	
		Wiluna	
		Laverton	
		Leonora	
		Cue	
2	665	Kalgoorlie	222
		Boulder	
		Ravensthorpe	878
		Norseman	
		Salmon Gums	
		Marvel Loch	
		Esperance	
1	Nil	Nil	Nil

(b) Officers with dependants (subclause 43(3)(b)):

Double the appropriate rate as prescribed in (a) above for officers without dependants.

The allowances prescribed in this schedule shall operate from the beginning of the first pay period commencing on or after July 1, 2005.

AWARDS/AGREEMENTS—Variation of—

2005 WAIRC 02636

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 S J KENNER
DATE	FRIDAY, 16 SEPTEMBER 2005
FILE NO/S	APPL 664 OF 2005
CITATION NO.	2005 WAIRC 02636

Result	Award varied. Order issued.
Representation	
Applicant	Mr G Bucknall
Respondent	Mr M O'Connor as agent

Order

HAVING heard Mr G Bucknall on behalf of the applicant and Mr M O'Connor as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby –

(1) 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 from the first pay period on or after the date hereof.

(2) NOTES that the district allowances in Clause 32(7) was amended in accordance with the following calculation:

ABS Catalogue No. 6401.0 – Table 1: CPI All Groups Index Numbers Perth.

March - 05	March - 04
144.4	139.6

$$\% \text{ Increase} = \frac{144.4 - 139.6}{130.6} \times 100 = 3.44\%$$

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

SCHEDULE

1. Clause 32. - District allowance: Delete subclause (7) of this clause and insert in lieu thereof the following:

(7) District Allowances

(a) Officers without dependants (subclause (2)(a))

COLUMN I DISTRICT NO.	COLUMN II STANDARD RATE $ p.a.	COLUMN III EXCEPTIONS TO STANDARD RATE TOWN OR PLACE	COLUMN IV $ p.a
6	3,569	Nil	Nil
5	2,920	Fitzroy Crossing	3,933
		Halls Creek	
		Turner River Camp	
		Nullagine	
		Liveringa (Camballin)	3,655
		Marble Bar	
		Wittenoom	
		Karratha	3,438
		Port Hedland	3,199
4	1,471	Warburton Mission	3,952
		Carnarvon	1,385

COLUMN I DISTRICT NO.	COLUMN II STANDARD RATE $ p.a.	COLUMN III EXCEPTIONS TO STANDARD RATE TOWN OR PLACE	COLUMN IV $ p.a
3	927	Meekatharra	1,471
		Mount Magnet	
		Wiluna	
		Laverton	
		Leonora	
		Cue	
2	665	Kalgoorlie	222
		Boulder	
		Ravensthorpe	878
		Norseman	
		Salmon Gums	
		Marvel Loch	
		Esperance	
1	Nil	Nil	Nil

(b) Officers with dependants (Subclause (2)(b))

Double the appropriate rate as prescribed in (a) above for officers without dependants.

2005 WAIRC 02744

BP FREMANTLE LTD OIL BUNKERING AWARD 1992, NO. A 20 OF 1981

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIV.

APPLICANT

-v-

BP FREMANTLE LTD

RESPONDENT

CORAM SENIOR COMMISSIONER J F GREGOR
DATE TUESDAY, 4 OCTOBER 2005
FILE NO/S APPL 784 OF 2005
CITATION NO. 2005 WAIRC 02744

Result Award Variation

Order

HAVING heard Mr L. Edmonds (of Counsel) on behalf of the Applicant and there being no appearance for the Respondent, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the BP Fremantle Ltd Oil Bunkering Award 1992 No.A20 of 1981 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 19th September 2005.

[L.S.]

(Sgd.) J F GREGOR,
Senior Commissioner.

SCHEDULE

1. Clause 22. – Allowances: Delete this Clause and insert in lieu the following:

(1) A Meal Allowance of $11.25 shall be paid where an entitlement exists as outlined in this award.

(2) A First Aid Allowance of $14.90 per week will be paid where an employee holds a current first aid qualification and is appointed by the employer to perform first aid duties. The employer shall reimburse the cost of fees for any courses necessary for an employee covered by this provision to obtain and maintain current the appropriate first aid qualification.

2005 WAIRC 02721

BURSWOOD HOTEL (MAINTENANCE EMPLOYEES') AWARD, 1990

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION WA BRANCH
	APPLICANT
	-v-
	BURSWOOD RESORT AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 29 SEPTEMBER 2005
FILE NO/S	APPL 795 OF 2005
CITATION NO.	2005 WAIRC 02721

Result Award varied

Order

HAVING heard Mr L Edmonds on behalf of the applicant, Ms S Thorp as agent on behalf of Burswood Resort and Ms L Dowden on behalf of the Construction, Forestry, Mining and Energy Union of Workers, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Burswood Hotel (Maintenance Employees') Award, 1990 (No A6 of 1989 [R]) 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 29 September 2005.

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

SCHEDULE

1. Clause 12. - Overtime: Delete paragraph (f) of subclause (3) of this clause and insert the following in lieu thereof:

(f) An employee required to work overtime for more than two hours shall be supplied with a meal by the Company or if no meal is supplied be paid $9.10 for a meal, and if owing to the amount of overtime worked, a second subsequent meal is required they shall be supplied with each such meal by the Company or be paid $6.20 for each meal so required.

2. Clause 14. – Wage Rates:

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

(2) Nominee

A Licensed Electrical Mechanic or Fitter who acts as nominee for an Electrical Contractor shall be paid an allowance of $52.90 per week.

B. Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) In addition to the weekly wage rate provided by subclause (1) of this clause an adult employee shall be paid:

		$
(a)	After the completion of one year's continuous service	15.70
(b)	After the completion of two years' service	31.70

Such payment shall be deemed part of the weekly wage rate for all purposes of the Award.

C. Delete subclause (4) of this clause and insert the following in lieu thereof:

(4) In addition to the weekly wage rate provided by subclause (1) of this Clause a leading hand shall be paid:

		$
(a)	If placed in charge of not less than three and not more than ten other employees	22.00
(b)	If placed in charge of more than ten and not more than 20 other employees	33.70
(c)	If placed in charge of more than 20 other employees	43.40

D. Delete subclause (7) of this clause and insert the following in lieu thereof:

(7) An employee holding either a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the Company to perform first aid duties, shall be paid $8.50 per week in addition to their ordinary rate.

E. Delete subclause (8) of this clause and insert the following in lieu thereof:

(8) An employee who holds, and in the course of their employment is required to use, a current "A" Grade or "B" Grade, or "L" Grade or "R" Grade license issued pursuant to the relevant regulation in force on the 28th day of February 1978 under the Electricity Act 1945 shall be paid an allowance of $17.60 per week.

F. Delete subclause (9) of this clause and insert the following in lieu thereof:

(9) An employee, who is in possession of, and is requested by the Company to use, a plumber's license issued by the Metropolitan Water Supply, Sewerage and Drainage Board, shall, in each week so requested, be paid an allowance of $32.50 per week.

G. Delete subclause (10) of this clause and insert the following in lieu thereof:

(10) A plumber holding registration in accordance with the Metropolitan Water Supply, Sewerage and Drainage Act shall be paid $22.40 per week in addition to their ordinary rate.

2005 WAIRC 02722

BURSWOOD ISLAND RESORT (MAINTENANCE EMPLOYEES') AWARD NO. A 22 OF 1986

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS' UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	BURSWOOD RESORT (MANAGEMENT) LTD AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 29 SEPTEMBER 2005
FILE NO/S	APPL 799 OF 2005
CITATION NO.	2005 WAIRC 02722

Result Award varied

Order

HAVING heard Mr L Edmonds on behalf of the applicant, Ms S Thorp as agent on behalf of Burswood Resort and Ms L Dowden on behalf of the Construction, Forestry, Mining and Energy Union of Workers, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Burswood Island Resort (Maintenance Employees') Award No. A22 of 1986 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 29 September 2005.

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

SCHEDULE

1. Clause 11. - Overtime: Delete paragraph (f) of subclause (3) of this clause and insert the following in lieu thereof:

(f) An employee required to work overtime for more than two hours shall be supplied with a meal by the Company or if no meal is supplied be paid $9.25 for a meal and, if owing to the amount of overtime worked, a second subsequent meal is required they shall be supplied with each such meal by the Company or be paid $6.30 for each meal so required.

2. Clause 13. – Wage Rates:

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

(2) In addition to the weekly wage rate provided by subclause (1) hereof an adult employee shall be paid:

		Per Week
		$
(a)	After the completion of one year's continuous service	15.70
(b)	After the completion of two years' continuous service	31.70

Such payments shall be deemed part of the weekly wage rate for all purposes of the award.

B. Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) Leading Hand: In addition to the appropriate total wage prescribed in this Clause a Leading Hand shall be paid:

		$
(a)	If placed in charge of not less than three and not more than ten other employees	22.00
(b)	If placed in charge of more than ten and not more than twenty other employees	33.70
(c)	If placed in charge of more than twenty other employees	43.40

C. Delete subclause (5) of this clause and insert the following in lieu thereof:

(5) Nominee

A licensed electrical mechanic or fitter who acts as nominee for the Company shall be paid an allowance of $52.90 per week.

D. Delete subclause (6) of this clause and insert the following in lieu thereof:

(6) An employee holding either a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the Company to perform first aid duties, shall be paid $8.20 per week in addition to their ordinary rate.

E. Delete subclause (7) of this clause and insert the following in lieu thereof:

(7) An employee who holds, and in the course of their employment is required to use, a current "A" Grade or "B" Grade licence issued pursuant to the relevant regulation in force on the 28th day of February, 1978 under the Electricity Act 1945 shall be paid an allowance of $17.60 per week.

F. Delete subclause (8) of this clause and insert the following in lieu thereof:

(8) An employee who is in possession of, and is requested by the Company to use, a plumber's licence issued by the Metropolitan Water Supply, Sewerage and Drainage Board, shall, in each week so requested, be paid an allowance of $30.40 per week.

G. Delete subclause (9) of this clause and insert the following in lieu thereof:

(9) A plumber holding registration in accordance with the Metropolitan Water Supply, Sewerage and Drainage Act shall be paid $12.60 per week in addition to their ordinary rate.

2005 WAIRC 02702

ELECTRICAL CONTRACTING INDUSTRY AWARD R 22 OF 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIV.
	APPLICANT
	-v-
	DOMINIC RIGGIO, ELECTRICAL CONTRACTORS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF EMPLOYERS), ELECTRICAL GROUP TRAINING LIMITED
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	TUESDAY, 27 SEPTEMBER 2005
FILE NO/S	APPL 782 OF 2005
CITATION NO.	2005 WAIRC 02702

Result Award Variation

Order

HAVING heard Mr L. Edmonds (of Counsel) on behalf of the Applicant and Mr D. Lee from the Chamber of Commerce and Industry WA and Mr C. Martin from the Electrical Contractors Association of WA for the Respondent, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the Electrical Contracting Industry Award No. R22 of 1978 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 19th September 2005.

(Sgd.) J F GREGOR,
[L.S.] Senior Commissioner.

SCHEDULE

1. Clause 12. – Overtime: Delete paragraph (e) of subclause (2) of this clause and insert in lieu the following:

(e) (i) An employee required to work overtime for more than two hours without being notified on the previous day or earlier that they will be so required to work overtime shall be supplied with a meal by the employer or be paid $10.00 for such meal and for a secondor subsequent meal if so required.

(ii) No such payments shall be made to any employee living in the same locality as their place of work who can reasonably return home for such meals.

(iii) If an employee to whom subparagraph (i) of paragraph (e) of subclause (2) hereof applies has, as a consequence of the notice referred to in that paragraph, provided themselves with a meal or meals and is not required to work overtime or is required to work less overtime than the period notified, they shall be paid for each meal provided and not required, **$10.00**.

2. Clause 18 – Special Rates and Provisions

A. Delete subclauses (1), (2), (3), (4) and (5) and insert in lieu the following:

(1) **Height Money**: An employee shall be paid an allowance of **$2.10** for each day on which they work at a height of 15.5 metres or more above the nearest horizontal plane, but this provision does not apply to linespersons.

(2) **Dirt Money**: An employee shall be paid an allowance of **43 cents** per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

(3) **Grain Dust**: Where any dispute arises at a bulk grain handling installation due to the presence of grain dust in the atmosphere and the Board of Reference determines that employees employed under this award are unduly affected by that dust, the Board may, subject to such conditions as it deems fit to impose, fix an allowance or allowances not exceeding **73 cents** per hour.

(4) **Confined Space**: An employee shall be paid an allowance of **51 cents** per hour when, because of the dimensions of the compartment or space in which they are working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.

(5) **Diesel Engine Ships**: The provisions of subclauses (2) and (4) of this Clause do not apply to an employee when they are engaged on work below the floor plates in diesel engine ships, but the employee shall be paid an allowance of **73 cents** per hour whilst so engaged.

B. Delete subclause (7) and insert in lieu the following:

(7) **Hot Work**: An employee shall be paid an allowance of **43 cents** per hour when they work in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees Celsius.

C. Delete subclauses (9), (10), (11) and (12) and insert in lieu the following:

(9) **Percussion Tools**: An employee shall be paid an allowance of **26 cents** per hour when working a pneumatic riveter of the percussion type and other pneumatic tools of the percussion type.

(10) **Chemical, Artificial Manure and Cement Works**: An employee other than a general labourer, in chemical, artificial manure and cement works shall, in respect of all work done in and around the plant outside the machine shop, be paid an allowance calculated at the rate of **$10.80** per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this Clause.

(11) **Abattoirs**: An employee employed in and about an abattoir shall be paid an allowance calculated at the rate of **$14.20** per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this Clause.

(12) **Phosphate Ships**: An employee shall be paid an allowance of **64 cents** for each hour they work in the holds 'tween decks of ships which, immediately prior to such work, have carried phosphatic rock but this subclause only applies if and for as long as the holds and 'tween decks are not cleaned down.

D. Delete subclause (19) and insert in lieu the following:

(19) An employee holding either a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid **$8.50** per week in addition to their ordinary rate.

E. Delete subclause (21) and insert in lieu the following:

(21) **Nominee**: A licensed electrical installer or fitter who acts as a nominee for an electrical contractor shall be paid an allowance of **$52.90** per week.

3. Clause 19 – Car Allowance: Delete this Clause and insert in lieu the following:

19. – CAR ALLOWANCE

Where an employee is required and authorised to use their own motor vehicle in the course of their duties the employee shall be paid an allowance of **65.9 cents** per kilometre travelled. Notwithstanding anything contained in this Clause the employer and the employee may make any other arrangement as to car allowance not less favourable to the employee.

4. Clause 20.-Allowance for Travelling and Employment in Construction Work: Delete paragraph (a) of subclause (2) and insert in lieu the following:

(a) On jobs measured by radius from the General Post Office, Perth situated within the area of:

		Per Day $
(i)	Up to and including 50 kilometre radius	14.20
	OR	
(ii)	Over 50 kilometres up to and including 60 kilometre radius	18.00
	OR	
(iii)	Over 60 kilometres up to and including 75 kilometre radius	27.70
	OR	
(iv)	Over 75 kilometres up to and including 90 kilometre radius	39.15
	OR	
(v)	Over 90 kilometres up to and including 105 kilometre radius	50.75

5. Clause 21.-. Distant Work

A. Delete subclause (6) and insert in lieu the following:

(6) An employee to whom the provisions of subclause (1) of this Clause apply shall be paid an allowance of **$27.80** for any weekend that they return to their home from the job but only if -

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

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

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

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

B. Delete subclause (9) and insert in lieu the following:

(9) Where an employee, supplied with the board and lodging by their employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of **$12.30** per day provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

6. Clause 27.-. Grievance Procedure and Special Allowance: Delete subclause (3) of this Clause and insert in lieu the following:

(3) (a) Subject to paragraph (e) of this subclause, a special allowance of **$26.30** per week shall be paid as a flat amount each week except where direct action takes place.

(b) Provided that a general combined union meeting called by the Unions W.A., or any absence declared by the Commission under Section 44 as being an authorised absence, shall not be regarded as non-adherence to the disputes procedure Clause or affect the payment of this allowance.

(c) In the event of the need for a meeting not covered by the circumstances outlined by the above, a Union Official shall give 24 hours' notice to the employer and the reason for the meeting and **$26.30** shall be paid.

(d) Any time which an employee is absent from work on annual leave, public holidays, bereavement leave or paid sick leave shall not affect the payment of this allowance.

(e) An apprentice shall be paid a percentage of **$26.30** being the percentage which appears against their year of apprenticeship set out in subclause (4) of the First Schedule - Wages.

7. Clause 30 – Special Provisions-Western Power: Delete subclauses (2), (3), (4), (5) and (6) and insert in lieu the following:

(2) In addition to the wage otherwise payable to an employee pursuant to the provisions of this award an employee (other than an apprentice) shall be paid:

(a) **$1.77** per hour for each hour worked if employed at Muja;

(b) **$1.06** per hour for each hour worked if employed at Kwinana;

(3) (a) An employee to whom Clause 20. - Allowance for Travelling and Employment in Construction Work applies and who is engaged on construction work at Muja shall be paid:

(i) An allowance of **$14.20** per day if the employee resides within a radius of 50 kilometres from the Muja Power Station;

(ii) An allowance of **$38.40** per day if the employee resides outside that radius;

in lieu of the allowance prescribed in the said Clause.

(b) Where transport to and from the job is supplied by the employer from and to a place mutually agreed upon between the employer and the employee half the above rates shall be paid provided that the conveyance used for such transport is equipped with suitable seating and weather proof covering.

(4) In addition to the allowance payable pursuant to subclause (6) of Clause 21. - Distant Work of this award an employee to whom that Clause applies shall be paid **$24.20** on each occasion upon which the employee returns home at the weekend but only if -

(a) The employee has completed three months continuous service with the employer;

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

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

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

and such payment shall be deemed to compensate for a periodical return home at the employer's expense.

(5) An employee to whom Clause 21. - Distant Work of this award applied and who proceeds to construction work at Muja from their home where located within a radius of 50 kilometres from the General Post Office, Perth -

(a) Shall be paid an amount of **$65.25** and for three hours at ordinary rates in lieu of the expenses and payment prescribed in subclause (3) of the said Clause; and

(b) In lieu of the provisions of subclause (4) of the said Clause, shall be paid **$65.25** and for three hours at ordinary rates when their services terminate if the employee has completed three months continuous service;

and the provisions of subclause (3) and subclause (4) of Clause 21. - Distant Work shall not apply to such an employee.

(6) (a) An employee to whom the provisions of Clause 21. - Distant Work of this Award, applies who work at Muja and who elects not to live in Construction Camp Accommodation shall, subject to paragraph (b) of this subclause, be paid a living-out allowance at the rate of **$348.10** per week to meet the expenses reasonably incurred by the employee for board and lodgings.

(b) (i) The allowance prescribed in paragraph (a) shall only apply to an employee while they continue to live with their spouse (including de facto partner) in accommodation provided by the employee.

(ii) The accommodation shall be of a reasonable standard.

(iii) The employee shall continue to maintain their original residence.

(iv) The employee shall satisfy the employer, upon request, that their circumstances meet the requirements of this subclause.

(v) Any dispute as to the application of this Clause shall be subject to discussion between the employer and the Union and, failing agreement, shall be referred to a Board of Reference for determination.

(c) Provided that the provisions of subclause (6) of Clause 21. - Distant Work of this Award shall not apply.

9. First Schedule – Wages:

A. Delete subclause (3) of this Clause and insert in lieu the following:

(3) Leading Hands - In addition to the appropriate rates shown in subclause (2) hereof a leading hand shall be paid -

(a)	If placed in charge of not less than three and not more than ten other employees	$22.20
(b)	If placed in charge of more than ten and not more than twenty other employees	$33.80
(c)	If placed in charge of more than twenty other employees	$43.60

B. Delete subclause (5) and (6) of this Clause and insert in lieu the following:

(5) Tool Allowance:

(a) In accordance with the provisions of subclause (20) of Clause 18. - Special Rates and Provisions of this Award the tool allowance to be paid is:

(i) $12.70 per week to such tradespersons, or

(ii) In the case of an apprentice, a percentage of $12.70 being the percentage which appears against the apprentice's year of apprenticeship set out in subclause (4) of this schedule.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this schedule.

(6) Construction Allowance:

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

(i) $39.30 per week if the employee is engaged on the construction of a large industrial any large civil engineering project.

(ii) $35.50 per week if the employee is engaged on a multi-storeyed building but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which the employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(iii) $20.80 per week if the employee is engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions, of this Award.

(b) Any dispute as to which of the aforesaid allowances applies to particular work shall be determined by the Board of Reference.

C. Delete subclause (9) and (10) of this Clause and insert in lieu the following:

(9) Licence Allowance:

A tradesperson who holds and in the course of their employment may be required to use a current "A" Grade or "B" Grade licence issued pursuant to the relevant regulation in force at the date of this Award under the Electricity Act, 1945, shall be paid $18.70 per week.

(10) Commissioning Allowances:

An "Electrician Commissioning" as defined shall be paid at the rate of $28.60 per week in addition to rates prescribed in this schedule.

2005 WAIRC 02704

ELECTRICAL TRADES (SECURITY ALARMS INDUSTRY) AWARD, 1980

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIV.

APPLICANT

-v-

CHUBB ELECTRONIC SECURITY, METROPOLITAN SECURITY SERVICES, WORMALD SECURITY CONTROLS

RESPONDENT

CORAM SENIOR COMMISSIONER J F GREGOR
DATE TUESDAY, 27 SEPTEMBER 2005
FILE NO/S APPL 778 OF 2005
CITATION NO. 2005 WAIRC 02704

Result Award Variation

Order

HAVING heard Mr L. Edmonds (of Counsel) on behalf of the Applicant and Mr D. Lee for the Respondent, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the Electrical Trades (Security Alarms Industry) Award 1980 No. 27 of 1979 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 19th September 2005.

[L.S.]

(Sgd.) J F GREGOR,
Senior Commissioner.

SCHEDULE

1. Clause 11. – Overtime. Delete paragraph (f) of subclause (3) of this clause and insert in lieu the following:

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $9.60 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required they shall be supplied with each such meal by the employer or be paid $6.50 for each meal so required.

2. Clause 15. – Special Rates and Provisions

A. Delete subclauses (1)- (4) inclusive and insert in lieu the following:

(1) **Height Money:** An employee shall be paid an allowance of **$2.15** for each day on which they work at a height of 15.5 metres or more above the nearest horizontal plane but this provision does not apply to linespersons nor to riggers and splicers on ships or buildings.

(2) **Dirt Money:** An employee shall be paid an allowance of **44 cents** per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

(3) **Confined Space:** An employee shall be paid an allowance of **56 cents** per hour when, because of the dimensions of the compartment or space in which he/she is working, he/she is required to work in a stooped or otherwise cramped position or without proper ventilation.

(4) **Hot Work:** An employee shall be paid an allowance of **44 cents** per hour when they work in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees celsius.

B. Delete subclause (6) and insert in lieu the following:

(6) **Percussion Tools:**

An employee shall be paid an allowance of 28 cents per hour when working a pneumatic riveter of the percussion type and other pneumatic tools of the percussion type.

C. Delete subclauses (13) and (14) insert in lieu the following:

(13) An employee, holding a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid **$9.00** per week in addition to his ordinary rate.

(14) A Serviceperson - Special Class, a Serviceperson or an Installer who holds, and in the course of their employment may be required to use, a current "A" Grade or "B" Grade Licence issued pursuant to the relevant regulation in force on the 28th day of February, 1978 under the Electricity Act 1945 shall be paid an allowance of **$18.40** per week.

3. Clause 16. – Car Allowance: Delete subclause (3) and insert in lieu the following:

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

RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE ON EMPLOYER'S BUSINESS

MOTOR CAR

AREA AND DETAILS	**ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES)**		
	Over 2600cc	Over 1600cc -2600cc	1600cc & Under
	Rate per Kilometre (cents)		
Metropolitan Area	68.9	61.5	53.5
South West Land Division	70.5	63.1	54.8
North of 23.5 º South Latitude	77.2	69.6	60.6
Rest of the State	72.5	65.2	56.6

Motor Cycle (In All Areas) 23.6 Cents per Kilometre

4. Clause 18. – Distant Work: Delete subclauses (4) and (5) and insert in lieu the following:

(4) An employee to whom the provisions of subclause (1) of this clause apply shall be paid an allowance of **$28.80** for any weekend that he/she returns to his/her home from the job but only if -

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

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

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

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

(5) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of **$12.80** per day provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

5. Clause 28. – Wages: Delete subclauses (3) - (5) and insert in lieu the following:

(3) (a) Where an employer does not provide a tradesperson with the tools ordinarily required by that

Tradesperson in the performance of their work as a tradesperson the employer shall pay a tool allowance of **$12.80** per week to such tradesperson for the purpose of such tradesperson supplying and maintaining tools ordinarily required in the performance of their work as a tradesperson.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this Clause.

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

(d) A tradesperson shall replace or pay for any tools supplied by his employer if lost through their negligence.

(4) (a) In addition to the appropriate rates of pay prescribed in this Clause an employee shall be paid -

(i) **$41.10** per week if they are engaged on the construction of a large industrial undertaking or any large civil engineering project.

(ii) **$37.10** per week if they are engaged in a multi-storeyed building but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which they are required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(iii) **$21.40** per week if they are engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of this Award.

(b) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.

(c) An allowance paid under this subclause includes any allowance otherwise payable under Clause 15. - Special Rates and Provisions of this Award except the allowance for work at heights, the first aid allowance and the licence allowance.

(5) **Leading Hand:** In addition to the appropriate total wage prescribed in subclause (1) of this Clause, a leading hand shall be paid –

(a)	If placed in charge of not less than three and not more than ten other employees	**$23.30**
(b)	If placed in charge of more than ten and not more than twenty other employees	**$35.60**
(c)	If placed in charge of more than twenty other employees	**$45.80**

2005 WAIRC 02703

ELECTRONICS INDUSTRY AWARD NO. A 22 OF 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIV.
	APPLICANT
	-v-
	ACTION ELECTRONICS PTY LTD, ALDETEC PTY LTD, ALLCOM PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	TUESDAY, 27 SEPTEMBER 2005
FILE NO/S	APPL 781 OF 2005
CITATION NO.	2005 WAIRC 02703

Result	Award Variation

Order

HAVING heard Mr L. Edmonds (of Counsel) on behalf of the Applicant and Mr D. Lee for the Respondent, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the Electronics Industry Award No. A22 of 1985 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 19th September 2005.

(Sgd.) J F GREGOR,
[L.S.] Senior Commissioner.

SCHEDULE

1. Clause 9. – Overtime. Delete paragraph (f) of subclause (3) of this clause and insert in lieu the following:

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $9.40 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with each such meal by the employer or be paid $6.35 for each meal so required.

2. Clause 13. – Car Allowance: Delete subclause (3) and insert in lieu the following:

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

RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE
ON EMPLOYER'S BUSINESS
MOTOR CAR

AREA AND DETAILS	**ENGINE DISPLACEMENT**		
	(IN CUBIC CENTIMETRES)		
Rate per kilometre (cents)	**Over**	**1600cc**	**1600cc**
	2600cc	**-2600cc**	**& Under**
Metropolitan Area	68.5	61.2	53.2
South West Land Division	70.0	62.6	54.6
North of 23.5o South Latitude	76.8	69.1	60.2
Rest of the State	72.1	64.8	56.2
MOTOR CYCLE (IN ALL AREAS)	23.4 cents per kilometre		

3. Clause 15. – Distant Work: Delete subclauses (4) and (5) and insert in lieu the following:

(4) An employee, to whom the provisions of subclause (1) of this Clause apply, shall be paid an allowance of $28.90 for any weekend that the employee returns home from the job, but only if -

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

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

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

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

(5) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of $12.65 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

4. Clause 20. – Special Provisions: Delete subclauses (1) – (4), (6) – (8) and (14) and insert in lieu the following:

(1) **Dirt Money**: An employee shall be paid an allowance of **44 cents** per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

(2) **Confined Space**: An employee shall be paid an allowance of **55 cents** per hour when, because of the dimensions of the compartment or space in which they are working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.

(3) **Hot Work**: An employee shall be paid an allowance of **44 cents** per hour when working in the shade in any place where the temperature is raised by artificial means to be between 46.1 and 54.4 degrees celsius.

(4) **Height Money**: An employee shall be paid an allowance of **$2.15** for each day on which the employee works at a height of 15.5 metres or more above the nearest horizontal plane.

(6) **Diesel Engine Ships**: The provisions of subclauses (1) and (2) hereof do not apply to an employee when the employee is engaged on work below the floor plates in diesel engine ships, but the employee shall be paid an allowance of **74 cents** per hour whilst so engaged.

(7) **Percussion Tools**: An employee shall be paid an allowance of **28 cents** per hour when working pneumatic riveter of the percussion type and other pneumatic tools of the percussion type.

(8) **Chemical, Artificial Manure and Cement Works**: An employee, other than a general labourer, in chemical, artificial manure and cement works, in respect of all work done in and around the plant outside the machine shop, shall be paid an allowance calculated at the rate of **$11.20** per week. The allowance shall be paid during

overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this clause.

(14) An employee holding either a Third Year First Aid Medallion of the St. John Ambulance Association of a "C" standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid **$8.70** per week in addition to their ordinary rate.

5. Clause 33. – Wages: Delete subclauses (2) and (5) and insert in lieu the following:

(2) Leading Hands:

In addition to the appropriate rate of wage prescribed in subclause (1) of this clause a leading hand shall be paid:

(a)	If placed in charge of not less than three and not more than ten other employees	$23.00
(b)	If placed in charge of more than ten but not more than twenty other employees	$35.00
(c)	If placed in charge of more than twenty other employees	$45.20

(5) **Tool Allowance**

(a) Where an employer does not provide a technician, serviceperson, installer or an apprentice with the tools ordinarily required by that person in the performance of work as a technician, serviceperson, installer or an apprentice the employer shall pay a tool allowance of -

(i) **$12.80** per week to such technician, serviceperson, installer; or

(ii) In the case of an apprentice a percentage of **$12.80** being the percentage which appears against their year of apprenticeship in subclause (3) of this clause for the purpose of such technician, serviceperson, installer or apprentice applying and maintaining tools ordinarily required in the performance of work as a technician, serviceperson, installer or apprentice.

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

(c) An employer shall provide for the use of technicians, service people, installers or apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A technician, serviceperson, installer or apprentice shall replace or pay for any tools supplied by the employer if lost through his negligence.

PART II. - CONSTRUCTION WORK

6. Clause 5. – Special Rates and Provisions: Delete subclause (2) and insert in lieu the following:

(2) (a) The employer shall, where practicable, provide a waterproof and secure place on each job for the safekeeping of a employee's tools when not in use and an employee's working clothes and where an employee is absent from work because of illness or accident and has advised the employer to that effect in accordance with the provisions of Clause 11. - Sick Leave of PART I - GENERAL of this award the employer shall ensure that the employee's tools and working clothes are securely stored during their absence.

(b) Subject to paragraph (c) hereof where the employee's tools or working clothes are lost by fire or breaking and entering whilst securely stored in the place provided by the employer under paragraph (a) hereof the employer shall reimburse the employee for that loss but only up to a maximum of **$267.50**.

(c) The provisions of paragraph (b) hereof shall only apply with respect to tools and working clothes used by an employee in the course of their employment as set out in a list furnished to the employer at least twenty four hours before being lost by fire or theft and if the employee has reported any theft to the police.

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

(a) On places within a radius of 50 kilometres from the General Post Office, Perth - $13.80 per day.

(b) For each additional kilometre to a radius of 60 kilometres from the General Post Office, Perth - 70 cents per kilometre.

(c) Subject to the provisions of paragraph (d), work performed at places beyond a 60 kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees, with the consent of the union, agree in any particular case that the travelling allowance for such work shall be paid under this clause, in which case an additional allowance of 70 cents per kilometre shall be paid for each kilometre in excess of the 60 kilometre radius.

8. Clause 6. – Distant Work: Delete subclauses (6) and (7) respectively and insert in lieu the following:

(6) An employee, to whom the provisions of subclause (1) of this clause apply, shall be paid an allowance of $28.15 for any weekend that the employee returns home from the job, but only if -

(a) The employee advises the employer or the employee's agent of the employee's intention not later than the Tuesday immediately preceding the weekend in which the employee so returns;

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

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

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

(7) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from the job or be paid an allowance of $12.40 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

9. Clause10. – Wages: Delete subclauses (5), (6) and (7) of this clause and insert in lieu the following:

(5) **Construction Allowances:**

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

(i) **$40.60** per week if engaged on the construction of a large industrial undertaking or any large civil engineering projects.

(ii) **$36.70** per week if engaged on a multi-storeyed building, but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which the employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(iii) **$21.50** per week if engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of PART I - GENERAL of this award.

(b) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.

(6) **Leading Hand:**

In addition to the appropriate rate of wage prescribed in subclause (1) of this clause a leading hand shall be paid:

(a)	If placed in charge of not less than three and not more than ten other employees	$23.00
(b)	If placed in charge of more than ten but not more than twenty other employees	$35.00
(c)	If placed in charge of more than twenty other employees	$45.20

(7) (a) Where an employer does not provide a Technician, Serviceperson, Installer or Apprentice with the tools ordinarily required by that Serviceperson, Technician or Installer in the performance of work as a Technician, Installer or Apprentice the employer shall pay a tool allowance of -

(i) $12.80 per week to such Technician, Serviceperson or Installer, or

(ii) In the case of an apprentice a percentage of $12.80 being the percentage referred to in subclause (3) of Clause 33. - Wages of PART I - GENERAL of this award,

for the purpose of such Technician, Serviceperson, Installer or Apprentice supplying and maintaining tools ordinarily required in the performance of work as a Technician, Serviceperson, Installer or Apprentice.

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

(c) An employer shall provide for the use of Technicians, Servicepersons, Installers and Apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A Technician, Serviceperson, Installer or Apprentice shall replace or pay for any tools supplied by the employer if lost through that person's negligence.

2005 WAIRC 02686

ENGINEERING TRADES (GOVERNMENT) AWARD, 1967 AWARD NOS. 29, 30 AND 31 OF 1961 AND 3 OF 1962

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA. ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH
	APPLICANT
	-v-
	MINISTER FOR EDUCATION, MINISTER FOR HEALTH, MINISTER FOR WORKS
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	FRIDAY, 23 SEPTEMBER 2005
FILE NO/S	APPL 776 OF 2005
CITATION NO.	2005 WAIRC 02686

Result Award Variation

Order

HAVING heard Mr L. Edmonds (of Counsel) on behalf of the Applicant and Mr D. Spivey for the Respondent, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the Engineering Trades (Government) Award, 1967 Award Nos. 29, 30 & 31 of 1961 and 3 of 1962 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 19th September 2005.

(Sgd.) J F GREGOR,
[L.S.] Senior Commissioner.

SCHEDULE

1. Clause 14. – Overtime

A. Delete paragraphs (e) of subclause (3) of this clause and insert in lieu the following:

(e) Subject to the provisions of paragraph (f) of this subclause, an employee required to work overtime for more than one hour shall be supplied with a meal by the employer or be paid $9.35 for a meal if, owing to the amount of overtime worked, a second or subsequent meal is required, they shall be supplied with each such meal by the employer or be paid $6.55 for each meal so required

B Delete paragraphs (h) of subclause (3) of this clause and insert in lieu the following:

(h) An employee required to work continuously from 12 midnight to 6.30 a.m. and ordered back to work at 8.00 a.m. the same day shall be paid $4.40 for breakfast.

2. Clause 17. – Special Rates and Provisions

A. Delete subclause (1) – (5) of this clause and insert in lieu the following:

(1) **Height Money:** An employee shall be paid an allowance of $2.10 for each day in which they work at a height of 15.5 metres or more above the nearest horizontal plane, but this provision does not apply to linespersons nor to riggers and splicers in ships or buildings.

(2) **Dirt Money**: Dirt Money of 44 cents per hour shall be paid as follows:-

(a) To employees employed on hot or dirty locomotives, or stripping locomotives, boilers, steam, petrol, diesel or electric cranes, or when repairing Babcock and Wilcox or other stationary boiler in s ite (except repairs on bench to steam and water mounting), or when repairing the conveyor gear in conduit of power houses and when repairing or overhauling electric or steam pile-driving machines and boring plants.

(b) Bitumen Sprayers - Large Units:

(i) To employees whilst engaged on work appertaining to the spraying of bitumen but exclusive of the standard chassis engine form the front end of the main tank to the back end of the plant. Provided that work on the compressor and its engines shall not be subject to dirt money.

(ii) To motor mechanics in the motor section for all work performed on the standard chassis from and including the sump to the rear end of the chassis, but excluding the engine and parts forward thereto unless the work is of a specially dirty nature, where clothes are necessarily unduly soiled or damaged by the nature of the work done. Provided that to employees engaged as above on sprays of the Bristow type, dirt money of 48 cents per hour shall be paid.

(c) Bitumen Sprayers - Small Units:

(i) To employees for work done on main tank, its fittings, pump and spray arms.

(ii) To motor mechanics on work from and including the sump to the rear end of the chassis, but excluding the engine and parts forward thereto unless the work is of a specially dirty nature where clothes are necessarily unduly soiled or damaged by the nature of the work done.

(d) To employees on all other dirty tar sprays and kettles.

(e) Diesel Engines: Work on engines, or on gear box attached to engines, but excluding work on rollers (wheels) on which a diesel powered roller travels.

(f) Dirt Money shall only be paid during the stages of dismantling and cleaning and shall not cover employees who receive portions of the work after cleaning has taken place.

(g) Notwithstanding anything contained in the foregoing provisions, dirt money shall not be paid unless the work is of an exceptionally dirty nature where clothes are necessarily unduly soiled of damaged by the nature of the work done.

(3) **Confined Space:**

54 cents per hour extra shall be paid to an employee working in any place, the dimensions of which necessitate the employee working in an unusually stooped or otherwise cramped position, or where confinement within a limited space is productive of unusual discomfort.

(4) Any employee actually working a pneumatic tool of the percussion type shall be paid 27 cents per hour extra whilst so engaged.

(5) **Hot Work**: An employee shall be paid an allowance of 44 cents per hour while working in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees Celsius.

B. Delete subclauses (8) – (16) and insert in lieu the following:

(8) Any employee working in water over their boots or, if gumboots are supplied, over the gumboots, shall be paid and allowance of $1.25 per day.

(9) Employees using Anderson-Kerrick steam cleaning un its or unit of a similar type on cranes or other machinery shall be paid an allowance of 44 cents.

(10) Well Work: Any employee required to enter a well nine metres or more in depth for the purpose in the first instance of examining the pump, or any other work connected therewith, shall receive an amount of $2.60 for such examination and 96 cents per hour extra thereafter for fixing, renewing or repairing such work.

(11) **Ship Repair Work**: Any employee engaged in repair work on board ships shall be paid an additional $4.65 per day for each day on which so employed.

(12) An employee shall, whilst working in double bottom tanks on board vessels, be paid an allowance of $1.81 per hour.

(13) An employee shall, whilst using explosive powered tools, be paid an allowance of 15 cents per hour, with a minimum payment of $1.10 per day.

(14) **Abattoirs -**

An employee employed in and about an abattoir shall be paid an allowance calculated at the rate of $14.80 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this clause. The allowance prescribed herein may be reduced to $13.60 with respect to any employee who is supplied with overalls by the employer.

(15) Employees engaged to iron ore and manganese or loading equipment at the Geraldton Harbour shall be paid an allowance of 45 cents per hour, with a minimum payment for four hours.

(16) **Morgues -**

An employee required to work in a morgue shall be paid 45 cents per hour or part thereof, in addition to the rates prescribed in this clause.

C. Delete subclause (19) and insert in lieu the following:

(19) An employee required to repair or maintain incinerates shall be paid $2.75 per unit.

D. Delete subclauses (21) – (24) and insert in lieu the following:

(21) (a) Subject to the provisions of this clause, an employee whilst employed on foundry work shall be paid a disability allowance of 32 cents for each hour worked to compensate for all disagreeable features associated with foundry work, including heat, fumes, atmospheric conditions, sparks, dampness, confined space and noise.

(b) The foundry allowance herein prescribed shall be in lieu of any payment otherwise due under this clause and does not in any way limit an employer's obligations to comply with all relevant requirements of Acts and Regulations relative to conditions in foundries.

(c) The foundry allowance herein prescribed shall be in lieu of any payment otherwise due under this clause and does not in any way limit an employer's obligations to comply with all relevant requirements of Acts and Regulations relative to conditions in foundries.

(d) For the purpose of this subclause foundry work shall mean:

(i) Any operation in the production of castings by casting metal in moulds made of sand, loam, metal moulding compos ition or other material or mixture of materials, or by shell moulding, centrifugal casting or continuous casting; and

(ii) Where carried on as an incidental process in connection with and in the course of production to which paragraph (i) of this definition applies, the preparation of moulds and cores (but not in the making of patterns and dies in a separate room), knock-out processes and dressing operations, but shall not include any operation performed in connection with:

(aa) Non-ferrous die casting (including grav ity and pressure);

(bb) Casting of billets and/or ingots in metal mould;

(cc) Continuous casting of metal into billets;

(dd) Melting of metal for use in printing;

(ee) Refining of metal.

(22) An electronics tradesperson, an electrician - special class, an electrical fitter and/or an armature winder or an electrical installer who holds and in the course of employment may be required to use a current "A" grade or "B" grade licence issued pursuant to the relevant regulation in force on the 28th day of February, 1978 under the Electricity Act, 1948 shall be paid an allowance of $18.00 per week.

(23) Where an employee is engaged in a process involving asbestos and is required to wear protective equipment, i.e: respiratory protection in the form of a high efficiency class H particulate respirator and/or special clothing, a disability allowance of 58 cents per hour shall be paid for each hour or part thereof that such employee is so engaged.

(24) **Towing Allowance**: A Level 1, 2 or 3 Tradesperson who drives a tow truck towing an articulated bus in traffic shall be paid an allowance of $4.09 per shift when such duties are performed. This allowance shall be payable irrespective of the time such work is performed and is not subject to any premium of penalty additions.

E. Delete subclauses (26) – (29) and insert in lieu the following:

(26) **First Aid Allowance**: A worker, holding either a Third Year First Aid Medallion of the St John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties, shall be paid $8.70 per week in addition to their ordinary rate.

(27) **Polychlorinated Biphenyls**

Employees required to remove or handle equipment or fittings containing polychlorinated biphenyls (PCBs) for which protective clothing must be worn shall, in addition to the rates and provisions contained in this Clause, be paid an allowances of $1.81 per hour whilst so engaged.

(28) **Nominee Allowance:**

A licensed electrical fitter or installer who acts as a nominee for the employer shall be paid an allowance of $15.70 per week.

(29) **Hospital Environment Allowance:**

Notwithstanding the provisions of this clause, the following allowances shall be paid to maintenance employees employed at hospitals listed hereunder:

(a) (i) $12.60 per week for work performed in a hosp ital environment; and

(ii) $4.30 per week for disabilities associated with work performed in difficult access areas, tunnel complexes, and areas with great temperature variation at -

Princess Margaret Hospital

King Edward Memorial Hospital
Sir Charles Gairdner Hospital
Royal Perth Hospital
Fremantle Hospital

(b) $9.10 per week for work performed in a hosp ital environment at -
Kalgoorlie Hospital
Osborne Park Hospital
Albany Hospital
Bunbury Hospital
Geraldton Hospital
Mt. Henry Hospital
Northam Hospital
Swan Districts Hospital
Perth Dental Hospital

(c) $6.10 per week for work performed in a hospital environment at -

Bentley Hospital	Derby Hospital
Narrogin Hospital	PortHedland Hospital
Rockingham Hospital	Sunset Hospital
Armadale Hospital	Broome Hospital
Busselton Hospital	Carnarvon Hospital
Collie Hospital	Esperance Hospital
Katanning Hospital	Merredin Hospital
Murray Hospital	Warren Hospital
Wyndham Hospital	

3. Clause 18. – Car Allowance: Delete subclause (3) and (5) and insert in lieu the following:

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

RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE ON EMPLOYER'S BUSINESS			
MOTOR CAR			
AREA AND DETAILS	*ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES)*		
DISTANCE TRAVELLED EACH	Over	Over 1600cc	1600cc
YEAR ON OFFICIAL BUSINESS	2600cc	-2600cc	& Under
Rate per Kilometre (Cents)			
Metropol itan Area	69.0	58.9	48.9
South West Land Division	71.5	61.1	51.0
North of 23.5º 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 cents per kilometre		

(5) The allowances prescribed in this clause shall be varied in accordance with any movement in the allowances in the Public Service Award 1992.

4. Clause 19. – Fares and Travelling Allowances: Delete paragraphs (a), (b) and (c) of subclause (1) and insert in lieu the following:

(a) On places within a radius of fifty kilometres from the General Post Office, Perth - $14.50 per day;

(b) For each additional kilometre to a radius of sixty kilometres from the General Post Office, Perth - 76 cents per kilometre;

(c) Subject to the provisions of paragraph (d) work performed at places beyond a sixty kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employee with the consent of the Union, agree in any particular case that the travelling allowance for such work shall be paid under this clause in which case an additional allowance of 76 cents per kilometre shall be paid for each kilometre in excess of the sixty kilometre radius.

5. Clause 20. – Distant Work-Construction: Delete subclause (6) and (7) of this clause and insert in lieu the following:

(6) An employee to whom the provisions of subclause (1) of this clause apply shall be paid an allowance of $29.80 and for any weekend that they return to their home from the job but only if -

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

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

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

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

(7) Where an employee supplied with board and lodging by the employer, is required to live more than eight hundred metres from the job, they shall be provided with suitable transport to and from that job or be paid an allowance of $13.05 per day provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

6. Clause 21. – District Allowances: Delete subclause (6) of this clause and insert in lieu the following:

(6) The weekly rate of District Allowance payable to employees pursuant to subclause (3) of this clause shall be as follows:

COLUMN I DISTRICT	COLUMN II STANDARD RATE	COLUMN III EXCEPTIONS TO STANDARD RATE	COLUMN IV RATE
	$ Per Week	Town Or Place	$ Per Week
6	69.30	Nil	Nil
5	56.70	Fitzroy Crossing	76.40
		Halls Creek	
		Turner River Camp	
		Nullagine	
		Liveringa (Camballin)	71.20
		Marble Bar	
		Wittenoom	
		Karratha	67.00
		Port Hedland	62.20
4	28.70	Warburton Mission	77.00
		Carnarvon	26.80
3	18.10	Meekatharra	28.70
		Mount Magnet	
		Wiluna	
		Laverton	
		Leonora	
		Cue	
2	12.90	Kalgoorlie	4.30
		Boulder	
		Ravensthorpe	17.00
		Norseman	
		Salmon Gums	
		Marvel Loch	
		Esperance	
1	Nil	Nil	Nil

Note: In accordance with subclause (4) of this clause employees with dependants shall be entitled to double the rate of district allowance shown.

7. First Schedule – Wages:

A. Delete subclause (5) and insert in lieu the following:

(5) (a) In addition to the rates contained in subclauses (2) and (3) hereof, employees designated in classifications C 14 to C 7 inclusive shall receive an all purpose industry allowance of $14.10

(b) This allowance shall be paid in two instalments, as follows:

(i) $7.10 of the allowance shall be paid after the first 12 months of Government service; and

(ii) the remaining $7.00 - totalling $14.10 - shall be paid on completion of 24 months of Government service.

(c) The industry allowance shall be adjusted in accordance w ith any movements to the wage prescribed in subclause (2) hereof, as follows:

(i) The increase shall apply to the 'plus 24 months of service' rate;

(ii) The increase is to be rounded to the nearest ten cents;

(iii) The rate is to be divided by two to calculate instalments in accordance with subparagraphs (i) and (ii) of paragraph (b) hereof, provided that the instalment rates are not expressed in less than ten cents amounts; and

(iv) In the event of such an equal division of the industry allowance not resulting in the rates being expressed in less than ten cent amounts, as provided in subparagraph (iii) hereof, the division shall be unequal and weighted to the 12 months' service instalment.

B. Delete subclause (8) and insert in lieu the following:

(8) (a) Leading Hands

A tradesperson placed in charge of three or more other employees shall, in add ition to the ordinary rate, be paid per week:

	$
If placed in charge of not less than three and not more than ten other employees	22.70
If placed in charge of more than ten and not more than twenty other employees	34.60
If placed in charge of more than twenty other employees	44.50

(b) Any tradesperson moulder employed in a foundry where no other jobbing moulder is employed shall be paid at the rate prescribed for leading hands in charge of not less than three and not more than ten other employees.

(c) A Certificated Rigger or Scaffolder on ships and buildings, other than a Leading Hand, who, in compliance w ith the provisions of the Occupational Health, Safety and Welfare Act and Regulations 1988, is responsible for the supervision of not less than three other employees, shall be deemed to be a Leading Hand and be paid at the rate prescribed for a Leading Hand in charge of not less than three and not more than ten other employees.

(d) In addition to any rates to which an employee may be entitled under this clause a Mechanic-in-Charge, employed by the Department of Conservation and Land Management in the following towns, shall be paid per week -

	$
Manjimup, Collie	55.60
Harvey, Dwellingup, Mundaring, Yanchep	27.80
Ludlow, Nannup, Margaret River, Kirup, Walpole, Pemberton	13.90
Jarrahdale	13.90

C. Delete subclause (10) - (12) and insert in lieu the following:

(10) Construction Allowance

(a) In addition to the appropriate rate of pay prescribed in subclause (1) hereof, an employee shall be paid -

(i) $39.90 per week if engaged on the construction of a large industrial undertaking or any large civil engineering project;

(ii) $35.90 per week if engaged on a multi-storeyed building but only until the exterior walls have been erected, the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which he/she is required to work. A "multi-storeyed building" is a building which, when completed will consist of at least five storeys.

(iii) $21.20 per week if engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Classification Structure and Definitions of this Award.

(b) Any dispute as to which of the aforesaid allowances applies to particular work shall be determined by the Western Australian Industrial Relations Commission.

(c) Any allowance paid under this subclause includes any allowance otherwise payable under Clause 17. - Special Rates and Provisions of this Award.

(11) Tool Allowance

(a) Where an employer does not provide a tradesperson or an apprentice w ith the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice, the employer shall pay a tool allowance of -

(i) $12.60 per week to such tradesperson; or

(ii) In the case of an apprentice a percentage which appears against the relevant year of apprenticeship in of this Schedule,

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

(b) Any tool allowance paid pursuant to paragraph (a) hereof shall be included in, and form part of, the ordinary weekly wage prescribed in this Schedule.

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

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

(12) **Drilling Allowance**

A driller using a Herbert two-spindle sens itive machine to drill to a marked circumference shall be paid an additional $2.09 per hour whilst so engaged.

8. Fifth Schedule – Building Management Authority Wages and Conditions:

A. Delete paragraphs (c), (d) and (e) of subclause (5) of this Schedule and insert in lieu the following:

(c) In addition to the wage rates provided in paragraph (a) hereof, electricians employed by the Building Management Authority will receive an all purpose payment of $23.70 per week.

(d) In addition to the wage rates prescribed in paragraph (a) hereof, by agreement between the employer, the employee and the Union, evidenced in writing, a Mechanical Fitter and a Refrigeration Mechanic may receive 25% loading in lieu of overtime payments.

(e) Leading hand electricians who are required to perform duties over and above those normally required of leading hands shall be paid an all purpose allowance of $31.90 per week in addition to the relevant leading hand rate prescribed in subclause (8) of the First Schedule - Wages of this Award.

B. Delete subclause (7) of this Schedule and insert in lieu the following:

(7) Computing Quantities:

An employee, other than a leading hand, who is required to compute or estimate quantities of materials in respect of work performed by others, shall be paid $3.40 per day, or part thereof, in addition to the rates otherwise prescribed in this award.

2005 WAIRC 02688

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED FIREFIGHTERS UNION OF WESTERN AUSTRALIA **APPLICANT**
	-v-
	THE FIRE AND EMERGENCY SERVICES AUTHORITY OF WESTERN AUSTRALIA **RESPONDENT**
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 23 SEPTEMBER 2005
FILE NO/S	APPL 755 OF 2005
CITATION NO.	2005 WAIRC 02688

Result Award varied

Order

HAVING heard Mr J Walker on behalf of the applicant and Ms C Bocso 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 *Fire Brigade Employees' Award, 1990 No A28 of 1989* be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 23 September 2005.

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

SCHEDULE

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

1. Title
1B. Paid Rates
1B. Minimum Adult Award Wage
2. Arrangement
3. Scope
4. Term
5. Interpretation
6. Wages
7. Promotion
8. Hours of Duty
9. Public Holidays
10. Annual Leave
11. Sick Leave
12. Long Service Leave
13. Compassionate Leave
14. Overtime
15. Higher Duties

16. Special Duties
17. Outside Duties
18. Special Conditions
19. On Call Allowance
19A. Availability After Hours Contact
20. Transfers
21. Standby
22. Travelling On Brigade Business
23. Relieving
24. Country Service
25. Accident Pay
26. Uniforms
27. Payment of Wages
28. Maternity Leave
29. Trade Union Training Leave
30. Leave To Attend Union Business
31. Deleted
32. Dispute Settlement Procedures
33. Termination of Employment
34. Formula for Calculation of Penalties
35. Award Modernisation
36. Liberty to Apply
37. Property Allowance

Appendix - Resolution of Disputes Requirements

Schedule A - Named Parties to the Award

2. Clause 36. – Liberty to Apply: Immediately following this clause insert a new number, title, and clause as follows:

37. - PROPERTY ALLOWANCE

(1) For the purposes of this clause the following expressions shall have the following meanings:

(a) "Agent" means a person carrying on business as an estate agent in a State or Territory of the Commonwealth, being, in a case where the law of that State or Territory provides for the registration or licensing of persons who carry on such a business, a person duly registered or licensed under that law.

(b) "Dependant" in relation to an employee means:

(i) spouse including defacto partner;

(ii) child/children; or

(iii) other dependant family;

who resides with the employee and who relies on the employee for support.

(c) "Expenses" in relation to an employee means all costs incurred by the employee in the following areas:

(i) Legal fees in accordance with the Solicitor's Remuneration Order, 1976 as amended and varied, duly paid to a solicitor or in lieu thereof fees charged by a settlement agent for professional costs incurred in respect of the sale or purchase, the maximum fee to be claimed shall be as set out under item 8 of the above order.

(ii) Disbursements duly paid to a solicitor or a settlement agent necessarily incurred in respect of the sale or purchase of the residence.

(iii) Real Estate Agent's Commission in accordance with that fixed by the Real Estate and Business Agents Supervisory Board, acting under Section 61 of the Real Estate and Business Agents Act, 1978, duly paid to an agent for services rendered in the course of and incidental to the sale of the property, the maximum fee to be claimed shall be fifty percent (50%) as set out under Items 1 or 2 - Sales by Private Treaty or Items 1 or 2 - Sales by Auction of the Maximum Remuneration Notice.

(iv) Stamp Duty.

(v) Fees paid to the Registrar of Titles or to the person performing duties of a like nature and for the same purpose in another State or Territory of the Commonwealth.

(vi) Expenses relating to the execution or discharge of a first mortgage.

(vii) The amount of expenses reasonably incurred by the employee in advertising the residence for sale.

(d) "Locality" in relation to an employee means:

(i) Within the metropolitan area, that area within a radius of fifty (50) kilometres from the Perth City Railway Station, and

(ii) Outside the metropolitan area, that area within a radius of fifty (50) kilometres from an employee's headquarters when they are situated outside of the metropolitan area.

(e) "Property" shall mean a residence as defined in this clause including a block of land purchased for the purpose of erecting a residence thereon to the extent that it represents a normal urban block of land for the particular locality.

(f) "Residence" includes any accommodation of a kind commonly known as a flat or a home unit that is, or is intended to be, a separate tenement including dwelling or house, and the surrounding land, exclusive of any other commercial property, as would represent a normal urban block of land for the particular locality.

(g) "Settlement Agent" means a person carrying on business as settlement agent in a State or Territory of the Commonwealth, being, in a case where the law of that State or Territory provides for the registration or licensing of persons who carry on such a business, a person duly registered or licensed under the law.

(2) When an employee is transferred from one locality to another in the public 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, the employee shall be entitled to be paid a property allowance for reimbursement of expenses incurred.

(a) In the sale of residence in the employee's former locality, which, at the date on which the employee received notice of transfer to a new locality: -

(i) the employee owned and occupied; or

(ii) the employee was purchasing under a contract of sale providing for vacant possession; or

(iii) the employee was constructing for the employee's own permanent occupation, on completion of construction; and

(b) In the purchase of a residence or land for the purpose of erecting a residence thereon for the employee's own permanent occupation in the new locality.

(3) An employee shall be reimbursed the following expenses as are incurred in relation to the sale of a residence:

(a) If the employee engaged an agent to sell the residence on the employee's behalf - 50 percent of the amount of the commission paid to the agent in respect of the sale of the residence;

(b) if a solicitor was engaged to act for the employee in connection with the sale of the residence - the amount of the professional costs and disbursements necessarily incurred and paid to the solicitor in respect of the sale of the residence;

(c) if the land on which the residence is created was subject to a first mortgage and that mortgage was discharged on the sale, then an employee shall, if, in a case where a solicitor acted for the mortgagee in respect of the discharge of the mortgage and the employee is required to pay the amount of professional costs and disbursements necessarily incurred by the mortgagee in respect of the discharge of the mortgage - the amount so paid by the employee;

(d) if the employee did not engage an agent to sell the residence on their behalf - the amount of the expenses reasonably incurred by the employee in advertising the residence for sale.

(4) An employee shall be reimbursed such following expenses as are incurred in relation to the purchase of a residence:

(a) if a solicitor or settlement agent was engaged to act for the employee in connection with the purchase of the residence - the amount of the professional costs and disbursements necessarily incurred and paid to the solicitor or settlement agent in respect of the purchase of the residence;

(b) if the employee mortgaged the land on which the residence was erected in conjunction with the purchase of the residence, then an employee shall, if, in a case where a solicitor acted for the mortgagee and the employee is required to pay and has paid the amount of the professional costs and disbursements (including valuation fees but not a procuration fee payable in connection with the mortgage) necessarily incurred by the mortgagee in respect of the mortgage - the amount so paid by the employee;

(c) if the employee did not engage a solicitor or settlement agent to act for the employee in connection with the purchase or such a mortgage - the amount of the expenses reasonably incurred by the employee in connection with the purchase or the mortgage, as the case may be, other than a procuration fee paid by the employee in connection with the mortgage.

(5) An employee is not entitled to be paid a property allowance under subclause (2)(b) of this clause unless the employee is entitled to be paid a property allowance under paragraph (2)(a) of this clause, provided that the employer may approve the payment of a property allowance under subclause (2)(b) of this clause to an employee who is not entitled to be paid a property allowance under subclause (2)(a) of this clause if the employer is satisfied that it was necessary for the employee to purchase a residence or land for the purpose of erecting a residence thereon in the employee's new locality because of the employee's transfer from the former locality.

(6) For the purpose of this Clause it is immaterial that the ownership, sale or purchase is carried out on behalf of an employee who owns solely, jointly or in common with:-

(a) the employee's spouse, or

(b) a dependant relative, or

(c) the employee's spouse and a dependant relative.

(7) Where an employee sells or purchases a residence jointly or in common with another person - not being a person referred to in subclause (6) of this clause the employee shall be paid only the proportion of the expenses for which the employee is responsible.

(8) An application by an employee for a property allowance shall be accompanied by evidence of the payment by the employee of the expenses, being evidence that is satisfactory to the Employer.

(9) Notwithstanding the foregoing provisions, an employee is not entitled to the payment of a property allowance-

(a) In respect of a sale or purchase prescribed in subclause (2) of this clause which is effected -

(i) more than twelve months after the date on which the employee took up duty in the new locality; or

(ii) after the date on which the employee received notification of being transferred back to the former locality;

Provided that the employer may, in exceptional circumstances, grant an extension of time for such period as is deemed reasonable.

(b) Where the employee is transferred from one locality to another solely at the employee's own request or on account of misconduct.

2005 WAIRC 02687

FIRE BRIGADE EMPLOYEES (WORKSHOPS) AWARD 1983 (NO A6 OF 1981)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIV.
	APPLICANT
	-v-
	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS-WESTERN AUSTRALIAN BRANCH AND WESTERN AUSTRALIAN FIRE BRIGADES BOARD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 23 SEPTEMBER 2005
FILE NO/S	APPL 777 OF 2005
CITATION NO.	2005 WAIRC 02687

Result Award varied

Order

HAVING heard Mr L Edmonds on behalf of the applicant, Mr D McLane on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch and Ms C Bocso on behalf of the Western Australian Fire Brigades Board, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Fire Brigade Employees (Workshops) Award 1983 (No A6 of 1981) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 23 September 2005.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 9. - Overtime:

A Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) An employee required to work continuous overtime for more than one hour shall be supplied with a meal by the employer or be paid $7.70 for a meal.

B Delete subclause (9)(b)(ii) of this clause and insert the following in lieu thereof:

(ii) An employee who is available in accordance with subclause (9)(b)(i) of this clause shall be paid an allowance of $59.10 for each week the employee is required to be available. This allowance shall be paid on a pro-rata basis for each "part week" where the employee is required to be available.

2. Clause 11. – Special Rates and Provisions:

A Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) An Electrician - Special class, an electrical fitter and/or armature winder or an electrical installer who holds, and in the course of his/her employment may be required to use a current "A" Grade or "B" Grade licence issued pursuant to the relevant regulation in force on the 28th day of February, 1978 under the Electricity Act 1945 shall be paid an allowance of $17.60 per week.

B Delete subclause (4) of this clause and insert the following in lieu thereof:

(4) A licensed electrical fitter or electrical installer who acts as nominee for the employer shall be paid an allowance of $16.60 per week.

3. Clause 19. - Wages:

A Delete subclauses (4) of this clause and insert the following in lieu thereof:

(4) A tradesperson placed in charge of three or more other employees, in addition to the ordinary rate, shall be paid per week:

(a)	If placed in charge of not less than three and not more than 10 other employees	$22.50
(b)	If placed in charge of more than 10 and not more than 20 other employees	$34.50
(c)	If placed in charge of more than 20 other employees	$44.30

B Delete subclause (5) of this clause and insert the following in lieu thereof:

(5) (a) The employer shall pay employees an allowance for service of:

$6.90 in the second year of service.

$13.80 in the third and subsequent years of service.

(b) This allowance shall be paid as "all purpose".

C Delete subclause (6)(a) of this clause and insert the following in lieu thereof:

(6) (a) Where the employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice, the employer shall pay a tool allowance of:

(i) $12.40 per week to such tradesperson; or

(ii) in the case of an apprentice a percentage of $12.40, being the percentage which appears against the relevant year of apprenticeship;

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

2005 WAIRC 02750

JOHN LYSAGHT (AUSTRALIA) LIMITED AWARD - THE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIV.
	APPLICANT
	-v-
	JOHN LYSAGHTS LTD, COATED PRODUCTS DIVISION, BHP
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	TUESDAY, 4 OCTOBER 2005
FILE NO/S	APPL 801 OF 2005
CITATION NO.	2005 WAIRC 02750

Result Award Variation

Order

HAVING heard Mr L. Edmonds (of Counsel) on behalf of the Applicant and Mr D. Lee for the Respondent, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the John Lysaght (Australia) Ltd Award No. 27 of 1967 be varied in accordance with the following Schedule and that such variation shall have effect commencing from the first pay period on or after 28th September 2005.

[L.S.]

(Sgd.) J F GREGOR,
Senior Commissioner.

SCHEDULE

1. Clause 4. – Wages/Payments:. Delete subclause (8) and insert in lieu the following:

(8) Allowances/Special Rates

(a) Tool Allowance

(i) Tradespersons shall be paid an allowance of $12.80 per week for supplying and maintaining tools ordinarily required in the performance of their work as tradespersons.

This allowance shall apply to apprentices on the same percentage basis as set out in subclause (6) - Apprenticeship of Clause 3. - Employment Relationship of this award.

This allowance shall apply for all purposes of the award.

(ii) Where it was the practice as at 5 November 1979 for the employer to provide all tools ordinarily required by a tradesperson or apprentice in the performance of work, the employer may continue that practice and in that event the allowance prescribed in sub-paragraph (i) hereof shall not apply.

(iii) Notwithstanding sub-paragraphs (i) and (ii) hereof, an employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments. Tradespersons or apprentices shall replace or pay for any tools supplied by the employer if lost through their negligence.

(b) Confined Spaces

Employees working in confined spaces (as defined) will be paid an additional 59 cents per hour.

(c) Dirty Work

Employees working in a job that is of an unusually dirty or of an offensive nature will receive an additional 44 cents per hour extra.

(d) Wet Places

An employee whose clothing or boots become saturated because of the working place whether by water, oil or otherwise shall be paid 44 cents per hour extra. Provided that this extra rate shall not be payable to an employee who is provided by the employer with suitable and effective protective clothing and/or footwear. Any employee who becomes entitled to this extra rate shall be paid the extra rate for such part of the day or shift which involves working in wet clothes or boots.

(e) Motor Allowance

(i) Where an employee is required and authorised to use their own personal motor vehicle in the course of their duties, the employee shall be paid an allowance not less than that provided for in the table set out hereunder. Notwithstanding anything contained in this subclause the employer and the employee may make any other arrangement as to car allowance not less favourable to the employee.

(ii) Where an employee in the course of a journey travels through two or more of the separate areas, payment at the rates prescribed herein shall be made at the appropriate rate applicable to the separate areas traversed.

(iii) A year for the purposes of this subclause, shall commence on the 1 st day of July and end on the 30 th day of June next following.

RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE
ON EMPLOYER'S BUSINESS

MOTOR CAR

AREA AND DETAILS	**ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES)**		
DISTANCE TRAVELLED EACH YEAR ON OFFICIAL BUSINESS	Over 2600cc	Over 1600cc -2600cc	1600cc & Under
Rate per Kilometre (Cents)			
Metropolitan Area	68.5	61.3	53.4
South West Land Division	70.1	62.9	54.7
North of 23.5º South Latitude	77.0	69.4	60.2
Rest of the State	72.5	64.9	56.4
Motor Cycle (In All Areas)	23.6 cents per kilometre		

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

(v) "South West Land Division" means the South West Land Division as defined by Section 28 of the Land Act 1933-1971 excluding the area contained within the Metropolitan Area.

(f) First Aid

An employee who has been trained to render first aid and who is the current holder of appropriate first aid qualifications, such as a certificate from the St John Ambulance Association or similar body, will be paid a weekly allowance of $14.20 if such employee is appointed by the employer to perform first aid duty.

(g) Rates Not Subject to Penalty Additions

The above special rates shall be paid irrespective of the times at which the work is performed and shall not be subject to any premium or penalty conditions.

2. Clause 5. – Hours: Delete paragraph (b) of subclause (3) and insert in lieu the following:

(b) Shift Work Loading

(i) Other than a permanent night shift employee, an employee working a shift which falls either partially or wholly outside the agreed spread of hours, will be paid a loading for such shift at the rate of $75.00 per week.

(ii) An employee on a permanent night shift will, for each such shift worked, be paid a loading at the rate of $150.90 per week.

(iii) An employee who is engaged on 12 hour rotating shifts will, when employed on night shift, be paid a loading for such shifts at the rate of $99.70 per week.

(iv) A split shift employee will be paid a loading for all such shifts at the rate of $48.50 per week.

(v) The above shift loadings will be paid for all purposes of the award and will be adjusted as appropriate in relation to State Wage Case decisions.

(vi) Shift loadings will not be paid on overtime shifts, or on long service leave.

2005 WAIRC 02748

LIFT INDUSTRY (ELECTRICAL AND METAL TRADES) AWARD 1973

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIV.
	APPLICANT
	-v-
	KONE ELEVATORS (AUST) PTY LIMITED, OTIS ELEVATOR CO PTY LTD, SCHINDLER LIFTS AUSTRALIA PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	TUESDAY, 4 OCTOBER 2005
FILE NO/S	APPL 785 OF 2005
CITATION NO.	2005 WAIRC 02748

Result Award Variation

Order

HAVING heard Mr L. Edmonds (of Counsel) on behalf of the Applicant and Mr D. Lee for the Respondent, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the Lift Industry (Electrical and Metal Trades) Award No. 9 of 1973 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 19th September 2005.

(Sgd.) J F GREGOR,
[L.S.] Senior Commissioner.

SCHEDULE

1. Clause 12. – Overtime. Delete paragraph (f) of subclause (3) of this Clause and insert in lieu the following:

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $9.60 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with each such meal by the employer or be paid $6.50 for each meal so required.

2. Clause 16. – Special Rates and Provisions: Delete subclauses (5) and (6) and insert in lieu the following:

(5) An Electrician Special Class, an electrical fitter and/or armature winder or an electrical installer who holds and, in the course of the employee's employment may be required to use a current "A" Grade or "B" Grade License issued pursuant to the relevant regulation in force on 28th day of February 1979 under the Electricity Act, 1945 shall be paid an allowance of $18.30 per week.

(6) An employee holding either a First Aid Medallion of the St. John Ambulance Association or a Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid $9.00 per week in addition to their ordinary rate.

3. Clause 17. – Car Allowance: Delete subclause (3) and insert in lieu the following:

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

RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE
ON EMPLOYER'S BUSINESS
MOTOR CAR

AREA AND DETAILS	**ENGINE DISPLACEMENT (In Cubic Centimetres)**		
Rate per Kilometre (Cents)	**Over 2600cc**	**Over 1600cc -2600cc**	**1600cc & Under**
Metropolitan Area	68.7	61.4	53.4
South West Land Division	70.2	62.9	54.6
North of 23.5' South Latitude	77.1	69.3	60.4
Rest of the State	72.5	65.0	56.6
Motor Cycle (In All Areas)	23.7 cents per kilometre		

4. Clause 18. – Fares and Travelling Time: Delete subclause (2) and insert in lieu the following:

(2) An employee to whom subclause (1) of this Clause does not apply and who is engaged on construction work or regular repair service and/or maintenance work shall be paid an allowance in accordance with the provisions of this subclause to compensate for excess fares and travelling time from the employee's home to their place of work and return:

(a) On places within a radius of 50 kilometres from the General Post Office, Perth - $14.20 per day.

(b) For each additional kilometre to a radius of 60 kilometres from the General Post Office, Perth - 78 cents per kilometre.

(c) Subject to the provision of paragraph (d), work performed at places beyond a 60 kilometres radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees, with the consent of the Union, agree in any particular case that the travelling allowance for such work shall be paid under this Clause, in which case an additional allowance of 78 cents per kilometre shall be paid for each kilometre in excess of 60 kilometres radius.

(d) In respect to work carried out from an employer's depot situated more than 60 kilometres from the G.P.O., Perth, the main Post Office in the town in which such depot is situated shall be the centre for the purpose of calculating the allowance to be paid.

(e) Where transport to and from the job is provided by the employer from and to their depot or such other place more convenient to the employee as is mutually agreed upon between the employer and employee, half the above rates shall be paid; provided that the conveyance used for such transport is provided with suitable seating and weatherproof covering.

5. Clause 19. – Distant Work: Delete subclauses (6) and (7) and insert in lieu the following:

(6) An employee, to whom the provisions of subclause (1) of this Clause apply, shall be paid an allowance of $28.90 for any week-end they return home from the job, but only if -

(a) The employee advises the employer or the employer's agent of such intention not later than the Tuesday immediately preceding the week-end in which the employee so returns;

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

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

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

(7) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job, the employee shall be provided with suitable transport to and from that job or be paid an allowance of $12.85 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates, whether or not suitable transport is supplied by the employer.

6. Clause 28. – Lift Industry Allowance: Delete subclause (1) of this clause and insert in lieu the following:

(1) Tradespeople and their assistants who perform work in connection with the installation, servicing, repairing and/or maintenance of lifts and escalators, other than in the employer's workshops, shall be paid an amount of $85.70 per week as a lift industry allowance in consideration of the peculiarities and disabilities associated with such work and in recognition of the fact that employees engaged in such work may be required to perform and/or assist to perform, as the case may be, any of such work.

7. First Schedule – Wages: Delete subclauses (3) and (6) and insert in lieu the following:

(3) **Leading Hands**:

In addition to the appropriate total wage prescribed in this Clause, a leading hand shall be paid -

		$
(a)	If placed in charge of not less than three and not more than ten other employees	23.10
(b)	If placed in charge of more than ten and not more than twenty other employees	35.20
(c)	If placed in charge of more than twenty other employees	45.50

(6) (a) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of his/her work as a tradesperson or as an apprentice the employer shall pay a tool allowance of:-

(i) $12.80 per week to such tradesperson; or

(ii) In the case of an apprentice a percentage of $12.80 being the percentage which appears against their years of apprenticeship in Clause 3 of this schedule, for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of his/her work as a tradesperson or apprentice.

(b) Any tool allowance paid pursuant of paragraph (a) of this Clause shall be included in, and form part of, the ordinary weekly wage prescribed in this schedule.

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

(d) A tradesperson or apprentice shall replace or pay for any tools supplied by his/her employer if lost through their negligence.

2005 WAIRC 02747

RADIO AND TELEVISION EMPLOYEES' AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIV.
	APPLICANT
	-v-
	HILLS INDUSTRIES LTD, CANBERRA TELEVISION SERVICES, INDOOR AMUSEMENT GAMES CO.
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	TUESDAY, 4 OCTOBER 2005
FILE NO/S	APPL 786 OF 2005
CITATION NO.	2005 WAIRC 02747

Result Award Variation

Order

HAVING heard Mr L. Edmonds (of Counsel) on behalf of the Applicant and Mr D. Lee for the Respondent, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the Radio and Television Employees' Award No. 3 of 1980 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 19th September 2005.

(Sgd.) J F GREGOR,
[L.S.] Senior Commissioner.

SCHEDULE

1. Clause 9. – Overtime. Delete paragraph (f) of subclause (3) of this Clause and insert in lieu the following:

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $9.55 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required they shall be supplied with each such meal by the employer or be paid $6.45 for each meal so required

2. Clause 13. – Car Allowances: Delete subclause (3) of this Clause and insert in lieu the following:

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

RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE
ON EMPLOYER'S BUSINESS
MOTOR CAR

AREA AND DETAILS	**ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES)**		
	Over 2600cc	Over 1600cc -2600cc	1600cc & Under
Rate per Kilometre (Cents)			
Metropolitan Area	68.7	61.4	53.4
South West Land Division	70.2	62.9	54.6
North of 23.5 ' South Latitude	77.1	69.3	60.5
Rest of the State	72.5	65.0	56.7
Motor Cycle (In All Areas)	23.6 cents per kilometre		

3. Clause 14. – Distant Work: Delete subclause (4) of this Clause and insert in lieu the following:

(4) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of $12.80 per day provided that where the time actually spent in travelling either to or from the job exceeds twenty minutes, that excess travelling time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

4. Clause 29. – Wages: Delete subclauses (2) and (5) of this Clause and insert in lieu the following:

(2) **Leading Hands:**

In addition to the appropriate total wage prescribed in subclause (1) of this Clause a leading hand shall be paid:

		$
(a)	If placed in charge of not less than three and not more than ten other employees	23.00
(b)	If placed in charge of more than ten and not more than twenty other employees	35.10
(c)	If placed in charge of more than twenty other employees	45.20

(5) (a) Where an employer does not provide a Serviceperson, Installer, Assembler or an apprentice with the tools ordinarily required by that Serviceperson, Installer, Assembler or apprentice in the performance of their work as a Serviceperson, Installer, Assembler or as an apprentice the employer shall pay a tool allowance of:-

(i) $12.70 per week to such Serviceperson, Installer or Assembler; or

(ii) In the case of an apprentice a percentage of $12.70 being the percentage which appears against their year of apprenticeship in subclause (3) of this Clause,

for the purpose of such Serviceperson, Installer, Assembler or apprentice supplying and maintaining tools ordinarily required in the performance of their work as a Serviceperson, Installer, Assembler or apprentice.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this Clause.

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

(d) A tradesperson or apprentice shall replace or pay for any tools supplied by their employer if lost through their negligence.

2005 WAIRC 02749

WUNDOWIE FOUNDRY AWARD 1986

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIV.
	APPLICANT
	-v-
	WUNDOWIE FOUNDRY PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	TUESDAY, 4 OCTOBER 2005
FILE NO/S	APPL 789 OF 2005
CITATION NO.	2005 WAIRC 02749

Result Award Variation

Order

HAVING heard Mr L. Edmonds (of Counsel) on behalf of the Applicant and Mr D. Lee for the Respondent, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the Wundowie Foundry Award, No. A8 of 1986 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 19th September 2005.

(Sgd.) J F GREGOR,
[L.S.] Senior Commissioner.

SCHEDULE

1. Clause 11. – Overtime. Delete subclauses (3) and (6) of this Clause and insert in lieu the following:

(3) Subject to the provisions of subclause (4) of this clause, any employee required to work after 6.00 p.m. on day shift or more than two hours overtime at any other time shall be supplied with a meal by the employer or be paid $8.95 for a meal, and if, owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be provided with each such meal or be paid $6.10 for each meal so required provided that -

(a) A rest period of ten minutes from the time of ceasing to the time of resumption of work shall be allowed approximately three hours after the preceding meal break.

(b) The rest period shall be counted as time off duty, without deduction of pay and shall be arranged at a time and in a manner to suit the convenience of the employer.

(c) Refreshments may be taken by employees during the rest period but the ten minutes duration shall not be exceeded under any circumstances.

(d) An employer who satisfies the Commissioner that any employee has breached any condition expressed or implied in this paragraph may be exempted from liability to allow the rest period.

(6) Any employee required to work continuously from 12 midnight to 6.30 a.m. and ordered back to work at 8.00 a.m. the same day, shall be paid $3.20 for breakfast.

2. Clause 13. – Special Rates and Provisions

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

(1) Patternmakers shall be paid a weekly tool allowance of $2.60 and apprentice patternmakers in the third, fourth and fifth year, $1.40. Provided that this allowance shall not be paid when an employee is absent on annual leave, sick leave or long service leave.

B. Delete subclause (3) and (4) of this Clause and insert in lieu the following:

(3) In addition to subclauses (1), (2), (4) and (5) an allowance of 32 cents for each hour worked shall be paid to employees to compensate for the disabilities associated with the industry.

(4) Hot Work: An employee shall be paid an allowance of 44 cents per hour when they work in the shade in any place where the temperature is raised by artificial means to between 46.2 and 54.4 degrees Celsius.

3. Clause 23. – Wages: Delete subclauses (2) and (3) of this Clause and insert in lieu the following:

(2) **Leading Hand Allowances:**

An employee placed in charge of three or more other employees, or otherwise classified by the employer as a leading hand, shall be paid the additional margin set out hereunder:

	$
(a) If placed in charge of not less than three and not more than ten other employees	22.40
(b) If placed in charge of more than ten and not more than twenty other employees	34.30
(c) If placed in charge of more than twenty other employees	45.70

(3) **Tool Allowance:**

(a) Where the employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of their work as a tradesperson or as an apprentice the employer shall pay a tool allowance of -

(i) $12.80 per week to such tradesperson, or

(ii) In the case of an apprentice a percentage of $12.80 being the percentage which appears against their year of apprenticeship in subclause (4) of this clause, for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of their work as a tradesperson or apprentice.

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

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

(d) A tradesperson or apprentice shall replace or pay for any tools supplied by their employer if lost through their negligence.

(e) Any employee in receipt of a tool allowance in accordance with this clause shall maintain an adequate tool kit located at the place of work to enable work to be carried out safely and efficiently. Such tool kit shall, at all times, contain the tools agreed by the Company and the union as the minimum for the respective occupation.

AWARDS/AGREEMENTS—Application for variation of—No variation resulting—

2005 WAIRC 02752

HOSPITAL SALARIED OFFICERS (PRIVATE HOSPITALS) AWARD, 1980

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERNAUSTRALIA (UNION OF WORKERS)
	APPLICANT
	-v-
	ATTADALE HOSPITAL AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER P E SCOTT
DATE	TUESDAY, 4 OCTOBER 2005
FILE NO	APPL 1935 OF 2002
CITATION NO.	2005 WAIRC 02752

Result Application Dismissed

Order

WHEREAS this is an application to vary the Hospital Salaried Officers (Private Hospitals) Award, 1980 (No. R28 of 1977); and

WHEREAS the Commission convened conferences between the parties for the purposes of conciliation; and

WHEREAS on Monday, the 3rd day of October 2005, the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

2005 WAIRC 02802

RETAIL PHARMACISTS'AWARD 2004

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES SALARIED PHARMACISTS' ASSOCIATION WESTERN AUSTRALIAN (UNION OF WORKERS)

APPLICANT

-v-

FRIENDLY SOCIETY CHEMISTS AND OTHERS

RESPONDENTS

CORAM COMMISSIONER P E SCOTT
DATE WEDNESDAY, 12 OCTOBER 2005
FILE NO APPL 677 OF 2005
CITATION NO. 2005 WAIRC 02802

Result Application to vary Award dismissed

Order

HAVING heard Mr G Bucknall on behalf of the applicant and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT this application be, and is hereby dismissed.

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

AGREEMENTS—Industrial—Retirements from—

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 939 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 Botanic Gardens and Parks Authority will cease to be a party to the Botanic Gardens and Parks Authority Agency Specific Agreement 2003 PSA AG 22 of 2003 on and from the 3 rd day of November 2005.

DATED at Perth this 11th day of October 2005.

J.A. SPURLING,
Registrar.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 940 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

John Holland Pty Ltd will cease to be a party to the John Holland/CFMEUW Industrial Agreement 2003 – 2005 (2004 WAIRC 12931) AG 144 of 2003 on and from the 3 rd day of November 2005.

DATED at Perth this 12th day of October 2005.

J.A. SPURLING,
Registrar.

CANCELLATION OF—Awards/Agreements/Respondents—

2005 WAIRC 02815

ELECTRICAL CONTRACTING INDUSTRY AWARD R 22 OF 1978

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION (COMMISSION'S OWN MOTION)
	APPLICANT
	-v-
	FEDERATION OF ELECTRICAL CONTRACTORS INC
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 13 OCTOBER 2005
FILE NO/S	APPL 942 OF 2005
CITATION NO.	2005 WAIRC 02815

Result	Deletion of Respondent to Award
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS the Commission, being notified that the Federation of Electrical Contractors Incorporated has wound up its activities and amalgamated with the Electrical Contractors Association of Western Australia (Union of Employers);

AND WHEREAS the Commission did give notice on the 11th day of August, 2005 of an intention to make an Order to delete the Federation of Electrical Contractors as a respondent to the award;

AND WHEREAS at the 12th day of October, 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 s.47 of the Act, do hereby order that Federation of Electrical Contractors be deleted as a respondent to the Electrical Contracting Industry Award R22 of 1978.

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

2005 WAIRC 02814

PUBLIC SERVICE ALLOWANCES (MORTUARY STAFF) AWARD 1985

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION (COMMISSION'S OWN MOTION)
	APPLICANT
	-v-
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED AND THE WESTERN AUSTRALIAN CENTRE FOR PATHOLOGY AND MEDICAL RESEARCH
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 13 OCTOBER 2005
FILE NO/S	APPL 941 OF 2005
CITATION NO.	2005 WAIRC 02814

Result	Award cancelled
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applied, did give notice on the 11th day of August, 2005 of an intention to make an Order cancelling the award;

AND WHEREAS at the 12th day of October, 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 s.47 of the Act, do hereby order that the following award be cancelled:

PUBLIC SERVICE ALLOWANCES (MORTUARY STAFF) AWARD 1985

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

NOTICES—Award/Agreement matters—

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 227 of 2005

APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT

TITLED "BT TRITECH ELECTRICAL ENTERPRISE BARGAINING AGREEMENT 2005"

NOTICE is given that an application has been made by The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA 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 AND SCOPE

This Agreement shall apply to commercial construction projects and other agreed works within the electrical contracting sector of the building and construction industry that takes place within the State of Western Australia.

For clarification:

Construction work means work on a site in or in connection with:

(a) The construction of a large industrial undertaking or any large civil engineering project;

(b) The construction or erection of any multi-storey building; and

(c) The construction, erection or alteration of any other building, structure, or civil engineering project which the Company and the Union agree, in the event of disagreement, which the Western Australian Industrial Relations Commission declares to be construction work for the purposes of this Agreement.

Project means the limits of an area of a site that "the Company" is contracted to work under and can be clarified via specific project scope of work documents.

4. PARTIES BOUND

- BT Tritech ("the Company");
- The employees of the Company who are members of or eligible to be members of the Union party to this Agreement engaged in work on commercial building works as described in Clause 3. - Area and Scope (hereinafter called "the employees");
- The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch;
- This agreement shall apply to approximately 4 employees.

6. APPLICATION OF AGREEMENT

6.1 The Wage Schedules in this Agreement shall apply to all commercial construction projects and agreed other works, and where a specific project payment or agreement or site agreement is applicable to work undertaken by the Company and the terms of that project payment/agreement or site agreement are agreed to by the Company, the specific project/site agreement shall take precedence over this Agreement.

6.2 No part of this Agreement shall be interpreted as permitting the establishment of a bargaining period on work covered by this Agreement during its term.

6.3 No part of this Agreement shall be used by the Company, or its employees as evidence or example before any industrial tribunal or proceedings not directly concerned with work covered under this Agreement.

6.4 This Agreement shall operate in conjunction with the Electrical Contracting Industry Award R22 of 1978 ("the Award") as at 1 January 2005. Where any inconsistency exists between this Agreement and the Award, this Agreement will take precedence to the extent of the inconsistency.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J.A. SPURLING,
Registrar.

16 September 2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. 689 of 2005

APPLICATION FOR VARIATION OF AN AWARD ENTITLED

" CATERING EMPLOYEES AND TEA ATTENDANTS (GOVERNMENT) AWARD 1982", NO. A 34 OF 1981.

NOTICE is given that an application has been made to the Commission by the *The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch (*"the union") to vary the above Award..

As far as relevant, those parts of the proposed variation that relate to area of operation or scope are published hereunder.

Clause 3. – Area. Renumber Clause 1.3. Delete and replace with the following:

1.3 AREA AND SCOPE

This award shall apply to all employees who are employed in the callings described in 4.4 Wages by the Western Australian Government, the Western Australian Public Sector, or public sector commissions or authorities in catering establishments as defined in 1.5. Provided that this Award shall not apply to any employee who at the date of this Award is covered by any other award registered or issued under the provisions of the Industrial Relations Act, 1979

Clause 4. – Scope. Delete this clause.

Clause 6. – Definitions. Renumber this Clause 1.5. Delete and Replace with the following:

1.5 DEFINITIONS

1.5.1 "Commission" means the Western Australian Industrial Relations Commission.

1.5.2 "Catering Establishment" shall mean any meal room, dining room, coffee shop, tea shop, canteen or cafeteria, and includes any place, building, or part thereof, in or from which food is sold or served for consumption on the premises or elsewhere.

1.5.3 "Bar Attendant" shall mean an employee over the age of 18 years who serves liquor for sale from behind a bar counter.

1.5.4 "Chef" shall mean an employee who is a "Qualified Cook", (as defined in subclause (4) hereof), and who is appointed as such by the employer.

1.5.5 "Qualified Cook" shall mean an employee who has completed and can produce appropriate documentary evidence to their employer to the effect that the employee has successfully completed an apprenticeship in cooking at an approved or recognised school or college, or who can provide documentary evidence of having served at least six years in the Australian Armed Forces in the classification of Cook.

1.5.6 "Cook Employed Alone" shall mean an employee who is employed when no other cook is employed during the employee's shift.

1.5.7 "Cashier" shall mean an employee who is principally engaged upon receiving monies in a dining room or restaurant area.

1.5.8 "Daily Spread of Shift" shall mean the time which elapses from the employee's actual starting time to the employee's actual finishing time for the day or shift.

1.5.9 "Tea Attendant" shall mean an employee engaged either wholly or for the major and substantial part of working time making and/or servicing morning and/or afternoon teas, washing up and other duties in connection with such work.

1.5.10 "Union" means the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch.

1.5.11 "Casual employee" means an employee as defined in subclause 2.2 - Types of Employment.

1.5.12 "Fixed term contract employee" means a person engaged by the employer under a contract of employment for a specified period.

1.5.13 "Probationary employee" means an employee who is serving a period of probation in accordance with paragraph 2.1.2 of this clause.

1.5.14 "Trainee" means an employee engaged in a full time or part time structured employment based training arrangement, approved by the Western Australian Department of Education and Training and which, on successful completion, provides the employee with a nationally recognised qualification.

1.5.15 "Traineeship training contract" means the agreement between the employer and the trainee that provides details of the traineeship and the obligations of the employer and trainee, and that is registered with the Western Australian Department of Education and Training.

Clause 22. – Wages. Renumber Clause 4.4. Delete and replace with the following:

4.4 WAGES

(1) The minimum weekly rate of wage payable to employees covered by this award shall be as per the subclauses comprising:

(a) Part A – Wages Adjusted by Arbitrated Safety Net Adjustments; or

(b) Part B – Expired Industrial Agreement Wages;

whichever is the greater.

(2) The wage rates to apply for the purpose of the no-disadvantage test under the Industrial Relations Act 1979 shall be as per the subclauses comprising:

(a) Part A – Wages Adjusted by Arbitrated Safety Net Adjustments; or

(b) Part B – Expired Industrial Agreement Wages;

whichever are the greater.

PART A: WAGES ADJUSTED BY ARBITRATED SAFETY NET ADJUSTMENTS

The rates of pay in subclause (3) of this clause include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in subclause (3), except where such absorption is contrary to the terms of an industrial agreement.

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

(3) Subject to subclause (1), the weekly rate of wage payable to employees covered by this award, excluding those who are employed by the Department of Education and Training, shall be as follows:

Classification	Base Rate ($)	Arbitrated Safety Net Adjustments per week ($)	Total Award Rate per week ($)
(1) Chef	351.20	159.00	510.20
(2) Qualified Cook	325.40	159.00	484.40
(3) Cook Employed Alone	307.90	159.00	466.90
(4) Other Cooks	304.60	159.00	463.60
(5) Bar Attendant	307.40	159.00	466.40
(6) Waiter/Waitress	300.20	159.00	459.20
(7) Steward/Stewardess	300.20	159.00	459.20
(8) Cashier	307.40	159.00	466.40
(9) Counter Hand	300.20	159.00	459.20
(10) Tea Attendant	297.20	159.00	456.20
(11) Kitchen Hand	297.20	159.00	456.20
(12) General Hand	297.20	159.00	456.20

PART B – EXPIRED INDUSTRIAL AGREEMENT WAGES

(4) The wage rates contained in subclauses (8) and (9) of this clause have been incorporated from an industrial agreement applicable to employees covered by this award and are not to be subject to arbitrated safety net adjustments.

(5) Subject to subclause (1), the weekly rate of wage payable to employees covered by this award shall be as follows:

Classification	Weekly Amount
Chef	
1st year of employment	$576.30
2nd year of employment	$582.30
3rd year of employment	$587.60
Qualified Cook	
1st year of employment	$542.30
2nd year of employment	$548.50
3rd year of employment	$553.60
Cook Employed Alone	
1st year of employment	$519.40
2nd year of employment	$525.40
3rd year of employment	$530.70

Classification	Weekly Amount
Other Cooks	
1st year of employment	$515.20
2nd year of employment	$521.10
3rd year of employment	$526.40
Bar Attendant	
1st year of employment	$518.80
2nd year of employment	$524.80
3rd year of employment	$530.10
Waiter/Waitress	
1st year of employment	$509.30
2nd year of employment	$515.40
3rd year of employment	$520.60
Steward/Stewardess	
1st year of employment	$509.30
2nd year of employment	$515.40
3rd year of employment	$520.60
Cashier	
1st year of employment	$518.80
2nd year of employment	$524.80
3rd year of employment	$530.10
Counter Hand	
1st year of employment	$509.30
2nd year of employment	$515.40
3rd year of employment	$520.60
Tea Attendant	
1st year of employment	$505.30
2nd year of employment	$511.50
3rd year of employment	$516.60
Kitchen Hand	
1st year of employment	$505.30
2nd year of employment	$511.50
3rd year of employment	$516.60
General Hand	
1st year of employment	$505.30
2nd year of employment	$511.50
3rd year of employment	$516.60

A copy of the proposed variation may be inspected at my office at 111 St George's Terrace, Perth.

J.A. SPURLING,
Registrar.

5 October 2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. 688 of 2005

APPLICATION FOR VARIATION OF AN AWARD ENTITLED:

"ENROLLED NURSES AND NURSING ASSISTANTS (GOVERNMENT) AWARD" NO. R 7 OF 1978

NOTICE is given that an application has been made to the Commission by the *The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch (*"the union") to vary the above Award.

As far as relevant, those parts of the proposed variation that relate to area of operation or scope are published hereunder.

Clause 3 – Scope. Delete this Clause and replace with the following:

This award shall apply throughout the State of Western Australia to:

(1) workers described in 4.3 - Wages of this award employed by (i) the Board of Management of any hospital constituted pursuant to the provisions of Section 7 to 15 of the Hospitals Act 1927 as amended or (ii) by the Hon Minister for Health in any of the institutions set out in sub-section (1) of Section 19 of the Mental Health Act 1962 as amended in which nursing care is regularly given; and

(2) to enrolled nurses, enrolled with the Nurses Board of W.A. employed by the respondents in the delivery of community health nursing services.

This award shall not apply to employees covered by Award Nos. 13 of 1947, 14 of 1973, 36 of 1965 or 35 of 1966 or Industrial Agreement No. 24 of 1972 or any award or industrial agreement issued or registered as a replacement therefore.

Clause 5 – Area. Delete this Clause.

Clause 26 – Wages. Renumber Clause 4.3

4.3 WAGES

4.3.1 The minimum weekly rate of wage payable to employees covered by this award shall be as per the subclauses comprising:

(a) Part A – Wages Adjusted by Arbitrated Safety Net Adjustments; or

(b) Part B – Expired Industrial Agreement Wages;

whichever is the greater.

4.3.2 The wage rates to apply for the purpose of the no-disadvantage test under the Industrial Relations Act 1979 shall be as per the subclauses comprising:

(a) Part A – Wages Adjusted by Arbitrated Safety Net Adjustments; or

(b) Part B – Expired Industrial Agreement Wages;

whichever are the greater.

PART A: WAGES ADJUSTED BY ARBRITRATED SAFETY NET ADJUSTMENTS

The rates of pay in subclause (3) of this clause include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in subclause (3), except where such absorption is contrary to the terms of an industrial agreement.

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

4.3.3 Subject to subclause (1), the weekly rate of wage payable to employees covered by this award, excluding those who are employed by the Department of Education and Training, shall be as follows:

		Base Rate $	Arbitrated Safety Net Adjustments $	Weekly Rate $
(a)	**Enrolled Nurse Level One**			
	1st year of employment	418.80	161.00	579.18
	2nd year of employment	423.80	161.00	584.80
	3rd year of employment and thereafter	434.70	161.00	595.70
(b)	**Enrolled Nurse Level Two**			
	1st year of employment	427.60	161.00	588.60
	2nd year of employment	432.70	161.00	593.70
	3rd year of employment and thereafter	443.50	161.00	604.50
(c)	**Enrolled Nurse Level Three**	456.10	161.00	617.10
(d)	**Nursing Assistant**			
	1st year of employment	377.40	159.00	536.40
	2nd year of employment	387.80	159.00	546.80
	3rd year of employment and thereafter	398.30	159.00	557.30

(e) A Nursing Assistant who has completed her first year of service and who is accepted for training as a Enrolled Nurse, shall be paid not less than she would have received had she continued as a Nursing Assistant.

(f) (i) Any employee who has passed the examination for registration prescribed by the Nurses' Board of W.A. shall for the purposes of this clause be deemed to be an Enrolled Nurse.

(ii) An Enrolled Nurse undergoing training in a post basic course approved by the Nurses' Board of W.A., will be paid the "first year of employment" rate of wage for his/her appropriate classification level during the training period.

(iii) The ordinary rate of wage prescribed for an Enrolled Nurse in this clause shall be increased by $11.75 per week when a Registered Enrolled Nurse has obtained a second post basic certificate approved by the Nurses' Board of W.A., and he/she is required to use the knowledge gained in that certificate as part of his/her employment.

(iv) Provided that the provisions of paragraph (c) hereof shall not apply to enrolled community nurses or enrolled community school nurses.

(g) When the term "year of employment" is used in this clause it shall mean all service whether full time or part time in any of the classifications contained in this award with any hospital covered by this award and shall be calculated in periods of completed months from the date of commencement of work covered by this award. Provided that:-

(i) "Service" in this context shall have the same meaning as it does in the Long Service Leave conditions appropriate to the employee concerned, but confined to respondents to this award; except where the employer or the Western Australian Industrial Relations Commission deems it appropriate to include service with hospitals not respondent to this award.

(ii) Employees shall be paid the rates shown in this clause according to their year of employment calculated in accordance with the provisions of this subclause. Proof of previous service, if required by the employer, shall rest on the employee; provided that production of the certificate of certificates referred to in subclause (12) of this clause, shall be sufficient proof for the purpose of this paragraph.

(iii) Notwithstanding the provisions of paragraph (b) of this subclause, an Enrolled Nurse who successfully completes a re-registration course following a break in service shall commence employment on the rate prescribed as follows:

(aa) Five year break in service - at third year of employment rate provided that the 1st and 2nd year of service rates have previously been attained.

(bb) Six year but less than eight year break in service - at second year of employment rate.

(cc) Greater than eight year break in service - at the first year of employment rate.

(h) Each employee whose service terminates shall at the time of termination be given a certificate signed by the employer in which shall be stated the name of the employee, the period of service, whether the service was full time or part time and the classifications in this award in which work has been carried out.

Provided that where an employee terminates without that employee having given the prescribed period of notice, the employer shall be under no obligation to provide the certificate at the time of termination. The employee shall, however, be entitled to request and receive the certificate at any time after the termination.

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

(i) $18.85 per week when in charge of not less than three and not more than ten other employees;

(ii) $28.40 per week when in charge of more than 10 and not more than 20 other employees; and

(iii) $37.85 per week when in charge of more than 20 employees.

PART B – EXPIRED INDUSTRIAL AGREEMENT WAGES

4.3.4 The wage rates contained in subclauses (8) and (9) of this clause have been incorporated from an industrial agreement applicable to employees covered by this award and are not to be subject to arbitrated safety net adjustments.

4.3.5 Subject to subclause (1), the weekly rate of wage payable to employees covered by this award shall be as follows:

Enrolled Nurses

The classification structure for Enrolled Nurses shall be as follows:

(a) “Enrolled Nurse Level 1” is an Enrolled Nurse in the first year of employment.

(b) “Enrolled Nurse Level 2” is an Enrolled Nurse in the second year of employment.

(c) “Enrolled Nurse Level 3” is an Enrolled Nurse in the third year of employment.

(d) “Enrolled Nurse Level 4” is an Enrolled Nurse in the fourth year of employment.

(e) “Advanced Skill Enrolled Nurse” (ASEN) is an Enrolled Nurse appointed as such. An ASEN would ordinarily have at least 5 years relevant experience, have demonstrated experience and ongoing learning (either internally or externally) in extended nursing role functions not included in the pre-registration program, and have the ability to act as a resource/mentor to other Enrolled Nurses.

Enrolled Nurse Level 1	$668.00
Enrolled Nurse Level 2	$680.00
Enrolled Nurse Level 3	$692.00
Enrolled Nurse Level 4	$720.10
ASEN	$768.00

Nursing Assistants

Year 1	$600.00
Year 2	$612.00
Year 3	$628.00

A copy of the proposed variation may be inspected at my office at 111 St George’s Terrace, Perth.

J.A. SPURLING,
Registrar.

5 October 2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. 690 of 2005

APPLICATION FOR VARIATION OF AN AWARD ENTITLED:

" RANGERS (NATIONAL PARKS) CONSOLIDATED AWARD, 2000"

NOTICE is given that an application has been made to the Commission by the *The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch (*"the union") to vary the above Award..

As far as relevant, those parts of the proposed variation that relate to area of operation or scope are published hereunder.

Clause 3 – Area and Scope. Renumber Clause 1.3. Delete and replace with the following:

This Award shall apply to employees who are members of, or eligible to be members of the Union, employed in National Parks under and by virtue of the Conservation and Land Management Act, 1984, classified in clause 4.3 – Wages of this Award.

Clause 17 – Wages. Renumber Clause 4.3

4.3 WAGES

4.3.1 The minimum weekly rate of wage payable to employees covered by this award shall be as per the subclauses comprising:

(a) Part A – Wages Adjusted by Arbitrated Safety Net Adjustments; or

(b) Part B – Expired Industrial Agreement Wages;

whichever is the greater.

4.3.2 The wage rates to apply for the purpose of the no-disadvantage test under the Industrial Relations Act 1979 shall be as per the subclauses comprising:

(a) Part A – Wages Adjusted by Arbitrated Safety Net Adjustments; or

(b) Part B – Expired Industrial Agreement Wages;

whichever are the greater.

PART A: WAGES ADJUSTED BY ARBITRATED SAFETY NET ADJUSTMENTS

The rates of pay in subclause (3) of this clause include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in subclause (3), except where such absorption is contrary to the terms of an industrial agreement.

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

4.3.3 Subject to subclause (1), the weekly rate of wage payable to employees covered by this award, excluding those who are employed by the Department of Education and Training, shall be as follows:

CLASSIFICATIONS	$ PER WEEK	ARBITRATED SAFETY NET ADJUSTMENTS $ PER WEEK	TOTAL $ PER WEEK
Ranger's Assistant			
Year 1	376.90	159.00	535.90
Year 2	389.70	159.00	548.70
Year 3	402.20	159.00	561.20
Year 4	414.70	159.00	573.70
Year 5	427.10	161.00	588.10
Ranger Grade 1			
Year 1	439.60	161.00	600.60
Year 2	452.00	161.00	613.00
Year 3	466.40	159.00	625.40
Year 4	476.30	159.00	635.30
Year 5	491.00	159.00	650.00
Ranger Grade 2			
Year 1	508.60	159.00	667.60
Year 2	522.10	159.00	681.10
Year 3	536.40	159.00	695.40
Year 4	551.20	159.00	710.20
Year 5	567.00	142.00	726.40
Senior Ranger Grade 3			
Year 1	588.50	144.00	747.50
Year 2	605.20	144.00	764.20
Year 3	623.10	144.00	782.10
Senior Ranger Grade 4			
Year 1	640.30	142.00	797.30
Year 2	662.60	142.00	821.60

(a) Employees with No Fixed Hours

The rate of pay referred to in this clause shall increase by 25% for any employee whose ordinary rostered hours of work are worked over five days of the week subject to subclause (3) of clause 7. - Hours of this award.

PART B – EXPIRED INDUSTRIAL AGREEMENT WAGES

4.3.4 The wage rates contained in subclauses (8) and (9) of this clause have been incorporated from an industrial agreement applicable to employees covered by this award and are not to be subject to arbitrated safety net adjustments.

4.3.5 Subject to subclause (1), the weekly rate of wage payable to employees covered by this award shall be as follows:

(a) Other Than No Fixed Hours Rangers

Classification	Base Rate	Plus 1.34% ARL Loading
Ranger's Assistant		
0.1	$539.70	**$546.90**
0.2	$561.60	**$569.10**
0.3	$578.00	**$585.70**
0.4	$594.50	**$602.50**
0.5	$610.70	**$618.90**
Ranger Grade One		
1.1	$627.10	**$635.50**
1.2	$643.40	**$652.00**
1.3	$662.40	**$671.30**
1.4	$675.30	**$684.30**
1.5	$694.70	**$704.00**
Ranger Grade Two		
2.1	$717.80	**$727.40**
2.2	$735.50	**$745.40**
2.3	$754.20	**$764.30**
2.4	$773.80	**$784.20**
2.5	$794.50	**$805.10**
Senior Ranger Grade Three		
3.1	$822.70	**$833.70**
3.2	$844.70	**$856.00**
3.3	$868.20	**$897.80**
Senior Ranger Grade Four		
4.1	$891.50	**$903.50**
4.2	$924.50	**$936.90**

(b) No Fixed Hours Ranger with 25% Loading

Classification	Base Rate	Plus 1.34% ARL Loading	Plus 1.5% PHP
Ranger Grade 1			
1.1	$627.10	$635.50	$645.00
1.2	$643.40	$652.00	$661.80
1.3	$662.40	$671.30	$681.30
1.4	$675.30	$684.30	$694.60
1.5	$694.70	$704.00	$714.60
Ranger Grade 2			
2.1	$717.80	$727.40	$738.30
2.2	$735.50	$745.40	$756.50
2.3	$754.20	$764.30	$775.80
2.4	$773.80	$784.20	$795.90
2.5	$794.50	$805.10	$817.20

Classification	Base Rate	Plus 1.34% ARL Loading	Plus 1.5% PHP
Senior Ranger Grade 3			
3.1	$822.70	$833.70	$846.20
3.2	$844.70	$856.00	$868.90
3.3	$868.20	$897.80	$893.00
Senior Ranger Grade 4			
4.1	$891.50	$903.50	$917.00

(i) Public Holidays

(1) National Parks Rangers subject to no fixed hours who are required to work on a public holiday shall not be entitled to any additional remuneration for having worked such a day, as the penalty rate has been built into the wage schedule above.

(2) Provided that the provision of 6.6 – Public Holiday Leave of this Award shall continue to apply to Park Rangers.

(c) Rostered Employees

Classification	Base Rate	Plus 1.34% ARL Loading	Plus 1.5% PHP
Ranger Grade 1			
1.1	$627.10	$635.50	$645.00
1.2	$643.40	$652.00	$661.80
1.3	$662.40	$671.30	$681.30
1.4	$675.30	$684.30	$694.60
1.5	$694.70	$704.00	$714.60
Ranger Grade 2			
2.1	$717.80	$727.40	$738.30
2.2	$735.50	$745.40	$756.50
2.3	$754.20	$764.30	$775.80
2.4	$773.80	$784.20	$795.90
2.5	$794.50	$805.10	$817.20
Senior Ranger Grade 3			
3.1	$822.70	$833.70	$846.20
3.2	$844.70	$856.00	$868.90
3.3	$868.20	$897.80	$893.00
Senior Ranger Grade 4			
4.1	$891.50	$903.50	$917.00
4.2	$924.50	$936.90	$950.90

A copy of the proposed variation may be inspected at my office at 111 St George's Terrace, Perth.

J.A. SPURLING,
Registrar.

5 October 2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. 929 of 2005

APPLICATION FOR VARIATION OF AN AWARD

ENTITLED " RESTAURANT, TEAROOM AND CATERING WORKERS' AWARD 1979"

NOTICE is given that an application has been made to the Commission by the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch, to vary the above Award. As far as relevant, those parts of the proposed variation that relate to area of operation or scope are published hereunder.

1. Clause 2. – Arrangement: Immediately following

53. – Temporary Exemption Clause

insert

54. – School Canteen Workers

2. Immediately following Clause 53. – Temporary Exemption Clause, insert the following new clause:

54. - SCHOOL CANTEEN WORKERS

(1) Without limiting the scope of this Award, the provisions of this clause shall only apply to canteen workers employed in government schools.

(2) This clause shall not apply to canteen workers employed by the Director General of the Department of Education and Training.

(3) To the extent that the provisions of this clause are inconsistent with the provisions in any other clause of this Award, the provisions of this clause shall prevail.

(4) **Definitions**

(a) **Canteen Worker**

Means an employee who works in a school canteen.

(b) **Food and Beverage Attendant Grade 2**

Means a canteen worker who is engaged in any of the following:

- Supplying, dispensing, warming or generally preparing light snack meals;
- Undertaking general serving duties of both food and/or refreshments;
- Maintaining canteen cleanliness;
- Attending a canteen customer service counter;
- Receipt of monies and dispensing change;
- Delivery duties to classrooms, when required;

(c) **Food and Beverage Attendant Grade 3**

Means a canteen worker who coordinates volunteers and a maximum of two other canteen worker employees who work a combined maximum total of 55 hours per week, and/or in addition to Grade 2 is engaged in any of the following:

- Controls canteen stock (including the weekly receipt, recording and ordering of basic pro forma stock);
- In consultation with Committee coordinates rosters for staff and volunteers;
- In consultation with Committee coordinates and/or prices snack food menus;

(d) **Food and Beverage Supervisor Grade 4**

Means a canteen worker who supervises volunteers and more than two other canteen employees, and/or in addition to Grade 3;

- Manages canteen stock (including responsibility for stock take and budgeted ordering);

(5) Canteen workers shall commence employment at a level not lower than Food and Beverage Attendant Grade 2.

(6) **Part-time Canteen Worker**

(a) A part-time canteen worker shall mean a worker who, subject to the provisions of Clause 8. - Hours, regularly works no less than twenty ordinary hours per fortnight nor less than three hours per work period.

(b) Notwithstanding the provisions of Clause 12. – Part Time Workers and of sub-clause (6)(a) of this clause a worker employed in a canteen may be employed for less than twenty ordinary hours per fortnight but for no less than three hours per day on a regular and rostered basis on set hours of the day and set days of the week.

(c) A worker employed in a canteen in accord with sub-clause (6)(b) and rostered for less than twenty ordinary hours per fortnight shall be paid in accord with Clause 10. – Overtime, for hours worked in excess of such rostered hours.

(d) Notwithstanding any other provision of this award, the employer and the worker, other than a worker employed in accord with sub-clause (6)(b) may, by agreement, increase the ordinary hours to be worked in any particular pay period to a maximum of seventy-six ordinary hours. Such extra hours shall be paid for at ordinary rates of pay.

(e) A part-time worker shall receive payment for wages, annual leave, holidays, bereavement leave, and sick leave on a pro-rata basis in the same proportion as the number of hours worked each fortnight bears to seventy-six hours.

(6) **No Reductions**

Nothing contained in this clause shall operate to reduce the wages of any employee who, at the date of amendment of this clause, was being paid a higher rate of wage than the minimum prescribed for their class of work.

J.A. SPURLING,
Registrar.

20 September 2005

INDUSTRIAL MAGISTRATE—Complaints before—

2005 WAIRC 02634

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES' COURT

PARTIES	AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES, W.A. CLERICAL AND ADMINISTRATIVE BRANCH
	CLAIMANT
	-v-
	SHIRE OF COLLIE
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE W.G. TARR
DATE	WEDNESDAY, 24 AUGUST 2005
CLAIM NO.	M 16 OF 2005
CITATION NO.	2005 WAIRC 02634

CatchWords	Breach of Federal Award/Certified Agreement; alleged failure to pay incremental increase.
Result	Finding for the Claimant; increment should have been awarded with effect from 21 August 2003.
Representation	
CLAIMANT	Mr S Bibby appeared for the Claimant
RESPONDENT	Mr S White of the *Western Australian Local Government Association* appeared for the Respondent.

REASONS FOR DECISION

(Delivered extemporaneously at the conclusion of the hearing, extracted from the transcript and edited by His Honour)

Claim

1. This is a claim made by the Australian Municipal, Administrative, Clerical and Services Union - Western Australian Branch on behalf of an employee of the Shire of Collie, Ms Nyree Bartram. The Shire of Collie is the Respondent in these proceedings and the claim alleges that the Respondent is in breach of the ***Local Government Officers (Western Australia) Award 1999*** and, in relation to this employment, there is also an agreement being the ***Shire of Collie Enterprise Bargaining Local Government Officers Agreement 2001*** which has been certified under the ***Workplace Relations Act 1996*** and which also has application to employees of the Shire.

2. The breach claimed is that the employee, Ms Bartram, was not paid an incremental increase in her salary following the second year of her employment.

3. An agreed statement of facts has been filed in the Court in the following terms:

AGREED STATEMENT OF FACTS

1. Ms Nyree Bartram ('employee') commenced employment with the Shire of Collie ('employer') on 20 August 2001 in the position of Recreation Centre Manager.

2. The employee currently manages the Shire of Collie Roche Park Recreation Centre.

3. The employee's employment anniversary commencement date is 20 August.

4. The employee was employed under the terms and conditions of the Local Government Officers (Western Australia) Award 1999 ('Award') and the Shire of Collie Enterprise Bargaining Local (Government) Officers Agreement 2001 ('Agreement').

5. The employee is classified as an 'Officer' as defined in clause 3.9 of the Award.

6. The employee's first incremental review pursuant to clause 13.4.1 of the Award was finalised on 17 January 2003. The employee was awarded an increment increase from 8:1 to 8:2 payable from that day.

7. Payment for the increment level increase was backdated to the employee's commencement date.

8. The review conducted on 17 January 2003 recommended the employee undertake a report writing course. The course was authorized in writing by the Shire of Collie Corporate Services Manager Mr Jason Whiteaker.

9. The respondent conducted a performance and salary review with the employee on 4 July 2003.

10. The respondent did not grant the claimant an increment increase from 8:2 to 8:3 on 4 July 2003.

11. The employee completed a report writing course conducted by the Western Australian Local Government Association on 15 August 2003.

12. The relevant clauses to determine the dispute are clause 13.4.1 of the Award and clauses 8 and 15 of the Agreement.

4. There does not seem to be a lot of dispute on the evidence. It is the case that Ms Bartram commenced her employment in August 2001 and in January of 2003, after a review of her performance, she was awarded an incremental progression from a level 8:1 to a level 8:2. She was employed on a level 8 and commenced the employment at the first point of that level being level 8:1.

5. There was a further performance review done in July 2003 and with an expectation, I presume, on her part that she would move to the next increment when the anniversary of her commencement of employment came about, but that incremental increase was denied by her immediate supervisor.

6. It is not in dispute that Ms Bartram's performance has been satisfactory and the reasons given for her not receiving the increment were set out in a letter signed by the manager of Corporate Service, Mr Jason Whiteaker dated 4 August 2003.

7. There are three points in that letter in relation to the non-incremental progression. They were, and I quote:

   - *Upon completion of your performance review I was satisfied that neither party, either at your previous review or during the year, had identified required new or enhancement of skills, required to be able to carry out your duties with the council.*
   - *Upon analysis of market conditions and employment (based on WALGA information) I was satisfied that your current remuneration was comparable, and in most cases in excess, of employees in similar roles within similar local authorities.*
   - *Upon analysis of your current remuneration with Managers within my department I was satisfied that your remuneration was comparable, and in some case in excess of employees undertaking a similar role. I also noted at your review that while comparisons were made between Managers in the Corporate Services Department, in order to maintain equity, should a Manager prove to be achieving in excess of others this will definitely be taken into account.*

8. The last dot point reads:

   - *As no improvement / development strategy has been developed it goes without saying that I (Council) are happy with your current level of performance / development.*

9. The award makes provision for incremental progression in clause 13.4 and clause 13.4.1 provides:

   At the conclusion of each twelve month period following appointment to their classification or entry into a classification level, Officers shall be eligible for incremental progression if;

   13.4.1(a) The Officer has given satisfactory service over the preceding twelve months; and

   13.4.1(b) The officer has acquired and is required by the employer to utilise new and/or enhanced skills within the ambit of the level definition for his/her position or other skills where agreed at the staff development/performance review, and this has been certified in writing following, and as part of, the assessment process.

   13.4.1(c) In cases where the review is delayed the anniversary date shall not be changed and the increase, if any, will be paid retrospectively to the anniversary date.

   13.4.1(d) Movement to a higher level or classification shall only occur by way of a promotion or reclassification.

10. As the authorities require, a Court is to look at the ordinary and well understood words that are used and they are to be accorded their ordinary or usual meaning.

11. My view is that there can be only two reasons why an incremental progression should not be made and they are those mentioned in 13.4.1(a) and 13.4.1(b) and, provided an employee has satisfied both of those, the salary increase should be allowed. In fact 13.4.1 contains the words "*shall be eligible for incremental progression*" which in the normal application means that it is mandatory. It is not "*may*", it is "*shall be eligible*", if both of the criteria have been met. There are only two criteria and it seems to me that the reasons Mr Whiteaker put forward in his letter dated 4 August 2003 (exhibit C), set out above, are misguided. There is no provision in the clause for him to take into account market conditions and employment. There certainly may well be if he had been setting a level, but this level has been set as a level 8 and there is no provision in clause 13.4 which allows him to take into account his view that the employee is being paid an appropriate amount when compared with other managers in his department.

12. It cannot be any clearer that there are only two criteria, being satisfactory service and the requirement in relation to training.

13. I must say that clause 13.4.1(b) is badly worded. It reads:

    The Officer has acquired and is required by the employer to utilise new and/or enhanced skills within the ambit of the level definition for his/her position or other skills where agreed at the staff development/performance review, and this has been certified in writing following, and as part of, the assessment process.

14. I think if one has to look at that long sentence and try and work out what it requires, it certainly requires, as a starting point, that the officer has acquired skills. It could read "*The Officer has acquired*" to mean, in other words, that the officer is capable of utilising new or enhanced skills. There is the requirement for the officer to be trained, I would have thought. Otherwise, if there is no training and if the officer has not got the skills then he cannot be required by an employer to utilise the skills.

15. The next part is that the officer is required by the employer to utilise those skills and those skills must be within the ambit of the level definition for his/her position and in this case, those skills need to be within the ambit of a level 8 position. It goes on to provide that there may be other skills where agreed at a staff development performance review and they could be, as it says, other skills that are relevant to the position or the officer's performance generally. It goes on to say "*and this has been certified in writing following, and as part of, the assessment process*".

16. So it seems to me, reading that sentence, that the officer needs to have the skill and if he/she did not have it initially he/she needs to have acquired that skill, and there needs to be a requirement by the employer for the employee to utilise those skills. It seems to be, in relation to other skills, there needs to be some agreement and that the agreement needs to be certified in writing.

17. When I then look at the Enterprise Bargaining Agreement and go to clause 15 which is entitled "*Training*" and has a heading "*Application and Approval of Training*", the provisions deal with the issue herein. The clause reads:

15.1 The Collie Shire Council is committed to providing employees with adequate training related to work purpose in a specific field in an effort to enhance their career opportunities or address safety concerns in line with the organisations needs. Training needs may also be identified through the annual performance review process or the manager/supervisor.

15.2 Where identified, employees shall undertake relevant training to enable them to perform their duties competently.

15.3 Employees may request of their immediate manager or supervisor the desire to undertake training. The employee's immediate manager/supervisor is responsible for the administration and approval of training requests or needs in line with Council's annual budget limitations for their respective department and the approved Training Plan. Approval or non-approval by the Manager/Supervisor will take into consideration the needs of the Organisation to have a certain number of employees trained in any particular field at any particular time. ie: there may only be a need to have a certain number of employees trained in computer maintenance or grader/plant operation at any particular time.

15.4 An organisational training plan will be developed within the first 6 months of this agreement in consultation with the EBA Consultative & Implementation Committee and the appropriate Manager/Supervisor taking into consideration the needs of the organisation to have a certain number of employees trained in any particular field at any particular time. Council agrees to annually budget a sum of money to commence implementation of the training plan.

15.5 Staff will be nominated for training programs in accordance with the principles of the Equal Employment Opportunity Act and paragraph 15.3 listed above.

15.6 Where possible training will be conducted by accredited training providers such that employees receive appropriate accreditation for the skills and competencies acquired.

15.7 A schedule of existing training skills will be developed to assist in the development of the Organisational Training Plan required under paragraph 15.4.

18. Clause 15.1 is a statement. Clause 15.2 makes it a requirement, and I would have thought that it would follow there that it is where an employer has identified that an employee needs training to enable them to perform their duties competently. It is for the employer to identify the type of training that is to be undertaken. Clause 15.3 allows an employee to request that he/she undertake certain training and that then is assessed by the employer and approval or non-approval is given by the manager/supervisor, taking into account the needs of the organisation, and so on.

19. Clause 15.4 provides that an organisational training plan will be developed within the first 6 months of the agreement, in consultation with the EBA Consultative & Implementation Committee and the appropriate manager/supervising, taking into consideration the needs of the organisation to have a certain number of employees trained. So once again, 15.4 provides for training which is organised by the employer and not the employee. Clause 15.5 again places a responsibility on the employer to nominate staff for training.

20. Under the heading of "*Training*" in clause 15, it is the employer who has the involvement, except where under 15.3 an employee makes a request to be trained in some area.

21. It follows, in my view, that clause 13.4.1(b) must be an employer initiated provision. It cannot be a provision left to an employee. There needs to be a requirement by the employer for the utilisation of new provisions. It could be a situation where a nurse, for example, is on a level 8 and there was a new computer system introduced into the nursing station and if that computer system was used throughout the hospital then it would not be unusual for an employer to say to the nurse "*You have to learn how to use this computer programme and I will then do what is necessary for you to get the required skills to do that*". That is a situation where, as I have indicated, something new has come into the duties that fit within a level 8 position.

22. To have this any other way would give an employer the power to refuse to pass on an incremental increase where the employee has done nothing wrong and the position duties may not have changed since the last incremental increase. There cannot be the situation where that provision would give the employer an opportunity to refuse, in my view, an increase on a whim, or as I suspect in this case, for some other reason. Certainly, it is well out of the scope of the award to consider an incremental progression based on an analysis of the market conditions or the current remuneration of other employees or other managers. That type of assessment has no place in the award under clause 13.4.

23. The only training that has been identified by the employer is the Local Government Report Writing Course which is, as I understand, a one day course. That was identified in January of 2003 and the uncontradicted evidence before me is that Mr Whiteaker intended giving Ms Bartram the information she required so that she could do that course. He did not follow that through and by the time the July 2003 review was done, that remained outstanding through, it would seem, no fault of the employee.

24. It follows, and seems to be credible evidence, that at that time, on 7 July 2003, Ms Bartram was given a copy of whatever it was which allowed her to get on to the Government Report Writing Course and it seems that she then did quickly follow that up and find that although the course was being run mid-August, she was able to secure that. So it seems to me she has complied with the request of the employer to do the only training that she has been asked to do. The evidence before me, however, is that she did a lot more than that on her own initiative and she produced as exhibit D the courses that she undertook between October 2002 through to the letter and report writing course on 15 August 2003. I would have thought that if there were any issue being taken or there was a requirement to consider any training that had been done by Ms Bartram then she certainly has got herself involved in doing courses and attending conferences which I would have thought would be to the benefit of the Respondent, the Shire of Collie.

25. For the reasons I have given, I find that there has been a breach of the award and that the Respondent did not have grounds for denying Ms Bartram the increment that the award entitles her to. I am satisfied on the balance of probability that the case has been made out and will succeed.

26. My finding is for the Claimant and that an increment should have been awarded to Ms Bartram with effect from 21 August 2003.

27. I do not know how long it will take the parties to calculate the quantum for any order I might make so I will adjourn sine die the proceedings for the lodgement of a consent order.

WG TARR,
Industrial Magistrate.

2005 WAIRC 02787

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GREG LOGAN-SCALES, DEPARTMENT OF CONSUMER &EMPLOYMENT PROTECTION **CLAIMANT** **-v-** TICKET XPRESS PTY LTD **RESPONDENT**
CORAM	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	WEDNESDAY, 20 APRIL 2005, WEDNESDAY, 20 JULY 2005, WEDNESDAY, 27 JULY 2005, WEDNESDAY, 14 SEPTEMBER 2005
DATE	THURSDAY, 4 AUGUST 2005
CLAIM NO.	M 295 OF 2004
CITATION NO.	2005 WAIRC 02787

CatchWords	Sick leave, annual leave, forfeiture of annual leave by reason of misconduct, outstanding wages, accrual of sick leave and annual leave, cessation of employment, alleged failure to work out notice, lack of jurisdiction to determine counterclaim.
Result	Claim allowed in its entirety.

Case(s) referred to in decision:

Myers v Viscount Plastics Pty Ltd [2003] SAIR Comm 25:

Fremantle Port Authority v MUA (1978) AILR 339

Case(s) also cited:

Robertson v Eden Bay Limited trading as Aust Rural (1991) 71 WAIG 1926

Representation

Claimant	Mr. W Milward (of Counsel) instructed by the *Department of Consumer and Employment Protection* appeared for the Claimant.
Respondent	Mr A Klein, the Respondent's Director, represented the Respondent

REASONS FOR DECISION

The Facts

1 The Claimant is and was at all material times an Industrial Inspector. The Respondent is and was at all material times a Corporation incorporated in Victoria, which has its registered office at Sandringham, Victoria. The Respondent's directors are Anthony Janos Klein and his wife Amanda Ruth Klein.

2 The Respondent operates under different entities within the tourism industry. One such entity is known as 26th Parallel. The Respondent, trading as 26th Parallel, commenced operations in both Carnarvon and Exmouth by setting up offices in those locations. In the early part of 2003 the Carnarvon office was established. Those working within it and the Exmouth office were responsible to managers at the Respondent's head office in Victoria. From the evidence, the precise nature of 26th Parallel's operations is somewhat unclear but it suffices to say that it was involved in the design and delivery of tourist services particularly for overseas tourists from Asia and North America visiting the Carnarvon and Exmouth regions.

3 On or about 31 March 2003, the Respondent appointed Ms Kathryn King as its Office Manager for the Carnarvon branch of 26th Parallel. The method by which Ms King came to be employed by the Respondent is in dispute. Ms King asserts that the process was relatively informal and that she attained the position without formal interview. The Respondent, on the other hand, through each of its directors says that Mrs Klein formally interviewed Ms King prior to her appointment. Mrs Klein testified that she met with both Ms King and her mother at which time the terms and conditions of employment were fully discussed. Mrs Klein did not however, during the course of her testimony, specify what was actually discussed.

4 In any event it is not in dispute that Ms King was appointed to work on a full time basis as the Respondent's Carnarvon Office Manager. She was required to work a forty-hour week comprised of eight hours each day. Ms King asserts that she worked from 9.00 am until 5.30 pm inclusive of a half hour unpaid lunch break each weekday. Her salary package was $38,000 per annum consisting of a base salary of $34,000 plus a discretionary bonus of two economy airfares to the value of $4,000 once per year. It was part of Ms King's responsibilities to directly supervise about fifteen trainees working at the Respondent's Carnarvon office engaged by the Respondent pursuant to a government traineeship scheme.

5 Ms King commenced working for the Respondent at its Robinson Street, Carnarvon office on 22 April 2003. She assisted in setting up the office in anticipation of the arrival of trainees. The trainees started working in the office in about the first week of May 2003. Each trainee was required, in completing his or her training modules to work twenty hours per week in accordance with a roster prepared by Ms King. The trainees could either work a morning or afternoon shift or a combination of both in any given week. In the initial stages trainees were permitted to work two full days plus a half-day to make up their weekly hours, but that was later changed to require them to attend training each weekday. In order to facilitate the payment of wages Ms King was required to collate information derived from the trainees' time cards and to transmit the same to the Respondent's accountant in Victoria. That was done on a fortnightly basis. Ms King was not required to submit a time sheet for herself given that she was paid by salary.

6 Leading up to Christmas 2003 the Respondent decided to close its Carnarvon operation from Monday 22 December 2003 until Monday 5 January 2004. All staff members were required to take annual leave during such period and indeed took annual leave during that period.

7 On 21 January 2004 Ms King applied for 14 days "recreational leave" from March 2 until March 19, 2004. The purpose for taking leave at that time was so that she could work as a Relief Manager at the Gateway Motel. Ms King testified that she informed Mr Klein about her intentions and that he had no problem with it. Indeed he approved her application for paid leave for that time. Such approval was communicated verbally. Mr Klein on the other hand asserts that he only approved two weeks leave with the remaining week to be taken on an unpaid basis. There is no documentary evidence to support either version. In any event it is the case that Ms King took leave and worked at the Gateway Motel during that period. Whilst working thereat, Mr Klein attended upon her to discuss various matters, including the purchase of a block and the needs of trainees.

8 On Monday 22 March 2004 Ms King was due to return to work but could not do so because she was unwell. She had flu like symptoms and accordingly informed the Respondent's Carnarvon office that she would not be attending work that day. She attempted to consult her doctor that day but could not see him because he was booked out but consulted him the following day. Dr Howes diagnosed that she was suffering from a stress reaction and associated upper respiratory tract infection. He prescribed her medication and issued a certificate declaring her to be unfit for work until 26 March 2004. Immediately following her medical appointment Ms King attended the Respondent's Carnarvon office in order to fax the medical certificate to the Respondent's Melbourne office. Having done so she left and returned to the Gateway Motel where she was then staying; "house sitting" pending the return of the Gateway Motel's Manager who had been delayed in returning to Carnarvon. Ms King testified that upon returning to the motel she went to bed. She convalesced and did not do any work.

9 Mr Klein and Mrs Klein testified that they, during Ms King's absence on sick leave, contacted Ms King at the Gateway Motel. As a result of such contact they became highly suspicious about the veracity of Ms King being sick. Indeed they were concerned about her bona fides. They formed the view that Ms King was not sick but rather had claimed to be sick in order to facilitate her continued acting management of the Gateway Motel in the absence of its Manager.

10 It was Ms King's evidence that during the period of her sick leave Mr Klein contacted her imploring her to attend an important meeting with a representative of *Hertz*. Despite her being unwell she agreed to attend and did attend the meeting on Thursday 25 March. Following the meeting she returned to the Gateway Motel to continue in her convalescence.

11 On Monday 29 March 2004 she returned to work for the Respondent. She had been away a total of four weeks, three weeks on approved leave and one week on sick leave. She completed a formal leave notification for the sick leave taken (exhibit 11) and submitted that to the Respondent. Later Ms King noted that she had not been paid for that sick leave. There was contention concerning payment of the sick leave. The Respondent through its accountant formed the view that a medical certificate had not been provided and therefore refused to pay Ms King sick leave entitlements. Ms King asserted that a medical certificate had been sent and therefore maintained her claim for sick leave. In the end Ms King was not paid for the period 23 to 26 March 2004.

12 In late April 2004 Ms King sent to Mr Klein an email in which she informed him that she was resigning from her employment with the Respondent. She gave two weeks notice of her resignation and informed the Respondent that her last day of work would be Tuesday, 11 May 2004. Her letter of resignation (exhibit 13) is not dated however by way of inference, having regard to the period of notice and the nominated final day of work, it is possible to conclude that her resignation was tendered on 28 April 2004. By facsimile dated 3 May 2005 (exhibit 14) Mr Klein acknowledged receipt of the resignation received by him on Thursday, 29 April 2004 and confirmed that Ms King's last day of work for the Respondent would be the Wednesday week (12 May 2004).

13 Ms King testified that following her resignation Mr Klein telephoned her and asked her to work out the final two weeks of her employment at half hours to which she agreed. Consequently she was to work the same hours as the remaining trainees. It later transpired that the Respondent decided to close its Carnarvon office and the remaining two trainees were, on 3 May 2004, offered alternate options including relocation or redundancy in light of the closure. Each accepted a redundancy package on or about 4 May 2005.

14 On 3 May 2004 Ms King wrote to Mr Klein (exhibit 26) informing him that she believed that she was entitled to sick leave and holiday entitlements which had not been paid. It is not known whether that letter was sent on the day it was written or whether it was sent on some later date. Further its mode of delivery is not known despite reference within the letter to facsimile transmission. What the letter does do however is to make it clear that by early May 2005 Ms King and her employer were in substantial dispute. It is evident from the correspondence passing between them at about that time that the employment relationship had broken down.

15 On or about 5 May 2005 and following the departure of the last two trainees Ms King in accordance with Mr Klein's instructions packed up all the staff files and transmitted the same to the Respondent's Melbourne office by registered mail. She also facilitated a quotation for the packing and removal of the remaining office equipment. Having done that there was nothing else for her to do. She accordingly sent Mr Klein an email (exhibit 15) in which she said:

> *"Dear Tony*
>
> *Please be advised that I still have not been paid.*
>
> *Also I have a doctors letter stating that I am not to be lifting computers or heavy boxes.*
>
> *I have sent you 2 boxes of staff information by registered mail. All other equipment is still here R & L couriers will be giving you a quote on packing and shifting the rest of the gear.*
>
> *Please be advised that I will be leaving the company today. There are no trainees in and nothing to do everything is secured and the building will be locked."*

16 Subsequently Ms King was contacted by Sandy, an employee of the Respondent's Exmouth office, advising that Mr Klein had instructed her to collect all "the gear" and take it to Exmouth. It was arranged that the gear be picked up on Sunday, 9 May 2004. Sandy turned up on that Sunday and picked up the gear. Ms King asked her to record what she took but Sandy did not do so because she was in a hurry to get back up to Exmouth before it got dark. Thereafter Ms King returned the office keys to the owners of the office namely the Shire of Carnarvon.

17 Given that Ms King was not paid subsequent to 19 April 2004 she made a complaint to the Department of Consumer and Employment Protection. On 14 June 2004 Cheryl Greenough, an Industrial Inspector, wrote to Mr Klein informing him of the alleged non-payment of correct entitlements in accordance with the ***Minimum Conditions of Employment Act 1993*** (the MCEA). The parties thereafter entered into discussion concerning the matter but have not been able to resolve the dispute.

The Claim

18 The Claimant claims the following:

1. Outstanding wages of $523.07 for the four days sick leave taken from 23 March 2004 to 26 March 2004 inclusive as prescribed by section 19(1) of the MCEA; and
2. Outstanding wages of $944.00 for the pay period ending 28 April 2004 as prescribed by section 10 of the MCEA; and
3. Outstanding wages of $112.10 for the pay period ending 12 May 2004 as prescribed by section 10 of the MCEA; and
4. Accrued annual leave of $811.36 due on the cessation of her employment on 5 May 2004 as prescribed by section 24(2) of the MCEA.

Response

Sick Leave

19 The Respondent asserts that sick leave accrues each financial year from 1 July to 30 June following and that pursuant to section 21 of the MCEA any untaken leave from the previous year does not carry over. Accordingly Ms King did not have a sufficient sick leave entitlement to cover the period taken.

20 Further and or in the alternative the Respondent asserts that Ms King was not sick during the material period. In that regard the Respondent asserts that Ms King worked at the Gateway Motel during the period of her alleged illness.

21 Further and or in the alternative the Respondent asserts that a medical certificate was not provided by Ms King and that she failed to prove her entitlement as is required by section 22 of the MCEA.

Outstanding Wages

22 The Respondent asserts that there is no evidence to prove that Ms King worked or attended the workplace during the pay periods ending 29 March 2004 and 12 May 2004.

23 The Respondent contends that there is no documentary evidence available or discovered as a consequence of Mr Logan-Scales' investigation to support the contention that Ms King worked for the Respondent during the relevant period.

24 Further the Respondent submits that the claim for outstanding wages is a recent invention given the failure by Ms King and the Industrial Inspector to specifically mention the same in correspondence leading up to the institution of the claim.

Accrued Annual Leave

25 The Respondent asserts that Ms King accrued only 140 hours of annual leave and not the 157.77 hours claimed. The Respondent says it has paid Ms King 108.8 hours of her accumulated entitlement. With respect to the balance the Respondent asserts that because Ms King did not work out her two week's notice that she was terminated for serious misconduct as provided for by section 170CM of the ***Workplace Relations Act 1996***. Given that Ms King was dismissed for misconduct, section 24(3) of the MCEA applies in disentitling Ms King to accrued annual leave.

26 Further the Respondent contends that Ms King had only completed 48 weeks of work and had not completed a year's work as is required under the MCEA.

Counterclaim

27 By way of counterclaim the Respondent asserts that Ms King only worked 7.5 hours per day amounting to 37.5 hours per week rather than the 40 hours per week she was obliged to work. Consequently she was overpaid $1,815.00. The Respondent seeks to set off such overpayment against any liability it might incur in the event that the Court finds against it in respect of this claim.

Determination

Counterclaim

28 I deal firstly with the Respondent's counterclaim. The counterclaim is incompetent. The enforcement of the MCEA is governed by section 7 of the Act. Relevantly section 7(c) provides:

> *"A minimum condition of employment may be enforced –*
>
> *(c) where the condition is implied in a contract of employment, under section 83 of the IR Act as if it were a provision of an award, industrial agreement or order other than an order made under section 32 or 66 of that Act."*

29 The IR Act is defined in section 3 of the MCEA to mean the ***Industrial Relations Act 1979*** (the IR Act).

30 There is no provision of which I am aware within the MCEA or the IR Act which facilitates, by way of counterclaim in an action for enforcement pursuant to section 83 of the IR Act, the recovery of wages allegedly over paid. Indeed this matter demonstrates the nonsense of such given that the counterclaim is purportedly made against the Industrial Inspector. He was not the Respondent's employee and cannot in fact or in law be the subject of the counterclaim. The Respondent is misguided in its counterclaim. This Court lacks jurisdiction to consider and determine the counterclaim. Accordingly the counterclaim must, and will be, struck out.

Outstanding Wages

31 The Respondent asserts that the claim for outstanding pay is a matter of recent invention. A premise for such contention is that Industrial Inspector Greenough in her letter dated 14 June 2004 to Mr Klein made no mention of outstanding pay. Such premise is erroneous because in her letter Industrial Inspector Greenough said that what needed to be addressed was:

> *"(the) non payment of correct entitlements in accordance with the Minimum Conditions of Employment Act".*

32 That statement, in my view, clearly encompasses outstanding wages. The failure by the Respondent to pay her wages was at that time a matter of concern for her as it had been leading up to her complaint. Indeed Ms King in her email to the Respondent dated 5 May 2004 (exhibit 15), which I accept was sent, expressly stated that she had not been paid. Ms King was an impressive witness and I have no difficulty in finding that she is a witness of truth. Her evidence concerning the transmission of that email and indeed on other issues is entirely accepted.

33 I accept Ms King's evidence that she worked for the entire period from her return from leave on 29 March 2004 until her employment ended. In my view her evidence in that regard is not only supported by the viva voce evidence of Mr Grayson, which I also accept, but also by the documentary evidence. For example the email from Mr Klein to Ms King dated 28 April 2004 (exhibit 12) which contains certain instructions is consistent with her ongoing performance of the duties of an office manager. Other correspondence such as the email sent by the Respondent to Ms King on 3 May 2004 (exhibit 14) is also reflective of the fact that Ms King exercised a managerial role, was working in that capacity and was expected, by the Respondent, to continue in that capacity until Wednesday, 12 May 2005. As mentioned earlier, Mr Grayson's evidence is supportive of a finding that Ms King worked for the Respondent on a continual basis through to the time he left.

34 The Respondent's contention that Ms King did not work for the period claimed is against the weight of the evidence and is fanciful. The fact that job cards were not found by Mr Logan-Scales in his investigation to support Ms King's contention is not determinative. Ms King was not required to keep details of the hours she worked; being consistent with her salaried position. The fact that Mr Logan-Scales was unable, in his investigations, to find any other job cards for the material period does not in any way undermine Ms King's testimony as supported by Mr Grayson, and the documentary evidence supporting Ms King's claim.

35 I find that Ms King worked consistently for the Respondent. I accept her evidence that when she took leave in March 2004 it was paid leave for the entire period. I reject Mr Klein's assertions that leave was granted on the basis of two week's paid leave and one week's unpaid leave. I do so because Mr Klein regarded Ms King to be a good and efficient employee. He told the Court in his evidence that he abides by the philosophy that it is important to hang on to good employees even at a cost. He expressed the view that it might even be worth overlooking a minor act of stealing to ensure that an otherwise good employee remained. Such necessitates flexibility to ensure the retention of good employees. That self professed flexible approach is entirely inconsistent with the purported refusal to grant paid leave for the entire leave period in March. Given that Mr Klein regarded Ms King to be an excellent employee it is most improbable that he would have rejected her application for paid leave for the entire period.

36 I find that Ms King, subject to absences on approved leave and sick leave, worked for the Respondent for the entire period between 22 April 2003 and 5 May 2004. Her opportunity to work thereafter was frustrated by the effective closure of the Respondent's operations in Carnarvon. To the extent that she was obliged to do anything after that date she did, on 9 May 2004, facilitate the removal of "gear" from Carnarvon to Exmouth. There was nothing improper or inappropriate in what Ms King did. She did not abandon her work but rather was frustrated in her attempts to work by the Respondent's actions. Accordingly there was no misconduct on Ms King's part. Indeed prior to responding to this Claim it was never suggested in writing or otherwise that Ms King had been terminated for misconduct. There was no protest at the material time about the alleged abandonment. It is obvious that the Respondent's plea of misconduct is one of recent invention aimed at defeating the claim.

37 Ms King was, in Mr Klein's view, a good and efficient employee who he highly regarded. It is the case that Ms King was a conscientious employee who worked from 9 am to 5.30 pm Monday to Friday. I am satisfied on Ms King's evidence as supported by Mr Grayson that she worked those hours. Mr Grayson was in a position to note her daily work hours particularly during the early stages of his traineeship. I accept that Ms King only ever had a half hour lunch break each day. It is the case therefore that she worked eight hours per day as required. The Respondent has seized on the apparent mistake contained in Ms King's leave notification slips dated 17 September 2003 and 30 January 2004 to support its contention. In my view those documents were simply incorrectly completed. The memorandum of 19 October 2003 (exhibit 20) regarding the company employment policy was never put to Ms King. It was unfairly raised in the Respondent's case and accordingly carries little weight. In any event it is readily apparent therein that the work times referred to in the roster options were applicable to trainees only and not to Ms King.

38 Finally I accept that the calculations contained in paragraphs B and C of exhibit 22, as prepared by Mr Logan-Scales are correct and that Ms King is entitled to recover those amounts sought.

Sick Leave

39 The evidence before the Court in the form of an affidavit from Dr Howes establishes that Ms King was sick and was unfit for work from 23 March to 26 March 2004. Indeed it is obvious that she was also sick on 22 March 2004. The fact that Ms King was sick at that time is also supported by Mr Grayson who testified concerning his observations of Ms King. He was of the view that she was genuinely sick. Indeed his evidence is also supportive of Ms King's contention that she left her sick bed at Mr Klein's request in order to attend a meeting on 25 March 2004. Mr Klein himself testified that when he spoke to Ms King at the material time she sounded sick.

40 Deputy President PJ Hampton said in Myers v Viscount Plastics Pty Ltd [2003] SAIR Comm 25:

> *"Indeed, the approach of the Western Australian Commission in Court Session in Fremantle Port Authority v MUA (1978) AILR 339 as cited by the applicant suggests that as a general rule the production of a medical certificate, prima facie meets the standard of proof that an employee is sufficiently ill not to attend for work. The Bench in that matter also recognised that such a certificate could be challenged where the employer was in possession of facts not known to the Medical Practitioner concerned.*
>
> *In my view, there may well be circumstances where an employee's total reliance upon a medical certificate is misplaced. Should the applicant have lied to the Medical Practitioner about his symptoms or the nature of his work, or subsequently undertaken activities patently inconsistent with the alleged illness or injury, then in my view the applicant may well have committed misconduct destructive of mutual trust in the employment relationship. Using my analogy of the sprained ankle, should an employee feign that injury and immediately then play vigorous sport of some description, that would raise serious issues as to the conduct of that employee in claiming sick leave even on the basis of the medical certificate obtained. In this case however, I am not persuaded that the applicant misled the Doctor. I am also not persuaded that the applicant's subsequent activities, whilst certainly raising concerns, were such as to cast sufficient doubt upon the illness and the medical certificate so as to lead to the conclusion that the applicant misled or defrauded his employer."*

41 In the present matter the evidence overwhelmingly dictates that Ms King was sick. There is no evidence to support that she otherwise worked for the Gateway Motel during that period of sickness. The evidence of Ms Lambert, a housemaid employed by the Gateway Motel, is strongly suggestive of the fact that Ms King did not work for the Gateway Motel during the period 23 to 26 March 2004. Having said that the fact that Mr and Mrs Klein spoke by telephone to Ms King at the Gateway Motel during the period she was away from work when purportedly sick is indisputable. However that alone does not, and cannot, establish that she was working at the Gateway Motel and that she was not genuinely sick. They did not see her work. They have made assumptions based on circumstantial evidence. Such evidence does not undermine Ms King's contention that she did not work during that period. The evidence given by Mr and Mrs Klein does no more than establish the fact that Ms King was at the Gateway Motel between 23 and 26 March 2004 inclusive (which is admitted in any event) and that they spoke to her.

42 I accept also that Ms King faxed a medical certificate to the employer on 23 March 2004. I accept that exhibit 10 is a true copy of such document. The apparent inconsistency between the date of the certificate (23 March 2004) and the date of facsimile transmission of that certificate (19 March 2004) is explained by the wrong date being programmed into the facsimile machine. In my view Ms King provided the employer with evidence that would satisfy a reasonable person as to her entitlement to paid sick leave. Section 22 of the MCEA has been complied with.

43 With respect to the Respondent's contention that sick leave is calculated on a financial year basis; that is simply not the case. Sick leave entitlements are calculated from year to year on the anniversary of the commencement of employment.

44 Given what I have said above and in light of the fact that she does not otherwise fall within the exceptions in section 20 of the MCEA, Ms King is entitled to that sought as is reflected at paragraph A of exhibit 22. I accept Mr Logan-Scales' evidence in that regard.

Accrued Annual Leave

45 I accept that Ms King worked from 22 April 2003 until she ceased to work on 5 May 2004. I accept that she accumulated 157.77 hours of leave. She was paid for 108.08 hours leaving a balance of 49.69 hours payable upon termination. She should have been paid for those hours at the rate of $16.346 but was not. I accept that the calculations set out in paragraph D of exhibit 22 are correct.

46 Given my earlier finding that Ms King was not terminated for misconduct it follows that she is entitled to the amount claimed.

Result

47 I allow the claim in its entirety. I find that the Respondent has committed four separate breaches of the MCEA as alleged by failing to pay Ms King, amounts totalling $2,391.28.

G Cicchini
Industrial Magistrate

2005 WAIRC 02788

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GREG LOGAN-SCALES, DEPARTMENT OF CONSUMER &EMPLOYMENT PROTECTION **CLAIMANT**
	-v-
	TICKET XPRESS PTY LTD **RESPONDENT**
CORAM	INDUSTRIAL MAGISTRATE G. CICCHINI
DATE	WEDNESDAY, 14 SEPTEMBER 2005
CLAIM NO	M 295 OF 2004
CITATION NO.	2005 WAIRC 02788

Catchwords	Imposition of penalities, claim for pre-judgment interest, claim for recovery of disbursements.
Result	Penalties imposed. Claim for pre-judgment interest dismissed. Order for unpaid wages, sick leave and accrued annual leave to be paid to the employee. Disbursements properly incurred by the claimant recoverable.

Case(s) referred to in decision

Foy v Terraqua Pty Ltd (2003) WAIRC 0951

Representation

Claimant	Mr W Milward (of counsel) instructed by the *Department of Consumer and Employment Protection* appeared for the claimant
Respondent	Mr M Stork (of Counsel) instructed by *Solomon Brothers, Barristers, Solicitors, Attorneys* appeared for the Respondent.

SUPPLEMENTARY REASONS FOR DECISION

(Given orally at the conclusion of the hearing, extracted from the transcript of proceedings and edited by His Honour)

The Claim

1 On 4 August 2005 I published reasons in this matter. I found that the Respondent had contravened the provisions of the Minimum Conditions of Employment Act 1993 (the MCE Act). Four separate contraventions were proved. They related to the non-payment of minimum wages with respect to separate periods; the non-payment of sick leave and the non-payment of accrued annual leave. I found that the Respondent had failed to pay its employee, Ms Kathryn King, a total of $2,515.28 to which she was entitled. The Claimant contends that the actual underpayment was in fact $2,515.28 and not $2,391.28. I accept that submission. Ms King's correct entitlement is in fact $2,515.28. The error resulted from the calculation made by the Claimant in paragraph C of exhibit 22 tendered in support of the claim.

Penalties

2 The Respondent is exposed to a maximum penalty of $2,000.00 for each contravention. The Claimant seeks imposition of penalties at the higher end of the scale to bring home to the Respondent and others that the Court will regard any breach of the MCE Act seriously. The Claimant submits that the penalties imposed should have a personal and general deterrent effect. In that regard the Claimant submits that it is important that the message be sent home not only to this Respondent but also other employers that the failure to pay employees their minimum entitlements it is not worth the risk. The employer should not view the financial risk of penalties as being part of the usual operating expense of the business. Heavy penalties are accordingly needed.

3 Although I accept that the imposition of deterrent penalties and, in particular, a general deterrent penalty is a matter that the Court must have regard to, the Court must also have regard to other factors, particularly those matters raised in mitigation by the Respondent. In this instance, the Respondent has not previously committed breaches of the MCE Act or, indeed, any other breaches of employment law so far as I am aware. The breaches did not occur over a long period of time and did not involve very significant amounts of money. Penalties approaching the maximum should be reserved for the worst cases involving deliberate breach where there is little or no mitigation, particularly where the person or the party who has committed the breach has a prior record for conduct of the same or similar type. None of that exists here. Furthermore, the Court should also have regard to the totality principle. Although each individual breach ought to be looked at separately, the total affect should also be considered in determining the appropriateness of the penalties to be imposed.

4 Having taken those matters into account, I have concluded that the following penalties are the appropriate penalties. I have regard to the quantum of underpayment involved in each instance together with the mitigatory factors to which I have referred.

5 Firstly, for the failure to pay sick leave, a penalty of $400.00 is imposed. Secondly, for the failure to pay the minimum wage for the period ending 28 April 2004, a penalty of $600.00 is imposed. Thirdly, for the failure to pay the minimum wage for the period ending 12 May 2004, a $300.00 penalty is imposed. Fourthly, for the failure to pay annual leave a $700.00 penalty is imposed. In my view, that last matter is the matter of most significance. The totality of the penalties amounts to $2,000.00.

Interest

6 It is also appropriate that I order that the Respondent pay to Ms Kathryn King, $2,515.28 being the amount underpaid. Interest is claimed on that sum. The Claimant seeks interest calculated in accordance with the formula provided in regulation 54(2) of the Industrial Magistrates' Courts (General Jurisdiction) Regulations 2000 (the Regulations) or, alternatively, a lesser amount calculated in accordance with regulation 54(1). Prior to receiving oral submissions from the parties, I brought to their attention a decision in Foy v Terraqua Pty Ltd (2003) WAIRC 0951. In that matter, His Honour the President of the Western Australian Industrial Relations Commission, determined that there is no express power conferred upon this Court to order interest on amounts underpaid. His Honour expressed the view that regulation 54 might properly be argued to be ultra vires section 83 of the Industrial Relations Act 1979 (the Act). His Honour concluded that because section 83(1) is a penal provision, regulation 54(4) does not apply. Such encompasses orders made pursuant to section 83A for the payment of amounts underpaid that follow findings against an employer pursuant to section 83 of the Act.

7 Mr Milward seeks to distinguish this matter from the matter in Foy (supra) because of the differing factual circumstances. With respect I do accept that they can be distinguished. In my view, His Honour's comments have equal application to this matter as they did to the matter His Honour was considering. His Honour's comments have general application to any matter falling under section 83(1) of the Act. Mr Milward also argues that the His Honours' comments are not those of the Full Bench and therefore are obiter because the Commissioners did not expressly agree with him. I note however that Commissioners Scott and Wood did not expressly disagree with the decision of His Honour, President Sharkey. I take the view that the decision of the Full Bench is binding upon me. That decision expressly disallows interest claimed in respect of section 83(l) matters, which this is. It follows therefore that in the light of the decision in Foy (supra), I cannot allow interest and I will dismiss the application for interest.

Disbursements

8 Turning to the claim for disbursements, I take the view that section 83(2) of the Act permits the recovery of disbursements properly incurred and should be viewed differently to costs incurred for representation by an agent or legal practitioner. Although costs are generally understood to include disbursements that is not the case for matters dealt with pursuant to section 83 of the Act because the provision only specifically refers to the cost of representation as not being recoverable. Such is akin to the situation in other jurisdictions where certain allowable costs (disbursements) are recoverable whereas costs incurred for representation are not recoverable. In my view, section 83(2) is the same.

9 The history of this matter dictates that the Claimant initially insisted that the matter be heard in Carnarvon however the Clerk of the Court, in accordance with regulation 9 of the Regulations determined that the matter could most conveniently and fairly be conducted in the Industrial Magistrate's Court sitting at Geraldton. Later the Claimant sought that the matter be transferred to Perth but by that time the Respondent had made all necessary arrangements for travel and accordingly opposed such application. In the end this Court determined that the matter should be heard in Geraldton and indeed the matter was heard in Geraldton. Had the matters been dealt with in Perth as the Respondent had initially desired, I would have thought that the cost to both parties would have been less. Be that as it may the Clerk having determined the place of trial, which neither party sought to review, the matter necessarily was heard in Geraldton with consequent costs to both parties. As a result the Claimant did incur costs in pursuing this matter in Geraldton. Such costs included disbursements for airfares, accommodation and meals. In my view, some of the accommodation and meal costs were unnecessarily incurred and I accept the submissions made by the Respondent in that regard. With respect to the proofing of witnesses, for example, that could have occurred by way of telephone from Perth and not necessarily in Geraldton. If that was the case, given that the matter was listed for one day and proceeded for one day, the parties could have travelled to Geraldton on the day of the hearing and returned there from the

same day. That, of course, would have where possible been the situation with their witnesses. It would have resulted in lower accommodation and meals costs. The only people, who could fly from Perth to Geraldton and return on the same day, were Ms King and Ms Moore. They made their way to Geraldton from Carnarvon. I accept that the flight schedules would not have enabled them to make the return trip in one day. I accept therefore that it was appropriate for each of them to have made their way to Geraldton prior to the hearing. I accept also that, although Ms Moore was a witness, because of the way in which the hearing transpired she was not ultimately called to testify. The claims made, with respect to her, are nevertheless appropriate.

10 In view of the foregoing I take the view that deductions to the amounts claimed should be made with respect to accommodation and meals. The Claimant seeks to recover the cost of accommodation for eight nights. In my view, Mr Milward's accommodation is not recoverable because such constitutes part of the provision of legal services that are not recoverable unless the Court were to conclude that the proceedings were frivolously or vexatiously defended, which is not the case. Accordingly I will not allow the accommodation costs for Mr Logan-Scales and Mr Grayson. I will however allow the accommodation cost of four nights for the witnesses King and Moore. Given that the costs incurred for eight nights were sought and only four nights are recoverable, only half of the total amount claimed is allowable.

11 So far as the meals are concerned the same approach should be taken and a substantial reduction in allowances for meals is made. I accept that the claim for Ms King and Ms Moore is appropriate. I would have thought that an amount of $40.00 per day for each of the two days ought to be allowed. Accordingly a total of $160.00 is allowable with respect to disbursements incurred for meals.

12 With respect to the airfares, I will disallow Mr Milward's airfare for the same reasons as previously stated. In my view such ought to be considered as part his provision of legal services. Accordingly I will deduct his airfare of $461.74 from the total amount sought. I will allow the remainder of the claim for airfares.

13 The following disbursements are allowed:

- $405.00 for the accommodation;
- $160 for the meals; and
- $1,716.12 for the airfares

14 The aforementioned disbursements were properly incurred in order to enable the Claimant to prove its claim. The disbursements allowed total $2281.12.

Orders

15 I make the following orders:

1. The Respondent shall pay to the Claimant the following penalties totalling $2,000.00 constituted as follows:
   - (i) For the failure to pay sick leave, the amount of $400.00.
   - (ii) For the failure to pay minimum wages for the period ending 28 April 2004 the amount of $600.00.
   - (iii) For the failure to pay minimum wages for the period ending 12 May 2004 the amount of $300.00.
   - (iv) For the failure to pay accrued annual leave, the amount of $700.00.
2. The Respondent is to pay Kathryn King $2515.28.
3. The claim for interest is dismissed.
4. The Respondent is pay to the Claimant the disbursements properly incurred in bringing the claim fixed at $2281.12.

G Cicchini
Industrial Magistrate

POLICE ACT 1892—APPEAL—Matters Pertaining To—

2005 WAIRC 02771

AGAINST RESPONDENT'S DECISION TO RECOMMEND THE APPELLANT'S REMOVAL FROM THE POLICE SERVICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KAREN LEE GORDON
	APPLICANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	SENIOR COMMISSIONER J F GREGOR
	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 7 OCTOBER 2005
FILE NO/S	APPL 792 OF 2005
CITATION NO.	2005 WAIRC 02771

Result	Appeal discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS on the 2nd August 2005 the appellant lodged an appeal in the Western Australian Industrial Relations Commission pursuant to section 33P of the *Police Act 1892*;

AND WHEREAS a conferences were convened before the Western Australian Industrial Relations Commission on the 11th and 18th August 2005;

AND WHEREAS a Notice of Discontinuance was filed in the Western Australian Industrial Relations Commission on the 5th October 2005;

NOW THEREFORE the Western Australian Industrial Relations Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979* and Regulation 94 of the *Industrial Relations Commission Regulations 2005* hereby orders –

THAT the appeal be and is hereby discontinued.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.
On Behalf Of The
Western Australian Industrial Relations Commission

2005 WAIRC 00103

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NEIL STIMPSON
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
	COMMISSIONER J H SMITH
DATE	THURSDAY, 20 JANUARY 2005
FILE NO.	APPL 622 OF 2004
CITATION NO.	2005 WAIRC 00103

Result	Leave for appellant to tender new evidence granted
Representation	
Appellant	Ms M. Ridley of counsel
Respondent	Mr J. O'Sullivan of counsel

Reasons for Decision – New evidence

1 THE COMMISSION: On 10 January 2005 the appellant lodged an application to tender new evidence in this appeal. The proposed new evidence consists of an affidavit of Ronald Perry made 6 January 2005, a statement of Michael Hughes dated 26 August 2004 and two affidavits of the appellant and of Michelle Ridley, the solicitor for the appellant which outlined the circumstances leading to the making of the respective affidavit and statement. On 13 January 2005 the respondent lodged an answering statement opposing the granting of leave to tender new evidence.

2 By way of background we note that on 10 May 2004 the Commission issued a Directions Order (2004 WAIRC 11426) which, relevantly, obliged the appellant to file with the Registrar a list and copy of any new evidence sought to be adduced and the grounds on which leave will be sought to tender the evidence within 21 days of the Respondent's Notice of Answer; the obligation on the appellant was therefore 19 July 2004. The present application is therefore out of time.

3 Further, the parties have been aware since at least 5 November 2004 that this appeal has been set down for 17 January 2005. The timing of the application to tender new evidence has meant that it was only able to be dealt with by the Commission on the day of hearing.

4 On that day the Commission heard both the appellant and the respondent and unanimously was of the view that the new evidence ought be admitted. What follows are our reasons for so deciding.

5 Section 33R of the *Police Act 1892* governs the granting or otherwise of new evidence. Section 26(1)(a) of the *Industrial Relations Act, 1979* also has application to the exercise of our jurisdiction by virtue of s.33S. We note that the new evidence sought to be tendered goes to only one of the five allegations made against the appellant. It goes to allegation 3 which is an allegation that the appellant acted corruptly in that he received a pecuniary benefit for neglecting to fulfil his duty on 9 August 2000. We also note that it is one of two allegations of acting corruptly.

6 We consider that the affidavit of Ronald Perry provides a context in which to consider the allegation. If the evidence of Ronald Perry is accepted, we consider that it may considerably weaken, if not eliminate, the allegation of having acted corruptly. We have therefore reached the conclusion that the new evidence might materially have affected the Commissioner of Police's decision to take removal action (s.33R(3)(b)(ii)). In doing so we acknowledge the submission of Mr O'Sullivan that the Commissioner of Police made his decision on the basis of the allegations as a whole and also take into consideration the possibility that part of Mr Perry's affidavit evidence may well entrench the decision of the Commissioner of Police. However, our conclusion was reached upon a consideration that the new evidence as a whole appears to counter paragraph 27 of the respondent's answer.

7 We regard seriously the terms of the directions order which issued in this matter. The Commission should not be too ready to admit new evidence which is sought to be admitted in breach of such an order lest it render such orders meaningless. Each case necessarily depends upon its own circumstances and we note also the evidence that Mr Perry was not available until early January 2005; we agree with Ms Ridley's submission that there appears to have been little point in submitting the affidavit without him being available to be called if necessary. On balance, we also reached the conclusion that it was in the interests of justice to allow the new evidence to be admitted (s.33R(3)(b)(iii)).

8 We find on the basis of paragraphs (3) and (6) of the appellant's affidavit that he was not aware of the substance of the new evidence before his removal from office; neither is it contained in a document (s.33R(4)).

9 Accordingly, the appeal proceedings were adjourned to allow a reasonable opportunity for the Commissioner of Police to consider the new evidence. We are conscious from the submission of Mr O'Sullivan that this may oblige the Commissioner to consider not just the allegation the subject of the new evidence but the effect of the new evidence upon the allegations as a whole. Accordingly, we have suggested that a period of 21 days may be a reasonable opportunity for the consideration of the new evidence by the Commissioner of Police. We acknowledge Mr O'Sullivan's submission that, depending upon the circumstances, this period of time may need to be extended. The Commission requests to be advised no later than 21 days from the date of the hearing, that is by 7 February 2005, of the positions of the parties in this matter.

2005 WAIRC 02621

APPEAL AGAINST THE DECISION TO RECOMMEND REMOVAL

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NEIL STIMPSON
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
	COMMISSIONER J H SMITH
DATE	THURSDAY, 15 SEPTEMBER 2005
FILE NO/S	APPL 622 OF 2004
CITATION NO.	2005 WAIRC 02621

Result	Appeal discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS on 6 May 2004 the appellant lodged an appeal in the Western Australian Industrial Relations Commission pursuant to section 33P of the *Police Act 1892*;

AND WHEREAS a conference was convened before the Western Australian Industrial Relations Commission on 30 August 2004;

AND WHEREAS on 20 January 2005 the Commission granted leave to the appellant to tender new evidence;

AND WHEREAS on 13 September 2005 the appellant's representative advised the Commission that the appellant has been returned to duty and that he does not intend to proceed with his appeal;

AND WHEREAS the Western Australian Industrial Relations Commission pursuant to regulation 37 of the *Industrial Relations Commission Regulations 2005* hereby exempts the appellant from the requirement to file and serve a notice of discontinuance under regulation 94;

NOW THEREFORE the Western Australian Industrial Relations Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders –

THAT the appeal be and is hereby discontinued.

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

ON BEHALF OF THE
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2005 WAIRC 02595

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRISHA LYNN HINTZ
	APPLICANT
	-v-
	OIS-MOC JOINT VENTURE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
HEARD	MONDAY, 4 JULY 2005
DELIVERED	MONDAY, 12 SEPTEMBER 2005
FILE NO.	APPL 161 OF 2005
CITATION NO.	2005 WAIRC 02595

Result	Application dismissed
Catchwords	Application for an entitlement under a contract of employment – No appearance in person – *Industrial Relations Act 1979* – s.27(1), s.29(1)(b)(ii) – Application dismissed
Representation	
Applicant	No appearance
Respondent	Mr R. De Franck on behalf of OIS-MOC Joint Venture Pty Ltd

Reasons for Decision

1 Ms Trisha Lynn Hintz ("the applicant") filed a claim in the Commission, on 14 February 2005, alleging she had been denied a benefit under her contract of employment by her former employer, OIS-MOC Joint Venture Pty Ltd ("the respondent").

2 The applicant advises she was employed by the respondent between 20 January 2004 and 11 February 2005. Her duties were mainly administrative in nature, involving the employment of personnel and logistics and training co-ordinator. The applicant claimed that she had been denied annual leave accrued up to the conclusion of her employment with the respondent, a total amount of $1,428.46. In addition, the applicant claims an outstanding amount of $145.08 in superannuation payments is owed by the respondent, which should be paid on the applicant's behalf to the CBUS superannuation fund.

3 The applicant failed to attend the conference convened by the Commission on 15 March 2005. Subsequently, the Commission was advised by the respondent that the applicant was overseas. At no stage did the Commission receive information regarding her intended absence from Perth prior to her departure.

4 The Commission considered the circumstances and reconvened the conference, contacting the parties to advise of the appropriate date, that being Wednesday, 13 April 2005. The Commission had regard, in the listing process, for the applicant's work cycle. The applicant on this occasion informed the Commission that she would not be able to attend as she had been employed to work a four week on, one week off cycle. The applicant's work on each occasion involved four weeks overseas.

5 The Commission, in light of the advice from the applicant, determined that the matter ought be listed for Friday, 22 April 2005 for the applicant to show cause as to why her application should not now be struck out for prosecution. The applicant was in attendance and the Commission listened to the evidence of the applicant and considered on balance, the claim ought not be dismissed. The respondent was informed that on this occasion he was not required to attend and, on this occasion, was not in attendance. He had advised the Commission on a previous occasion however, that his company was involved in three overseas tenders and it was becoming difficult for the company to attend proceedings when the applicant failed to attend.

6 The Commission reminded the applicant her task was to prosecute her claim and it was not for the Commission to keep in contact with the applicant. Rather, it was important for information to be imparted by the applicant particularly where it related to absences from Perth, which might hinder the progress of the application at any given time in the near future.

7 In any matter of this nature the Commission is always obliged to act swiftly particularly, as peoples' recollection of the details of events as time passes becomes somewhat hazy and unreliable. It therefore is of little assistance to the Commission enquiring and dealing with the claim as the recollections of one or more of the participants in the events may be unreliable.

8 In making the decision to adjourn the application the Commission reminded the applicant that it would be unlikely to take this view in the future if no further action was taken to prosecute the claim.

9 Accordingly, the matter was at that stage adjourned.

10 The Commission convened a conference on 13 June 2005. The issues in dispute were discussed with the parties both together and in divided conference. No agreement was able to be reached and at the conclusion of the conference, and on the applicant's request, the Commission determined that conciliation had been exhausted and the matter was referred for hearing and determination and set down for 4 July 2005.

11 On the day of the hearing the applicant again failed to attend. It is the Commission's understanding and I am satisfied for the purposes of my decision that a phone call was made to the applicant and by consent between my Associate and the applicant the date and time for the hearing of 4 May 2005 was agreed and understood.

12 The respondent attended and submitted that his company had been put to some inconvenience on a number of occasions in respect of the applicant's failure to progress the application.

13 Indeed, the Commission is concerned that the respondent on this occasion and on previous occasions has appeared to have suffered some ongoing inconvenience, particularly for the time spent in these proceedings. The Commission does not consider, on the basis of the delays caused by the failure of the applicant to prosecute the application, that the Commission ought now proceed.

14 Given that the applicant failed to attend to prosecute her own application it is the Commission's view that those views expressed by His Honour President P. Sharkey reflect the appropriate principles to be applied in this matter. In the Full Bench matter *The Australian Workers' Union, Western Australian Branch vs Barminco Pty Ltd – Plutonic Project* 80 WAIG 3162 it was said by His Honour that the decision as to whether dismiss an application for want of prosecution is:

"…….a discretion and it ought not be fettered by any absolute or inflexible rules." .

15 The Commission has determined that this application ought, having regard to the provisions of s27(1)(a) (iv) of the *Industrial Relations Act 1979*, now be dismissed for want of prosecution. An order will now issue reflecting the Commission's reasons for decision.

2005 WAIRC 02667

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRISHA LYNN HINTZ
	APPLICANT
	-v-
	OIS-MOC JOINT VENTURE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 21 SEPTEMBER 2005
FILE NO/S	APPL 161 OF 2005
CITATION NO.	2005 WAIRC 02667

Result	Order issued dismissing application
Representation	
Applicant	No appearance
Respondent	Mr R. De Franck on behalf of OIS-MOC Joint Venture Pty Ltd

Order

THERE being no appearance on behalf of the applicant, and Mr R. De Franck having appeared on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders –

THAT the application be dismissed for want of prosecution.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2005 WAIRC 01920

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IAN ROSS PAPPS
	APPLICANT
	-v-
	ROBE RIVER MINING CO PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 10 JUNE 2005
FILE NO.	APPL 407 OF 2005
CITATION NO.	2005 WAIRC 01920

Catchwords	Industrial law - Termination of employment - Alleged harsh, oppressive and unfair dismissal and denied contractual benefits - Whether applicant's salary exceeds prescribed amount for purposes of s 29AA(3) - What constitutes "salary" - Commission satisifed that applicant's salary does not exceed salary cap - Commission has jurisdiction - Application upheld - Declaration and order issued - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i), s 29(1)(b)(ii), s 29AA
Result	Declaration and Order issued
Representation	
Applicant	Mr A Prime of counsel
Respondent	Mr S Brown

Reasons for Decision
(Ex Tempore)

1 The substantive claim in this matter is one brought by the applicant against the respondent by which he alleges that on or about 21 March 2005 he was harshly, oppressively or unfairly dismissed from his employment with the respondent as a maintainer of mobile equipment.

2 The application as filed in the Registry on 15 April 2005, in the particulars of claim, prescribes at par 17 that the applicant's gross wages and salary were $108,000 per annum. Prima facie therefore, the Commission, having considered the application, determined that it was required of its own motion to list the application for the parties to be heard on the preliminary issue as to whether or not the applicant's claim could be entertained by the Commission given the terms of s 29AA of the Industrial Relations Act 1979 ("the Act"), which presently prescribes that an applicant invoking this aspect of the Commission's jurisdiction must not earn a salary in excess of $99,700 per annum, on the basis that the employee is not covered by an industrial instrument for the purposes of that section. There is no issue as to that matter for present purposes.

3 The submissions of the parties were directed to the issue of whether the applicant's salary exceeded the salary cap prescribed by s 29AA of the Act. Exhibits R1 and A1 are uncontentious. Exhibit A1 is a pay advice for the applicant for the pay period ending 31 December 2004. Exhibit R1 is, helpfully, an analysis of the applicant's annualised salary over various periods, 1 March 2004 to 28 February 2005 and secondly, 23 March 2004 to 22 March 2005, which carries a pro rata period from 1 March 2005 to 22 March 2005.

4 The various arguments for the applicant and the respondent can be simply described as follows. Counsel for the applicant submitted to the Commission that based upon exhibit R1 and indeed exhibit A1, the salary for the purposes of s 29AA of the Act should only be taken to be the base salary for the purposes of jurisdiction which according to exhibit R1 is an amount of some $51,774 per annum. Secondly, his submission was that neither the function or commute payments, as they are expressed, although annualised in the applicant's remuneration as described, should be characterised as "salary" for present purposes. Furthermore, he submitted that the profit share which, it was uncontentious, was paid pursuant to an employee incentive or bonus scheme apparently in operation by the respondent during the course of the applicant's employment, did not satisfy the requirement of "salary".

5 For the respondent, it was submitted that all four elements of the applicant's remuneration as such ought be described as "salary", that being the base salary, function and commute payments and the profit share.

6 The Commission has considered those submissions and applies the well-settled authority in this jurisdiction in the matter of *Edith Fisher v The Totalisator Agency Board* (1997) 77 WAIG 619, a decision of the Full Bench of this Commission which was considered further by the Industrial Appeal Court. Whilst the appeal in that matter was upheld, the principles dealt with by the Full Bench were not controversial. The Full Bench considered and applied the relevant authorities as to the common law definition of "salary" in the absence of a statutory definition in the Act and in particular I refer to the decision in *Re Shine; Ex parte Shine* [1892] 1 QB 522, where in that case Lord Justice Fry made the following comments:

> *"Whenever a sum of money has these four characteristics; first, that it is paid for services rendered; secondly, that it is paid under some contract or appointment; thirdly, that it is computed by time and, fourthly, that it is payable at a fixed time, I am inclined to think that it is a salary and not the less so because it is liable to determination of the will of the payer or that it is liable to deductions. I do not mean to say that it is a complete definition of 'salary' or that it includes every kind of salary but I think that whenever these four circumstances concur, the payment is a salary".*

7 That authority has been consistently applied by this Commission in relation to matters of this kind. Having regard to the terms of exhibits R1 and A1, on the authority of *Ex parte Shine* applied by the Full Bench in *Fisher*, I consider that the applicant's base salary, the function payment and the commute payment all satisfy the requirements of the definition of "salary" for the purposes of the common law meaning.

8 As to the employee incentive or bonus scheme as it is set out in exhibit R1, I have considered carefully the nature of that payment and it seems to me to be similar to payments of that kind operated by employers in a range of industries. On the basis of the terms of exhibit R1, I am not satisfied that the employee incentive scheme meets the requirement of "salary" for the purposes of the common law definition.

9 It is undisputed that the employee incentive scheme is a form of bonus payment paid at the discretion of the respondent and from its terms plainly may be either varied or withdrawn at its discretion. In particular, from the terms of exhibit R1, it is quite clear that it is a payment which is not, in my view, computed as such by time. There are three factors which weigh in the balance as to whether a payment is payable by way of a bonus, that is, tonnes shipped, cash costs and safety considerations. Simply because a payment of that kind may be paid at certain times of the year, in my view, does not mean that it satisfies the requirements of the definition of "salary" for the purposes of the common law.

10 Accordingly, whether one adopts the calculations in exhibit R1 or indeed in exhibit A1 annualised, in my view, whether the figures there expressed being $98,168.40 or $98,322.51 or, alternatively, in exhibit A1, $98,168.40 annualised, in my view, in neither case do those amounts exceed the salary cap of $99,700 per annum and therefore I am satisfied that the applicant's claim falls within the jurisdiction of the Commission. Accordingly the Commission will make a declaration in those terms and will refer the matter for conciliation before a Deputy Registrar in accordance with the terms of the Act and the Regulations.

2005 WAIRC 01820

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IAN ROSS PAPPS
	APPLICANT
	-v-
	ROBE RIVER MINING CO PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 16 JUNE 2005
FILE NO.	APPL 407 OF 2005
CITATION NO.	2005 WAIRC 01820

Result	Declaration and Order issued
Representation	
Applicant	Mr A Prime of counsel
Respondent	Mr S Brown

Declaration and Order

HAVING heard Mr A Prime of counsel on behalf of the applicant and Mr S Brown on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, ("the Act") hereby –

(1) DECLARES that the applicant's salary prior to the termination of his employment did not exceed the prescribed amount for the purposes of s 29AA of the Act.

(2) ORDERS that the application be referred to a Deputy Registrar for conciliation.

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

2005 WAIRC 02758

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IAN ROSS PAPPS
	APPLICANT
	-v-
	ROBE RIVER MINING CO PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 5 OCTOBER 2005
FILE NO/S	APPL 407 OF 2005
CITATION NO.	2005 WAIRC 02758

Result	Application discontinued by leave
Representation	
Applicant	Mr A Prime of counsel
Respondent	Mr S Brown

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.

2005 WAIRC 02740

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOYCE SAKE
	APPLICANT
	-v-
	THE AFRIKAN COMMUNITY IN WA INC
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	MONDAY, 13 JUNE 2005
DELIVERED	TUESDAY, 4 OCTOBER 2005
FILE NO.	APPL 1629 OF 2004
CITATION NO.	2005 WAIRC 02740

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal –Procedural fairness considered – Applicant harshly, oppressively and unfairly dismissed – Compensation ordered – Compensation for injury ordered – Industrial Relations Act 1979 (WA) s 29(1)(b)(i)
Result	Application alleging unfair dismissal upheld and order issued for compensation in lieu of reinstatment
Representation	
Applicant	Ms J Sake on her own behalf
Respondent	Mr G Asekeh

Reasons for Decision

1 This is an application by Joyce Sake ("the applicant") pursuant to s29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act"). The applicant alleges that she was unfairly terminated from her employment as a Women's Services Support Worker with the Afrikan Community in WA Incorporated ("the respondent") on 24 November 2004. The respondent denies that the applicant was unfairly terminated.

Preliminary matter

2 I formed the view that the hearing should proceed even though one of the respondent's main witnesses was absent. The respondent sought and was granted an adjournment of the first hearing date set down in relation to this matter as one of its main witnesses, its President Mr Francis Olaka, was unavailable. The respondent did not seek an adjournment of this hearing even though Mr Olaka was unable to be present. On 1 June 2005 the respondent wrote to the Commission stating the following (formal parts omitted):

> "A request was made by our organisation to adjourn the hearing because of the unavailability of a key witness Mr. Francis Olaka. Although we tried to make sure that he avail himself to the hearing scheduled on the 13/06/05 we are not any certain of his availability as he is overseas (sic).
>
> I, therefore, kindly request you to proceed with the hearing with the remaining witnesses if Mr. Francis Olaka is not able to attend the hearing. I also kindly request you not to consider his absence as disregard or contempt of the court."

Background

3 The applicant commenced employment with the respondent on 7 November 2002 and her role was to assist African women to settle in Australia. The applicant's letter of appointment and written conditions of employment are set out in Exhibit A1. The applicant initially commenced employment on a part-time basis and on or about 1 January 2003 the applicant became a full-time employee.

4 The applicant's duties were as follows:

"
- Provide information, referral and advocacy.
- Explain the high ideals of multiculturalism and actively promote living peacefully and harmoniously.
- Identify and respond to the settlement needs of migrant and refugee communities in the target areas.
- Facilitate co-operation and collaboration with existing service providers for the delivery of services.
- Establish programs and projects relevant to the needs of target group (women, youth at risk and people with special needs).
- Participate as a member of ACWA's Services Program.
- Seek funding for specific community settlement projects.
- Represent ACWA women on relevant committees and forums.
- Establish and maintain network with government agencies and community groups.
- Conduct program evaluations, consumer survey and collect and analyse data.
- Maintain accurate records of all work undertaken.
- Other duties as required."

(Exhibit A1)

5 The following disciplinary and dismissal procedures process applied to the applicant while she was employed by the respondent:

> "***Schedule 2***
>
> Discipline and Dismissal Procedures
>
> This schedule sets out the steps the employer will follow if not satisfied with the performance or conduct of an employee.
>
> ***Definitions***
>
> - Poor performance – An employee is not performing to the required standard.
> - Misconduct – An employee who knowingly breaches a policy or procedure, or is accused of inappropriate work behaviour that does not justify dismissal unless repeated.
> - Serious misconduct – An employee is accused of unacceptable or unlawful behaviour that justifies immediate dismissal.
>
> The parties acknowledge the right of either party to appoint, in writing, another person to act on their behalf at any stage of the discipline and dismissal procedures.
>
> ***Step 1***
>
> The employer will notify the employee in writing of the allegation of poor performance or misconduct and advise the employee of arrangements for a meeting to discuss the Matter. At the meeting the employee will be given an opportunity to respond to the Allegations. The employer and the employee will discuss the issues and draw up a written plan to resolve the matter. A date will be set to review the situation.
>
> ***Step 2***
>
> If there is a further allegation of poor performance or misconduct, or the original allegation is not resolved by the review date, then employer and the employee will meet again to discuss the matter. The same process will be followed as in Step 1. The employer may call further meetings with the employee during this stage to try and resolve the concerns.
>
> At this stage the employer may issue a notice in writing stating that the employment contract will be terminated if the employee's performance or conduct does not improve to the required standard within a specified period of time.

Step 3

If, after being issued with at least one written warning, the employee's performance or conduct does not improve to the required standard within the specified period of time, the employer may terminate the employee's contract or take other appropriate disciplinary action.

Summary Dismissal

The employer is entitled to dismiss an employee without notice for serious misconduct. This may include, but is not limited to:

- Theft of the employer's property or funds.
- Wilful damage of the employer's property.
- Intoxication through alcohol or other drugs during working hours
- Physical violence to another person in the course of the employee's duties.
- Verbal or physical harassment of a client, another employee or the employer.
- Falsification of any of the employer's records for personal gain.
- A breach of the employer's confidentiality provisions.

In a case of summary dismissal, salary will be paid up to the time of dismissal only."

(Exhibit A1)

6 In the period immediately prior to the applicant's termination on 24 November 2004, correspondence was generated between the applicant and Mr Olaka concerning a number of allegations made about the applicant by a colleague Ms Fatma Warsame.

7 On 10 November 2004 the following letter was given to the applicant by Mr Olaka (formal parts omitted):

"I have received a letter from Ms Fatma Warsame stating a number of allegations about your behaviour toward her.

At this stage, I have not investigated the matter and therefore your response to the allegations would assist me to find a resolution to the situation in order to build a welcoming work environment. Your reply is expected in this office by the 17th November, 2004.

ACWA is a unifying body for Africans and all staff are therefore expected to work as a team and cooperate for the benefit of the community."

Attached to this letter was a copy of a letter dated 4 November 2004 from Ms Warsame which is as follows (formal parts omitted):

"It is with great sadness that I have resorted to write this complaint to you because I believe that if such behaviour is left unattended and undocumented it will continue and reach a point where it will have a negative impact on our delivery of service to community, work efficiency and productivity.

Since the nature of this job is to work as a team, I find very (sic) difficult to achieve this as my colleague does not want to cooperate. The following is the list of events to support my words;

- Joyce did not attend the office on 25th and 26th October without informing me. This made my job difficult as I was unable to tell clients who are requesting when Joyce is returning to the office.
- There was an important meeting on 27th October regarding Disability Standard Services but both of us we were not able to attend because of confusion regarding another meeting in Office of Women's Policy which Joyce knew but she didn't inform me.
- On 29th October, Joyce was invited to attend a meeting on Domestic Violence, but she did not invite me to go together despite of (sic) having an invitation letter two weeks prior to the meeting. Later I found that we had two invitation letters (sic)
- On 1st November, Joyce attended a meeting held by Assets without informing me. I tried to call her on her mobile but there were (sic) no response.

The above behaviours made me feel excluded, unwelcome and unwanted in the workplace. This made me very sad because I am committed to working for advancement of the African community and in particular African Women and Children.

Mr President, I hope that your office and the management committee will be able to provide us with clear office procedures in regard to staff codes of ethics and conduct including staff to staff relationships policy.

Looking forward to professional and welcoming workplace environment (sic)"

(Exhibit A2)

8 As the applicant did not provide a written response to this letter by the due date the respondent gave the applicant a further letter on or about 19 November 2004. The letter is as follows (formal parts omitted):

"Reference to my letter dated 10th November 2004; I have not received your reply although the letter stated clearly that your reply should be received by the 17th November 2004.

I would like to remind you to reply to the letter within two working days that is by the 23-11-2004. Failure to do so, ACWA will be left with no option but to take appropriate measure (sic)."

(letter dated 19 November 2004 attached to respondent's Notice of Answer and Counter Proposal)

9 The applicant was given three weeks' pay in lieu of notice when she was terminated.

Applicant's evidence

10 The applicant gave evidence that she applied for the position of Women's Services Support Worker with the respondent approximately five months after coming to Australia in June 2002. The applicant stated that she had the relevant qualifications for this position and was appointed by a different committee to the current committee which runs the respondent's operations. The applicant stated that her job was diverse and required her to spend approximately three quarters of the working week outside of the respondent's office. The applicant stated that she initially worked with a Ms Frances Fahbulleh until she

resigned at the end of June 2004 and the applicant then worked on her own until Ms Warsame was appointed to assist her in early October 2004. The applicant stated that when Ms Warsame commenced employment she gave her a general orientation and files to read.

11 The applicant's position was funded by the Department of Immigration and Multicultural and Indigenous Affairs ("DIMIA") and the applicant gave evidence that the respondent provided quarterly reports to DIMIA and that DIMIA reviewed her work.

12 The applicant gave evidence that the only concerns raised by the respondent about her behaviour and performance related to the complaints made by Ms Warsame. The applicant maintained that only two days after Ms Warsame commenced employment she complained to Mr Olaka about the applicant not taking her to meetings and not assisting Ms Warsame.

13 The applicant believed that Mr Olaka was favouring Ms Warsame. The applicant stated that when Mr Olaka approached her about not taking Ms Warsame to a particular meeting the applicant told him that she did not take her to this meeting as only one of the respondent's representatives was required to attend this particular meeting. The applicant maintained that she was not abusive towards Mr Olaka when he approached her about Ms Warsame's allegations and the applicant claimed that Mr Olaka harassed her and was hostile and interfering when he raised matters with her towards the end of her employment with the respondent.

14 The applicant stated that even though Mr Olaka had previously spoken to her about Ms Warsame's concerns she was surprised to receive the letter dated 10 November 2004 from Mr Olaka along with the allegations made by Ms Warsame as Ms Warsame's allegations about her were untrue (Exhibit A2). The applicant gave evidence that because of the accusations made against her by Ms Warsame she became stressed and traumatised and asked Mr Olaka for time to respond and the applicant stated that Mr Olaka then agreed to allow her to take two days off.

15 The applicant stated that she did not accept the second letter from Mr Olaka dated 19 November 2004 as she claimed she was still in the process of replying to his letter dated 10 November 2004.

16 The applicant gave evidence about her termination. The applicant stated that she attended work as normal on 24 November 2004 and she was at her desk in the respondent's office when Mr Asekeh approached her and handed her a letter of termination in the presence of a number of other staff members (Exhibit A2). Mr Asekeh stated:

> ""Joyce, today I'm not going to have good news for you. Huh, it's bad news for you today" and he gave me the letter."
>
> (Transcript page 23)

17 The applicant stated that she then packed up her personal effects and left the respondent's premises.

18 The applicant's termination letter is as follows (formal parts omitted):

> "**Re: Termination of Employment Contract**
>
> This is to advise you formally that the position you currently hold CSSS worker, will be terminated effective 24/11/2004.
>
> The contract is terminated due to your breach of conditions employment (sic) as provided in your contract. The executive committee has provided you with several verbal requests and two letters to follow office procedures regarding your regular absence from work, however, your conduct has not improved to the required standards within the specified period of time in this case the 23/11/04 as per letter dated 19/11/04) (sic).
>
> The executive committee reminded you that you must fill in a leave form when you are absent from work and notify management about your out of office activities as appropriate. The leave conditions are contained in your employment contract.
>
> You were absent from work without formal requests on 25th October, 2004 and 26th of October, 2004. The 27th of October you arrived at work very late once again with no prior notice or approval from the executive committee. Although you were reminded time and again to fill in leave forms you refused to do so. The President sent you three letters which you were required to reply (sic) but you have refused to respond to. This is an (sic) ethical and unacceptable by the spirit of employment contract (sic).
>
> On Friday 22nd October you came to the office at around 4:00pm and informed the President that you were leaving for Melbourne on the following day. The Committee thought you were not serious because that was the busiest weekend at ACWA due to Africa Day Celebration. To confirm that you were leaving, you produced an air ticket and said that you did not know when you were coming back.
>
> You were aware that ACWA was having its major annual event (Africa Day Celebration) on 24th of October 2004. However you did not attend or give appropriate notice that you will not be attending. (sic)
>
> Following the Africa Day event, you failed to turn up to work on 5th of November and the 11th of November 2004. Up on (sic) your return, the executive committee asked you to fill in a leave form but you have not done so to date.
>
> You have also been asked several times to provide out of office meeting/program schedules to the executive committee, however, you have continued to disregard office procedures.
>
> You have shown complete disregard and disrespect for your contractual agreement as well as the executive committee. Such misconducts impacted negatively on the ability of the executive committee to productive (sic) work, service provision and task prioritisation. Our services to the community require respect, being customer focused, prioritising of tasks and flexibility to which you had no regard to all.
>
> Your continued misconduct is unacceptable and breaches the agreement you signed for. Therefore, the executive committee is left with no option but to terminate your contract.
>
> Your employment conditions require us to offer you a termination payment of two weeks (sic) salary. This constitutes payment in lieu of notice. The accountant Mr. Gavin Wood will be directed to prepare your contract termination and entitlements as appropriate."
>
> (Exhibit A2)

19 On 30 November 2005 the applicant responded to the allegations outlined in her termination letter. Her letter reads as follows (formal parts omitted):

> "**RE: TERMINATION OF EMPLYMENT** (sic) **CONTRACT**
>
> I received your letter of November 24, 2004, terminating my service as CSSS worker effective November 24, 2004. I would have replied to you earlier than this, but I was shocked and stressed to have received such a letter after working

for the African Community for two years and seventeen days without any history of negligence of my work or misconduct.

In connection with points mentioned in your letter as conditions of terminating my employment, I disagree with those conditions as they are mere allegations used against me to discontinue my services as CSSS worker with the African Community for reasons best known to you. I would like to draw your attention to your allegations accordingly as stipulated in your own letter:

1. With regards to paragraph two of your letter stating that my contract is terminated due to my breach of conditions of employment as provided in my contract, I wish to mention here that under no circumstances have I breached conditions of my employment. The allegations are an effort and covert tactics to demoralize my credibility, image, integrity and self-esteem. Your further allegations that the Executive Committee had provided me with several verbal requests and two letters to follow office procedures are nothing but a framework of few executive individual members siding with you to harass me and frustrate me so that, first of all, I should have abandoned my position. However, seeing that I was determined to hold on to my job efficiently with commitment, without giving in to any pressure, harassment and frustration put on me by you and few others, you then resulted into terminating my employment without any notice in lieu of dismissal, forgetting that I have been in this employment for two years and seventeen days without any history of misconducts and negligence of duty.
2. In relation to my duties and responsibilities stated in my initial contract of employment, amongst others, I should represent African Community in WA women on relevant committees and forums and establish and maintain network with government agencies and community groups and perform other duties as required. I am thus obliged to carry out field activities which involved attending meetings and outreach services to our clients. As you are quite aware of the nature of my work, I carry out my work with minimal supervision as this was one of the vital criteria emphasized upon during the interview before my being accepted as a successful candidate for the position of CSSS worker for which you are dismissing me without any reflection of my contract of employment. Furthermore, where I do need your supervision even when I am on outreach posts, I do frequently contact you on your cell phone to inform you of my activities and upon return to the office, debrief you of my field performance.
3. Touching on my conduct not being improved to the required standards within the specified period of time "in this case the 23/11/04 as per letter dated 19/11/04", setting a parameter to the aspect of my conduct is indeed a breach of my employment contract and over sighting my performance since the time of my employment. As you could remember, there had never been a complaint against me whether written or verbal since my employment on November 7, 2002 until the complaint of Fatma Warsame, dated November 4, 2004, sent to you and forwarded to me on November 10, 2004. I wished Fatma could have approached me regarding her claims rather than to have resorted to a written complaint to you when she has just been within the system less than three weeks. Therefore, this issue should have been looked at carefully according to employment procedures and standards and then resolved mutually without any party being sided; which resulted into my services being terminated after working with the African Community as CSSS worker for the period of two years and seventeen days. I think where you could not have been able to resolve the issue amicably between Fatma and myself, alternatively, you could have even referred the matter to the whole association of the Executive Committee for their deliberation so that the interest of the African Community would be paramount rather than to satisfy individual's interest to see me being dismissed from the job I have held for so long with high commitment, integrity and proficiency.
4. On the aspect of my going to Melbourne as you alleged, you are quite aware of my request which you accepted when I showed you the ticket and explained to you my purpose of going. On the other hand, if you had refused my going when I showed you the ticket, I could have cancelled the trip willingly. In order to assure you of the reason for my trip this was why I showed you the ticket and you were convinced that I was indeed traveling (sic) to Melbourne and would not only try to avoid attending the African Community festivities by staying in Perth. I even handed over to you the cabinets keys to pass on to Fatma, of which she claimed in her letter of complaint that she did not know where I had gone, and would not know what to tell clients if asked.
5. Accusing me of being absent from work without permission on November 5th is surprising. Perhaps this is an oversight on your part, for you, yourself told me to stay away from work for the Friday, 5th and Monday, 8th of November because of my being stressed regarding Fatma's letter which you handed me. Upon seeing my depression, you advised that I stayed away from work for two days. However, when I realized that a day's rest, especially during weekend was adequate for me to get over the stresses and depression, I returned to work on Monday, the 8th of November. Then, how could you accuse me of being absent from work on the 5th without excuse while you gave me the permission to do so. All these accusations are signs of harassment in an effort to discourage my commitment to my job. With regards, to the 11th of November 2004, I indeed called the office and informed Fatma that I would be late as I had to take my son to see the GP.
6. In connection with your statement that I have shown complete disregard and disrespect for my contractual agreement as well as the Executive Committee and that such misconducts impacted negatively on the ability of the Executive Committee to productive work, service provision and task prioritization, (sic) In my past work history with International and Non Governmental Organizations (NGOS) for several years, I have never had (sic) been served with any explanation letter nor negligence of my work or any misconduct not even leaving my place of work or desk without permission. This has never been my altitude (sic) towards my duties and I would like to bring to your attention that I sometimes work beyond working hours and claim no payment or even days off, (sic) However, I wish to remind you of the training that we attended on strategic planning, conducted by DIMIA, in August 2004, in order to improve productivity and community development within the African Community, one of the tools mentioned to these aspects was effective communication among Executive Committee members and us staff members within the African Community as well as all African Communities. And (sic) that communication be tailored accordingly in order to promote confidence, trust, mutual understanding and proficiency for the development of the African Community. I am certain that if that training had been reflected upon and followed as discussed then by all participants including you, this matter could have been handled proficiently, effectively and mutually between me and Fatma and the Executive Committee. Thus, your allegations that my misconducts had impacted negatively on the ability of the Executive Committee to productive work, service provision and task prioritization is mere allegations in order to get rid of me from my position as CSSS worker.

7. According to your statement that my continued misconduct is unacceptable and breaches the agreement I signed, and that the Executive Committee was left with no option but to terminate my contract, again, I wish to reiterate that, were the Executive Committee informed from the initial stage of when these "misconducts" started or came into existence, (I do not know when, but only remember your letter of November 10 with regards to Fatma Warsame's letter of complaint), I am certain that the Executive Committee with its composition could have reached consensus to have resolved the issue proficiently, (sic) effectively in order to promote mutual working relationship between Joyce and Fatma and the Executive Committee.
8. Looking at the whole issue, there is no viable reason/s to have terminated my services. For if I had had a history of misconducts since I started work with the African Community, this should have sufficed from the past Executive Committee and even yours from last year when you were voted in the capacity as President. But if there had been no "misconducts" of mine since my time of employment until now, only when Fatma wrote you a letter of complaint against me, this should have given you an administrative reason to investigate the issue thoroughly with the aid of the Executive Committee. I had never made complaints against any member of the Executive Committee neither my former colleague made a complaint against me up to the time of her resignation on June 28, 2004; nor any of us made complaint against one another, rather we worked cooperatively and mutually to the delight and good image of the office. I did not make complaint although when my colleague left I was doing her share of work in conjunction to my own work. I was not appreciated neither did I ask for a topping-up or bonus compensation. I did the work with great enthusiasm and efficiency. It is a disturbing surprise and frustrating experience that my new colleague could put me on a negative record only within a short time of her employment within the African Community. I do agree that African Community in WA is a unifying body for Africans and all staff are therefore expected to work as a team and cooperate for the benefit of the community as mentioned in your letter with regards to Fatma's complaint. Therefore, you could have reflected on this very statement of yours and endeavor (sic) to have brought unity between me and Fatma in resolving her complaint against me; and advised both staff members to work mutually and harmoniously.
9. Should you have exercised your authority impartially and gotten the consensus of the Executive Committee, you could have saved me from harassment, stresses, and frustrations and sleepless nights; and you could have prioritized the tasks and productive work of the African Community so as to promote peace and unity among us employees for the benefit of the community.
10. Your impartial role in trying to run the office activities could have also increased mutual growth and development among members of the African Community as a whole.

Meanwhile, I will appreciate any opportunity accorded to me in order to exonerate myself from the allegations levied against me. My dismissal is unfair and I do not deserve this kind of humiliating conclusion of my services with the African Community, for which I have worked relentlessly to contribute to the developed stage of the African Community CSSS services to our general community, especially when my colleague resigned and I was left alone to carry on the activities of two employees, (June 29-!st. (sic) week of October). As actually the reason/s for terminating my services do not warrant me to be treated as if I had had a negative history record with the African Community since my employment in November 2002, I am looking forward to be reinstated on (sic) my job as CSSS worker. Reason/s of my dismissal are bias (sic) and based on individual/s' interest, and therefore hope that you will reconsider your action against me. I am willing to resume work and continue working enthusiastically with the Executive Committee and Fatma who has just started working with me. I am certain that both of us will be able to work cooperatively and mutually if we are given the opportunity to work as a team rather than as rivals for any position in the office. I had worked with my former colleague amicably; why not Fatma. I am always at my capacity to work with her, and I trust both of us will consider the importance of our working as a team and you to encourage us to do so in order to achieve the objectives and goals of the organization and for the benefit and deliverance of the services to our clients."

(Exhibit A2)

20 The applicant gave evidence about the issues raised in her letter of termination and responded to Ms Warsame's allegations against her. The applicant stated that on 25 and 26 October 2004 she was on leave and in Melbourne and that Mr Olaka was aware that she was in Melbourne on these dates. The applicant stated that even though there was confusion over her attendance at a meeting on 27 October 2004 she stated that she did attend a meeting on this date at the Office of Women's Policy and that she was unaware of a meeting at the Disability Standard Services on that date. The applicant stated that she did not take Ms Warsame to the meeting held on 29 October 2004 because only one of the respondent's representatives was required to attend and Ms Warsame was unable to make a contribution at this meeting. The applicant stated that she attended a meeting on 1 November 2004 and did not attend the respondent's office beforehand and that when Ms Warsame would have called her she would have been in the meeting and therefore had her mobile phone turned off. The applicant stated that she explained what had happened to Ms Warsame when she returned to the respondent's office later that day.

21 The applicant stated that she is not seeking reinstatement. The applicant was unemployed until 6 April 2005 when she gained a position earning a similar income to her position with the respondent. The applicant stated that she did not apply for any jobs prior to taking on this position as she was too traumatised. The applicant stated that she registered with Centrelink in late March 2005.

22 Under cross examination the applicant stated that she believed that she was unfairly terminated because the respondent did not follow a number of requirements contained in her contract of employment. The applicant maintained that she was terminated without notice, she had no opportunity to defend herself against the accusations made against her, she was not given any warnings about her performance and the applicant claimed that the respondent's executive committee did not properly approve her termination. The applicant agreed that Mr Asekeh offered to assist her with communication difficulties she had with Mr Olaka and when asked about an issue with Mr Olaka over the distribution of a relief grant, the applicant stated that this grant was relevant to the applicant's role and that after discussions were held about this issue she was allocated part of this grant to administer.

23 Mr Oswald Ntagengerwa is vice-president of the respondent's management committee and he has been a member of this committee since January 2004. Mr Ntagengerwa maintained that the applicant was terminated unlawfully as the decision to terminate the applicant was not made by the respondent's executive committee in accordance with its constitution. Mr Ntagengerwa claimed that there was no evidence to support the claims made by Ms Warsame against the applicant. Mr Ntagengerwa maintained that Mr Olaka's presence in the respondent's office on a regular basis and his approaches to the applicant constituted harassment and he was of the view that Mr Olaka was acting in a vindictive manner towards the applicant. Mr Ntagengerwa maintained that Ms Warsame was a personal friend of at least one committee member and that she

obtained her position without it being advertised and as a result of cronyism. Even though Mr Ntagengerwa stated that he attended most of the respondent's management committee meetings he was not made aware of any issues concerning the applicant. Mr Ntagengerwa claimed that he attended approximately 75 per cent of meetings excluding the meetings held in the previous two to three months.

Respondent's evidence

24 Mr Asekeh has been the secretary to the respondent's management committee, which is a voluntary position, since April 2004. Mr Asekeh stated that the respondent's executive committee meets monthly and holds other meetings as required. Mr Asekeh claimed that there were communication difficulties between Mr Olaka and the applicant in June 2004 and that as a result he and one other committee member, Dr Casta Tungaraza assisted the applicant. Mr Asekeh stated that another issue arose between Mr Olaka and the applicant in relation to the allocation of relief grant monies and there was also conflict involving the applicant about access to the key to Mr Olaka's office. Mr Asekeh stated that as a result of these issues the relationship between Mr Olaka, the respondent's management committee and the applicant was 'a bit rocky'.

25 Mr Asekeh maintained that there was no cronyism involved in relation to Ms Warsame's appointment. Mr Asekeh stated that when Ms Warsame was appointed to assist the applicant her appointment was made without Ms Warsame being interviewed because a previous attempt by the respondent to fill this role was unsuccessful.

26 Mr Asekeh stated that soon after Ms Warsame commenced employment on a part time basis with the respondent she started complaining about the applicant.

27 Mr Asekeh maintained that Mr Olaka behaved appropriately when he put Ms Warsame's allegations to the applicant and Mr Asekeh stated that it was a simple request for a response from the applicant.

28 Mr Asekeh stated that on 19 November 2004 Mr Olaka contacted him and advised him that the applicant was being aggressive and abusive towards him and he asked him to attend the respondent's office which he did so at approximately 5.30pm. When Mr Asekeh attended the office he told the applicant to respond to the allegations made against her otherwise the management committee would deal with the situation. Mr Asekeh said that the applicant stated that she would not respond to issues raised by Ms Warsame and then left the office. Mr Asekeh stated that Mr Olaka then told him that he had contacted every management committee member and executive committee member about the applicant and the consensus was to terminate the applicant and Mr Asekeh had no reason to doubt what Mr Olaka had told him. Mr Asekeh stated that he discussed the applicant's termination letter with Mr Olaka prior to the letter being given to the applicant.

29 Mr Asekeh maintained that at all times throughout her employment with the respondent the applicant was treated with respect.

30 Under cross examination it was put to Mr Asekeh that he was aware that the applicant contacted Mr Olaka about her movements. Mr Asekeh maintained that leave notes should have been completed by the applicant indicating her movements for the day however the applicant regularly refused to do so. Mr Asekeh stated that he was unaware if this requirement was in place prior to Ms Warsame being employed by the respondent.

31 Mr Asekeh stated that he had spoken to many executive members who confirmed they had been contacted by Mr Olaka about the applicant's performance and behaviour problems.

32 Mr Bosco P'Ogwaro is the youth representative on the respondent's executive committee and he has held this position since April 2004. Mr P'Ogwaro claimed that he often visited the respondent's office when fulfilling this role.

33 Mr P'Ogwaro claimed that the applicant was not mistreated by the respondent's management committee. Mr P'Ogwaro stated that on 7 November 2004 Mr Olaka contacted him about issues between the applicant and Mr Warsame and Mr Olaka told him that the applicant was not training Ms Warsame.

34 Mr P'Ogwaro stated that when he was at the respondent's office on 19 November 2004 he heard the applicant shouting at Mr Olaka and stating that she would not explain anything. Mr P'Ogwaro was later contacted by Mr Olaka on three or four occasions and they agreed that if the situation between the applicant and Ms Warsame was not resolved the issue could escalate. Mr P'Ogwaro stated that an emergency meeting of the executive committee was held on or about 19 November 2004, which included Mr P'Ogwaro, Dr Tungaraza, Mr Asekeh and Mr Olaka and that the meeting resolved that if the applicant could not explain herself or did not respond to the allegations against her then she should be terminated. Mr P'Ogwaro said there were two apologies for this meeting and Mr P'Ogwaro assumed that minutes were taken of this meeting.

35 Mr P'Ogwaro stated that it was important that the applicant to record her movements in an attendance book so that the respondent could be accountable to DIMIA which provided funds for the applicant's employment. Mr P'Ogwaro could not recall when the requirement to fill out the attendance book was brought into place.

36 Under cross examination Mr P'Ogwaro stated that he understood Mr Olaka called Mr Asekeh to assist him at a meeting held with the applicant because of her violent behaviour on 19 November 2004 and that he understood that the applicant had thrown a letter at Mr Olaka during this meeting.

Submissions

37 The applicant maintains that the respondent failed to follow the procedures contained in her contract of employment when effecting her termination. The applicant argues that the respondent did not have any reason to terminate her and that she was denied procedural fairness as she had no chance to defend herself against the accusations against her. The applicant claims that issues about her employment only arose subsequent to Ms Warsame's appointment and that Ms Warsame was favoured by the executive committee. The applicant argued that there were no minutes kept of the committee meeting of 19 November 2004 as claimed by Mr P'Ogwaro.

38 The respondent maintains that it had valid reasons to terminate the applicant and that the applicant was not unfairly terminated. The applicant was given the opportunity to respond to a number of concerns raised with her by the respondent and did not do so. The respondent maintains that the applicant could have easily responded to Mr Olaka's reasonable request to provide feedback about Ms Warsame's allegations but chose not to do so. The management committee therefore had no other option but to terminate the applicant. The respondent argues that it followed a proper procedure in effecting the applicant's termination and the respondent maintains that there was no untoward behaviour towards the applicant or that the executive committee behaved inappropriately towards the applicant.

Findings and Conclusions

39 I listened carefully to the evidence given by each of the witnesses. In my view the applicant gave her evidence honestly and to the best of her recollection and I found the applicant's evidence to be clear and consistent and she was unshaken during cross-

examination. On this basis I accept her evidence. I have the same view about the evidence given by Mr Ntagengerwa. Even though Mr P'Ogwaro and Mr Asekeh gave their evidence in a straightforward manner I have concerns about the evidence they gave. Mr P'Ogwaro gave evidence about a meeting he attended along with Mr Asekeh and other committee members on 19 November 2004 whereby a decision was made by the respondent's executive committee to terminate the applicant however Mr Asekeh did not mention this meeting when he gave his evidence. Both Mr Asekeh and Mr P'Ogwaro referred to minutes being taken of this critical meeting yet these minutes were not presented to the Commission nor discovered to the applicant. In my view the inconsistency in the evidence between Mr Asekeh and Mr P'Ogwaro in relation to this meeting brings into doubt that this meeting took place. I also note that Mr Asekeh stated that he had no reason to doubt Mr Olaka's claim that he had spoken to all executive committee members about problems with the applicant yet Mr Ntagengerwa stated that he was unaware of issues of concern about the applicant nor was he consulted about the applicant's termination. Given that I have concerns about the evidence given by the respondent's witnesses where there is any inconsistency in the evidence given by the applicant and Mr Ntagengerwa and Mr Asekeh and Mr P'Ogwaro I prefer the evidence of the applicant and Mr Ntagengerwa.

40 The test for determining whether a dismissal is unfair or not is well settled. The question is whether the employer acted harshly, unfairly or oppressively in dismissing the applicant. This is outlined by the Industrial Appeal Court in *Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia, Hospital Service and Miscellaneous WA Branch* (1985) 65 WAIG 385. The onus is on the applicant to establish that the dismissal was, in all the circumstances, unfair. Whether the right of the employer to terminate the employment has been exercised so harshly or oppressively or unfairly against the applicant as to amount to an abuse of the right needs to be determined. A dismissal for a valid reason within the meaning of the Act may still be unfair if, for example, it is effected in a manner which is unfair. However, terminating an employment contract in a manner which is procedurally irregular may not of itself mean the dismissal is unfair (*see Shire of Esperance v Mouritz* (1991) 71 WAIG 891 and *Byrne v Australian Airlines* (1995) 61 IR 32). In *Shire of Esperance v Mouritz* (op cit), Kennedy J observed that unfair procedures adopted by an employer when dismissing an employee are only one element that needs to be considered when determining whether a dismissal was harsh or unjust.

41 Paragraphs 3, 4, 5 and 9 of this decision set out the uncontested background to this dispute and paragraphs 7 and 8 detail the correspondence relevant to the applicant's termination.

42 In my view the respondent did not have sufficient reasons to terminate the applicant and that the respondent therefore treated the applicant unfairly when it terminated her on 24 November 2004.

43 As I accept the applicant's evidence I find that the respondent did not have any significant concerns about her performance or behaviour until Ms Warsame was appointed to assist the applicant in October 2004 and there was no evidence that throughout the applicant's employment with the respondent she was subject to any disciplinary processes nor was there any evidence that any warnings were given to the applicant about not complying with her contract of employment. Even though the respondent claimed the applicant had difficulties with Mr Olaka concerning access to office keys and a dispute over the allocation of relief funding on the evidence before me it is my view that these issues concerned day to day operational issues and in any event the applicant gave satisfactory explanations about her role in relation to these issues.

44 I find that after Ms Warsame was appointed by the respondent in October 2004 to assist the applicant the relationship between Mr Olaka and the applicant deteriorated significantly and that as a result the applicant was terminated by the respondent. I find that Ms Warsame approached Mr Olaka in relation to her day to day concerns about the applicant soon after she commenced employment with the respondent and she formally outlined these issues to Mr Olaka on 4 November 2004 (Exhibit A2). It was not in dispute and I find that the applicant did not respond to Mr Olaka's formal request on 10 November 2004 for a response to Ms Warsame's claims however I accept that the applicant was stressed about the complaints and accusations made about her by Ms Warsame and as a result had taken some days off work with Mr Olaka's approval. In my view Mr Olaka was aware that the applicant was distressed by Ms Warsame's claims and that it was therefore difficult for her to respond in the timeframe required of her. Notwithstanding this situation Mr Olaka sent a further letter to the applicant on 19 November 2004 requesting that she reply to his first letter by 23 November 2004 and the applicant was advised that failure to do so would leave the respondent 'with no option but to take appropriate measure (sic)' (letter dated 19 November 2004 attached to the respondent's Notice of Answer and Counter Proposal). Even though it was appropriate that the applicant respond to Mr Olaka's letters dated 10 and 19 November 2004 at some point, I accept the applicant's evidence that she was distressed and upset when these issue were raised with her by Mr Olaka after Ms Warsame had been employed by the respondent for such a short period and I therefore do not find that the applicant's failure to respond to Mr Olaka within the requested timeframes was sufficient to warrant her termination. Indeed, given the nature of Ms Warsame's complaints, which related to day to day communication issues, it would have been appropriate for Mr Olaka to arrange a meeting with Ms Warsame and the applicant about Ms Warsame's concerns rather than expect a formal written response from the applicant.

45 It was not disputed that the applicant was terminated on 24 November 2004 whilst she was working in the respondent's office undertaking her normal duties, by being handed her letter of termination in full view of her colleagues and without any opportunity to discuss her termination.

46 As neither Mr Asekeh or Mr P'Ogwaro gave clear reasons as to why the applicant was terminated I rely on the reasons set out in the applicant's letter of termination given to the applicant on 24 November 2004. Even though it appears that the catalyst for the applicant's termination was Ms Warsame's dispute with the applicant and Mr Olaka's handling of this dispute and his requests for feedback from the applicant I find that there is a tenuous link between the requests made by Mr Olaka to respond to Ms Warsame's complaints and the applicant's refusal to reply to him and the reasons outlined in the applicant's letter of termination. The letters given to the applicant by Mr Olaka prior to her termination refer to two requests for feedback from the applicant within specified timeframes about the allegations raised by Ms Warsame, to which the applicant did not respond, and Ms Warsame's complaints related to the applicant not informing her of her whereabouts. On the other hand the applicant's letter of termination raises issues about the applicant not following office procedures regarding absences from work and not filling out leave forms. This letter refers to the applicant arriving late to work without approval and the letter claims that three letters were sent to the applicant about these issues and the applicant did not respond to this correspondence. However, there was no evidence that correspondence was generated between the applicant and the respondent in regard to this issue prior to her termination. Furthermore, the applicant gave evidence that her absences from the respondent's office were authorised by Mr Olaka and she regularly kept Mr Olaka informed about her general whereabouts. This letter chastises the applicant for not attending the respondent's Africa Day Celebration yet there was no evidence that the attendance at this function formed part of the applicant's duties or that she was directed to attend this out of hours function. The applicant was accused of not providing out of office meeting schedules, yet there was no evidence that the applicant was required to conform to this requirement and that the respondent was unaware of her day to day whereabouts. Even though Mr Asekeh and Mr P'Ogwaro gave evidence about the requirement on the applicant to fill out forms when the applicant was absent from the office I find that their evidence in this regard was vague and inconclusive as they were unsure when these requirements were instituted. Reference was made in this letter to the applicant travelling to Melbourne at a significant time for the respondent however I accept the applicant's

evidence that she was on approved leave at this time as the applicant gave evidence, which was corroborated in her written response to her letter of termination, that Mr Olaka was aware that she was to be in Melbourne and granted her leave for this period. In the circumstances I find that there was no substance to the respondent's claims in its letter dated 24 November 2004 that the applicant behaved in a manner which warranted termination.

47 I find that the respondent breached its contractual arrangement with the applicant and therefore acted unlawfully when it terminated the applicant. Under the applicant's contract of employment with the respondent she was to be subject to specific processes and procedures when matters of a disciplinary nature arose (see paragraph 5 of this decision). In this instance the respondent did not follow these processes and procedures. It also appears that the applicant was terminated in breach of the respondent's constitution as there was no evidence confirming Mr P'Ogwaro's evidence and Mr Asekeh's assertions that the respondent's executive committee met to decide to terminate the applicant or that a quorum was present, if indeed this meeting took place.

48 I find that the applicant was denied procedural fairness given the manner of her termination. I find that the applicant was not formally notified prior to her termination about specific problems and concerns the respondent had with the applicant's behaviour such that her employment was in jeopardy nor was the applicant given any opportunity to respond to the concerns outlined in the respondent's letter of 24 November 2004 given the summary nature of her termination and the applicant was only able to respond to the concerns raised by the respondent in her letter of termination after her termination (see Exhibit A2). I find that Mr Olaka's correspondence to the applicant immediately prior to her termination did not indicate to the applicant that her failure to respond to his letter could lead to the applicant being terminated as Mr Olaka's letter of 19 November 2004 refers to the respondent 'being left with no option but to take appropriate measure' (sic) this could involve a range of options including disciplinary processes being invoked.

49 I find that the applicant did not behave in a manner which warranted termination, that her termination was unlawful, that the manner of the applicant's termination was procedurally unfair and the applicant was not given sufficient opportunity to defend herself against the allegations relied upon to effect the termination. In the circumstances I am satisfied that the applicant has demonstrated that she was unfairly terminated as she was not afforded "a fair go all round" (*Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* [op cit]).

Compensation

50 The applicant is not seeking reinstatement and I am satisfied on the evidence that the working relationship between the applicant and the respondent has broken down such that an order for reinstatement or re-employment would be impracticable. 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.

51 I find that the applicant would have had an ongoing expectation of work with the respondent, for a period of at least six months, given her lengthy and exemplary service with the respondent, and given the lack of warnings about her performance and behaviour. In limiting this period to six months I take into account that at the time the applicant was terminated some tensions existed between the applicant and Mr Olaka which may have eventuated in the applicant's ongoing employment with the respondent being of a limited duration.

52 I am not satisfied the applicant took reasonable steps to mitigate her loss for the full period after her employment with the respondent ceased. I find that as the applicant was terminated in a summary and unexpected manner and was accused of a number of performance deficiencies which lacked substance this led to the applicant being distressed by her termination and I accept that this impacted on her ability to seek out alternative employment for some time. The applicant gave evidence that she registered with Centrelink in March 2005 and did not take up alternative employment until early April 2005. As the timeframe whereby the applicant did not seek alternative employment and her commencement in another position was lengthy I am not satisfied that the applicant took reasonable steps to mitigate her loss for the whole of the period from her termination to her employment recommencing on 6 April 2005. Whilst the applicant eventually gained an alternative position and I accept the applicant's evidence that it took her some time to recover from her treatment by the respondent it is my view that a period of approximately ten weeks would constitute a sufficient timeframe for the applicant to have recovered to seek out alternative employment. From this I discount the three weeks' pay in lieu of notice already paid to the applicant. I will therefore order that the applicant be paid $4,727.63 gross (37.5 hours x $18.01 x 7 weeks) as compensation for her unfair dismissal.

Injury

53 The notion of injury must be treated with some caution (*AWI Administration Services Pty Ltd v Andrew Birnie* (2001) 81 WAIG 2849). In *AWI Administration Services Pty Ltd v Birnie* (op cit) at 2862 Coleman CC and Smith C observed:

> "It is accepted that there is an element of distress associated with almost all employer initiated terminations of employment. For injury to be recognised by way of compensation and thereby fall outside the limits which can be taken to have normally been associated with a harsh, oppressive or unfair dismissal there needs to be evidence that loss of dignity, anxiety, humiliation, stress or nervous shock has been sustained. Injury embraces the actual harm done to an employee by the unfair dismissal. It comprehends 'all manner of wrongs' including being treated with callousness (*Capewell v Cadbury Schweppes Australia Limited* (1998) 78 WAIG 299)."

54 I find that the summary and unexpected manner of the applicant's termination as well as the callous way in which the applicant was terminated in front of her colleagues and with no discussion or opportunity to respond to the reasons for her termination led to the applicant suffering injury over and above that which is normally associated with a dismissal. I accept the applicant's evidence that she was shocked at the way the respondent treated her such that she became distressed after her termination particularly given her lengthy and committed service to the respondent. I also find that the applicant was subjected to a number of unfounded accusations as detailed in the applicant's termination letter which contributed to the injury suffered by the applicant such that she took some time to recover from her termination. As I consider that the respondent's treatment of the applicant was unwarranted and caused the applicant injury over and above that which is normally associated with a termination it is my view that an award for injury of $2000.00 should be made to the applicant.

55 In the circumstances I find that the applicant is due $6,727.63 gross as compensation for her termination and for injury.

56 A minute of proposed order will now issue.

2005 WAIRC 02791

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOYCE SAKE
	APPLICANT
	-v-
	THE AFRIKAN COMMUNITY IN WA INC
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 11 OCTOBER 2005
FILE NO/S	APPL 1629 OF 2004
CITATION NO.	2005 WAIRC 02791

Result	Application alleging unfair dismissal upheld and order issued for compensation in lieu of reinstatement

Order

HAVING HEARD Ms J Sake on her own behalf and Mr G Asekeh 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 Joyce Sake by the respondent was unfair and that reinstatement is impracticable.

2) ORDERS the respondent to pay Joyce Sake the sum of $6,727.63 gross within seven (7) days of the date of this order as compensation for loss and injury.

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

2005 WAIRC 02786

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JEFFREY VAN ALTENA
	APPLICANT
	-v-
	AIRROAD DISTRIBUTION PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
HEARD	MONDAY, 30 MAY 2005, TUESDAY, 23 AUGUST 2005, MONDAY, 10 OCTOBER 2005
DELIVERED	MONDAY, 10 OCTOBER 2005
FILE NO.	APPL 400 OF 2005
CITATION NO.	2005 WAIRC 02786

Catchwords	Application alleging unfair dismissal - show cause hearing - application adjourned .
Result	Application adjourned
Representation	
Applicant	Mr J. Van Altena
Respondent	Ms L. Nickels (of counsel

Reasons for Decision
(Given extempore as edited by the Commissioner)

1 This is an application lodged on 12 April 2005, pursuant to s.29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act"). The application was lodged some 4 days out of time and on 30 May 2005 the Western Australian Industrial Relations Commission ("the Commission") heard and determined that, in the circumstances, the powers of s.29(3) ought be exercised to accept the application out of time.

2 Since that time the Commission attempted to list a conference on several occasions without success. Initially a conference was set down for 20 July 2005 and adjourned at the request of the respondent and re-listed for 22 July 2005. The applicant requested that conference be re-listed due to work commitments and a further conference was listed for 23 August 2005. Correspondence was forwarded to the parties advising of the conference and its whereabouts. The applicant failed to attend and made no attempt to advise the Commission of the reasons for his non attendance. Subsequently correspondence was received by the applicant, apologizing for his failure to attend and advising he was in the country at the time and had inadvertently noted the incorrect date in his diary.

3 The Commission, due to the constant delays, listed the matter on 10 October 2005 for the applicant to show cause why the application ought not be dismissed for want of prosecution.

4 The Commission is obliged to act swiftly in matters relating to unfair dismissal. It is not unusual for peoples' recollections of the details of events as time passes, to become hazy and unreliable. It becomes of little assistance to the Commission when

enquiring into and dealing with the claim if the recollections of one or more of the participants are unreliable. It is not for the Commission to keep in touch with the applicant, it is for the applicant to keep in contact with the Commission. It is important that the application is pursued diligently.

5 Taking all of these factors into account and having listened to the applicant's submissions I consider that on balance, the matter will not be struck out for want of prosecution but in so doing the Commission reminds the applicant it will be unlikely to take such a view in future if there is not a vigorous attempt to prosecute the matter.

6 The applicant is reminded of the necessity for him to keep the Commission informed of his intentions. Any failure to do so may well result in the application being dismissed for want of prosecution in the future. The respondent is able at any future time to apply to have the application struck out if is considered future circumstances warrant the Commission adopting such a course of action.

7 In making this decision the Commission is mindful that a decision to adjourn is within the discretion of the Commission. Where the refusal of an adjournment would result in a serious injustice to one party an adjournment should be granted unless in turn, this would mean serious injustice to the other party (*Myers v. Myers* (1999) WAR 19).

8 In considering whether the granting of an adjournment to the applicant would create a serious injustice to the respondent I have taken into account the submissions of each party.

9 As indicated earlier the Commission would be unlikely to agree to a further adjournment in the future if, the applicant takes no further action to prosecute the application.

10 An order will therefore issue adjourning this application.

2005 WAIRC 02821

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JEFFREY VAN ALTENA
	APPLICANT
	-v-
	AIRROAD DISTRIBUTION PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 14 OCTOBER 2005
FILE NO/S	APPL 400 OF 2005
CITATION NO.	2005 WAIRC 02821

Result	Order issued adjourning application
Representation	
Applicant	Mr J. Van Altena
Respondent	Ms L. Nickels (of counsel)

Order

HAVING heard Mr J. Van Altena on his own behalf as the applicant and Ms L. Nickels (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the application be adjourned.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2005 WAIRC 02592

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GERTRUDE CHELAGAT WILLIAMS
	APPLICANT
	-v-
	EMMANUEL EDUCATION GROUP PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	FRIDAY, 19 AUGUST 2005
DELIVERED	MONDAY, 12 SEPTEMBER 2005
FILE NO.	APPL 1480 OF 2004
CITATION NO.	2005 WAIRC 02592

Catchwords	Contractual benefits claim – Entitlements claimed under contract of employment – Principles – Application upheld in part – *Industrial Relations Act 1979* WA s 29(1)(b)(ii)
Result	Application for contractual benefits partially allowed.
Representation	
Applicant	Mr G Williams on her own behalf
Respondent	No appearance

Reasons for Decision
(Given extemporaneously at the conclusion of the proceedings as edited by the Commissioner)

1 This is an application by Gertrude Chelagat Williams ("the applicant") pursuant to s29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act") seeking benefits which she claims are due to her under her contract of employment with Emmanuel Education Group Pty Ltd ("the respondent").

2 The respondent did not appear at the hearing. I am satisfied that sufficient notice was given to the respondent that these proceedings were to take place as the notice of hearing was sent to the respondent at the home address of Dr Emmanuel Benson who is the respondent's principal and was not returned to the Commission prior to the hearing date. 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 on the day of the hearing that it was appropriate in the circumstances to proceed with the hearing in the absence of the respondent.

3 The applicant is claiming a number of benefits under her contract of employment with the respondent which are not benefits due to her under any award or order. The applicant is claiming two week's wages of $1269.23 gross for the period up to and including Friday 22 October 2004 which includes two days of sick leave for which the applicant provided a medical certificate to the respondent (see Exhibit A2), $126.92 gross in wages for working on 25 October 2004, eight days of sick leave entitlements of $1015.36 for sick days after 25 October 2004 and $742.50 in superannuation entitlements the applicant claims is owed to her for the period 26 July 2004 to 22 October 2004 ($1269.23 ÷ 2 x 9% x 13 weeks = $742.50).

4 The applicant gave evidence that she was employed by the respondent as a personal assistant from 26 July 2004 after working on a casual basis for four weeks prior to that date and that her terms and conditions of employment were outlined in her letter of appointment and written contract of employment (Exhibit A1) and the applicant confirmed that under this contract of employment she was paid an annual salary of $33,000. The applicant stated that during her employment with the respondent she experienced difficulty in being paid on time and the applicant gave evidence that the last fortnightly pay paid to her was for the period ending 8 October 2004. The applicant gave evidence that she worked for the respondent in the two weeks after 8 October 2004 except for two days which she took as sick leave as confirmed by the medical certificate she provided to the respondent (Exhibit A2). The applicant stated that she contacted the taxation office and the respondent's accountant and they both confirmed that no superannuation payments had been made into the applicant's superannuation fund for the period that she was employed by the respondent. The applicant stated that she has lodged a claim for workers' compensation against the respondent for the period after she ceased working with the respondent and that the claim has not yet been finalised.

Findings and conclusions

5 I accept the evidence given by the applicant in these proceedings as it is my view that her evidence was given honestly and to the best of her recollection and her evidence was corroborated by documentation tendered during the hearing.

6 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).

7 As I accept the applicant's evidence I find that the applicant was not paid for the period from 11 October 2004 to 22 October 2004 and she is therefore due $1269.23 gross in wages which she is claiming for this period. I also find that the applicant worked for the respondent on Monday 25 October 2004 and as she was not paid for working this day she is owed $126.92.

8 I find that the applicant is entitled to be paid the superannuation payments claimed by her by virtue of Clause 4 of her contract of employment (see Exhibit A1). I accept the applicant's evidence that she made inquiries to the Australian Taxation Office and the respondent's accountant and she was advised that no superannuation payments had been made by the respondent on her behalf. I therefore find that the applicant has made out her claim that she be paid $742.50 (not $1,484.99 which was erroneously calculated during the hearing) in superannuation entitlements for the period 26 July 2004 to 22 October 2004.

9 I have difficulty with the applicant's claim for sick leave entitlements for eight days after 25 October 2004. I accept that the applicant's last day of work with the respondent was 25 October 2004 and that the applicant lodged a workers' compensation claim subsequent to this date and that this claim remains unresolved. In my view the Commission should not order that the applicant's claim for sick leave entitlements be paid as the period for which this claim is made is subject to an ongoing workers' compensation claim and as the applicant's claim in this regard remains unresolved it is my view that it is inappropriate at this point to issue any order in relation to the applicant's claim for eight days in sick leave entitlements. In not allowing this claim I also note the applicant's evidence that she refused to continue working for the respondent after 25 October 2004 due to the non-payment of wages as at 25 October 2004 and that this may have been the date the employment relationship between the applicant and the respondent ceased in any event.

10 The applicant is therefore owed the following amounts under her contract of employment with the respondent; $1269.23 gross in outstanding wages for the fortnight ending 22 October 2004, $126.92 gross as wages for working on 25 October 2004 and $742.50 in superannuation entitlements, being a total amount of $2138.65.

11 A minute of proposed order will now issue that the respondent pay the applicant the amounts due to her.

2005 WAIRC 02619

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GERTRUDE CHELAGAT WILLIAMS
	APPLICANT
	-v-
	EMMANUEL EDUCATION GROUP PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 15 SEPTEMBER 2005
FILE NO/S	APPL 1480 OF 2004
CITATION NO.	2005 WAIRC 02619

Result Application for contractual benefits partially allowed.

Order

HAVING HEARD Ms G Williams 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 respondent denied the applicant benefits under her contract of employment.

2 ORDERS that the respondent pay Gertrude Chelagat Williams $2,138.65 gross within seven (7) days of the date of this order.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

SECTION 29(1)(B)—Notation of—

Parties		File Number	Commissioner	Result
Adele Maria Wilson	Duncraig Convenience Store	APPL 390/2004	COMMISSIONER J L HARRISON	Dismissed
Aida Rifae	The Australian Islamic College - Kewdale	APPL 805/2005	COMMISSIONER J L HARRISON	Discontinued
Alastair Robert John Sinclair	Peter Velzen	APPL 1236/2004	COMMISSIONER J L HARRISON	Discontinued
Allan Borge Poulsen	Ryan Hanrahan Wave Engineering	APPL 559/2005	COMMISSIONER S WOOD	Discontinued
Anne Teresa Ellard	National Data Centre	APPL 378/2005	COMMISSIONER S M MAYMAN	Discontinued
Barbara Lee Bacon	Cutting Edges Pty Ltd	APPL 650/2005	COMMISSIONER S WOOD	Discontinued
Belinda Jane Watson	KG & KJ Gorham t/as LJ Hooker Kwinana	APPL 583/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Ben Banney	Hydrocool Pty Ltd	APPL 1611/2004	COMMISSIONER S J KENNER	Order Issued
Benjamin Francis Sheridan	Mega Music	APPL 668/2005	COMMISSIONER P E SCOTT	Discontinued
Benjamin Paul Seidl	Bill & Vivian Skett - Sth Mandurah News Delivery	APPL 584/2005	COMMISSIONER P E SCOTT	Discontinued
Boyd Wilson Parker	Bradley Wylde	APPL 593/2005	COMMISSIONER P E SCOTT	Discontinued
Brendan Francis McFaull	Wesley College	APPL 23/2005	COMMISSIONER J H SMITH	Discontinued
Brett Manners	Hydrocool	APPL 1634/2004	COMMISSIONER S J KENNER	Order Issued
Carl Della-Polina	Rendevous Hotel	APPL 450/2005	COMMISSIONER J L HARRISON	Discontinued
Carmel Monica Murphy	Menapia Pty Ltd	APPL 184/2005	COMMISSIONER J H SMITH	Dismissed
Catherine Collard	Rocky Nominees	APPL 187/2005	COMMISSIONER J L HARRISON	Discontinued
Chad Walker	Mitchell West Pty Ltd	APPL 326/2005	COMMISSIONER S M MAYMAN	Discontinued
Christopher John Fly	Paragon Precast Industries Pty Ltd	APPL 681/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Cindy Stevenson	Jeff Mouritz' Gas & Air Pty Ltd	APPL 261/2005	COMMISSIONER S M MAYMAN	Discontinued
Clayton Adam Simpson	Buick Holdings T/A DVG Morley	APPL 827/2005	COMMISSIONER S J KENNER	Discontinued
Craig Andrew Walker	LB & CJ Minchin T/A Minchin Metal & Hardware	APPL 829/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued

Parties		File Number	Commissioner	Result
Daniela O'Mara	Export Corporation (Australia) Pty Ltd ACN 009 441 632	APPL 1489/2004	COMMISSIONER S J KENNER	Discontinued by Leave
Danny Greenwood	Civil & Mechanical Maintenance Pty Ltd ACN 009 149 366	APPL 562/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Darren Richard Taylor	CPE Recruitment Group - Skilled Trades & Blue Collar	APPL 804/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
David Bryan Williams	Harris Refrigerated Pty Ltd (ACN 085 193 728)	APPL 416/2005	COMMISSIONER J L HARRISON	Discontinued
David Doyle	Caffi Logistics	APPL 546/2005	COMMISSIONER S WOOD	Discontinued
David William Levett	Anvil Mining	APPL 1211/2004	COMMISSIONER S J KENNER	Discontinued
Debbie Melina Scott	The Mead Group	APPL 544/2005	COMMISSIONER S M MAYMAN	Discontinued
Donald Sherratt	Elizabeth Manley (Midland Nursing Home)	APPL 640/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Donna Ann Trott	Hermal Pty Ltd t/as Roebuck Bay Hotel (ACN 009 281 163) t/a Roebuck Bay Hotel	APPL 311/2005	COMMISSIONER J H SMITH	Dismissed
Douglas Eric Gray	Grandview Asset Pty Ltd	APPL 375/2005	COMMISSIONER S M MAYMAN	Discontinued
Gary Nealings	Jon Aldridge - Jon Aldridge Real Estate	APPL 712/2005	COMMISSIONER J L HARRISON	Discontinued
Giuseppe Lumbaca	Coventry Group Ltd (ABN 37 008 670 102)	APPL 1502/2004	COMMISSIONER J L HARRISON	Order Issued
Glen William Innis	Gloria Jean's Coffee Floreat	APPL 295/2005	COMMISSIONER J L HARRISON	Discontinued
Gregory J Mackay	Mark Hill Investments Pty Ltd (ABN 30052046812) T/A Abbotts Industrial Cooling	APPL 211/2005	COMMISSIONER J L HARRISON	Discontinued
Harolletta Whitlock	Sampson Tours Trading as Gold Rush Tours Perth Goldfields Xspress	APPL 861/2005	COMMISSIONER S J KENNER	Dismissed
Harry Eschenbach	Newmont Golden Grove Operation Pty Ltd	APPL 376/2005	COMMISSIONER P E SCOTT	Discontinued
Ian Michael Cook	Woodside Energy Ltd	APPL 894/2004	COMMISSIONER J L HARRISON	Discontinued
Jacob Smith	Rheochem Ltd	APPL 637/2005	COMMISSIONER J H SMITH	Discontinued
Janet Morrison	Bartter Enterprises Pty Ltd	APPL 624/2005	COMMISSIONER S WOOD	Discontinued
Janette Ruth Tarr	Fred Matson and Anita McKay T/A Duncraig Convenience Store	APPL 392/2004	COMMISSIONER J L HARRISON	Dismissed
Jeremie Garry Watts	Wood Building Co Pty Ltd	APPL 509/2005	COMMISSIONER S J KENNER	Dismissed
Jo-Anne Joy Murray	Hydrocool Pty Ltd	APPL 1643/2004	COMMISSIONER S J KENNER	Order Issued
Joel Boyce	Domain Furniture & Homewares	APPL 549/2005	COMMISSIONER P E SCOTT	Discontinued
John Bergamaschi	Emporess Pty Ltd	APPL 231/2005	COMMISSIONER S M MAYMAN	Discontinued
John Pica	City of Fremantle	APPL 426/2005	COMMISSIONER J H SMITH	Discontinued
Judith Maree Willox	Health Training Australia Pty Ltd	APPL 1014/2004	COMMISSIONER J L HARRISON	Discontinued
Julie Patricia Bechelli	Emmanuel Education Group	APPL 517/2005	COMMISSIONER S M MAYMAN	Discontinued

Parties		File Number	Commissioner	Result
Karen Aine Doherty	Pam Riches & Steve Rout	APPL 698/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Karen Natasha Anne McEwan	Micron Research Pty Ltd	APPL 505/2005	COMMISSIONER P E SCOTT	Discontinued
Kate Michelle Wilson	Fleet Network Pty Ltd	APPL 747/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Katherine Ann Gurr	Lumen Christi College	APPL 1662/2004	COMMISSIONER J L HARRISON	Discontinued
Kenneth Allan Donaldson	Property Practice Real Estate	APPL 659/2005	COMMISSIONER J L HARRISON	Discontinued
Kerrie Rachel Kuriata	Fred Matsen & Anita McKay	APPL 391/2004	COMMISSIONER J L HARRISON	Dismissed
Kevin Beresford	Prosser Toyota Used Cars	APPL 77/2005	COMMISSIONER J L HARRISON	Discontinued
Kevin Nixon	Marni Holdings and Rebel Entertainment T/A Monkey Bar	APPL 534/2005	COMMISSIONER P E SCOTT	Dismissed
Kylie Lovegrove	The Audi Centre Perth	APPL 467/2005	COMMISSIONER S J KENNER	Discontinued
Lauren Conlon	GlaxoSmithKline Australia Pty Ltd ABN:47 100 162 481	APPL 703/2005	COMMISSIONER S J KENNER	Discontinued
Leanne Taylor	Wila Gutharra Community Aboriginal Corporation	APPL 649/2005	COMMISSIONER J L HARRISON	Discontinued
Leith Dodunski	CJM Contractors Pty Ltd T/As Limescapes	APPL 632/2005	COMMISSIONER P E SCOTT	Discontinued
Leslie Duncan Jones	The Centre For Appropriate Technology Inc	APPL 515/2005	COMMISSIONER J L HARRISON	Discontinued
Lolla Bacic	Russell Poliwka (owner) First Western Realty	APPL 675/2005	COMMISSIONER J L HARRISON	Discontinued
Maree Naomi Woods	Morgan & Co Pty Ltd	APPL 719/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Mario Rene Wade	Tru-Blue Hire Australia Pty Ltd	APPL 475/2005	COMMISSIONER J L HARRISON	Discontinued
Mark Jamieson	King St Restaurant	APPL 835/2004	COMMISSIONER J L HARRISON	Dismissed
Mark O'Hurley	United KG Pty Ltd	APPL 495/2005	COMMISSIONER S M MAYMAN	Discontinued
Mark Roger Lambert	Project Services Australia Pty Ltd (PSA)	APPL 1377/2004	COMMISSIONER J L HARRISON	Discontinued
Mary Jennifer Meunier	Pearlside Investments Pty Ltd	APPL 670/2005	COMMISSIONER S M MAYMAN	Discontinued
Mathew Dean Anderson	Brian Micke Synegex	APPL 647/2005	COMMISSIONER J L HARRISON	Discontinued
Michael Wayne Shayler	PIHA Pty Ltd	APPL 746/2005	COMMISSIONER S J KENNER	Discontinued
Mick Baker	The Australian Workers' Union, West Australian Branch, Industrial Union of Workers	APPL 614/2005	COMMISSIONER J H SMITH	Discontinued
Ms Victoria Marie Chapman	Mairie McGowan - Australian Curtain Industries ACI	APPL 356/2005	COMMISSIONER S M MAYMAN	Discontinued
Natalie Adele Franklyn	Centro Dianella – Andrea Smith	APPL 886/2005	COMMISSIONER J L HARRISON	Discontinued
Natalya Calais Kingh	Christopher Tan - Club Manager of Zest Health Club	APPL 446/2005	COMMISSIONER J L HARRISON	Discontinued
Neil Charles Harrington	McNabb Plantation Alliance Pty Ltd	APPL 588/2005	COMMISSIONER J H SMITH	Dismissed
Nona A Hoban	Steve Revite Xdream Outlet Store	APPL 726/2005	COMMISSIONER S J KENNER	Discontinued

Parties		File Number	Commissioner	Result
Patrick Leslie McMullan	Itranex Ltd / All Finance Shop.Com	APPL 1529/2004	COMMISSIONER J L HARRISON	Discontinued
Peter Kok Keong Lee	State One Stockbroking, State One Equities Pty Ltd, State One Holdings Pty Ltd	APPL 1490/2004	COMMISSIONER J L HARRISON	Discontinued
Rebecca Lea Roberts	Reeces Hire & Structures Pty Ltd	APPL 656/2005	COMMISSIONER J L HARRISON	Discontinued
Rhonda Janice Lee	Talebi-Fard Family Trust T/a Woodvale Dental Surgery	APPL 669/2005	COMMISSIONER J L HARRISON	Discontinued
Richard Burlinson	Scott Park Homes	APPL 808/2005	COMMISSIONER S WOOD	Discontinued
Richard Frederick Twomey	BHP Billiton Iron Ore Pty Ltd	APPL 810/2004	COMMISSIONER J L HARRISON	Discontinued
Robert Michael Weymouth	Hydrocool Pty Ltd	APPL 30/2005	COMMISSIONER S J KENNER	Order Issued
Ronald Vincent	John Mitchell, Financial Controller; Janetto Holdings Pty Ltd T/as Subaru Osborne Park	APPL 858/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Roslyn Margaret Watkins	Noel Gardner	APPL 646/2005	COMMISSIONER S J KENNER	Discontinued
Roy Creighton	Turfmaster Facility Management	APPL 756/2005	COMMISSIONER P E SCOTT	Discontinued
Sean Beaumaster	DVG Chrysler Jeep	APPL 899/2004	COMMISSIONER J L HARRISON	Discontinued
Shaun Douglas Whittaker	Pemberton Aquaculture Producers Pty Ltd	APPL 749/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Sheryl Anne Wyatt	Craig and Tamara Chapman Pingelly Trading Co. (Supa Valu)	APPL 514/2005	COMMISSIONER J L HARRISON	Discontinued
Sonia L Dale	Joe Crisafio KIA	APPL 846/2005	COMMISSIONER S WOOD	Discontinued
Stephen Alexander Ikin	High Performance Window Films	APPL 721/2005	CHIEF COMMISSIONER A R BEECH	Dismissed
Stephen Robert Castle	Graeme Miller The Boatshed Restaurant	APPL 660/2005	COMMISSIONER J L HARRISON	Discontinued
Steven Raymond Byrne	FAL	APPL 465/2005	COMMISSIONER S M MAYMAN	Discontinued
Talit Paul	Australian Islamic College	APPL 1467/2004	COMMISSIONER J L HARRISON	Discontinued
Tania Matthews	Supmark Pty Ltd & Bui Pty Ltd	APPL 737/2005	COMMISSIONER J L HARRISON	Discontinued
Thanh Son Van Viet	Embroidery WA	APPL 607/2005	COMMISSIONER S WOOD	Discontinued
Tony Pargovski	Chief Executive Officer City of Stirling	APPL 491/2005	COMMISSIONER S M MAYMAN	Discontinued
Tricia Kylie Delamotte	Gary Davies	APPL 473/2005	COMMISSIONER S J KENNER	Discontinued
Ursula Anna Herrmann	Rottnest Lodge Pty Ltd ACN 009333859	APPL 674/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
William James Warrell	Wheatbelt Aboriginal Corporation	APPL 883/2004	COMMISSIONER P E SCOTT	Dismissed

CONFERENCES—Matters referred—

2005 WAIRC 02698

DISPUTE REGARDING TERMINATION OF EMPLOYMENT OF A UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	BHP BILLITON IRON ORE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
HEARD	MONDAY, 5 SEPTEMBER 2005, TUESDAY, 6 SEPTEMBER 2005, WEDNESDAY, 7 SEPTEMBER 2005
DELIVERED	FRIDAY, 23 SEPTEMBER 2005
FILE NO.	CR 130 OF 2005
CITATION NO.	2005 WAIRC 02698

CatchWords	Industral Law (WA) - Unfair termination - Verbal abuse and intimidation of supervisor - Interference with supervisor's duties - Interference with Drug and Alcohol Test - Procedural fairness - Fair go all round - Reinstatement
Result	Dismissal unfair, member reinstated without loss
Representation	
Applicant	Mr D H Schapper of Counsel
Respondent	Mr A D Lucev of Counsel and with him Ms K O'Rourke

Reasons for Decision

1 This is an application pursuant to section 44 of the Western Australian *Industrial Relations Act 1979* ("the Act"). The applicant union lodged the application on 22 July 2005 alleging their member, Mr John Johnston had been unfairly dismissed on notice by the respondent company on 21 July 2005. The letter of termination states as follows:

> "Dear John
>
> I refer to the disciplinary inquiry conducted, on 27 June 2005 and 15 July 2005 in relation to the incident on 18 June 2005.
>
> The disciplinary inquiry was conducted into allegations that you had verbally abused and intimidated the Assistant Mining Superintendent whilst he was in the process of conducting a drug and alcohol test in accordance with the Company's Drug and Alcohol Program, your actions in interfering with the test and failing to comply with a lawful direction made at that time.
>
> In the inquiry you denied abusing the Assistant Mining Superintendent and interfering with the testing.
>
> The inquiry has found that, notwithstanding your denial, you did abuse and intimidate the Assistant Mining Superintendent. That behaviour was totally unacceptable and unjustifiable. All employees have the right to be protected from such behaviour in the workplace.
>
> The investigation has also found that you unreasonably and unjustifiably interfered with a ding and alcohol test and failed to comply with the lawful instruction to leave the testing location.
>
> In addition, the inquiry found that you lacked candour in responding to questions in the investigation.
>
> In all the circumstances, including those referred to above, and having considered all the matters raised by you, the Company considers that you are unsuitable for further employment and your employment is terminated in accordance with clause 9(3) of the Award with payment in lieu of notice.
>
> Please contact HR Services to finalise the procedural aspect of the termination of your employment.
>
> Yours faithfully
>
> G Knuckey
>
> Manager Whaleback Maintenance"

2 The matter came on for conference on 28 July 2005. The substantive matter could not be settled and was referred for hearing. Two other issues relating to housing and income maintenance were subsequently dealt with. The company advised Mr Johnston that he could remain in his present housing until 9 October 2005. The Commission did not grant an interim order for income maintenance. The Commission was able to list the substantive matter for hearing on 5 September 2005 and this was within the period of notice paid to Mr Johnston.

3 The Memorandum for Hearing and Determination reads as follows:

> "1. The Applicant says that:
>
> (a) The Applicant's member, Mr John Johnston, had his employment terminated with the Respondent on 21 July 2005;
>
> (b) The Respondent paid Mr Johnston in lieu of notice in accordance with clause 9(3) of the Award;
>
> (c) The termination letter given to Mr Johnston dated 21 July 2005 specifies the basis on which the Respondent purported to terminate Mr Johnston's employment;

(d) The termination letter states that a disciplinary inquiry instituted by the Respondent found that Mr Johnston:

(i) abused and intimidated the Assistant Mining Superintendent on 18 June 2005;

(ii) unreasonably and unjustifiably interfered with a drug and alcohol test and failed to comply with a lawful instruction to leave the testing location on 18 June 2005; and

(iii) lacked candour in responding to questions in the investigation.

2. The Applicant denies that Mr Johnston:

(a) abused and intimidated the Assistant Mining Superintendent on 18 June 2005;

(b) unreasonably and unjustifiably interfered with a drug and alcohol test and failed to comply with a lawful instruction to leave the testing location on 18 June 2005; or

(c) lacked candour in responding to questions in the investigation.

3. In all the circumstances, particularly those referred to above, the Applicant says that the termination of Mr Johnston's employment with the Respondent is unfair.

4. The Applicant seeks an order from the Commission reinstating Mr Johnston's employment with the Respondent without loss of entitlement.

5. The Respondent opposes the Applicant's claims and denies that the Applicant is entitled to the relief sought or any relief at all."

4 The essence of this dispute and the reasons for Mr Johnston's dismissal rest on events that occurred around 6am on 18 June 2005 on site at the Mt Whaleback mine at Newman, and the subsequent disciplinary inquiry. The applicant says also that it is important to put these events in context; the context being a reported incident on 13 June 2005 and the company's policy that they seek a direct relationship with the workforce and prefer the use of Australian Workplace Agreements to Award employment.

Background

5 On 13 June 2005 Mr Dave Fairbrass reported an incident at intersection SP17. As he was approaching that intersection another truck entered the intersection and stopped half-way across the road. Mr Fairbrass did not think the truck at first was going to stop and took evasive action. He reported the incident to his supervisor who told Mr Fairbrass that he would have to undergo a Drug & Alcohol test (a D&A test). Mr Fairbrass in conjunction with another union representative objected to taking the test as he considered that he was not responsible for the incident and had only sought to report the incident. The testing in these circumstances is referred to as "for cause" testing under the company's policy [Exhibit A10]. Mr Fairbrass thought that under the policy only the person responsible for the incident had to undergo a D&A test. His complaint is also that, if a person who reports an incident then has to undergo such a test, it would serve as a positive disincentive for someone to report an incident; given the inconvenience and imposition of having to do a test. Following discussion he was advised that he did not have to take the test as he had passed the time limit for the test. He was advised subsequently that he would have to take the test. He rejected this direction and was deemed to have had a "first positive". In other words if one fails the test by testing positive for a substance then that is a "positive" result. If it is the first such result then it is a "first positive"; a refusal to test is taken as a "positive". Positive results are subject to disciplinary action as prescribed in the policy. Mr Fairbrass says also that as a result of the company's approach he invoked the Issues Resolution Procedure.

6 I do not need to go into further detail about the events of 13 June 2005 for the purposes of this application. There is another application pursuant to s.44 of the Act which deals specifically with Mr Fairbrass and I will decide that in due course if need be. As Mr Fairbrass had a "first positive", under the policy, he had to undergo a D&A test before next resuming work. He was advised on 17 June 2005 by Mr McDonald, his supervisor, that this test would be conducted before he commenced shift the next day. He was also told to get a lift into work as per the policy. Mr Johnston took him to work that morning at about 5.45am. Mr McDonald later approached Mr Fairbrass to take him to be tested. Mr Fairbrass called Mr Johnston and advised him of this and Mr Johnston went to the D&A testing room where Mr McDonald and Mr Fairbrass had been sitting and waiting. I have punctuated the detail of course but what I have just covered is sufficient and would appear to be uncontested. There was then an exchange predominantly between Mr McDonald and Mr Johnston both inside and outside the D&A waiting room which gave rise to the allegations against Mr Johnston and led to his dismissal.

7 There were four other independent witnesses to some parts of these exchanges. Some time after Mr Johnston entered the waiting room two contractors, Mr Rovetto and Mr Miles, entered the room to undergo tests. Both men gave evidence and a record of interview of the two men together was tendered at hearing [Exhibit A11]. Two other men, Mr Roe and Mr Thompson, were sitting outside the Electrical Workshop, opposite the waiting room (approximately 17 to 20 metres from the door) and witnessed some of the exchanges. They saw some of the exchanges because of course they could not have seen any of the events which occurred inside the waiting room. They separately were interviewed as part of the disciplinary inquiry and their records of interview are [Exhibits A7 and A8] respectively. The only other person present was the person who was to do the testing. There is no evidence that she witnessed or heard any of the exchanges and she was not called to give evidence or to provide a statement. The evidence unchallenged is that she spoke to Mr McDonald and Mr Fairbrass shortly after they arrived at the waiting room. They rang the bell to summons her. She then departed that room for the adjoining room, ie the testing room. She did not reappear and I do not know whether she remained in the testing room or departed that room through another exit. I say this because from my inspection of the site it is probable that she could have heard some of the exchange in the waiting room if she had remained in the testing room and depending on the loudness of the exchange. I take that matter no further as neither party have brought forward any evidence from her.

8 The allegations against Mr Johnston, which were outlined by counsel for the respondent at the commencement of the hearing, are as follows:

- That he interfered with a drug and alcohol test;
- That he breached the drug and alcohol policy and undermined the supervisor's responsibility by taking Mr Fairbrass offsite;
- That he lacked candour during the investigations;
- That he abused and intimidated a supervisor during the exchange both inside and outside the waiting room; and

- He used inappropriate language towards a supervisor by saying as follows: "Don't be a smart-arse", "Don't be a fucking smart-arse, Dave's not doing the test", "Piss off he's not taking the test", "Piss off you fucking little upstart, He's not taking the test", "There's two on one here Jack, you have no fucking chance".

These were all alleged to have been said in a loud, aggressive and intimidatory way towards Mr McDonald and included pointing a finger towards him. There was also allegedly a comment made by Mr Johnston which was directed to Mr Fairbrass where he referred to Mr McDonald as a "stupid cunt" or "stupid prick". The respondent does not allege any physical contact, but allege there was intimidatory behaviour of a physical nature.

The Evidence

9 Evidence was given for the applicant by Mr John Johnston, Mr Dave Fairbrass and Mr James McKean, Fitter and AMWU convenor. Evidence was given for the respondent by Mr Jack McDonald, Assistant Mining Superintendent, Mr Joe Rovetto, Offsider Lanes Drilling; Mr Justin Miles, at the relevant time an Offsider with Lanes Drilling; Mr Mick Carroll, Mining Superintendent; Mr Mike Lohse, Acting Manager, Human Resources and Mr Geoff Knuckey, Manager, Whaleback Maintenance.

10 The evidence of Mr Johnston was that on 18 June 2005, after he had taken Mr Fairbrass to work, received a call from Mr Fairbrass who advised that Mr McDonald had asked him to take a D&A test. Mr Johnston told Mr Fairbrass to tell Mr McDonald that there was a matter in dispute and that they wanted a meeting. Mr Fairbrass called back 5 minutes later and advised that Mr McDonald had said that he would be tested first and then they could meet. Mr Fairbrass told Mr Johnston that he was in the waiting room. Mr Johnston says that he asked his acting foreman, Mr Lamb, if he could go to a meeting, he was advised that was okay and Mr Johnston proceeded to the waiting room.

11 Mr Johnston says that he opened the door of the waiting room and said good morning. Mr McDonald was sitting in a chair to the right of the door and Mr Fairbrass was sitting in a chair opposite the door. Mr McDonald asked if he was there for a test and said, "if not, get out". Mr Johnston told Mr McDonald that he was there to represent Mr Fairbrass and that an issue had been raised through the Issue Resolution Process. Mr McDonald told him again that if he was not there for a test then to get out. Mr Johnston repeated that he was there to represent Mr Fairbrass and referred to a letter dated 8 June 2005 which was sent to the Commission. Mr McDonald interrupted him and repeated that if he was not there for a test then he should get out.

12 Mr Johnston says that he indicated that he had been to Human Resources. This part of the evidence is a little confused in that it is clear later in Mr Johnston's evidence that Mr McDonald said that he had spoken to Human Resources and said "that's how its going to be". Mr Johnston replied that he did not doubt that Mr McDonald had been to Human Resources but that the matter was over Mr McDonald's head and Mr Johnston suggested that Mr McDonald get Mr Cooper to sort out the matter.

13 At that point the door opened and Mr Rovetto and Mr Miles stood at the door. Mr Johnston asked them if they were there for a test and they replied "yes". Mr Johnston said to Mr McDonald that Mr Fairbrass' confidentiality had been breached and said to Mr Fairbrass, "we're out of here". He then proceeded to the door and Mr Fairbrass followed. Mr McDonald stood at the door, held it open and in a raised voice asked Mr Fairbrass, "are you going to do the test or not?" Mr Fairbrass was putting something in his bag and did not answer Mr McDonald. Mr McDonald then left the door and the door closed. He asked Mr Fairbrass again whether he was doing the test and said that he would take it as a refusal. Mr Fairbrass denied that he was refusing the test and said that his confidentiality had been breached.

14 Mr Johnston says that he told Mr McDonald to get hold of someone who could handle the issue. Mr McDonald ignored this and kept raising his voice to Mr Fairbrass over the second refusal. Mr McDonald walked off then came back and said that he would take Mr Fairbrass home. Mr Johnston asked him why and Mr McDonald said to Mr Fairbrass for a second time that he was taking him home. Mr Johnston again asked why and was told because he was Mr Fairbrass' foreman. Mr Johnston said he would take Mr Fairbrass home. Mr McDonald then walked off and got his mobile phone out. Mr Johnston rang his foreman to obtain permission to take Mr Fairbrass home.

15 Mr Johnston says that just after he left the room, Mr McDonald stood at the door, he was about 6 yards away from Mr McDonald near a handrail and Mr Fairbrass was between them. Mr McDonald was inside the room, and after the contractors arrived, Mr McDonald yelled at Mr Fairbrass about not taking the test and yelled at him again outside the room for not doing the test. The whole conversation outside lasted 3 minutes. Outside the room Mr McDonald went to Mr Fairbrass first and asked about not taking the test. Mr Fairbrass mentioned the confidentiality breach and the three men were then around in a huddle, in that context everyone outside the room had raised voices but no one was yelling. Mr McDonald did not say much to Mr Johnston, he was more intent on speaking to Mr Fairbrass.

16 Under cross-examination Mr Johnston says that Mr Fairbrass did not say anything to McDonald whilst inside the room. Outside the room he says Mr Fairbrass said that he was not refusing to take the test and mentioned there was a confidentiality breach. Mr Fairbrass was asked 2 or 3 times whether he was taking the test. Mr Johnston denies saying to Mr McDonald, "What's going on here Jack", when he entered the room. Mr McDonald did ask him whether he was there for a test. Mr Johnston denies that he said, "Don't be a smart arse Jack I'm here to represent Dave". He says that Mr McDonald told him to get out and did not say, "in that case I'm going to have to ask you to leave". Mr Johnston denies saying to Mr McDonald, "I'm not going anywhere as Dave's case is in the Commission", or, "I've been in the Commission all week and he is not doing the test".

17 Mr Johnston says that Mr McDonald did not ask Mr Fairbrass whether he would do the test until they were outside the room. When this happened Mr Johnston denies saying to Mr McDonald. "Jack don't be a fucking smart arse Dave's not doing the D&A test". Mr Johnston says that the contractors entered the waiting room when he mentioned Mr Cooper's name. He says that Mr McDonald yelled at Mr Fairbrass as to whether he was doing the test. Mr Fairbrass did not respond. Mr Johnston denies saying to Mr McDonald whilst Mr McDonald was at the door, "piss off he's not taking the test". He denies also that Mr McDonald said, "I strongly recommend you take the test". He denies also saying, "piss off you fucking little upstart he's not taking the test". He says that Mr McDonald did not say, "This conversation is ending here as we are now into personal abuse".

18 Mr Johnston agrees that Mr McDonald took out his mobile phone. He denies saying to Mr McDonald, "there's two on one here Jack you have no fucking chance". Mr Johnston agrees that he took Mr Fairbrass off site and that was a breach of policy. He denies describing Mr McDonald as a "stupid cunt" or a "stupid prick". Mr Johnston denies that he was aggressive or the aggressor. He says that he did not stand over Mr McDonald or wave his finger at Mr McDonald. His hands were in his pockets and he had a book under his arm. He says that he did not use foul language throughout the exchange and did not say to Mr Fairbrass, "I'm sick of this shit".

19 Mr David Fairbrass gave evidence that he had commenced working with the respondent in 1984. The last four years he has driven trucks for the respondent at Newman. Mr Fairbrass is the treasurer of the Pilbara Mining Union (PMU). For the last five years he has held a union position.

20 On 13 June 2005 Mr Fairbrass was driving on the W13 haul road towards the crib room. At junction SP17 a truck pulled out. Mr Fairbrass did not think the truck would stop. In the end the truck stopped. Mr Fairbrass called up the foreman and reported the incident as "truck shouldn't have pulled half way into the haul road". Mr Fairbrass had right of way. The foreman informed Mr Fairbrass that he would have to take a test. Mr Fairbrass asked whether the foreman was working on the old or the new policy. The foreman said he was working under the old policy. As they were walking to the vehicle Mr Fairbrass rang Mr Des Brewer, the convenor of the PMU and told him what had happened. Mr Fairbrass had a problem with doing the test as he had only reported the incident. He had not been the cause of the incident. The supervisor spoke to the other truck driver to find out what had happened. Discussion about the incident lasted for about two hours and the supervisor said that they had now passed the time line and advised Mr Fairbrass not to worry about the test. Mr Fairbrass said that he went into the crib room and prepared a statement. Sometime thereafter the supervisor said to Mr Fairbrass that the time line had been over ruled and he was to take the test. Mr Fairbrass asked who had over ruled the time line and he was told that he did not need to know that. Mr Fairbrass rang Mr Brewer and the three men discussed whether the test should be taken. They asked why Mr Fairbrass had to take the test and brought up previous incidents where there had been no testing. The supervisor indicated that that was the policy. When asked who had over ruled the policy, the supervisor indicated that they did not need to know that. The supervisor asked Mr Fairbrass to do the test and Mr Fairbrass refused to do so. The supervisor then took Mr Fairbrass home. Mr Fairbrass says he has not done any drugs since his daughter was born 15 years ago. Mr Fairbrass then proceeded to be on his four day break.

21 On 18 June 2005 Mr Fairbrass was taken to work by Mr Johnston. At shift change he saw that there was no allocation for him. He was talking to Ms Sally Williams when Mr McDonald approached. Mr McDonald said that he wanted to speak to him separately. Ms Williams asked if he needed anyone there and Mr Fairbrass said "No". Mr McDonald said that he wanted Mr Fairbrass to take a test and Mr Fairbrass said he wanted Mr Johnston to represent him. Mr McDonald said that Mr Fairbrass needed to take the test first and then he could get a representative. Mr Fairbrass replied that he was entitled to a representative. They walked to the waiting room and Mr McDonald rang for the nurse. Mr Fairbrass asked again for a representative and was refused. Mr Fairbrass rang Mr Johnston and Mr Johnston said that he would come over to the waiting room. There was an exchange between the nurse, Mr McDonald and Mr Fairbrass which, for the purposes of this application, I do not need to cover. The men sat in the waiting room for about 10 to 15 minutes before Mr Johnston came.

22 Mr Fairbrass said that Mr Johnston came in and said, "Morning All". Mr McDonald replied that if he was not there to take a test then he was to leave now. Mr Johnston replied that he was there to represent Mr Fairbrass. Mr McDonald repeated that if he was not there to take a test then he should leave now. Mr Johnston referred to a letter of 8 June. Mr McDonald told him to leave the room and he referred to having spoken to Human Resources. Mr Johnston said that he may have spoken to Human Resources but the matter was over his head and he said he should speak to Mr Cooper. At that stage the door opened and two contractors walked in. Mr Johnston asked them if they were here for a test and they replied, "Yes", to which Mr Johnston said, "there goes your confidentiality Jack". Mr Johnston and Mr Fairbrass then walked out of the room. Mr McDonald yelled towards Mr Fairbrass asking whether or not he was going to take the test. Mr Fairbrass did not respond.

23 Outside Mr Fairbrass was tending to something in his bag when Mr McDonald yelled, "Are you refusing to take the test?" At that point Mr Johnston was at the hand rail; Mr Fairbrass was in the middle and Mr McDonald was at the door. Mr Fairbrass said that he was not refusing to take the test but said, "there goes your confidentiality with those two in there". Mr Johnston tried to show Mr McDonald the letter but Mr McDonald was yelling. Mr McDonald came outside and was yelling. Mr Johnston was trying to explain. Later Mr McDonald walked off and came back and said to Mr Fairbrass he would take him home. Mr Johnston queried this and Mr McDonald said it was because he was Mr Fairbrass' foreman. Mr Johnston replied that he (Mr McDonald) was not taking him home, that he (Mr Johnston) would. At this point Mr McDonald walked off. Mr Johnston then said to Mr Fairbrass, "I'm sick of this shit". The two men went home.

24 Mr Fairbrass produced a notebook which he says that he wrote in that morning when he arrived home after the incident [Exhibit A4].

25 Mr Fairbrass says that Mr McDonald has been his supervisor for two years. He referred to a meeting regarding overtime sometime in the past where things got quite heated and voices were raised. He says that in his general interaction with Mr McDonald, Mr McDonald's manner is friendly.

26 Mr Fairbrass was then interviewed by Mr Lohse on 12 July 2005 and was asked what had happened [Exhibit R3].

27 Under cross-examination, Mr Fairbrass says that he rang Mr Johnston and told him that he was in the waiting room. He says the ramp outside the waiting room is about three or four metres wide with a rail on the outside. Mr Fairbrass says that whilst in the waiting room Mr McDonald did not ask at all about him doing the test. Mr Fairbrass says that Mr Johnston was aware that Mr Fairbrass was to be tested on 18 June. Mr Fairbrass saw Mr Johnston prior to 18 June 2005 whilst on his four days off. Mr Fairbrass says that he found out, probably on the Wednesday, that he was to be tested. He had a telephone call from Mr McDonald to tell him to present for the test on his return. He telephoned Mr Johnston after this call. He then met with Mr Johnston and others in the union meeting rooms. He says that he did not discuss what they would do about the test. They just discussed that he was going to do the test. He rejects the suggestion that he refused to do the test on the Saturday. He says that Mr McDonald asked him if he was refusing to do the test and he did not respond to him on a number of occasions.

28 Mr Fairbrass denies that Mr Johnston said, "What's going on here Jack". He agrees that Mr McDonald asked Mr Johnston if he was here for testing. He denies that Mr Johnston said, "Don't be a smart-arse Jack, I'm here to represent Dave". He denies that Mr Johnston said, "I'm not going anywhere, Dave's case is in the Commission", or that Mr Johnston said that he'd been in the Commission all week. He denies that Mr Johnston said, "Don't be a smart-arse Dave's not doing the test". Mr Fairbrass says that Mr Johnston asked the contractors whether they were doing the test and one of them replied, "Yes". Mr Johnston said, "Jack there goes your confidentiality. Dave we're out of here". Mr Fairbrass then got up from his chair and left with Mr Johnston. He denies that Mr McDonald said to him "I strongly recommend you take this test". Mr Fairbrass denies that Mr Johnston said, "Piss off. He's not taking the test". He says that he is not aware that Mr McDonald was treating the incident as a second refusal. He agrees that Mr McDonald whilst in the doorway said, "I'll take that as a second refusal". Mr Fairbrass denies that Mr Johnston said, "Piss off you little upstart. He's not taking the test". He denies that Mr Johnston leaned into Mr McDonald and said, "There's two on one here Jack, you've no fucking chance". Mr McDonald did say to Mr Fairbrass that he was taking him home. Mr McDonald did not say that it was his duty as his supervisor to do so. Mr Fairbrass denies that Mr Johnston said to him that Mr McDonald was a "stupid cunt" or a "stupid prick". Mr Fairbrass said that Mr Johnston did not use foul language. He says that Mr Johnston was not physically aggressive.

29 In re-examination Mr Fairbrass said that he preferred Mr Johnston to take him home. He says that if he had gotten into the car with Mr McDonald he would not have been responsible and that anything could have happened.

30 Mr James McKean gave evidence that he had worked as a fitter for the respondent for 17 years. He has been the AMWU convenor for two years. He says that during the investigation he attended with Mr Johnston to represent him. He says that he took notes during his meetings. On 21 July 2005 two new allegations were put to Mr Johnston. The first was that Mr Johnston had called Mr McDonald a "stupid cunt", plus intimidation was mentioned as was puffing out the chest and being aggressive. Exhibit A6 are his notes of the meetings. At the first meeting with Mr Jessop they asked whether Mr Fairbrass was allowed to have representation or not. Mr McKean says that Mr Jessop said nothing at the time when queried about representation but at the end of the meeting advised that Mr McDonald had contacted Human Resources and Human Resources had said that Mr Fairbrass was allowed representation there and then.

31 Under cross-examination Mr McKean says that there was nothing mentioned in the second inquiry about any aggression. He says he was never shown the statement of the contractors but it was read out to them.

32 The evidence of Mr McDonald is that he told Mr Fairbrass that he could not have representation before the test but could do so after the test. On their way to the waiting room Mr Fairbrass made a call and advised someone that he had been refused representation. Whilst in the waiting room Mr Fairbrass received a brief telephone call and advised that he was sitting in the waiting room. They sat for about ten minutes in the waiting room. Mr Johnston entered and said, "what's going on here Jack". Mr Fairbrass and Mr McDonald were both sitting at that stage. Mr McDonald says that he asked Mr Johnston, "Johnny are you here for testing". Mr Johnston replied, "Jack don't be a smart arse, I am here to represent Dave." Mr McDonald said, "Johnny I am not going to discuss this now, I've spoken to HR and we've decided this is the process we're taking".

33 Mr McDonald says that Mr Johnston replied that he had been in the Commission with Dave's case all week and that Dave (Mr Fairbrass) won't be taking the test. Mr McDonald says that he turned to Mr Fairbrass and asked him whether he was refusing to take the test. Mr Fairbrass said, "No", but he was cut off by Mr Johnston. Mr Johnston said to him, "Jack, don't be a fucking smart arse, he's not doing the test". Both Mr McDonald and Mr Fairbrass remained seated at that stage.

34 Mr Rovetto and Mr Miles arrived at that stage and Mr Johnston asked the first guy whether they were there for a test. He replied, "yes", and Mr Johnston said to Mr McDonald, "Jack, you've just breached confidentiality". Mr Johnston then said to Mr Fairbrass, "Dave, grab your gear, we are getting out of here". Mr McDonald asked Mr Fairbrass whether he was refusing to do the test. Mr Fairbrass did not respond. He simply picked up his bag and walked out the door. Mr McDonald says that Mr Johnston was saying quite a bit and swearing but Mr McDonald did not get a lot of what Mr Johnston said.

35 Mr McDonald says that he then got up and stood in the doorway. He said to Mr Fairbrass, "Dave I would strongly recommend that you take the test". Mr Fairbrass did not respond. Mr Johnston said, "Jack, piss off he is not taking the test". Mr McDonald replied saying to Mr Fairbrass that he would have to count this as a second refusal. Mr Johnston then turned to Mr McDonald and said, "Fuck off you little upstart, he's not taking the test". At that time Mr Johnston was about a metre away from Mr McDonald. Mr McDonald told Mr Johnston that he was not taking the conversation any further because of personal abuse. He realised that he needed to get someone down there as the situation was getting out of hand. He pulled out his mobile phone to ring the shift supervisor and Mr Johnston leaned towards him and said, "Jack, there's two on one here, you've got no fucking chance".

36 Mr Johnston and Mr Fairbrass went to walk off and Mr McDonald told Mr Fairbrass that he needed to take him home, he needed to escort him off site. Mr Johnston then said, "you're not taking him anywhere, I'll take him". Mr McDonald responded that it was his duty as a supervisor and Mr Johnston said that he did not care. The two men then walked off. Mr McDonald immediately called Mr Carroll and then called Occupational Health and Safety.

37 Mr McDonald says that during the exchange he did not yell or swear at anyone. He knew he had to follow a procedure and to give Mr Fairbrass every opportunity to take the test. Mr McDonald says that Mr Johnston was loud and aggressive, and his physical demeanour was that of standover. Mr Johnston had folders in his arms and he was pointing and talking at the same time that he was leaning over Mr McDonald. He was gripping the folders in one hand and pointing with the other. Mr McDonald says that Mr Johnston made him feel insignificant and intimidated. He says that to reinstate Mr Johnston would be an insult.

38 Under cross-examination Mr McDonald says that he felt that all his rights as a supervisor had been taken away. Mr McDonald was challenged about his statement and says that he thinks that Mr Johnston used the word "smartarse". Mr Johnston used this term twice before the contractors arrived. When he said that he had met with Human Resources, Mr Johnston replied that he knew Mr McDonald had met with Human Resources but that Mr McDonald and they had got it wrong. Mr Johnston said that Mr Fairbrass would not be taking the test. Mr McDonald asked Mr Fairbrass if he was refusing to take the test and Mr Fairbrass replied, "No".

39 Mr McDonald says that Mr Johnston and Mr Fairbrass left about a minute after the contractors arrived. He says that he was not annoyed. He says that there are a lot of things he cannot remember prior to the contractors arriving. Mr McDonald recalls that Mr Johnston, as he was walking out of the room, said "stupid something". Mr McDonald cannot put his hand on his heart and be sure about this. Mr McDonald denied that Mr Cooper's name was ever raised. Whilst in the room Mr Johnston said that Mr Fairbrass' first refusal was in the Commission and Mr Johnston had been down there all week.

40 Mr McDonald says that there was no mention of Mr Cooper's name during the conversation. He says that Mr Johnston did not attempt to show him the letter from the Company's solicitors. Whilst Mr McDonald stood at the door of the waiting room, Mr Johnston was about three feet away. Whilst in the doorway Mr McDonald said, "Dave, I would strongly recommend that you take the test". Mr Johnston replied, "Piss off Jack, he's not taking the test". Mr McDonald replied to Mr Fairbrass that if that was the case, then he would have to take it as a second refusal. Mr Johnston replied to this comment saying, "Look you fucking little upstart, piss off he's not taking the test".

41 Mr McDonald says that when inside the room Mr Johnston was leaning over him, raising his voice and pointing down. He says that this was not mentioned in his statement because he was under pressure at the time, he wanted to get the important things down and he was focussed on Mr Fairbrass and making sure that he gave him every opportunity to take the test. Mr McDonald agrees that he tried to ignore Mr Johnston and focus on Mr Fairbrass. He denies he told Mr Johnston to get out of the room. He says that he told him to leave when Mr Johnston said that he was not there to be tested. Mr McDonald says after Mr Johnston told him to "piss off" he moved away from the door and went to make a telephone call. He says that he moved east towards the shift change and walked about two or three paces. At that stage Mr Johnston leaned into him making the "2 on 1" comment. He denies that Mr Johnston told him to calm down, he denies that he raised his voice at all, either inside or outside the room.

42 In response to questions from the Commission, Mr McDonald says that only Mr Johnston raised his voice. He says that it was not loud, it was more of a demanding voice. It would seem from his evidence also that Mr McDonald indicated that Mr Johnston raised his voice more inside the room than he did outside the room. Mr McDonald says that he felt pressure when Mr Johnston walked into the room because it was unexpected. He wanted to get it right and give Mr Fairbrass every opportunity to take the test. He did tell Mr Fairbrass that it would be a second refusal if he did not test. He was concerned that if they walked away and he had not told Mr Fairbrass that it was a second refusal then they could say in future that this had not been mentioned. He says that when he was making the telephone call Mr Johnston leaned into him, about two thirds of a metre from his face and said "Two on one, mate, you've got no fucking chance".

43 Mr McDonald says that he had achieved what he had to do during the day and that was to give Mr Fairbrass every opportunity to take the test. He says that he cannot see what benefit it would have been for Mr Johnston to have had Mr Cooper present because Mr Cooper would have supported what he (Mr McDonald) was doing. He says that it would have been confirmed that Mr Johnston was not in the Commission for Mr Fairbrass' matter. He says that he felt intimidated by being told to piss off by Mr Johnston. He felt intimidated also by Mr Johnston standing over him and pointing towards him. He says the whole incident inside and outside was about two to three minutes. Their discussion outside was not very long. He says he went to make the call directly after Mr Johnston made the "upstart" comment.

44 Mr McDonald says under cross-examination that he felt physically intimidated in the waiting room with Mr Johnston standing over him leaning and pointing towards him. He says that there were bigger issues on the day and the bigger issue was that Mr Johnston undermined his rights as a supervisor. He says also that the intimidation outside was worse than the intimidation inside. By this he meant the comment "Forget about it Jack, there's two on one here you've got no fucking chance". Mr McDonald says that Mr Johnston leaned into him and said this when Mr McDonald was making a telephone call. Mr McDonald says that his whole focus was to get Mr Fairbrass to do the test and to give him every opportunity to do so. He denies getting angry, annoyed or upset. Mr McDonald denies that the issue resolution process was ever initiated. He says that whilst he was standing at the door he was hanging onto the door, the door was ajar and that Mr Johnston and Mr Fairbrass were probably a metre outside the door. He says also that he was not interested in anything that Mr Johnston had to say, he directed his focus towards getting the test done. He denies that Mr Johnston said anything about a letter of 8 June or tried to show him such a letter. He says that Mr Johnston said he was in the Commission. He denies emphatically that he demanded to know, in a raised voice, whether Mr Fairbrass would do the test. He says that he was letting a fair bit of stuff go over his head. He says that when Mr Johnston was walking out the door, Mr Johnston said that Mr McDonald was a stupid idiot or something like that. He says that Mr Johnston was saying a lot as he was going out the door but Mr McDonald was focussed on Mr Fairbrass doing the test. Mr McDonald denies that he was frustrated to the point of losing it.

45 Evidence was given by Mr Knuckey that he received a telephone call from Mr Carroll on the morning of 18 June 2005. Mr Carroll was with Mr McDonald at the time and they separately gave him an account of what had transpired earlier that morning between Mr McDonald, Mr Johnston and Mr Fairbrass. He was advised that whilst Mr McDonald and Mr Fairbrass were in the waiting room, Mr Johnston had entered unannounced and attempted to take control of the situation. Mr McDonald asked Mr Johnston if he was there to do a test. Mr Johnston replied that he was there to represent Mr Fairbrass. There was a discussion between the two men about Mr Johnston not being authorised to be there. Mr McDonald asked Mr Johnston to leave. Mr Johnston attempted to influence Mr Fairbrass not to take the test. Mr Johnston was abusive to Mr McDonald and told him to "piss off"; called him something like "a fucking little pip squeak"; told him he did not know what he was talking about; said to Mr Fairbrass "we're out of here" and also said to Mr McDonald that there were "2 on 1" and he did not have a chance.

46 Mr Carroll told Mr Knuckey that Mr McDonald had tried to get Mr Fairbrass to take the test but Mr Johnston said he, i.e. Mr Fairbrass, was not taking the test. Mr McDonald indicated that it would be taken as a second refusal and hence a positive result. Mr Johnston took Mr Fairbrass home against Mr McDonald's wishes. Mr McDonald said "pretty much" the same thing. He said he was pretty upset at what had happened, he felt uncomfortable and intimidated. Mr McDonald told Mr Knuckey that he would lodge a formal complaint against Mr Johnston for the way he behaved in the room.

47 Mr Knuckey's evidence is also that Mr Carroll indicated that he did not know why Mr Johnston was at the testing facility. Mr Carroll asked Mr Knuckey to follow up this issue with Mr Johnston's supervisor. Mr Knuckey called Mr Lamb, i.e. Mr Johnston's supervisor, and asked why he had released him. Mr Lamb appeared confused.

48 Mr Knuckey says that after those telephone calls he was left with a concern as to what had happened. There were allegations of abuse, intimidation and interference with a D&A test. He was also concerned as to why Mr Johnston was there in the first place and how he had managed to get released from work. Mr Lamb had said that Mr Johnston rang him about 7am and told him there had been some problem, and was taking Mr Fairbrass home and wanted to take the rest of the day off. Mr Johnston said he was not feeling well or something like that. He said that he had been in the Commission all week and needed to go to Port Hedland the next day and then to Perth. Mr Knuckey wondered why Mr Johnston was going to Port Hedland and Perth and whether he had asked to be released.

49 Mr Knuckey decided to stand down Mr Johnston. He considered the allegations to be very serious. He telephoned Mr Johnston, talked to him for about half an hour, and told him he was being stood down. Mr Johnston asked why and Mr Knuckey said due to the events earlier that day. Mr Johnston queried this and was told the concern related to his behaviour that morning. Mr Johnston asked "what behaviour" and Mr Knuckey declined to be more specific and advised that those matters would be left for the investigation. Mr Knuckey was not part of the investigation.

50 Mr Knuckey took part in a discussion, on the Monday or Tuesday prior to Mr Johnston's dismissal. Present for the discussion were Mr Lohse, Mr Shaw, Ms O'Farrell, Mr Ritchie and Mr Stockden. They discussed Mr Lohse's report of his investigation and whether to dismiss Mr Johnston. They decided to dismiss Mr Johnston; Mr Knuckey agreed with this decision. Mr Lohse gave an overview of the statements taken during the investigation. Mr Knuckey was asked about the standards of behaviour in his department. In essence, Mr Knuckey says that he believed Mr McDonald's version of events. Mr Knuckey says that he interacts with Mr McDonald 2 or 3 times a week. He has found Mr McDonald to be professional and helpful. Mr McDonald had assisted in sorting out issues that arose between the Mining and Maintenance departments. Mr Knuckey says that Mr McDonald listens to both sides, identifies who is responsible and tries to sort out matters. Mr Knuckey was influenced also by the statement of the contractors. He considered that Mr Johnston had interfered with a D&A test and that this was completely unacceptable and a breach of the policy. Mr Johnston had entered the waiting room unannounced, was not authorised to be there and had interfered with a supervisor carrying out his duties. Mr Knuckey says that he had not heard Mr McDonald raise his voice at work.

51 Mr Knuckey says that Mr Johnston and Mr McKean were involved in a trial relating to improving the behaviour of fitters on one shift at Newman. Mr Johnston and Mr McKean met with him during the trial to discuss progress with the trial and the outcome. They agreed that the behaviour on that shift was unacceptable and needed to change. The trial proved to be successful.

52 Mr Knuckey says that he would be extremely concerned if Mr Johnston were reinstated. He says that Mr Johnston has demonstrated that he will break the rules to suit himself. He complains that Mr Johnston was not authorised to go to the testing facility, did not follow the right process, even though he well knew the process. Mr Knuckey says that under the policy representation was not appropriate. Mr Johnston's behaviour was also intimidatory towards a supervisor. He says that he has lost trust and confidence in Mr Johnston.

53 Under cross-examination Mr Knuckey says that he does not think that Mr Johnston was authorised to go to the testing facility. He did not follow the correct process. He thinks that Human Resources did not pursue this question of authorisation during the investigation because it was not seen as significant in the dismissal. He knows that Mr Johnston has had 2 incidents previously of being absent from work without authorisation.

54 Mr Michael Lohse gave evidence that he was the acting Human Resources Manager. He took over the investigation of the incident involving Mr Johnston. The earlier part of the investigation had been done by Mr Jessop. Exhibits R3, R4 and R5 are his notes from his investigations. Mr Lohse says that it was arranged for him to give the letter of termination for Mr Johnston [Exhibit R6] to Mr McKean.

55 Mr Lohse says that on probably 19 July he had a meeting involving Mr Shaw, Ms O'Farrell, Mr Knuckey, Mr Jessop, Mr Carroll and by telephone Mr Ritchie and Mr Stockden. At that meeting he presented the information gained from the investigation and it was decided that Mr Johnston should be dismissed.

56 Under cross-examination Mr Lohse says that there are no notes from the meeting of 19 July. There was general discussion and Mr Shaw said that following the previous instant at Newman there was a line drawn in the sand regarding bad behaviour to supervisors and he would not retract from that. He says that Mr Stockden and Mr Ritchie agreed with the decision to terminate. Mr Lohse reported the findings that he had made to the meeting. Mr Lohse says that he showed Mr Johnston the contractors' statement for his own information on 21 July 2005. He says that perhaps Mr Johnston should have seen the statement previously. He says that there was an opportunity for Mr Johnston to ask to see the statement and he would have shown it to him at the first meeting. He agrees that he did not tell him that he had the statement. In response to a question about whether he showed him the accusations from the contractors after the decision had been made he replied, "I guess so".

57 Mr Lohse agreed that Mr Johnston and Mr Kumeroa would have been the two main union people on site prior to Mr Kumeroa's departure. This has been the case for some time. He believes that Mr Johnston is a competent and articulate union representative. Mr Lohse said that the investigation took a little bit of time because Mr Fairbrass was on sick leave. He agreed that Mallesons solicitors had an involvement in advising him how the investigation should proceed.

58 Mr Lohse says that there was no discussion regarding AWA or Award employment at the meeting when they decided to terminate Mr Johnston's employment. In response to questions from the Commission Mr Lohse says that the decision to terminate was based on the information from Mr McDonald, the two contractors, Mr Miles and Mr Rovetto, and the statements of Mr Thompson and Mr Roe. He says that their stories gelled. The statements refer to verbal abuse. He said that Mr Johnston had obstructed the D&A test, refused to leave the D&A area and had abused Mr McDonald by his comments. He says that, in his view, the instances of abuse are of equal importance and says that the substance of what was put to Mr Johnston in meetings of 15 July and 21 July was substantially the same.

59 Mr Joseph Rovetto gave evidence that he entered the waiting room with Mr Miles on 18 June 2005. He refers to a man with a moustache which must be Mr Johnston, a stocky man which must be Mr Fairbrass and a short man which must be Mr McDonald. He says that people can sit opposite the door to the waiting room, i.e. near the workshop, and can see the door of the waiting room. When he opened the door Mr Johnston was near the door and asked, "Are you here to do a Drug and Alcohol test?" He replied, "Yes" then Mr Johnston spoke to Mr Fairbrass and said "C'mon let's go." Mr Fairbrass was sitting facing the door. Mr McDonald was sitting beside the door. Mr Johnston headed for the door. Mr McDonald said to Mr Fairbrass "I take it you're refusing the drug test", Mr Fairbrass did not reply. He says then, "the other man got up and walked across the other corner of the room". I take this to mean Mr McDonald. Mr Fairbrass got up from his chair and followed Mr Johnston out the door. Mr McDonald walked to the door. Mr Rovetto says the door pushed in towards the room. Mr McDonald stood at the door and the door closed up against his back.

60 Mr Rovetto says that he cannot remember many of the words of the conversation that then followed between Mr McDonald and Mr Johnston. He does remember Mr Johnston saying to Mr McDonald something about a stress break, and said, "I think its time you took it". Mr Johnston said he wanted to see someone about this matter and 2:10 pm or 2:30 pm was mentioned. Mr McDonald walked out of the room, at that point Mr Rovetto presumed that he just walked off. Mr Johnston and Mr Fairbrass were standing outside the doorway. Mr Johnston said, "He's a stupid something." Mr Rovetto presumes this was said to Mr Fairbrass. Mr Johnston's tone was a bit loud. He was trying to get his point across. His tone was a bit aggressive. There was a bit of language going on. Mr Rovetto cannot really remember the words. Mr Johnston did say a few foul words. Mr McDonald, in the doorway, was pretty calm and did not raise his voice. Mr McDonald just wanted to know if Mr Fairbrass was going to do the test. Mr Johnston did most of the talking. Mr Fairbrass did not say anything. Mr Rovetto and Mr Miles walked to the opposite end of the waiting room. All five men were in the waiting room for not more than a minute, if that. The conversation outside the room did not last more than a minute or two. Mr Rovetto rang the bell for the nurse.

61 Under cross-examination Mr Rovetto says that Mr McDonald stood in the doorway for about 20 seconds and then the door closed behind him. There is a window in the door and Mr Rovetto stood opposite the door. He could see through the window who was doing the talking. He cannot remember much of what was said.

62 Mr Justin Miles gave evidence that he is currently unemployed but was previously employed as an offsider with Lanes Drilling. In that role he worked at Newman and Yarri. He left that employment due to family reasons.

63 On 18 June he was picked with Mr Rovetto for a random D&A test. When they arrived in the room Mr Johnston asked them if they were there for a test to which one of them replied replied, "Yes". Mr Johnston then said, "Okay, let's go". He says that there was a domestic happening in there. He says that Mr McDonald asked Mr Fairbrass, "Are you refusing to do the test?" and Mr Fairbrass replied that his confidentiality was broken. Mr Johnston seemed to override the whole conversation. Mr Johnston answered before Mr Fairbrass could talk. Mr Johnston's demeanour was quite aggressive and he was trying to put on standover tactics. He puffed his chest out, raised his voice and stepped closer to Mr McDonald. Mr Miles says that Mr McDonald tried to calm everything down and Mr McDonald asked again if Mr Fairbrass was doing the test. Mr McDonald was overridden again. Mr Miles says that Mr Johnston and Mr Fairbrass then walked out. Mr McDonald was at the door and

held the door close to him. Mr Johnston said to Mr McDonald, "Two on one, you've got no chance". Mr Johnston and Mr Fairbrass then walked off at a fast pace. Mr Miles says that as they walked off Mr Johnston referred to Mr McDonald as a "stupid cunt". He says he could not see outside as Mr McDonald held the door close to him. He repeated that Mr McDonald tried to calm everything down.

64 Under cross-examination Mr Miles says he made a statement a bit after the incident. Mr Jessop met with both Mr Rovetto and him. He said that the incident in the room lasted about ten minutes and outside lasted perhaps three to five minutes. Mr Rovetto led them into the room and Mr Rovetto answered, "Yes", when asked about whether they were there for the test. Mr Miles says that whilst in the room, when Mr McDonald was standing at the door, they were standing at the side of the room. He says that Mr McDonald stood at the door for two, three or four minutes. At the time there was a comment about "2 on 1" and refusing the test and then after the door closed there was a comment about "stupid cunt". Mr Miles says that is all he heard. Mr Miles says it was dark outside and he could not see through the door or the window.

65 Mr Mick Carroll gave evidence that he was in bed on 18 June when Mr McDonald called him just after 6.00 am. He asked him what had happened about Mr Fairbrass and Mr McDonald said, "it has all gone to shit Mick". Mr McDonald said that Mr Johnston had abused him, humiliated him and threatened him. He says that Mr McDonald clearly sounded stressed. He told Mr McDonald to get a cup of coffee and that he would meet him at about 10.00 am. Mr McDonald told him that Mr Fairbrass had refused a second test. Mr McDonald told him that Mr Johnston had ordered Mr Fairbrass out of the room. He said that Mr McDonald had indicated that he was taking Mr Fairbrass home. Mr Johnston said that he would not be taking him home.

66 Mr Carroll says that when he met Mr McDonald, he looked humiliated and stressed. Mr McDonald came in with his statement and Mr Carroll asked him questions about his statement. Mr McDonald said that he wanted to make a verbal complaint against Mr Johnston. Mr Carroll asked Mr McDonald where Mr Johnston was and Mr McDonald said that he thought that Mr Johnston had gone home. Mr McDonald rang Ms O'Farrell at Mr Carroll's instruction. Mr McDonald read parts of his statement to Ms O'Farrell and she advised him to ring Mr Knuckey. Mr McDonald told Mr Knuckey what had happened. Mr Knuckey rang back later and advised he would stand Mr Johnston aside for his behaviour. Mr Carroll told Mr McDonald to send his statements to Human Resources and Mr Knuckey would take care of the matter from there.

67 Mr Carroll says that he has known Mr McDonald for eight years and he has not heard him raise his voice. He says that if he had raised his voice there would have been a complaint and he would have heard about it. He says that the shift change occurs outside his office and he would have heard any heated words. Mr Carroll says that Mr Johnston's behaviour was unacceptable, inappropriate and he humiliated Mr McDonald. He says that Mr Johnston should have known better and he should not be reinstated. He says that the relationship between him and the company is not repairable.

68 Under cross-examination Mr Carroll says he is concerned as to what message it would send to others if Mr Johnston were to be reinstated. It is wrong for a supervisor to be treated like that and it is difficult to get supervisors as the job is hard enough as it is. He says that he spent 10 to 15 minutes with Mr McDonald in his office to go over his statement and to ensure that it was complete. There are no changes to the statement and Mr McDonald was happy that the statement was true and correct.

69 There are the statements of Mr Roe [Exhibit A7] and Mr Thompson [Exhibit A8]. The statements were taken by Mr Jessop on 28 June and 29 June 2005 respectively. Both men were sitting together outside the smoko room during shift change on 18 June 2005. The incident they witnessed occurred between 6:15 and 6:20 am and involved Mr Johnston and two other people. Mr Roe says that he noticed Mr Thompson look over to the conversation between three people outside the D&A waiting room. Mr Roe then looked over his shoulder towards the conversation. He heard Mr Johnston say in what sounded like a raised voice the words "breach of policy" and "doesn't have to take the test". Another person, which would be Mr McDonald walked past Mr Johnston to the third person, which would be Mr Fairbrass, and said, "Are you refusing to take a test Dave". Mr McDonald appeared frustrated by what was taking place. He may have used a raised voice but was not yelling. Mr Fairbrass was standing next to Mr Johnston and did not reply. Mr Johnston then in a raised voice said, "Doesn't have to", followed by "go and read the policy". Mr McDonald then moved away from Mr Johnston and Mr Fairbrass about 2-3 metres, appearing to make a call on his mobile, but then walked back rather suddenly. Mr Roe and Mr Thompson exchanged a brief comment and looked back to the three men. Mr Johnston and Mr Fairbrass walked in one direction, Mr McDonald walked away in the other direction. The whole conversation took about two minutes.

70 Mr Thompson says he exchanged greetings with Mr Johnston as Mr Johnston walked by on his way into the D&A waiting room. Mr Thompson heard the D&A waiting room door close and overheard what appeared to be raised voices. Mr Thompson looked towards the conversation taking place between three people outside the waiting room. Mr McDonald said something about "policy being followed". Mr Johnston replied, "you don't know policy" or "you don't know what policy is about". Mr McDonald then stepped aside a few metres and came back again. Mr Thompson does not recall if Mr McDonald was trying to make a call on his mobile. Mr Johnston then said to Mr McDonald "calm down". Mr McDonald said something about "policy" and then said, "this is going to be first or second strike or positive". There was a short break when Mr Roe said to Mr Thompson, "what's going on here?" Mr Thompson looked up again and saw Mr McDonald moving away. A short time after Mr Johnston and Mr Fairbrass walked away. Mr Thompson also remembered 2 contractors entered the D&A waiting room after Mr Johnston. Mr Thompson heard raised voices during a discussion between Mr Johnston and two other people during this period but no yelling. It is not clear which period he means, but I assume he means the discussion outside the D&A waiting room. Mr Fairbrass did not say anything during the discussion.

Closing Statements

71 Mr Lucev for the respondent submitted that the easiest lie to perpetuate is a complete denial and this is what Mr Fairbrass and Mr Johnston have done. They consistently denied the abuse, the intimidation and the foul language. They consistently did not tell the truth and they stuck to their story. Mr Johnston has everything to lose, his job, his status, house and maybe even his child's private schooling. Hence to lie is an understandable human reaction. Mr Lucev says there is no half way, he either did or he did not do as alleged.

72 Mr Lucev says that Mr Johnston is an experienced union official, said to be articulate and competent by some and has been to countless meetings. He is physically imposing which is a relevant factor, he is used to the cut and thrust of these matters. He is familiar with matters of this nature. In contrast Mr McDonald has nothing to gain from pursuing this matter. Mr McDonald indicated as much in his evidence. This evidence was heartfelt. It would have been much easier for him to walk away. However, he had made a complaint and he was doing his job. He did not know that Mr Johnston would be there in the room so there was no conspiracy. Mr Lucev says that Mr McDonald was consistent and honest in his answers. Mr Knuckey says that Mr McDonald always tries to help out and in this matter Mr McDonald has tried to help the Commission. Mr McDonald is new to the Commission and underwent a relatively prolonged cross-examination. In the face of this he gave his evidence in a quiet and calm manner.

73 Mr Rovetto told what had happened both quietly and simply. The essentials of his evidence was that there was abuse by Mr Johnston and Mr Johnston used foul language and intimidation. Mr Rovetto was inconsistent with minor details but one would expect that some three months later.

74 Mr Lucev says Mr Miles is an uncomplicated person who had nothing to gain. He told the Commission in his own way about what happened on 18 June, he did not observe everything in minute detail, but he did see abuse, intimidation and heard use of foul language. Mr Lucev says that there are some inconsistencies regarding the way that the door opened and what was said by whom and when, but this is a common difference in respect of matters of recall.

75 Mr Lucev submitted that these are two independent people who Mr Jessop saw together during the investigation but their story is not concocted in any way. If the story had been concocted or schooled then the stories would have been more consistent. Mr Miles had not seen his statement for some months, however, he remembered the big picture and told those details.

76 Mr Lucev said there was no reason for an unprovoked oral assault on Mr McDonald of that gravity and magnitude. The question before the Commission is did Mr Johnston abuse Mr McDonald and, if so, what are the consequences that flow. Mr Johnston says that he did not abuse or intimidate, he did not yell, he used no foul language, he did not interfere with the D&A test and he did not lie to the inquiry. Mr Fairbrass says that Mr McDonald was yelling. The versions are very different. Mr McDonald says that Mr Johnston stood over him, he finger pointed towards him, Mr Johnston was yelling and Mr McDonald could not get a word in. Mr Lucev refers to [Exhibits R4, R3 and Exhibit A5] and says that there is inconsistency regarding who was yelling or who had a raised voice. Mr Lucev says that Exhibit A5 is a self serving document. For the Commission to resolve the inconsistency the Commission should turn to independent people in close proximity namely Mr Rovetto and Mr Miles. Mr Rovetto and Mr Miles did not know who these people were. Mr Rovetto says that Mr Johnston did all the talking, he was loud and aggressive. Mr McDonald says that he could not shut Mr Johnston up. Mr Rovetto says that Mr McDonald was calm and was trying to do his job. Mr Miles says Mr Johnston was domineering, controlling, aggressive and used standover tactics. He says that he puffed his chest out like a pigeon, this is the sort of thing that Mr Miles says he saw as a bouncer. Mr Miles says that Mr McDonald tried to calm the situation down, Mr McDonald simply asked if Mr Fairbrass was refusing to do the test. Mr Miles says that there was a lack of aggression on Mr McDonald's part. Mr McDonald remained sitting in a chair in the corner, so this is consistent with his lack of aggression. Mr Lucev says that it would have been difficult for Mr McDonald to have been aggressive in the manner alleged if he was sitting in the corner with someone standing over him and two contractors in the room.

77 Mr Lucev submitted that both contractors said that the words, "Two on one, you've got no chance", were in fact said. Mr McDonald gave his account that when he went to make a telephone call Mr Johnston leaned onto him and said these words. Mr Rovetto and Mr Miles heard these words. Mr Lucev says that neither Mr Rovetto nor Mr Miles were cross-examined as to whether these words were said and so the Commission must accept that they were said. Mr McDonald repeated what was said to Mr Carroll shortly after the incident and these words are clearly an act of intimidation or abuse.

78 Mr Lucev says that there were other people in the vicinity, naming Mr Roe and Mr Thompson. There would have been the gloom of a mid-winter morning. They were sitting some 20 metres away and sitting near an air-conditioner. In [Exhibit A7] Mr Roe says that he looked over and that he saw three people, he heard an argument, he heard the words, "Are you refusing to do the test". There may have been raised voices. He is equivocal about this. There was no yelling. Mr Roe says that Mr Johnston had a raised voice in [Exhibit A8]. Mr Thompson says he overheard what appeared to be raised voices. He heard Mr Johnston say "calm down" or something like that. His hearing would have been affected and the Commission cannot put much credence on the words "calm down". Mr Thompson says that he heard raised voices but no yelling. Neither witness was called to the court to support Mr Johnston's case and no weight ought to be placed on their statements. They were not near the incident and their statements are equivocal. Mr Lucev submitted that these statements should be disregarded and the Commission should rely on the evidence of Mr Rovetto and Mr Miles.

79 Mr Lucev submitted that Mr McDonald made a contemporaneous statement [Exhibit R2] where he asserted that Mr Johnston had abused and intimidated him. He also took Mr Johnston's action as interference with his supervisory duties. Mr McDonald was cross-examined at length as to whether he told Mr Johnston to get out and he refuted this. Mr Lucev referred to Mr Johnston's own notes [Exhibit R1] where he says that Mr McDonald told him to leave the room and it was quite blunt and later told him to leave the room now and said this loudly. This is repeated in the note of investigation of 12 July 2005 [Exhibit R3] where he was told to leave the room now and this was said quite forcefully. Mr Lucev says that these are inconsistencies in the evidence on behalf of the applicant and Mr McDonald was entitled to be blunt but he did not raise his voice during the incident. Mr Lucev submitted that there are other inconsistencies in Mr Johnston's evidence. Mr Johnston said that he kept his hands in his pockets. Mr McDonald showed how Mr Johnston had gripped the file and showed how he had pointed his finger at him. He said Mr Johnston stepped and leaned forward. Mr Lucev submitted that it would be difficult to have your hands in your pockets with a file under your arm and have such a conversation. Mr Fairbrass' evidence contradicts that of Mr Johnston. Mr Lucev refers to Mr Fairbrass' interview on 13 July 2005 [Exhibit R3, final page] where it says that Mr Johnston had his paperwork in his hands. Mr Lohse was not challenged about those notes. This speaks against Mr Johnston's evidence.

80 Mr Lucev says that the walkway incident was exaggerated. The walkway is two paces across, the evidence for the applicant would have the distance as much greater. Mr Lucev submitted that on the evidence of Mr Knuckey and Mr Carroll, Mr McDonald never raised his voice. Their evidence is that Mr McDonald is calm and cool, he may come across as blunt. Mr McDonald was certainly humiliated at the time. Mr Carroll saw this. Mr Carroll saw him some hours later and Mr McDonald still looked humiliated. The Commission should find that the abuse and intimidation was unwarranted, unprovoked and unnecessary.

81 Mr Lucev submitted that in respect of language there was both verbal and body language. This gives rise to the abuse and intimidation. Mr Johnston's evidence was that there was no foul language. He says that he did not use the words "stupid cunt" and does not use language like that. Mr Lucev refers to [Exhibit R4], page 2, where Mr Johnston says that in the interview on 15 July 2005 he never abused or swore at Mr McDonald. He did not have a chance to finish his sentence. Mr Lucev refers to [Exhibit R5] where Mr Johnston says that the rest is total "bullshit", and yet Mr Johnston says that he does not use language like that.

82 Evidence from Mr McDonald, Mr Rovetto and Mr Miles is that Mr Johnston did all the talking. Mr McDonald's evidence is also that Mr Johnston used stand over tactics from the outset to make him unsure about the information he had received. Exhibit R2 is Mr McDonald's statement. It indicates that Mr Johnston was getting very aggressive. Mr McDonald takes his position very seriously; his responsibilities were taken away from him by Mr Johnston. Mr Rovetto said that Mr Johnston said "stupid something". Mr Rovetto was tall enough to see outside. The sound may have been muffled but he could hear it through the door. Mr Miles says that he heard the words "stupid cunt". Mr Miles and Mr Rovetto were not crossed in respect of the use of foul language or the words used. Their evidence is consistent with Mr McDonald's.

83 Mr Lucev submitted that the words used by Mr Johnston as alleged by Mr McDonald were in fact used and that the Commission should so find.

84 Mr Lucev submitted also that Mr Johnston is culpable in that he lied at the inquiry. Mr Johnston denies that he lied and such lying would justify his dismissal.

85 Mr Lucev submitted that Mr Johnston interfered with a drug and alcohol test. Mr Johnston admitted that he interfered with the test in that he took Mr Fairbrass home. There was no need to take Mr Fairbrass away from the testing room. Mr McDonald was calm. There was nothing wrong with Mr Fairbrass being tested. Mr Johnston in the interview on 15 July 2005 says that Mr Fairbrass probably would have tested but it "all went to shit". Mr Fairbrass effectively says the same thing. Mr Lucev submitted that on any version of the facts Mr Johnston was the one who encouraged Mr Fairbrass to leave the waiting room. Mr Johnston knew that this would be deemed to be a second positive and he still took Mr Fairbrass off site. Mr Johnston knew that this was a breach of policy. Mr Lucev submitted that [Exhibit R4] shows that Mr Lohse asked Mr Johnston if he was aware of the procedure. Mr Johnston repeated that it was the supervisor's job to take people home and that he thought that he was being stood down for this. Hence he knew that it was a breach of policy. Mr Knuckey and Mr Carroll's evidence indicate how significant they view this action by Mr Johnston. It is not for a union official to take events into their own hands. Mr Lucev reiterated the seriousness of safety requirements in the mining industry. Mr Johnston's conduct in this regard constituted serious misconduct warranting summary dismissal. It is farcical to say that Mr Johnston was concerned about what Mr McDonald would do. Mr McDonald was at a disadvantage in respect of size. Mr Johnston vaguely, but menacingly, suggested this in evidence. Mr Johnston did not suggest any other measures he simply pulled Mr Fairbrass off site which is a breach of policy.

86 In relation to procedural fairness, there is no issue on Mr Lucev's submission. Mr Johnston was stood aside and the matter was investigated. All matters of substance were put to him. Mr Johnston's evidence was clear that the allegations put to him by Mr Jessop were the same allegations put to him by Mr Lohse. Under cross-examination he agreed that all the allegations put to him were those put to him by Mr Jessop and Mr Lohse. Mr Johnston knew as early as 18 June 2005 what the substance of the allegations were. Mr Knuckey told him this in the broad sense. Mr Lucev referred to the back page of Exhibit R1 where Mr Johnston included in his notes as follows:

> "Jack accuses me of:
>
> 1. did you tell Jack to piss off;
> 2. look you fucking little upstart;
> 3. two on one you have no fucking chance."

87 These allegations were dealt with by Mr Lohse the only new allegation was the "stupid cunt" comment. The notes of the interview of 21 July 2005 are consistent with the version on 15 July 2005. They are consistent with Mr McKean's notes and the version put by Mr Jessop. Mr Johnston simply says it was all a fabrication. Mr Johnston understands the importance of the allegation. Mr Lucev referred to the decision of *Byrne v Australian Airlines Ltd* (1994) 47 FCR 300 and *Shire of Esperance –v- Peter Maxwell Mouritz* 71 WAIG 891.

88 Mr Lucev submitted that the references on behalf of Mr Johnston are of no relevance as one was from a good mate who referred to Mr Johnston as a "soccer nut" and the other two references are from people who have not been in Newman for eight years. It is the case that community work is not relevant to what one does at work. Mr Lucev submitted that Mr Johnston is not saved by his length of service as was the case in *The Construction, Forestry, Mining and Energy Union of Workers v BHP Billiton Iron Ore Pty Ltd* 84 WAIG 3787*, Gonzalo Portilla v BHP Billiton Iron Ore Pty Ltd* 85 WAIG 2023 and *The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers – Western Australian Branch v BHP Billiton Iron Ore* 85 WAIG 119.

89 The allegation that there was some discrimination between Award v AWA employees is not a factor that should be considered. Mr Knuckey made it clear that this was not considered. This submission was advanced recklessly on behalf of the applicant. Mr McDonald is not aware of the recruitment policy of the respondent. There is evidence that Mr Johnston displays a lack of trust in the company. The policy regarding AWA's is only a policy in respect of recruitment.

90 Mr Lucev submitted that reinstatement is not a prospect. Mr Knuckey's view is that Mr Johnston breaks the rules and did so again in respect to this incident. Mr Carroll says that Mr Johnston humiliated a supervisor and should have known better. Mr Lucev submitted that Mr Johnston had a problem with the company. He says that in [Exhibit R5], Mr Johnston alleges a conspiracy in that he says it is all a fabrication and it has to do with Mr Shaw and the D&A policy. There is no prospect for reinstatement as trust and confidence has been lost.

91 Mr Lucev submitted that there should be no question of compensation as Mr Johnston on his own evidence has not sought paid work. He did not pursue the indication of a position from the AWU. In normal circumstances Mr Lucev submitted that Mr Johnston's conduct deserved termination for the abuse and intimidation, the use of foul language, interference with the D&A policy and lying to the inquiry. Given the information available to the company the Commission should not interfere with the termination. Mr Lucev submitted that the allegation of interference with the D&A policy was itself sufficient to justify dismissal.

92 Mr Schapper for the applicant in closing submissions submitted that the incident of 18 June 2005 should be seen in the broader context. The incident of 13 June 2005 is related and it is part of the same transaction. There is also a current dispute about the Drug and Alcohol Policy of which two matters are to be heard in matter C 32 of 2005. There is no argument about the events of 13 June 2005. Mr Fairbrass was asked to perform a 'for cause' test. He was not involved in the incident. The testing is a positive disincentive for reporting incidents. There is the indignity of urine testing the invasion of privacy and dignity. Mr Fairbrass put the matter of the testing in dispute. Mr Fairbrass is in a double bind, if he does the test then he loses his right re having to undergo the test. If he rejects the test then it is treated as a positive. Hence he is damned if he does, and damned if he does not.

93 Mr Schapper, under objection by Mr Lucev, said there is inconsistency in the respondent's approach to testing. Urine testing is largely at the discretion of management, in a climate that exists between the union and management there is a fear that urine testing will become a weapon to be used against employees.

94 Mr Fairbrass knew that, under the policy, he needed to be tested prior to his return to work. The test on 18 June 2005 would not have been necessary if Mr Fairbrass was right about 13 June 2005. If he was right then one wrong is compounded by another. If on 18 June 2005 he continued to protest about the testing then it would be deemed to be a second positive. So again Mr Fairbrass' rights are taken away even though the matter was raised through the issues resolution process. Mr Fairbrass fronted for the test. He believed he was entitled to representation. Mr Johnston sought approval and was granted to

go to the testing room. Mr Johnston entered the room; he was told by Mr McDonald to get out or to leave the room. Mr Fairbrass and Mr Johnston said either form of words were used. Mr Schapper submitted that it is clear on Mr McDonald's own evidence that he told Mr Johnston to leave. There was no need for Mr McDonald to be in the waiting room. There was nothing in the policy that required him to be there.

95 Mr Schapper submitted that Mr Johnston was entitled to represent Mr Fairbrass during the testing. The applicant does not accept that management can dictate when and how representation by the union may be achieved. Mr McDonald's actions in telling Mr Johnston to "get out" were wrong and unjustified.

96 Mr Schapper submitted that the rationale of the policy that requires the supervisor to take the employee home is so as to ensure duty of care. Mr Johnston in taking Mr Fairbrass home served the same objective of the policy. In any event it is a deemed positive only. Mr Fairbrass' evidence is that he could not have anticipated what would have happened if Mr McDonald had taken him home. The events should be looked at in this broader context.

97 Mr Schapper submitted that Mr Miles' evidence is so widely at variance with all others including Mr McDonald's that his evidence should be disregarded in its entirety. Mr Miles says that he walked in on a domestic which continued for ten minutes and went on outside for about five minutes. Mr Schapper submitted that everyone else gave evidence that the whole incident took approximately three minutes. Mr Miles said that all the discussion was in the room whereas no one else supports this view. Mr Miles is solo also in his evidence in respect of the puffing out of the chest, standover tactics, that there is a blind on the window, and that Mr Johnston said "stupid cunt". Mr Miles' evidence is also inconsistent with the statement at [Exhibit A11]. Mr Schapper says that Mr Miles did not refer to the "2 on 1" comment in [Exhibit A11] statement. Mr Rovetto did not indicate this in his evidence. Their statements were given to Mr Jessop in discussion together. This leads to a higher degree of suspicion. It is clear from their evidence that Mr Miles is the more dominant person. The notes at Exhibit A11 do not purport to be transcript; they are interspersed with Mr Jessop's notes of the contractors' opinions. Mr Rovetto said that Mr Johnston's mode of talking was aggressive. Mr Schapper submitted that as Mr Rovetto was jointly interviewed and that Mr Rovetto is more passive, he picked up on Mr Miles' point. In his evidence in the witness box Mr Rovetto had abandoned nearly all of what was in his statement. Mr Schapper submitted that the evidence is that Mr Johnston and Mr Fairbrass left shortly after saying that the confidentiality was breached so there is no basis to make a judgement that Mr Johnston operated aggressively.

98 Mr Schapper submitted that Mr McDonald was out of the room albeit for a short period of time when the door was ajar when there was some discussion. Mr Miles and Mr Rovetto were diagonally across the waiting room. They would have had to look through the door with a restricted view. The door is self closing and once the door is shut it is difficult to hear. Mr Rovetto said that he could not hear what was being said outside. He says that he heard foul language but this does not fit comfortably with the statement that the door was shut and he could not hear. Mr Schapper submitted that the evidence of Mr Miles and Mr Rovetto does not take the respondent further. It is not corroboration of Mr McDonald's evidence. It is unreliable and is contaminated by the fact that they were interviewed together.

99 Mr Schapper says that Mr Roe and Mr Thompson were interviewed separately. They were in a direct line of sight. It is not likely that the air-conditioner was going as it was the dead of winter and cold. There is nothing in their statements that indicates that the air-conditioner was operating nor that they could not hear what was being said. Mr Thompson said that Mr Johnston and Mr McDonald had raised voices. Mr Roe says that Mr Johnston had a raised voice and Mr McDonald may have had a raised voice. Mr Johnston and Mr Fairbrass say that Mr McDonald's voice was raised. So their evidence is corroborated. Mr Roe and Mr Thompson did not hear any abusive comments by Mr Johnston. They heard the comment from Mr Johnston to Mr McDonald saying, "calm down". This is consistent with Mr Fairbrass' evidence that Mr McDonald was feeling frustrated, challenged and desperate to get Mr Fairbrass to do the test. Mr McDonald in evidence said that he missed a lot of what was said. This is the first time that he has given this evidence and Mr Carroll and he went over the evidence to ensure that it was correct and complete.

100 Mr McDonald's statement differs between the first and the second statement. The "smart-arse" comment was not in statement one. In evidence Mr McDonald says he was not annoyed, but in his second statement he says that he was. There is no reference in the statements to physical intimidation. If the "silly cunt" comment was made then it is unthinkable that Mr McDonald would not have heard it and written it down. At his interview on 21 July 2005 Mr Johnston, for the first time, had it put to him that he physically intimidated Mr McDonald. It was two days after the dismissal decision was made. Mr McDonald does not make this allegation. Mr McDonald says he felt intimidated. There is a big difference between feeling intimidated and actual intimidation. Mr McDonald is not claiming actual intimidation but says he felt intimidated by Mr Johnston. Mr Schapper referred to the decision in *The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers – Western Australian Branch v BHP Billiton Iron Ore* 85 WAIG 119 at paragraph 116 where the Commission indicated a difference between verbal and physical abuse.

101 Mr Schapper submitted that in the witness box Mr McDonald is a person of whom his position and authority are important. Mr McDonald said that the conduct of Mr Johnston was disrespectful. It was very important to him that he felt that his authority was being taken away. Mr McDonald thought that he should not be questioned by Mr Johnston, especially threatened in terms of his authority over Mr Fairbrass. Mr McDonald was told by Human Resources that Mr Fairbrass was entitled to representation. It was important to him that Mr Fairbrass remained under his control. This was ignored by Mr Johnston in his view. This probably caused him to raise his voice. His voice was raised as Mr Johnston and Mr Fairbrass were leaving. In other words matters were getting out of control in his mind.

102 Mr Schapper submitted that Mr McDonald's evidence is that it would have been easy to walk away. Mr McDonald did not know that the incident would come to this. Mr McDonald felt insulted, annoyed and angry that his authority had not been accepted. This is what got to him. His sense of authority would not let him walk away. In fact Mr McDonald was still seething four hours later when he reported the matters in detail to Mr Carroll. Mr McDonald knew that it was important not to be openly angry. He wrote a statement that was about how he thought that he had been treated. Mr Schapper submitted that he accepts that Mr McDonald may believe that what he reported is true but it is not actually what happened. It is what he felt about what happened.

103 Mr Schapper submitted that the Commission should not construe the "2 on 1" comment as a threat. Mr Johnston did not view it as a threat. He was simply saying that there were two opinions as opposed to one. To identify whether something is a threat is a subjective matter.

104 Mr Schapper submitted that Mr Lucev's submission that a lie is the easiest thing to perpetuate is not the case. The evidence of Mr Johnston and Mr Fairbrass over many meetings is in fact consistent and requires more than simply saying, "No". Mr Fairbrass wrote his notes up straight away. Mr Johnston wrote his notes up shortly after the incident. Their accounts are consistent from one occasion to the next and are internally consistent.

105 Mr Schapper submitted that Mr Lucev's submissions concerning the inconsistency of Mr Johnston's evidence should not be accepted. Mr Lucev pointed to three things. Firstly, Mr McDonald was said to say "get out" rather than "leave now", however, Mr McDonald's evidence in this regard also varies and it is a natural variability for witnesses. It is clear on the evidence that Mr McDonald was telling Mr Johnston to leave, not asking him. Secondly, Mr Lucev submitted that there was no consistency as to where Mr Johnston was holding his papers. Mr Schapper submits that this is irrelevant. Finally, Mr Lucev submits that there is a lack of consistency about the width of the walkway. Mr Johnston said it was wider that it actually is. Again this is a variability of normal observation.

106 Mr Schapper says that the only one who can directly verify Mr McDonald's evidence is Mr Miles and his evidence should be wholly regarded as unreliable.

107 Mr Schapper submitted that Mr Johnston has shown to be proactive in resolving disputes. He gave an example of a problem with the treatment of supervisors on "B Shift". Mr Schapper submitted that it does not make sense that a person who sought to correct these attitudinal problems would then be the perpetrator of such problems. He did not conduct himself in that way. If Mr Johnston had conducted himself in this manner in the past then this would certainly have been put to the Commission. There was no evidence of this. The Commission must conclude that the respondent has no complaint about Mr Johnston's conduct previously except for some absenteeism notes.

108 Mr Schapper submitted under objection from Mr Lucev that the respondent's approach to Mr Johnston has been infected by their industrial strategy. Once Mr McDonald made and allegation Mr Johnston was on the path to being dismissed. Mr Schapper also submitted that the Commission should look at the role of Mallesons in the process against Mr Johnston.

109 Mr Schapper says that in the meeting of the senior managers where it was decided to terminate Mr Johnston, there was no consideration to the statements of Mr Fairbrass or Mr Johnston. The evidence of Mr Lohse is clear on this point. The two contractors, Mr Rovetto and Mr Miles, and the evidence of Mr McDonald were given prominence.

110 Mr Schapper submitted that the respondent's policy of preferring a direct relationship with their employees, as per the evidence of Mr Lohse, infected this process. This policy goes beyond recruitment. It goes to the making of agreements, pay increases and benefits provided to AWA's. Mr Schapper also referred to Exhibit A1 which was a broadcast by the Vice President following the Commission's order to stay the D&A policy. The applicant's submission is that the company wishes to eliminate unions from the workplace.

111 Mr Schapper submitted that Mr Lohse agreed that he probably should have shown the statement of the contractors to Mr Johnston before the dismissal decision was made. Mr Schapper says that procedural fairness was not there. Management was preoccupied with getting rid of Mr Johnston. He says that this is not a minor procedural fairness problem. Mr Schapper submitted that it is natural instinct for senior managers to support one another. If one overlays these two points then Mr Johnston's dismissal was virtually inevitable. Senior managers failed to take into account the fact that the evidence of Mr Fairbrass and Mr Johnston was corroborated by Mr Roe and Mr Thompson. Mr Schapper says that the Commission should give proper and balanced consideration to this material.

112 Mr Schapper, on behalf of the applicant, submitted that if Mr Johnston conducted himself as alleged then it would have been wrong. The union condemns this behaviour and Mr Johnston has actually condemned this behaviour in the past. However, even if Mr McDonald's evidence is accepted in part there has been no physical assault and each case turns on its own facts. Even if there were some strong language, and the applicant says that there was not, then the worst that can be said is that this was a brief exchange of two to three minutes. If the allegations are true then dismissal is too harsh.

113 The fact that Mr Fairbrass was taken home is of no real consequence, it was a breach of policy but the intent of the policy was adhered to. Mr Johnston did not think that Mr Fairbrass should be taken home by Mr McDonald given the circumstances. Mr McDonald felt grossly insulted and undermined according to his evidence. Mr Schapper submitted that reinstatement is clear albeit it causes some embarrassment to the respondent. There is no evidence that Mr Johnston left his workplace without authority. The dismissal is both substantively and procedurally unfair. In relation to mitigation Mr Johnston works at Newman and lives at Newman and it would be unreasonable to assume that he should move away from Newman given that the matter is on foot. He has not failed to mitigate.

114 In reply Mr Lucev says that Mr Lohse presented all the information to senior managers and they preferred the account of Mr McDonald and the contractors. Mr Lucev says that under the criminal code a threat is a statement made to gain a benefit or to cause a detriment. Mr Johnston's statements amount to that. Mr Lucev submitted that there was a concession regarding the fact that Mr Johnston ignored the authority of Mr McDonald. This is an important fact as testified by Mr Carroll. Mr Schapper says that it was not undermining other than in Mr McDonald's perception.

115 Mr Lucev advised the Commission that the distances had been measured and that the distance between the D&A waiting room to the crib room is 19.5 metres. The distance to the general workshop door is 17 metres and the distance to the large workshop at the right entry door is 22 metres. He further submitted that under the policy the supervisor cannot delegate his obligation to take the person home. The policy does not give the right for the union to be there, but says that once a person has a positive result then he may request another person of his choice to be there. He says that if there was no problem for Mr Fairbrass doing the test then there was no need for Mr Johnston to act in the way that he did. Mr Schapper says that the Award provides the source of the unions rights and the union will not be fettered by management in terms of how they are to represent their members.

Inspection

116 I inspected the waiting room, testing room and viewed the outside area from the door of the waiting room. The door of the waiting room opens out to the right as one exits. It is a self closing door and is a solid door, as is the door adjoining the waiting room and testing room. Present for the inspection were Mr Schapper, Mr Lucev, Mr Cooper and Mr Burton. Mr Lohse and Mr Ritchie waited outside the waiting room. The waiting room is situated opposite the maintenance workshop. There is a smoko room opposite, and slightly to the left of the waiting room as one looks out from the waiting room. The distance from there to the waiting room was measured at 19.5 metres. There is a ramp outside the waiting room that runs across the face of the waiting room. There is an iron hand rail that runs next to the ramp; presumably for safety as the ramp is slightly elevated. Hence as one exits the waiting room one needs to go left or right and down the ramp. The width of the ramp would be no more than two metres.

117 The two external witnesses, Mr Roe and Mr Thompson, were sitting near the crib room, which is part of the Electrical Workshop. This distance is in the range of 17 - 20 metres from where Mr Johnston, Mr Fairbrass and Mr McDonald were standing outside the waiting room. There is a reasonably loud airconditioning unit near the crib room which would have muffled or masked any sound from the exchange between Mr Johnston, Mr Fairbrass and Mr McDonald, if it were working. Mr Schapper submitted correctly in my view that, given the incident would have occurred on a winter morning, the

airconditioning unit is likely not to have been operating. The evidence uncontested of Mr Roe and Mr Thompson is also effectively that they heard and saw the exchange outside the waiting room. At the time of inspection there was no other traffic, vehicle movements or machinery operating so as to provide additional noise.

118 I asked Mr Cooper to talk in a moderately loud voice whilst in the waiting room. I stood in the testing room at that time with the door closed. I could hear his conversation and make it out by listening carefully. If I stood at the other end of the testing room, a distance of no more than 4 metres further away, I could not make out his conversation. I asked Mr Cooper also to talk loudly. If he did this I could clearly hear him through the closed door. I did not do a similar test between the waiting room and outside. The only difference in my view would be that the waiting room door has a small window in it. This may allow for more sound to travel but I do not consider the difference would be much. In other words it is hard to hear someone outside the waiting room, if someone is in that room, unless the conversation is loud.

119 I looked through the closed door of the waiting room, through the window to the outside. If I stood across the room from the window and near the corner of the room, I could only see the helmet of Mr Burton as he stood against the rail outside. This corner is the only vacant corner of the room which gives a view outside the room.

Issues and Conclusions

120 The most important issue is whether Mr Johnston acted as alleged in verbally abusing and intimidating Mr McDonald. There is no dispute that Mr Johnston entered the waiting room and had an exchange with Mr McDonald, both within and outside the waiting room. Mr Johnston then proceeded to take Mr Fairbrass home, which he concedes was a breach of the D&A policy. He conceded this point during the investigation and thought when Mr Knuckey initially telephoned him that this was the reason for his stand-down. There can be no question that somehow Mr Johnston breached the rules of the company by being absent from his worksite without permission. Mr Johnston's unchallenged evidence is that he sought and was granted permission by his supervisor to leave his workplace. He later contacted his supervisor, after the incident with Mr McDonald, and sought and was granted permission to take the rest of the day off. Mr Knuckey's evidence suggests only that Mr Johnston's supervisor was confused. The intimation may be that Mr Johnston did not properly advise his supervisor as to why he needed to be absent from the workplace, or that his supervisor did not make the right decision in granting Mr Johnston the time-off. I do not need to decide this point, however, there can be no finding on the evidence before me that somehow Mr Johnston acted inappropriately by absenting himself from his workplace. As rightly submitted by Mr Schapper, Mr Johnston had previously been warned for such behaviour, and if this had been an issue for the employer it would have been raised in Mr Johnston's dismissal. It was not raised on termination.

121 I will turn first to whether Mr Johnston can be found to have verbally abused and intimidated Mr McDonald. This is the fundamental issue. The foundation of the respondent's decision to dismiss Mr Johnston is based on an acceptance of the statements of Mr McDonald, Mr Rovetto, Mr Miles, Mr Roe and Mr Thompson. This is the evidence of Mr Lohse. At a meeting on about 19 July 2005 several senior managers considered Mr Lohse's verbal report of the disciplinary inquiry, decided that they accepted the accounts of events given by these five people, and decided to terminate Mr Johnston's services for the reasons expressed in the letter of 21 July 2005. Mr Schapper for the applicant complains that the senior managers took no or little account of the statements of Mr Johnston and Mr Fairbrass. He submits that the dismissal of Mr Johnston was a given once the allegations by Mr McDonald were made. On his submission the company supported its supervisor; the company has an agenda against award employees. Mr Lohse says that the respondent simply preferred the accounts of the five men as opposed to that of Mr Johnston and Mr Fairbrass. In this way the credibility of the evidence and a weighing of the various accounts of what happened are very important.

122 Mr McDonald says that he missed quite a lot of what Mr Johnston said as he was focussed on ensuring that he gave Mr Fairbrass every opportunity to take the D&A test. He was focussed on doing his duty. The comments which Mr McDonald says he missed were said to have been made by Mr Johnston whilst he was in the waiting room and as he proceeded to leave the waiting room. This point is not highly relevant. What is relevant is that Mr McDonald was quite clear that Mr Johnston did say certain things to him. I will deal later with the issues of behaviour, lack of candour, interference with a D&A test and undermining and interfering with a supervisor's duty. The point is that Mr McDonald may have missed some of the comments allegedly made by Mr Johnston, due to his focus on Mr Fairbrass and because he was, on his own evidence, trying to ignore Mr Johnston. However, he says that he remembers clearly that Mr Johnston made the '2 on 1' comment. Mr McDonald found this comment to be the most threatening or intimidatory comment. That is his evidence under cross-examination and I can well understand that that comment, if made and delivered about two thirds of a metre from his face, could be taken as directly threatening or intimidatory. There are also other comments whereby Mr Johnston is said to have sworn at Mr McDonald, told him to 'piss off', referred to him as a 'fucking little upstart' and a 'smartarse' or else told him not to get smart with him. These are not matters of approximate recall or having to remember specific events after some time has elapsed. These words were committed to paper shortly after the incident [Exhibit R2]. Mr McDonald went through this account with Mr Carroll to ensure that he had correctly identified what had happened. He also added to the statement; albeit the additions are mostly commentary on the incident and how he felt. The substantive allegations made by Mr McDonald as to what Mr Johnston actually said did not alter in any significant detail.

123 Mr Lucev for the respondent submitted that the Commission should be guided by the independent witnesses to the event; namely Mr Miles and Mr Rovetto. The evidence of Mr Miles is that Mr Johnston, whilst in the waiting room was domineering, aggressive and tried to put on a few standover tactics. He refers to him as being pidgeon chested, a term he says is used in the security industry to explain a person who puffs out their chest in a show of aggression. It is notable that neither Mr Rovetto nor Mr McDonald makes such a claim, although Mr McDonald in his statement [Exhibit R2] refers to Mr Johnston's actions as 'standover tactics'. Mr Miles says also that there was a "real domestic" going on in the waiting room when Mr Rovetto and he entered. Yet Mr McDonald refers to the actions of Mr Johnston as being worse in terms of intimidation when he was outside than when he was inside the room. Mr Miles says that the exchange in the room went for 10 minutes. He says that he could not see outside the room as it was dark outside. He was standing about half a metre from the back wall and 1 metre from the side wall, inside the waiting room. Yet he says he heard Mr Johnston make the "2 on 1" comment to Mr McDonald. A claim that neither Mr Rovetto nor he made in their statement to Mr Jessop. A claim that Mr Rovetto did not make during his evidence.

124 Mr Miles seems to be the only person who says that the exchange within the waiting room, during the time after Mr Rovetto and he entered was an extended exchange. He says emphatically it lasted about 10 minutes. This time frame is considerably larger than the evidence of Mr Rovetto, or anyone else present in the room. The evidence of Mr Rovetto, Mr McDonald, Mr Johnston and Mr Fairbrass differs, but would commonly suggest that the whole exchange, both inside and outside the waiting room, lasted considerably less than 10 minutes. In fact, once Mr Rovetto and Mr Miles entered the room Mr Johnston on all the evidence encouraged or told Mr Fairbrass to leave the room and they did so shortly after. This would appear to be the case also from the statement both Mr Rovetto and Mr Miles gave to Mr Jessop [Exhibit A11]. Mr Miles' approach to giving evidence is at best described as unreliable and exaggerated. His evidence should be disregarded in its totality. In saying this I

am not merely guided by his wrong estimation of the length of the discussion or his demeanour as a witness. Mr Miles has also claimed in evidence that he heard Mr Johnston make the "2 on 1" comment. For reasons which I will express, it is highly improbable that he heard such a comment.

125 Mr Rovetto was more measured in his giving of evidence. There is nothing in his demeanour in giving evidence that leads me to question his evidence. However, his evidence must be weighed carefully. There is little in his evidence which supports some of the specific and stronger allegations against Mr Johnston which were made in his earlier joint statement with Mr Miles. He says that he cannot remember many of the words of the conversation. On his own evidence the majority of the conversation must have occurred when Mr Johnston and Mr Fairbrass were out of the room. Mr McDonald stood in the doorway for about 20 seconds. He then left the room and the door must have closed because it is a heavy self-closing door. Mr Rovetto remembers Mr Johnston saying something about a stress break and about seeing someone about the matter. Mr Rovetto says that he remembers Mr Johnston saying to Mr Fairbrass that "he's a stupid something". Mr Johnston's tone was a bit loud and aggressive. He was trying to get his point across. There was a bit of language used. Mr Johnston did swear. Mr Rovetto cannot remember any of those words, but he can remember other parts of the conversation. Mr McDonald was pretty calm when he was in the doorway. He just wanted to see if Mr Fairbrass would do the test.

126 Mr Miles says that he could not see outside because it was dark. It was most probably dark outside at that time of day and year. I do not know if there was any lighting but I would presume there was some lighting around the buildings. Mr Rovetto says that he stood at the corner of the room and could see through the window in the door. The window is a relatively small window. This would have placed him in the corner of the room which I stood in at inspection. It is effectively the only corner that one could stand in to get a view outside due to the structure of the room and placement of chairs. I certainly do not perceive Mr Rovetto to be particularly tall, albeit I cannot recall his precise height. Mr Lucev says that Mr Rovetto was over 6 feet tall. I am happy to accept this. However, given his position in the room, except for the short period when Mr McDonald was standing in the doorway, he would only have been able to see someone's head if that person had been standing directly outside. He may have been able to see more during the short period when Mr McDonald held the door open. However, from that vantage point he would only have been able to see to the left as one exits the door. Mr McDonald is not a big man. On his evidence he held the door to himself; which stands to reason because the door might otherwise close. The point being that the opening in the doorway could not have been large. Mr Lucev for the respondent submitted that Mr Johnston must have been standing directly out from the door or slightly to the right. In this position it is unlikely that Mr Rovetto could have seen Mr Johnston through the doorway opening. On his own evidence as to his vantage point I consider that his view would have been too restricted.

127 I cover all of this ground because in my view the prospect of Mr Rovetto or Mr Miles having seen or heard much of the exchange between Mr Johnston, Mr McDonald and Mr Fairbrass, once the door closed, would have been minimal. The prospect of them having seen much when the door was ajar would also have been minimal. The prospect of them having heard much, when Mr Johnston and Mr Fairbrass were outside would have been restricted to the short period when the door was ajar. Mr Rovetto says this period was about 20 seconds. Mr Rovetto says that Mr Johnston was a bit loud. It is then improbable that Mr Johnston could have been heard clearly through the closed door. This is a point which Mr Johnston raised during the inquiry when interviewed on 15 July 2005 [Exhibit R4]. The exchange is as follows:

> "ML – Did anybody either in the waiting room or outside hear the discussion going on
>
> JJ – After J McD stated it was a second refusal, he came outside and the door closed behind him. I don't believe the contractors would have heard. I found out mid week that Chris Thompson (CT) had heard."

128 Mr Rovetto says that Mr Johnston said "stupid something". He does not repeat the comment in his joint statement. In [Exhibit A11] there is reference to a comment by Mr Johnston to Mr Fairbrass. Mr Johnston is said to have called Mr Mc Donald a "stupid cunt'. This is not the evidence of Mr McDonald, and the term is certainly a more abusive term than the comments which Mr McDonald reported. Mr McDonald says that he did not hear everything. This evidence seems to relate to the period they were in the room or in the process of leaving the room. From the flow of Mr Rovetto's evidence this comment in his view was made when the door was closed; although this is not entirely clear. It does lead me to doubt that the comment was actually made. Mr Rovetto and Mr Miles were interviewed together and the record of that interview was made by Mr Jessop. There is no indication from that record what Mr Rovetto and Mr Miles separately recalled. Mr Schapper submitted rightly in my view that Mr Miles at hearing was the older and apparently more dominant figure. He submitted that the statement was in effect contaminated in that it is not clear whether Mr Miles influenced the recall of Mr Rovetto, especially as Mr Rovetto's evidence does not support several of the more damning aspects of that statement concerning Mr Johnston's behaviour. In summary, Mr Rovetto's evidence must be treated with considerable caution as to it being an accurate recall of what transpired.

129 There is then the independent evidence of Mr Roe and Mr Thompson who I have not had the benefit of seeing. Mr Roe said that he heard various comments about the policy and whether Mr Fairbrass would take the test. Mr Johnston's voice seemed to be raised. Mr McDonald may have spoken in a raised voice but was not yelling. Mr McDonald appeared to be frustrated. Mr Thompson heard comments concerning the policy. He heard raised voices and heard Mr Johnston say to Mr McDonald "calm down". They did not hear any abusive or derogatory comments coming from Mr Johnston. They did not mention any physical behaviour that was aggressive or intimidatory. Their version of what they heard and saw outside the waiting room and at a distance of some 17 to 20 metres away is completely different to that of Mr Rovetto and Mr Miles, who were inside the waiting room. The common features are that Mr Fairbrass did not say much or anything, that an incident was occurring and that Mr McDonald asked whether Mr Fairbrass was refusing to test. Mr Roe and Mr Thompson exchanged a comment, "What's going on here". Hence they knew there was some disagreement.

130 It is the case that I only have the statements of Mr Roe and Mr Thompson. They did not give evidence and were not subjected to cross-examination. However, these statements were taken by the respondent during the disciplinary inquiry and display marked inconsistencies with the statements of Mr Miles and Mr Rovetto that should have been considered and explored further. I note that the statements were taken separately, which in my view is undoubtedly a better practise than that adopted for Mr Miles and Mr Rovetto. It provides for a better free recall of what that person saw and heard and is uncomplicated by a compared or shared version of events. Any inconsistencies can then be further explored. In saying this I am not applying to an employer some more forensic or elaborate requirement than commonsense might dictate. The employer is not required to engage in some extensive investigative process in forming a view as to what transpired. However, they have to satisfy themselves that they have the necessary information to make a reasoned judgement. Having received that information they must weigh or reconcile it to form a view. It is the respondent who asked the questions, took the statements and then seemingly did not seek to reconcile why there were key differences in the statements of the independent witnesses. There is nothing to suggest that Mr Roe and Mr Thompson were not in a direct line of sight to witness the events that occurred outside the waiting room. From the evidence and inspection there is every reason to find that Mr Rovetto and Mr Miles were not able to see much if anything of what occurred outside the room. There is every reason to also find that they could not have heard much of what was said outside the room when the door was closed. There is no evidence to suggest that Mr Roe and

Mr Thompson could not properly hear the exchange outside the room. There is nothing to suggest that the senior managers in forming their views discounted the statements of Mr Roe and Mr Thompson for any reason. Mr Lohse says that these statements were considered. For the reasons expressed I do not consider that Mr Rovetto and Mr Miles were in a similar position of advantage, compared to Mr Roe and Mr Thompson, to see and hear what was said outside the room.

131 Mr Lucev made submissions as to the comparative weight I should attach to the statements of Mr Roe and Mr Thompson as opposed to the evidence of Mr Rovetto and Mr Miles. He submits that the applicant did not choose to call Mr Roe and Mr Thompson to give evidence. This is true; neither party did. The applicant bears the onus of proof. However, the respondent has collected and relied on this information in making the decision. I am entitled to do likewise. For the reasons given above I would treat with considerable caution the evidence of Mr Rovetto and disregard in its entirety the evidence of Mr Miles. I accept uncontested the statements of Mr Roe and Mr Thompson.

132 The submission on behalf of the respondent is that Mr Miles could have heard the "2 on 1" comment if Mr Johnston had spoken loud enough. This matter was not in Mr Miles' statement and so not before the respondent when the decision was made. My observation from inspection is that Mr Johnston would have to have been loud to have been heard inside the room. There is no evidence that he was loud particularly at that point. At that point he is said to have leaned into Mr McDonald to within two thirds of a metre. In fact the bulk of the evidence from the independent witnesses is that Mr Johnston's voice was raised but that he did not yell. Mr McDonald does say that Mr Johnston was loud at times during the exchange. There is nothing to suggest that Mr Johnston yelled out the alleged "2 on 1" comment. If he had yelled out any of the comments of abuse whilst outside, and the evidence of Mr McDonald is that these were mostly expressed when Mr Johnston was outside, then Mr Roe and Mr Thompson would seemingly have been in a position to hear those words of abuse and to recall them shortly thereafter. They did not.

133 It is important in my view to consider also the movements and positioning of Mr McDonald vis a vis Mr Johnston. Some of this evidence is mentioned in the statements which were taken, though not all. Mr Roe and Mr Thompson both say that Mr McDonald moved away from Mr Johnston and Mr Fairbrass a few metres, maybe 2 to 3 metres. Mr Roe says that Mr McDonald appeared to make a call on his mobile. Mr Thompson cannot recall if this happened. He says that Mr McDonald moved away and then came back. It would appear to be a natural action to move away from a conversation, particularly a conversation involving raised voices, to make a call on a mobile. Mr McDonald's evidence is that he moved away from the door 2 or 3 paces and moved east towards the shift change. He then moved back towards the door and sought to make a call on his mobile. Mr McDonald says in his statement, "I went (my emphasis) to make a phone call and Johnny responded by saying "two on one mate, you've got no fucking chance". In answer to questions from the Commission Mr McDonald says that he took that to mean that the word of one man would not be taken over the word of two men.

134 Mr Lucev concedes that Mr McDonald moved away from Mr Johnston to make the call. If that is the case then Mr McDonald would have been no less than four metres away from Mr Miles at that point in time, and more likely six metres. There was a solid closed door between them and Mr McDonald could not have been visible to Mr Miles. Mr McDonald's evidence is that while he was making the call on his mobile, while he had the mobile to his ear (this is the demonstration he gave to the Commission during hearing), and before he had connected the call Mr Johnston came within two thirds of a metre from him, leant towards him and said, "Jack, it's 2 on 1; you've got no chance." It is of no surprise that this comment, if made and said in a quiet or even normal speaking voice, would probably not have been heard by Mr Roe and Mr Thompson who were 17 to 20 metres away. However, importantly neither Mr Roe nor Mr Thompson says that Mr Johnston approached Mr McDonald. Given the evidence it would seem that if Mr McDonald had walked away to make a call and Mr Johnston had leaned to within two thirds of a metre from his face to make the comment, then Mr Johnston would have had to follow Mr McDonald at that point. Mr Roe and Mr Thompson witnessed and recalled the movements of Mr McDonald. They knew there was an incident in progress. They did not say that Mr Johnston followed Mr McDonald or leaned into him. If there was such an exchange in a disputed encounter then this would seemingly have been memorable. Even if this is not right, and Mr McDonald was at the door of the waiting room when Mr Johnston allegedly approached him and spoke those words, Mr Johnston would still have had to step forward to do this. I consider it more probable that two persons independently witnessing a raised conversation would have witnessed and recalled one person moving closer to the other person during the course of the events; events which Mr Roe queried "what's going on here".

135 In assessing this evidence two other issues have also passed my mind. Firstly, if Mr Miles did not hear the statement then how could it be that he came to mention it in his evidence. For the reasons expressed I do not consider that it is probable that Mr Miles could have heard Mr Johnston express those words on 18 June 2005. I can only speculate how he then came to know those words and it is not appropriate that I do so speculate. Secondly, why would Mr Johnston say those words? The only explanation is that given by Mr McDonald to the Commission which is that the words meant that the word of two persons would be believed against the word of one person. This seems plausible on first blush because Mr McDonald's evidence is that he was in the process of making a call on his mobile which would seemingly be to report what had happened. An instant reaction might be to dissuade him from doing so, and this is perhaps how Mr McDonald perceived the exchange. However, in the context of the whole incident no one could seriously believe that Mr McDonald would not have reported to management what happened on that morning; least of all Mr Johnston. As is common ground Mr Johnston is an experienced union delegate. He knew that Mr Fairbrass was to be tested that morning. Mr McDonald rang Mr Fairbrass the previous day and told him to get a lift to work in accordance with the policy. Mr Johnston gave him that lift and told Mr Fairbrass to organise a meeting about the incident on 13 June 2005. Hence it was known that management (I use that term in a very general sense) wanted Mr Fairbrass to be tested under the policy. It is not common ground whether the test was justified. Mr Johnston would surely have known that if Mr Fairbrass did not test then questions would have been asked as to why. The failure to do a test could not have been silenced, nor could have Mr Johnston's role in that. Under this logic why would Mr Johnston then try to do so unless he had simply lost control of himself? It is more likely in my view that, consistent with the evidence of Mr Johnston and Mr Fairbrass, it was in fact Mr McDonald who lost control of the situation and himself. The submission on behalf of the applicant is that in fact it was Mr McDonald who lost control. In effect he lost control of the task he was responsible for undertaking; namely to get Mr Fairbrass tested and hence his frustration grew and clouded his perception of events.

136 It is relevant that Mr Thompson recalls Mr Johnston saying to Mr McDonald something like "calm down". He is the only person to provide this recall. This would seem to be at odds with the evidence of Mr McDonald that he was in fact calm. It also speaks against, but of course is not contradictory to, the evidence of Mr Knuckey and Mr Carroll who say they have never known Mr McDonald to raise his voice. It would seem that during the exchange between Mr Johnston and Mr McDonald , both men had raised voices.

137 I do not seek to analyse the evidence of Mr Miles further for the reasons I have expressed. As I have said, I treat with considerable caution the evidence of Mr Rovetto. In the face of his evidence, it is the case that the evidence of Mr Rovetto provides support to the evidence of Mr McDonald and is against the evidence of Mr Johnston, in that he says Mr Johnston's

tone was a bit aggressive, that he was trying to get his point across, that there was a bit of language used (although he is not specific about this except to say Mr Johnston used foul words), that Mr McDonald was calm and that Mr Johnston did most of the talking. However, Mr Rovetto says also that Mr Johnston said he wanted to see someone about the matter. Mr McDonald does not say this was mentioned. Mr Johnston says that he asked Mr McDonald to get hold of someone to handle the issue. This point, albeit the recall is not in the same terms, seems to support Mr Johnston's version. Mr Rovetto says that Mr Johnston said something about a stress break to Mr McDonald. This was not mentioned by either Mr Johnston or Mr McDonald. Mr Rovetto says that Mr Johnston made a comment "stupid something". Mr Johnston denies he said "stupid cunt" or "stupid prick". Mr McDonald in cross-examination says that Mr Johnston said he was a "stupid idiot" or something like that, but this was not mentioned by him in his statement [Exhibit R2].

138 The evidence of Mr Rovetto supports that of Mr McDonald in that he says Mr McDonald was calm and focussed on whether Mr Fairbrass would do the test, and Mr Johnston did most of the talking. The evidence of Mr Johnston and Mr Fairbrass is at odds with this evidence. The evidence of Mr Thompson is that Mr Johnston told Mr McDonald to calm down. No other witness gave this evidence. However, the evidence of Mr Johnston, Mr Fairbrass, Mr Roe and Mr Thompson states or suggests that Mr McDonald was not in fact calm.

139 Mr McDonald says in evidence that Mr Johnston's physical demeanour was that of standover; Mr Johnston had folders in his arms and he was pointing in Mr McDonald's direction and leaning over Mr McDonald. This occurred in the room and it would seem prior to Mr Rovetto and Mr Miles entering the room. Mr McDonald says he felt insignificant and intimidated. Mr McDonald says that Mr Johnston was loud and aggressive during the exchange. I must say that I consider it curious that Mr McDonald after such an exchange which was fairly brief, perhaps one minute but no more than two, was then calm and focussed. He sat in his chair for the whole of this exchange and only arose from his chair after Mr Johnston went to depart the room. I would have thought that a more natural reaction to such behaviour by Mr Johnston would have been to rise from his chair, or to be agitated, angry or raise his voice in reply to counteract the aggressive behaviour. Yet Mr McDonald was seated and calm as Mr Rovetto entered the room, saw a brief exchange, then saw Mr Fairbrass and Mr Johnston leave, then saw Mr McDonald calmly get out of his chair, move across the room then move to the doorway and proceed to address Mr Fairbrass in a calm manner. This is of course all possible but it raises the seeds of doubt in my mind as to whether Mr McDonald, if Mr Johnston acted as alleged, would have remained calm and seated; then continued to act calm throughout the exchange.

140 I note also that Mr McDonald's evidence is not that his feelings of intimidation arose later; he had those feelings at the time. Mr Carroll says that when he saw Mr McDonald more than 3 hours later he looked humiliated and stressed. Hence such feelings had not subsided. Mr Johnston, on the evidence of Mr McDonald [see Exhibit R2] got very aggressive once outside. Mr Johnston at that stage was in less physical proximity. He told Mr McDonald to 'piss off' and Mr McDonald was then 'totally stunned' and felt the most intimidated when, on his evidence, Mr Johnston leant towards him and said the '2 on 1' comment. In all of this exchange Mr McDonald did not seek to physically distance himself from the exchange, except as conceded by the respondent when he walked away to make a call on his mobile. It is of course quite possible that Mr McDonald simply kept himself contained, got on with his duty and shielded his emotions. It is also quite possible that he did not; that he raised his voice and was not calm. It is also quite possible that these feelings of intimidation were not actually present.

141 The evidence of Mr Roe and Mr Thompson is that comments were made about a "breach of policy" or "policy being followed" or "you don't know what policy is about". This evidence is not matched by the evidence of Mr McDonald. This evidence supports the evidence of Mr Johnston who says he made such a comment whilst outside [see Exhibit R1]. He also says, as does Mr Fairbrass, that whilst outside Mr Fairbrass said to Mr McDonald that his confidentiality had been breached. The evidence of Mr Johnston and Mr Fairbrass is at odds on whether Mr Johnston stated "I'm sick of this shit". The evidence of Mr Johnston and Mr Fairbrass is otherwise reasonably consistent with each other and with their earlier statements to the disciplinary inquiry. The evidence of Mr McDonald is completely at odds with the evidence of Mr Johnston and Mr Fairbrass. The evidence of Mr McDonald is largely consistent with his statement with only minor exception. These differences as to what was actually said may be said to be the differences expected of normal recall of events by different people. That of course is with the exception as to the stark difference in evidence about what was said, between Mr McDonald versus Mr Fairbrass and Mr Johnston. I have focussed in weighing the evidence, on the statements of the four persons who say they witnessed the exchange. I have also focussed on the alleged words that are clearly abusive or confrontational, as these in my mind are the words that would most readily, at least in approximate terms, stick in the mind of witnesses. Having weighed the evidence of these four persons I can not conceive that Mr Johnston said to Mr McDonald the "2 on 1" comment which I find to be the most intimidatory comment. I am not convinced that he told Mr McDonald to "piss off" once let alone twice, or that he called him a "fucking little upstart", or passed the comment to Mr Fairbrass that Mr McDonald was a "stupid cunt" or "stupid prick". I would add that I consider Mr Johnston's denial of the use of such language to be directed to those words, not to be a rejection of the use of foul language, on occasion, more generally. This is clear also from the notes of Mr McKean [Exhibit A6] on the day of 21 July 2005 when Mr Johnston refuted the comment by Mr Lohse that the contractors had said he said 'stupid cunt'.

142 There is nothing in the demeanour of Mr McDonald, Mr Johnston or Mr Fairbrass at hearing nor in response and approach to questions, nor in consistency of response at hearing that leads me to doubt their evidence. They were all direct in their responses and seemingly answered to the best of their recall. The same is true of Mr Knuckey, Mr Carroll, Mr McKean and Mr Lohse. It is not the case that Mr Johnston or Mr Fairbrass approached their evidence in a manner which was simply denial. I would add though that it is clear from Mr McDonald's evidence both at first hearing and then on listening again to the tapes, that he is a man who takes his duties seriously. This is of course to be commended. My point is that it is clear that he took offence, in fact considerable offence, to these duties being interfered with by Mr Johnston. This point is very clear from the hearing and from weighing Mr McDonald's evidence as a whole. In essence, he explained many times that he had a job to do, he had rehearsed what he had to do the day before, he wanted to get his instructions clear, and he was focussed on giving Mr Fairbrass every opportunity to do the test. He says Mr Johnston put pressure on him by interfering with his duties and he says Mr Johnston made him feel insignificant and humiliated as a result. Mr McDonald says that Mr Johnston displayed "a total disregard to my position as supervisor", a position which he takes "very seriously". His duties and accountabilities were "clearly taken away from me by Johnny Johnston". In Mr McDonald's version of events it is not simply the alleged abuse and intimidation, it is also the undermining of his responsibilities as a supervisor which upset Mr McDonald.

143 I emphasise that my comments should not be read as detracting from the seriousness of ensuring that a supervisor can properly perform his/her duties and responsibilities. The comments are to do with the actual situation on 18 June 2005 and deciphering what was guiding Mr McDonald at the time and what was his manner. For the reasons expressed, I doubt that he was calm during this exchange and I consider he took considerable offence at Mr Johnston's intervention in his task of making sure Mr Fairbrass had every opportunity to do the test, and if he did not then advising him that it could be taken to be a second positive. The submission made by Mr Schapper as to what personally guided Mr McDonald on that day, namely the importance to him of his position as a supervisor, is an accurate perception in my view. The submission made by Mr Lucev that Mr Johnston and

Mr Fairbrass have simply travelled the path of lying, by denying every adverse point, does not ring true and cannot be sustained on the evidence in my view.

144 This must ultimately lead to a conclusion that I prefer the evidence of Mr Johnston and Mr Fairbrass to that of Mr McDonald. It leads to the conclusion that Mr Johnston did not verbally abuse nor verbally or physically intimidate Mr McDonald on 18 June 2005. It is in no way the case that the word of two men is to be preferred over the word of one. It is the case that having weighed the evidence of all concerned I come to a different conclusion to that of the respondent. I also come to the conclusion that if these matters had been properly assessed by the respondent at the time they should have doubted the statement of Mr Rovetto and Mr Miles. They should have put this statement to Mr Johnston. They should have considered more fully why the statements of Mr Roe and Mr Thompson leant little support to the statement of Mr McDonald.

145 I would add that I have considered the evidence of Mr Knuckey and Mr Carroll who say that Mr McDonald is both helpful and does not raise his voice. There is no evidence that Mr Johnston has a habit of raising his voice. The evidence is that Mr Johnston actively participated in and was helpful in resolving a dispute about abuse of supervisors on 'B' shift. The references for Mr Johnston do not take me further. Two references are fairly dated and the other relates to Mr Johnston's actions in the community. Whichever way I look at the incident on 18 June 2005; whether I favour Mr Johnston's version or Mr McDonald's, it would seem that the actions of that person was out of character on that occasion. There can be no finding that the behaviour as alleged of Mr Johnston, if true and I do not so find, was consistent with some earlier pattern of behaviour. There can be no finding that Mr McDonald's actions in getting upset and making such allegations could be said to be consistent with some earlier pattern of behaviour. For the reasons above I do not consider that Mr Johnston received a fair go. The question raised in *Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385 is whether there was a fair go all round and whether the employer abused its right to terminate.

146 In terms of procedural fairness there are three aspects to the stand-down and investigation that I have difficulty with. The first is that Mr Johnston was entitled to know the substance of the allegation against him on 18 June 2005. It is not clear to me from the evidence and Exhibit R1 whether the writing on the back of that exhibit arose from Mr Johnston's discussion with Mr Knuckey. If it did then this first concern is irrelevant. Mr Knuckey says that he spoke to Mr Johnston for approximately half an hour on that day when he telephoned Mr Johnston to advise him that he was being stood down. Mr Knuckey says that he told Mr Johnston that he was to be stood down due to his behaviour on that day. Mr Johnston says that he thought he was being stood down for taking Mr Fairbrass offsite. Mr Knuckey's concern at that time would seem to be that Mr Johnston had interfered with the test, abused a supervisor and had not been cleared properly to be absent from his workplace. The fact that Mr Johnston had taken Mr Fairbrass offsite contrary to the respondent's policy may have been sufficient to stand down Mr Johnston pending a further investigation of the matter. It is the case however, that Mr Johnston should have been apprised of the fact that Mr Knuckey had been told by Mr McDonald that he had been abused and intimidated by Mr Johnston. The full details of the allegations could have waited until further investigation but Mr Johnston in my view was entitled to know that he faced the serious allegation of abuse and intimidation of a supervisor at the time of his stand-down.

147 The second component of unfairness relates to the fact, on Mr Lohse's evidence, that the statements of the two contractors, Mr Miles and Mr Rovetto were not put to Mr Johnston until 21 July 2005. This clearly upset Mr Johnston who at that time described it as "all bullshit", and shortly after left the meeting. Those statements were put to Mr Johnston after the meeting of senior managers when they decided to dismiss Mr Johnston. Mr Lohse says it would have been better to put this material to Mr Johnston before the decision was taken. The submission on behalf of the respondent is that all matters of substance were put to Mr Johnston during the inquiry. Mr Johnston had an opportunity to put his version of events, and the allegations and substance have not changed. This is true, but the difficulty I have is that Mr Johnston did not have an opportunity to put a view as to what he thought of the contractors' views. He said on 15 July 2005 in response to a neutral question that he did not think the contractors could have heard anything when the door was closed. The statement of Mr Miles and Mr Rovetto was taken by the respondent to be corroborative of the statement by Mr McDonald. The obvious point is that two independent persons seemingly supported key features of Mr McDonald's version of events. For the reasons I have expressed this is in fact not the case. The statement was in my view persuasive in the eyes of the respondent. In a procedural sense if Mr Johnston had been given the opportunity to comment he may have had something relevant to say about the statement of the two contractors. His comments could then have been weighed into the consideration as to whether his services should have been terminated. This does not put the respondent in the position of having to conduct some lengthy inquiry or to go back and forth between individuals to check or verify facts or reconcile versions of events. It does however mean that Mr Johnston would have been better placed to present his case and that the senior managers would have been better placed to weigh all the aspects and versions of events. The third component of the procedure which I query is why was Mr McDonald not interviewed?

148 Having said that there were three aspects of procedural fairness with which I have difficulty, the second being of more significance than the other two, it is not the case that if the allegations against Mr Johnston can be said to be true then the procedural elements would have themselves made the dismissal unfair (*Shire of Esperance –v- Peter Maxwell Mouritz* 71 WAIG 891).

149 Mr McDonald in his evidence says that Mr Johnston referred to having been in the Commission all week in relation to the earlier incident of 13 June 2005 concerning Mr Fairbrass. Mr Johnston rejects this and says that he tried to show Mr McDonald a letter dated 8 June 2005 from Mallesons solicitors. This letter is not before me in these proceedings. However, I am separately dealing with matter no. C32 of 2005 concerning the implementation of the new D&A policy. That file contains a letter of 8 June 2005 which is a report back, as directed by the Commission, from Mallesons as to the progress with discussions between the company and unions over certain issues in the new policy. One such issue, which was at that stage unresolved in discussions, was whether union or OH&S representatives could be present at 'for cause' testing. The application in respect of Mr Fairbrass (matter no. C112 of 2005) was not lodged in the Commission until 29 June 2005 and came on for conference on 30 June 2005. Hence the first time the Commission became aware of any incident with Mr Fairbrass was 11 days after the 18 June 2005 incident. Mr McDonald mentioned in cross-examination that the matter which Mr Johnston was in the Commission for could not have been Mr Fairbrass' incident; that is so. Mr Johnston made it clear during the inquiry that he was referring to matter no. C32 of 2005, not Mr Fairbrass' matter. He said that he tried to show Mr McDonald a letter of 8 June 2005 from lawyers for the respondent. This letter is directly relevant to union representation of 'for cause' testing. He did not say he had been in the Commission on Mr Fairbrass' matter. Mr Johnston's evidence is more logical and probable on this point. Remembering of course that what happened on 18 June 2005 did not happen just in isolation. There was the incident of 13 June 2005. The prelude to 18 June 2005 also included Mr McDonald meeting with and taking some instruction from Human Resources as to how to conduct the second test. If Mr Johnston was in fact just trying it on with Mr McDonald, he would have been easily found out.

150 I would deal briefly with the allegation that Mr Johnston lacked candour during the investigation. That allegation is correct if the other allegations against him are correct. If the allegations are not correct then that allegation cannot be sustained. For the reasons expressed I do not find that Mr Johnston abused or intimidated Mr McDonald. Therefore a denial by him of these matters cannot constitute a lack of candour. As to whether Mr Johnston interfered with the duties of a supervisor then clearly under the policy he did so by removing Mr Fairbrass from site. This point is conceded and was conceded during the inquiry. The policy states in respect of the supervisor escorting someone from site following a positive test that:

> "• These duties shall not be delegated so as to minimise employee contact with people and optimise confidentiality."

151 Mr Johnston overrode Mr McDonald's wishes and duty in that regard, because Mr Fairbrass did not think he could have been held responsible for his actions if he had got into a vehicle with Mr McDonald. This suggests that Mr Fairbrass was angered by the events which had just transpired. Mr Johnston says Mr Fairbrass was stressed. This does not mean that Mr Fairbrass should have been taken off site. The issue should have been resolved on site by referring the matter to higher supervision. Mr Johnston attempted to do this. This is notwithstanding Mr McDonald's rejection of the suggestion to get someone else involved. Mr Johnston should have remained on site and persisted with this course of action.

152 The other issue is whether Mr Johnston was entitled to represent Mr Fairbrass at the test. The allegation of interference by Mr Johnston with a D&A test flows from this point. Mr Johnston made it clear that his attempt to represent Mr Fairbrass arose because Mr Brewer was absent and Mr Brewer had earlier instigated the Issue Resolution Process with Mr Fairbrass' supervisor over the incident on 13 June 2005. The Award states:

> "23. - ISSUE RESOLUTION PROCESS
>
> (1) An employee or employees who wish to raise a matter shall first discuss it with his/her/their direct supervisor as soon as is practicable.
>
> (2) If those discussions do not result in a settlement the question, dispute or difficulty shall be referred to the next level of supervision. Discussions at this level will take place as soon as practicable.
>
> (3) The terms of any agreed settlement shall be jointly recorded.
>
> (4) Any settlement resolution reached which is contrary to the terms of this award shall have no effect unless and until that conflict is resolved to allow for it.
>
> (5) Throughout all stages of the procedure all relevant facts shall be clearly identified and recorded.
>
> (6) Each employee shall be entitled to union representation and assistance at each stage of this procedure. Any shop steward representing or assisting an employee shall be entitled to do so without loss of pay. Provided that if the union representative concerned is not a shop steward or official of the union of which the employee is or is eligible to be a member, then that union representative must be authorised in writing by that union to assist the employee.
>
> (7) If a matter affects more than one employee, subject to the requirements of sub clause (6), the employees concerned have the right to have the matter dealt with, and be represented and assisted by shop stewards and the union in accordance with the procedure in this clause.
>
> (8) Any question, dispute or difficulty not settled may be referred to the Commission provided that the persons involved in the question, dispute or difficulty have conferred amongst themselves and made reasonable attempts to resolve the question, dispute or difficulties before referring the matter to the Commission."

153 There is also the question as to whether Mr McDonald was to be present at the test. There is no requirement in the policy for anyone to be present at the test. In fact it is only the person testing and the person tested. The policy is silent about the presence of someone in the waiting room but it simply states that a person may be escorted to the waiting room, and that the supervisor is advised if it is a positive test and then he/she takes action.

154 Mr Schapper for the applicant submitted that he would not accept that the company is able to define when and how the union could exercise its right to represent its members. Mr Schapper submitted also that the incident on 18 June 2005 must be seen in the context of the incident on 13 June 2005. I accept this submission. I accept that Mr Johnston sought to represent a member within the terms of the Issue Resolution Process. The fact that the incident got out of hand is not, in my view, the fault of Mr Johnston and he cannot be blamed or accused of interfering with a D&A test or a supervisor's responsibility.

155 Separate to the issue of removing Mr Fairbrass from site, there is the issue of Mr Johnston's role in Mr Fairbrass leaving the waiting room. Clearly Mr Johnston had a prominent role in this. Mr Johnston says in effect that Mr McDonald's immediate actions, when he entered the room to represent Mr Fairbrass, were blunt or hostile. The matter escalated from there. Mr Johnston departed when he says Mr Fairbrass' confidentiality of testing had been broken. I am not clear as to how this is the case. However, in the context of the denial by Mr McDonald of Mr Johnston's right to represent Mr Fairbrass, and Mr McDonald's refusal to obtain Mr Cooper's assistance (or some else), I do not consider that Mr Johnston should be penalised for those actions.

156 There is an issue as to whether Mr Johnston should receive any penalty for breaching the policy and removing Mr Fairbrass from site. The applicant's submissions are that the intent of the policy had been complied with, namely a duty of care to the employee. The policy does not allow the supervisor to delegate this task. The applicant also submits in effect that the events of 18 June 2005 should not have arisen; I am not convinced by that submission. Whether Mr Fairbrass should or should not have been present for a test on 18 June 2005 is not the issue before me in this application. The applicant submits and the evidence for the applicant is that Mr Fairbrass was going to take the test, but for the events which transpired. I have found that Mr Johnston during these events did not act as alleged. I have found that Mr Johnston should not have taken Mr Fairbrass offsite. Mr Johnston did ask Mr McDonald to get someone to sort out the problem. I consider that weighing those circumstances Mr Johnston should be counselled for taking Mr Fairbrass off-site. He knows he did the wrong thing. A counselling note should be placed on his file. This is not a warning note or letter.

157 For the reasons expressed, and having regard to the principles in *Undercliffe*, I find that Mr Johnston's dismissal was unfair.

Reinstatement

158 The respondent submits that reinstatement is impracticable as trust and confidence in the employment relationship cannot be re-established. Mr McDonald says that it would be damaging to supervision. Mr Carroll conveyed a similar message and added that it was hard enough now to get personnel to be supervisors; to reinstate Mr Johnston would make the task considerably harder and that the supervisor's job was already very hard. Mr Knuckey says that the difficulty with Mr Johnston is that he has a tendency to break the rules to suit himself. I am not clear what this means and nothing specific was put to Mr Johnston other than the events of 18 June 2005. The other problem he expressed about Mr Johnston is that he can be inconsistent, albeit this was not connected to whether Mr Johnston could be re-instated. The respondent further submitted that to reinstate given Mr Johnston's prominence as a union delegate would send the wrong messages to the workforce.

159 The problem I have with these submissions is that they are understandably based on the belief that Mr Johnston transgressed in all the ways alleged. Hence such behaviour should not be tolerated and could not be rewarded with re-instatement. The applicant's submission in effect does not contest this, if the allegations can be found to be well grounded. However, for the reasons expressed Mr Johnston did not behave as alleged; except that he concedes he wrongly took Mr Fairbrass off-site. Mr Johnston did not lie, he did not abuse, he did not intimidate. He did not interfere with the responsibilities of a supervisor. The incident must be seen in its context.

160 It would then be wrong to find that Mr Johnston was dismissed unfairly but to find that reinstatement is impracticable. It would also be wrong not to reinstate without loss. It cannot be said, "How can Mr Johnston be reinstated when he abused, intimidated and threatened a supervisor, then lied to an inquiry". The judgement must be how can Mr Johnston not be reinstated when he did not do these things? Mr Johnston should never have lost his employment and it would be unjust not to return him to that employment and the position he would have otherwise been in but for the dismissal. There is no other reason in terms of too great an effluxion of time or the behaviour of Mr Johnston since his employment to lead to a conclusion that reinstatement is impracticable. The complaint that it is a slap in the face to supervision cannot be sustained. The complaint that Mr Johnston breaks the rules and the inference being he would continue to do so or alternatively be emboldened to do so by this decision cannot also be sustained. This is a limited incident which occurred. Mr Johnston as stated has a much longer history of dealing with conflict in a not inappropriate manner and if he were to break the rules in the future his actions would most probably be judged at that time.

161 For all the reasons expressed I find that reinstatement of Mr Johnston to his previous position is practicable and I would order that he be reinstated to the job from which he was dismissed. I would order that he be reinstated without loss of entitlement or service and that his reinstatement be effected no later than 7 days from the date of the order. It may be that Mr Johnston can be reinstated prior to 7 days from the date of the order but I would have thought that 7 days is more than adequate time to ensure that arrangements are made so that he returns to the roster that he would otherwise have worked on. The rosters as I understand them to be 4 days on and 4 days off.

2005 WAIRC 02737

DISPUTE REGARDING TERMINATION OF EMPLOYMENT OF A UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIALUNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	BHP BILLITON IRON ORE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	MONDAY, 3 OCTOBER 2005
FILE NO	CR 130 OF 2005
CITATION NO.	2005 WAIRC 02737

Result	Dismissal unfair, member reinstated without loss
Representation	
Applicant	Mr D H Schapper of Counsel on behalf of the applicant
Respondent	Mr A D Lucev of Counsel and with him Ms K O'Rourke on behalf of the respondent

Order

HAVING heard Mr D Schapper of counsel on behalf of the applicant union and Mr A Lucev of counsel and with him Ms K O'Rourke 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's member, Mr John Johnston was unfairly dismissed by the respondent on 21 July 2005;
2. DECLARES that reinstatement of the applicant's member, Mr John Johnston, is practicable;
3. ORDERS that within 7 days of the date of this order, the Respondent shall reinstate the Applicant's member, Mr John Johnston, to his previous position;
4. ORDERS that Mr John Johnston's service with the Respondent shall be deemed not to have been broken by reason of the termination of his employment;
5. ORDERS that Mr John Johnston be paid for the period between his dismissal on 21 July 2005 and the date of his reinstatement as if he had been at work during that period;
6. ORDERS that the respondent counsel Mr John Johnston, and place on his personal file a counselling note for his breach of the BHP Iron Ore – Drug and Alcohol Programme, by taking Mr Fairbrass off site on 18 June 2005.

(Sgd.) S WOOD,
[L.S.] Commissioner.

CORRECTIONS—

2005 WAIRC 02797

ADVANCE DRILLING & SAWING / CFMEUW INDUSTRIAL AGREEMENT 2002-2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	COTTON ROCKET PTY LTD T/A ADVANCE DRILLING & SAWING
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	TUESDAY, 11 OCTOBER 2005
FILE NO.	AG 87 OF 2005
CITATION NO.	2005 WAIRC 02797

Result Correction Order

Correction Order

WHEREAS on the 16th August 2005 an Order in this matter was deposited in the office of the Registrar; and

WHEREAS the said order had an error in the paragraph related to the registering of Advance Drilling & Sawing/CFMEUW Industrial Agreement 2002-2005; and

WHEREAS the Order should have read:

THAT the agreement made between the two parties lodged in the Commission on 14th June 2005 entitled Advance Drilling & Sawing/CFMEUW Industrial Agreement 2002-2005 and replaces AG 60 of 2003 be registered as an Industrial Agreement

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

THAT the Order made on the 16th August 2005 should be corrected to read:

> THAT the agreement made between the two parties lodged in the Commission on the 14th June 2005 entitled Advance Drilling & Sawing/CFMEUW Industrial Agreement 2002-2005 and replaces AG 60 of 2003 be registered as an Industrial Agreement

[L.S.]

(Sgd.) J F GREGOR,
Senior Commissioner.

2005 WAIRC 02709

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KELVIN GADEKE
	APPLICANT
	-v-
	ALLISON PTY LTD T/AS SEAWEST MARINE SERVICES
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 28 SEPTEMBER 2005
FILE NO.	APPL 1289 OF 2004
CITATION NO.	2005 WAIRC 02709

Result *Correction Order*

Correction Order

WHEREAS on the 16th August 2005 an Order in this matter was deposited in the Office of the Registrar; and

WHEREAS the said Order had an error in the Respondent name referring to Seawest Marine Services; and

WHEREAS the Respondent name should have read Allison Pty Ltd T/As Seawest Marine Services *ab initio*

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

> THAT the Order made on the 16th August 2005 should be corrected to show the Respondent name as Allison Pty Ltd T/As Seawest Marine Services.

[L.S.]

(Sgd.) J F GREGOR,
Senior Commissioner.

2005 WAIRC 02798

WESTRAC (SERVICE OPERATIONS) ENTERPRISE AGREEMENT 2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTRAC PTY LTD
	APPLICANT
	-v-
	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS-WESTERN AUSTRALIAN BRANCH AND OTHERS
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	TUESDAY, 11 OCTOBER 2005
FILE NO.	AG 121 OF 2005
CITATION NO.	2005 WAIRC 02798

Result Correction Order

Correction Order

WHEREAS on the 16th August 2005 an Order in this matter was deposited in the office of the Registrar; and

WHEREAS the said order had an error in the paragraph related to the registering of Wes Trac (Service Operations) Enterprise Agreement 2005; and

WHEREAS the Order should have read:

THAT the agreement made between the two parties lodged in the Commission on 14th June 2005 entitled Wes Trac (Service Operations) Enterprise Agreement 2005 and replaces AG 237 of 2003 be registered as an Industrial Agreement.

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

THAT the Order made on the 16th August 2005 should be corrected to read:

> THAT the agreement made between the two parties lodged in the Commission on the 14th June 2005 entitled Wes Trac (Service Operations) Enterprise Agreement 2005 and replaces AG 237 of 2003 be registered as an Industrial Agreement.

(Sgd.) J F GREGOR,
[L.S.] Senior Commissioner.

PROCEDURAL DIRECTIONS AND ORDERS—

2005 WAIRC 02612

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR ANDREW HERZFELD
	APPLICANT
	-v-
	ANTHONY & SONS PTY LTD T/A OCEANIC CRUISES
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	THURSDAY, 15 SEPTEMBER 2005
FILE NO/S	APPL 206 OF 2005
CITATION NO.	2005 WAIRC 02612

Result Order

Order

WHEREAS Andrew Herzfeld of 940 Rycroft Road Darlington, the Applicant herein has made application pursuant to s33(1)(d) of the *Industrial Relations Act, 1979* (the Act) to give deposition of his evidence at his residence due to illness; and

WHEREAS solicitors behalf of the Applicant have submitted medical evidence to support the application; and

WHEREAS the Commission is satisfied ex parte that the interests of justice dictate that the Applicant be allowed to give his deposition of his evidence at the place of his residence; and

WHEREAS the Commission has decided that it is just and convenient so to do and intends to make an order for the examination upon oath of the Applicant by Deputy Registrar Judith Wickham being an Officer of this Commission pursuant to s93 of the Act; and

WHEREAS the Commission will order that the examination take place at the residence of the Applicant herein at a time to be fixed by Deputy Registrar Wickham; and

WHEREAS Counsel for the parties may attend such deposition but will not be empowered to examine or cross examine the Applicant; and

WHEREAS when the deposition is completed Deputy Registrar Wickham shall file the deposition before the Commission; and

WHEREAS the matter will then be listed to allow Counsel for the parties to make submissions as to any terms upon which the Commission should admit the deposition into evidence.

NOW therefore pursuant to the powers vested in it under s33(1)(d) of the *Industrial Relations Act, 1979* the Commission hereby orders that:

1. The Applicant be allowed to give his deposition of his evidence at the place of his residence; and
2. Deputy Registrar Judith Wickham being an Officer of this Commission pursuant to s93 of the Act obtain a deposition by the examination upon oath of the Applicant herein; and
3. The examination take place at the residence of the Applicant herein at a time and date to be fixed by Deputy Registrar Wickham; and
4. Counsel for the parties may attend such deposition but will not be empowered to examine or cross examine the Applicant; and
5. When the deposition is completed Deputy Registrar Wickham shall file the deposition before the Commission
6. The matter be then listed to allow Counsel for the parties to make submissions as to any terms upon which the Commission should admit the deposition into evidence.

(Sgd.) J F GREGOR,
[L.S.] Senior Commissioner.

2005 WAIRC 02632

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HENRY MICHAEL DOYLE	**APPLICANT**
	-v-	
	ANTHONY & SONS PTY LTD T/A OCEANIC CRUISES	**RESPONDENT**
CORAM	SENIOR COMMISSIONER J F GREGOR	
DATE	FRIDAY, 16 SEPTEMBER 2005	
FILE NO	APPL 207 OF 2005	
CITATION NO.	2005 WAIRC 02632	

Result Discovery of documents granted ex parte

Order

WHEREAS on the 15th September 2005 this matter proceeded to hearing; and

WHEREAS during the course of the hearing Mr G. Stubbs, Counsel for the Applicant, moved the Commission pursuant to s27 of the *Industrial Relations Act, 1979* for orders that the Respondent produce rosters worked by the Applicant from 1999 until the period covered by rosters before the Commission in Exhibit C1. The Applicant also seeks pay records of the Respondent relating to the Applicant for the same period; and

WHEREAS the Commission heard from Mr T. Caspersz, Counsel on behalf of the Respondent, as to the Respondent's position on the issue of such orders; and

WHEREAS while Mr Caspersz did not question the need for the production of the documents in terms of the production of information for the Commission upon which to make a decision, he did question the efficacy of the request; and

WHEREAS the Commission has decided that orders for production of the documents should be made; and

NOW THEREFORE pursuant to the powers vested in it by s27 of the *Industrial Relations Act, 1979* the Commission hereby orders;

THAT the Respondent produce to the Applicant the rosters worked by the Applicant from 1999 until the period covered by the rosters produced to the Commission in Exhibit C1 together with wage records of the Applicant for the same period.

(Sgd.) J F GREGOR,
[L.S.] Senior Commissioner.

2005 WAIRC 02638

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SYLVIE TOURIGNY
	APPLICANT
	-v-
	CANARVON MEDICAL SERVICES ABORIGINAL CORPORATION
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	MONDAY, 19 SEPTEMBER 2005
FILE NO/S	APPL 217 OF 2005
CITATION NO.	2005 WAIRC 02638

Result	Order for further and better particulars and discovery of documents
Representation	
Applicant	Mr T Carmady (of counsel)
Respondent	Mr J Brits (of counsel)

Order

Having heard Mr T Carmady, of counsel on behalf of the Applicant and Mr J Brits, of counsel on behalf of the Respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that –

(1) The Respondent file in the Commission and serve on the Applicant within 28 days of 13 September 2005 particulars of –

(a) conduct of the Applicant said to justify termination of her employment, in particular, acts of misconduct, inappropriate behaviour and mismanagement; and

(b) breaches of contract relied upon by the Respondent in making the decision to dismiss;

(2) The parties shall exchange lists of discoverable documents within 28 days of 13 September 2005.

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

2005 WAIRC 02699

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICK BAKER
	APPLICANT
	-v-
	TIM DALY-AWU BRANCH SECRETARY
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	FRIDAY, 23 SEPTEMBER 2005
FILE NO/S	APPL 614 OF 2005
CITATION NO.	2005 WAIRC 02699

Result	Respondent's name substituted
Representation	
Applicant	Mr M Q Baker
Respondent	Mr J Fiocco (of counsel)

Order

Having heard Mr Baker on his own behalf and Mr Fiocco, 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 name of the Respondent be deleted and that be substituted therefor the name, The Australian Workers' Union, West Australian Branch, Industrial Union of Workers.

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

2005 WAIRC 02679

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GILLIAN ENDERSBY
	APPLICANT
	-v-
	CUDDLES CHILD CARE CENTRE
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	THURSDAY, 22 SEPTEMBER 2005
FILE NO/S	APPL 638 OF 2005
CITATION NO.	2005 WAIRC 02679

Result	Respondent's name to be substituted
Representation	
Applicant	In person
Respondent	Mr D J Pugh (as agent)

Order

Having heard the Applicant and Mr D J Pugh, as agent on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the name of the Respondent be deleted and that be substituted therefor the name, Paul Orohoe trading as Cuddles Child Care Centre Kalamunda.

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

2005 WAIRC 01934

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PB FOODS LTD
	APPLICANT
	-v-
	TRANSPORT WORKERS UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 29 JUNE 2005
FILE NO.	C 113 OF 2005
CITATION NO.	2005 WAIRC 01934

Result	Recommendation issued
Representation	
Applicant	Ms B Gavranich
Respondent	Mr N Hodgson

Recommendation

WHEREAS on 29 June 2005 the applicant applied to the Commission for an urgent compulsory conference pursuant to s 44 of the Industrial Relations Act 1979 ("the Act");

AND WHEREAS on 29 June 2005 the Commission convened a compulsory conference between the parties pursuant to s 44 of the Act;

AND WHEREAS at the conference the Commission was informed by the applicant that the parties were in dispute in relation to a proposal by the applicant that its employee drivers and owner drivers be based at a location in Spearwood as opposed to the present location at the applicant's Balcatta site. This proposal is known as "Project Direct;"

AND WHEREAS the applicant informed the Commission that at a meeting of employee drivers and owner drivers at 4.30am this morning concerns expressed by the drivers in relation to Project Direct has led to a stoppage of work with a report back meeting to be held at 4.30am Thursday 30 June 2005. The stoppage of work is causing significant disruption to the applicant's distribution services and the applicant is incurring substantial losses as a consequence of the industrial action;

AND WHEREAS the respondent informed the Commission that the employees concerned have inadequate information as to Project Direct and feel aggrieved as to additional burdens imposed on them as a result of, in particular, travelling times with a change in location;

AND WHEREAS as a result of discussions between the applicant and the respondent before the Commission and as a consequence of suggestions and recommendations by the Commission the parties have undertaken to enter into a process of negotiations surrounding the implementation of Project Direct and in relation thereto, the applicant has indicated a preparedness to be flexible in relation to the implementation date subject to the discussions between the parties;

AND WHEREAS the Commission, in an endeavour to assist the parties in resolving the industrial dispute, outlined a procedure by which the matters in dispute may be resolved and advised the parties it would issue a recommendation accordingly;

NOW THEREFORE the Commission having regard for the interests of the parties directly involved, the public interest and to prevent the further deterioration of industrial relations in respect of the matters in question, in accordance with the provisions of the Act hereby recommends:

(1) THAT the issue of the implementation of Project Direct be the subject forthwith of negotiations in good faith between the applicant and the respondent in accordance with the relevant enterprise agreement between the parties and involving the appropriate State level officials of the respondent and representatives of the applicant's management.

(2) THAT as a part of those negotiations, the parties divulge all relevant information and commit to a program of meetings over a period not exceeding 21 days from today.

(3) THAT as soon as practicable after 4.30am Thursday 30 June 2005 employees of the applicant, members of or eligible to be members of the respondent presently engaging in industrial action cease that industrial action and resume work in accordance with their contracts of service and refrain from commencing or taking part in further industrial action in respect of this matter.

(4) THAT the application be adjourned to a report back conference to be held on a date after 21 days from today as fixed by the Commission and thereafter any matters remaining in dispute be the subject of further conciliation and/or arbitration by the Commission.

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

2005 WAIRC 02313

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS AND THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANTS
	-v-
	TIWEST PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 11 AUGUST 2005
FILE NO/S	C 116 OF 2005
CITATION NO.	2005 WAIRC 02313

Result	Order issued
Representation	
Applicant	Mr G Wood
Respondent	Mr T Davies of counsel

Order

HAVING heard Mr G Wood on behalf of the applicants and Mr T Davies 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 divided.

(2) THAT application C 116A of 2005 be that part of application C 116 of 2005 which seeks the assistance of the Commission in respect of the matter involving Mr Simon White.

(3) THAT application C 116B of 2005 be that part of application C 116 of 2005 which seeks the assistance of the Commission in respect of the matter involving Mr Peter Clarke.

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

2005 WAIRC 02648

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS & OTHER
	APPLICANTS
	-v-
	TIWEST PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 19 SEPTEMBER 2005
FILE NO.	CRA 116 OF 2005
CITATION NO.	2005 WAIRC 02648

Result	Recommendation issued
Representation	
Applicant	Mr G Wood
Respondent	Mr T Davies of counsel

Recommendation

The present application has been brought by the applicants against the respondent concerning the issuance by the respondent of a first warning letter to Mr Simon White, a member of the Construction, Forestry, Mining and Energy Union of Workers ("the Union"). The warning letter issued by the respondent relates to alleged inappropriate use by Mr White of the respondent's email system to canvass donations for the recent tsunami relief effort.

A compulsory conference pursuant to s 44 of the Industrial Relations Act 1979 ("the Act") was convened by the Commission in an endeavour to resolve the dispute. Conciliation was unavailing and the matter was referred for hearing and determination pursuant to s 44(9) of the Act. The referral is in the following terms:

1. *The applicant is in dispute with the respondent over the disciplinary action taken in respect of its member, Mr Simon White.*
2. *The applicant says Mr White has been inappropriately disciplined in respect of use of the respondent's email system to canvass donations for the tsunami relief effort on 1 and 3 January 2005.*
3. *The applicant was issued with a first written warning by the respondent in respect of his conduct on 7 January 2005.*
4. *The applicant says that the disciplinary action taken by the respondent was in all the circumstances inappropriate and harsh and is seeking an order from the Commission that the written warning be removed from its member's file.*
5. *The respondent wholly denies the applicant's claim and opposes the orders sought.*

Subsequent to the referral of the dispute for arbitration, by agreement, the parties have requested the Commission to issue a recommendation in order to resolve the present dispute, with both parties agreeing to abide by any such recommendation. Accordingly, the matter was the subject of a further s 44 compulsory conference, where the parties were provided with an opportunity to make oral submissions in support of their respective positions, supplementary to those contained in written submissions filed by them.

The Commission has carefully considered the written and oral submissions and supporting documents. The essential complaint of the respondent through its counsel Mr Davies is that Mr White sent at least two emails using the respondent's internet email system in contravention of the respondent's internet email policy. The written warning issued to Mr White on 7 January 2005, complained that his actions in this regard involved him in conduct described as distributing "an inappropriate non-business related e-mail to all Tiwest employees."

Whilst it was accepted by the respondent that limited personal use of its email system is permitted, the thrust of its complaint was that the emails were sent to all users of its system, including those outside of Australia. Additionally, the context and tone of the communication was said to be inappropriate. In order to understand the context, the two offending emails are reproduced as follows:

"---Original Message---

From: *Simon White*

Sent: *Sunday, 2 January 2005 10:28 PM*

To: *Tony Martin*

Cc: *All Tiwest Users*

Subject*: TSUNAMIS APPEAL*

Hi Tony, I was wondering if Tiwest Joint Venture was donating to the appeal, I see Woodside have donated $250,000, Western Mining $100,000, Rio Tinto $150,000, Bluescope Steel $200,000 etc. Bill Gates has donated 3 million and will match contributions made by its employees. I would be happy to rattle the can if you would match whatever I raise. What do ya reckon, Its been a good year 107,000 tonnes. Show em the corporate world cares. Simon White"

*"**From:** Simon White*

Sent: *Friday, 7 January 2005 11:44 AM*

To: *Tony Martin*

Cc: *All Tiwest Users*

Subject*: RE: TSUNAMIS APPEAL*

Tony, maybe we could have a raffle for $20.00 a ticket to win 2 weeks annual leave, no restriction on how many tickets people buy. This is something people can not even buy if they wanted to, obviously the leave would have to be taken at an appropriate time to suit the business but maybe this would be an effective way to raise money

I'm sure a lot of people have already donated but this could be a win win for everybody especially the tsunami victims, just think you could win it, what do ya reckon?

Simon White"

The respondent submitted that whilst it applauded the concern expressed by Mr White in relation to the tsunami victims, it considered the manner and method of his communications in this regard as being a breach of the relevant policies and inappropriate.

On behalf of Mr White, the Union submitted that at all material times, Mr White's intentions were honourable and he at no stage sought to unduly pressure or embarrass the respondent. In fact, the Union submitted that far from seeking to unduly pressure or denigrate the respondent, Mr White sought to portray the respondent in a favourable light, by being actively involved in the tsunami relief effort. Additionally, Mr Wood submitted that there were other examples of employees of the respondent using the email system for personal purposes, including raising monies for charitable purposes, which had brought no sanction by the respondent. It was also submitted that if the respondent now wished to significantly change its email usage policy, then that should be brought to the intention of all employees. The Union maintained that the written warning should be removed from Mr White's personal file, because not to do so would be harsh and unfair in all of the circumstances.

Mr Davies acknowledged in his written submissions that Mr White had apologised if his actions had caused any unintended consequences.

It is undoubtedly the case, as counsel for the respondent submitted, that matters of discipline involve the exercise of a managerial prerogative, which should not be lightly interfered with by the Commission. However, that does not mean, in cases where the exercise of that prerogative amounts to unfairness, that the Commission will not grant relief. That is what is alleged in the present case by the Union.

From the content of the emails, it is clear, and it was accepted by the respondent, that the motivation of Mr White in relation to tsunami relief was commendable. It is the case however, that the language and tone of Mr White's communications may have left the wrong impression with some recipients of the emails. The fact that all users of the system were copied in to these communications only heightens the potential for such misinterpretation in my view.

I have also taken into account however, the fact that other employees of the respondent have used the email system for personal purposes, and on one occasion, for a purpose seeking to in effect, promote a consumer boycott of petrol products produced by certain oil companies. One may also question whether this is an appropriate use of the respondent's email system. In this particular case, these communications were also copied widely, although not to "All Tiwest Users", as was the case with Mr White's emails.

In my view having considered these issues carefully, whilst Mr White was in error in using the respondent's email system in the manner in which he did, and he should have communicated his proposals directly with the relevant manager Mr Martin, I consider the issuance of a written warning, with attendant possible disciplinary consequences flowing from it, to be harsh in all of the circumstances. This is particularly so when one compares his communications with for example, the communication from other employees that I have referred to above.

It is relevant to observe that disciplinary policy to be imposed by an employer should be generally consistent. Consistency in treatment however does not require equality in treatment: *Capral Aluminium Ltd v Sae* (1997) 75 IR 65. In the present circumstances in my view, Mr White should not suffer the consequences of his conduct by way of formal discipline. The Commission is able to reasonably assume that there would not now be a repeat of Mr White's usage of the respondent's internal email system in this way.

The Commission therefore recommends that the written warning issued to Mr White by the respondent dated 7 January 2005 be removed from his personal file.

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

2005 WAIRC 02777

DISPUTE REGARDING ENTITLEMENT TO LONG SERVICE LEAVE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED **APPLICANT**
	-v-
	A/ DIRECTOR GENERAL, HEALTH DEPARTMENT OF WESTERN AUSTRALIA **RESPONDENT**
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER P E SCOTT
DATE	MONDAY, 10 OCTOBER 2005
FILE NO	PSAC 42 OF 2005
CITATION NO.	2005 WAIRC 02777

Result Recommendation issued

Recommendation

WHEREAS this is an application to the Public Service Arbitrator made pursuant to Section 44 of the Industrial Relations Act 1979; and

WHEREAS on the 6th day of October 2005 the Arbitrator convened a conference for the purpose of conciliating between the parties; and

WHEREAS having heard from the parties as to the merits of the matter and impediments to its resolution, the Arbitrator made a recommendation to the parties for the resolution of the dispute.

NOW THEREFORE, pursuant to the powers set out in the Industrial Relations Act 1979, the Public Service Arbitrator hereby recommends:

1. THAT for the purposes of Ms Martha Teshome's accrual of long service leave entitlements that the period 26th February 2004 to the 4th May 2004 not count as service but not constitute a break in service.
2. THAT this recommendation or the respondent's acceptance of it shall not constitute a precedent for any other matter.

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

ENTERPRISE BARGAINING AGREEMENT—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Carey Baptist College Inc (Enterprise Bargaining) Agreement 2004 AG 179/2005	6/09/2005	Independent Education Union of Western Australia, Union of Employees, Carey Baptist College Inc	(Not applicable)	COMMISSIONER J L HARRISON	Agreement Registered
Carrington's (WA) Pty Ltd trading as Carringtons Traffic Service New Metro Rail Southern Suburbs Rail Project, Structural Project Agreement 2005 AG 93/2005	23/09/2005	The Construction, Forestry, Mining and Energy Union of Workers	Carrington's (WA) Pty Ltd trading as Carringtons Traffic Service	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Department for Planning and Infrastructure Agency Specific Agreement 2005 PSAAG 23/2005	22/09/2005	Civil Service Association of Western Australia Incorporated, Director General, Department for Planning and Infrastructure	(Not applicable)	COMMISSIONER S J KENNER	Agreement Registered
Geraldton Meat Export Pty Ltd AMIEU Processing Agreement (2005) AG 208/2005	23/09/2005	Geraldton Meat Export Pty Ltd	West Australian Branch, Australasian Meat Industry Employees' Union, Industrial Union of Workers, Perth	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Hale School Non-Teaching Staff (Enterprise Bargaining) Agreement 2005 AG 180/2005	6/09/2005	Independent Education Union of Western Australia, Union of Employees, Liquor, Hospitality and Miscellaneous Union, Western Australian Branch, The Construction, Forestry, Mining and Energy Union of Workers	(Not applicable)	COMMISSIONER J L HARRISON	Agreement Registered
Imaging The South Enterprise Agreement 2005 AG 181/2005	23/09/2005	Health Services Union of Western Australia (Union of Workers)	Imaging The South	COMMISSIONER S J KENNER	Agreement Registered
Improved Concrete Pumping Services (WA) Pty Ltd New Metro Rail Southern Suburbs Rail Project, Structural Project Agreement 2005 AG 97/2005	23/09/2005	The Construction, Forestry, Mining and Energy Union of Workers	Improved Concrete Pumping Services (WA) Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Paraplegic - Quadriplegic Association of Western Australia (Inc) Supported Employees' Wages Agreement 2005 AG 178/2005	7/09/2005	Paraplegic-Quadriplegic Association of Western Australia (Inc)	The Disabled Workers' Union of Western Australia	COMMISSIONER J L HARRISON	Agreement Registered
Parent Controlled Christian Education Association Northern Suburbs Inc Schools' Non-Teaching Employees (Enterprise Bargaining) Agreement 2004 AG 222/2005	22/09/2005	Independent Education Union of Western Australia, Union of Employees, Liquor, Hospitality and Miscellaneous Union, Western Australian Branch, Parent Controlled Christian Education Association Northern	(Not applicable)	COMMISSIONER J L HARRISON	Agreement Registered
PB Foods Limited Operations Enterprise Agreement 2005 AG 125/2005	19/09/2005	Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	PB Foods Ltd, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Div., The Automotive, Food, Metals, Engineering	COMMISSIONER S J KENNER	Agreement Registered
PB Foods Ltd Balcatta Security Officers Enterprise Agreement 2005 AG 184/2005	19/09/2005	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	PB Foods Ltd	COMMISSIONER S J KENNER	Agreement Registered
PB Foods Ltd Brunswick (Enterprise Bargaining) Agreement 2005 AG 185/2005	19/09/2005	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	PB Foods Limited	COMMISSIONER S J KENNER	Agreement Registered
Perth Montessori School (Enterprise Bargaining) Agreement 2004 AG 182/2005	6/09/2005	Independent Education Union of Western Australia, Union of Employees, Liquor, Hospitality and Miscellaneous Union, Western Australian Branch, Perth Montessori School	(Not applicable)	COMMISSIONER J L HARRISON	Agreement Registered
Reoright Pty Ltd New Metro Rail Southern Suburbs Rail Project, Structural Project Agreement 2005 AG 94/2005	23/09/2005	The Construction, Forestry, Mining and Energy Union of Workers	Reoright Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Rottnest Island Authority Agency Specific Agreement 2005 PSAAG 24/2005	06/10/2005	Civil Service Association of Western Australia Incorporated & Others	(Not applicable)	COMMISSIONER S J KENNER	Agreement Registered
Structural Systems (Western) Pty Ltd New Metro Rail Southern Suburbs Rail Project, Structural Project Agreement 2005 AG 95/2005	23/09/2005	The Construction, Forestry, Mining and Energy Union of Workers	Structural Systems (Western) Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Support Services & Enrolled Nurses (Mercy Hospital & LHMU) Union Recognition & Job Security Agreement 2005 AG 126/2005	27/09/2005	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Mercy Hospital Mount Lawley	COMMISSIONER J L HARRISON	Agreement Registered
Tranby College (Enterprise Bargaining) Agreement 2005 AG 219/2005	22/09/2005	Independent Education Union of Western Australia, Union of Employees, Liquor, Hospitality and Miscellaneous Union, Western Australian Branch, Tranby College	(Not applicable)	COMMISSIONER J L HARRISON	Agreement Registered
Transport Workers' (Eastern Goldfields Transport Board) Agreement 2005 AG 230/2005	11/10/2005	Eastern Goldfields Transport Board	Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	COMMISSIONER J H SMITH	Agreement Registered
WAMMCO International (Katanning) AMIEU Processing Agreement (2005) AG 123/2005	16/09/2005	WAMMCO	West Australian Branch, Australasian Meat Industry Employees' Union, Industrial Union of Workers, Perth	COMMISSIONER J H SMITH	Agreement Registered

NOTICES—Cancellation of Awards/Agreements/ Respondents—under Section 47—

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

TAKE NOTICE that the Commission acting pursuant to Section 47 of the Industrial Relations Act, 1979, intends, by order, to cancel the following award, namely the:

Railway Officers' Award 1985,

on the grounds that there is no longer any person employed under the provisions of that award.

Any person who has sufficient interest in the matter may, within 30 days of the publication of this notice, object to the Commission making such order.

Please quote File No. Admin. 51/2004 on all correspondence.

Dated 26 October 2005.

J. SPURLING,
Registrar.

PUBLIC SERVICE APPEAL BOARD—

2005 WAIRC 00409

AGAINST THE DECISION TO DISMISS MADE ON 3/11/2003
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES KAY DALLIMORE

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
COMMISSIONER J L HARRISON – CHAIRPERSON
MR B HEWSON – BOARD MEMBER
MS C BREUDER – BOARD MEMBER

DATE OF ORDER THURSDAY, 24 FEBRUARY 2005

FILE NO/S PSAB 11 OF 2003

CITATION NO. 2005 WAIRC 00409

Catchwords	Public Service Appeal Board – Appeal against decision to terminate employment – Principles applied – Compliance with statutory scheme – Procedural fairness considered– Appeal upheld – *Industrial Relations Act 1979* (WA) s 80I *Public Sector Management Act 1994* (WA) s 80, s 81, s 83, and s 86
Result	Appeal against dismissal upheld
Representation	
Appellant	Mr M Amati (as agent)
Respondent	Mr D Newman

Reasons for Decision

1 These are the unanimous reasons for decision of the Public Service Appeal Board ("the Board").

2 On 21 November 2003 Kay Dallimore ("the appellant") lodged an appeal to the Board against the decision to terminate her made on 3 November 2003 by the Director General Department of Education and Training ("the respondent"). The schedule to the application is as follows:

"**GROUNDS:**

1. The Applicant seeks an Appeal to the Public Service Appeal Board pursuant to Section 80I(1)(e) and Section 26 of the Industrial Relations Act 1979.
2. The dismissal of the Applicant on the (sic) 3 November 2003 from her position as a School Registrar was harsh, oppressive and unfair.
3. That the Respondent failed to comply with the Public Sector Management Act 1994, Part 5 Division 3.
4. The Respondent is unable to rely on reasons stated in the termination letter to be factually correct.
5. That even if the discipline (sic) deficiencies are found, the penalty of dismissal is too severe.

REMEDY SOUGHT:

1. An Order quashing the decision to dismiss the Applicant and the reinstatement of the Applicant with no loss of salary, continuity or entitlements.
2. Any other Orders the Appeal Board considers necessary to resolve this matter."

3 A statement of agreed facts was filed by the parties in relation to this matter and reads as follows:

"1. For the material time Ms Dallimore was employed by the Respondent at Queens Park Primary School as a Ministerial Officer under the terms of the Education Department Ministerial Officers Salary Allowance and Conditions Award 1987.
2. The appellant is a Government Officer within the meaning of that definition as per section 80C of the Industrial Relations Act 1979, and the Respondent is an Employing authority for the purposes of the same section.
3. The Appellant is employed by the Respondent pursuant to section 235(c) of the *School Education Act 1999* (the "SE Act") in the class of "other officers".
4. Part 5 of the *Public Sector Management Act 1994* – Substandard performance and disciplinary matters, is imported into the SE Act against "other officers", via section 239 of the SE Act.
5. The position occupied by the Appellant is that of level 3 School Registrar. The Appellant has held a position of School Registrar for some 23 years.
6. The Appellant has been the School Registrar at Queens Park Primary School for approximately four years.
7. The Principal, Ms Paula Gray, has been the Appellant's line manager for approximately 18 months.
8. One of the functions required of the appellant was to receive, open, sort and distribute the school's mail.
9. The Principal, (sic) permitted the Appellant to open all mail directed to her either by name or position, other than mail marked Private and Confidential.
10. Following discussions with Ms Margaret Stinton, 7 March 2003 and 10 March 2003, the Principal, (sic) agreed to allow Ms Stinton an opportunity to gain work experience in the office of the school and that this could commence the following day, Tuesday 11 March 2003.
11. Due to a long standing flexible hours arrangement with the past Principal, and which Ms Gray permitted to continue, the Appellant was away from the school on Friday 7 March 2003.
12. The Appellant was also absent on approved leave on Monday 10 March 2003.
13. A note was left in the Appellant's office advising of the work experience situation commencing on Tuesday 11 March 2003.
14. Ms Stinton attended the school on the morning of Tuesday 11 March 2004 (sic) and leaving (sic) at lunchtime.
15. Ms Stinton reported to Ms Gray that her experience at the school was uncomfortable and unpleasant.
16. Ms Stinton did write to the Principal regarding her experience at the school in a letter dated Friday 14 March 2003.
17. The letter (envelope) is Australia Post date stamped Monday 17 March 2003.
18. The Appellant did receive the letter from Ms Stinton on or around 19 March 2003.
19. The Appellant did open the letter from Ms Stinton in accordance with her duties.
20. The Appellant did read aloud parts of the letter relating to herself to at least 2 other members of staff in the office at the time."

(Exhibit 1)

4 The parties agreed on a chronology of events in relation to this matter as follows:

"1. On 10 March 2003 arrangements were made for a work experience person at the Queens Park Primary School.

2. On 11 March 2003 the work experience person arrives at the school as arranged.

3. On 19 March 2003 a letter arrives at the school from the work experience person.

4. On 19 March 2003 the alleged letter is found shredded in the school's shredder.

5. By letter dated 7 April 2003, the Director General, Mr Paul Albert advised the applicant in writing that:

(a) she may have acted in a manner that could constitute a suspected breach of discipline pursuant to s.80 of the *Public Sector Management Act 1994* ("Act"). Specifically it was alleged that:

(i) On 19 March 2003 the Applicant intercepted a letter personally addressed to the Principal of Queens Park Primary School, from a person known as Mrs Stinton, and read parts of the letter out aloud to staff members.

(ii) On 19 March 2003, the Applicant intercepted and shredded a letter personally addressed to the Principal of Queens Park Primary School, from a person known as Mrs Stinton.

(b) the above alleged conduct, if proven, amounted to breaches of sections of the *School Education Act 1999, Public Sector Management Act 1994*, principles of the Western Australian *Public Sector Code of Ethics* and the Department's *Staff Conduct Policy*.

(c) in accordance with s.81(1) of the Act, the Applicant was given ten working days to furnish a response to the above allegations.

6. By letter dated 28 April 2003, the Applicant furnished a response to the allegations.

7. By letter dated 20 May 2003, the Applicant was advised that following careful consideration of the Applicant's response, a formal investigation would be initiated pursuant to s.81(2)(a) of the Act.

8. By letter dated 20 May 2003, an investigator Mr Peter Burgess was appointed to investigate and prepare a report as to whether or not the employee was guilty of a breach of discipline.

9. By letter dated 20 June 2003, the investigator submitted his report.

10. By letter dated 2 July 2003, the respondent advised that:

(a) following careful consideration of the investigator's report and the Applicant's response to the allegations, the Applicant was charged with a serious breach of discipline against allegation (i) as per section 83(1)(b); and a minor breach with a proposed penalty of reprimand and fine not exceeding 1 days pay against allegation (ii) pursuant to s.83(1)(a) of the Act.

(b) pursuant to s.86(1)(c) the Applicant was required to state in writing within ten working days whether she admits or denies the charges.

(c) pursuant to s.85(a) the Applicant was notified that an objection to a minor breach of discipline would constitute a charge of committing a breach of discipline.

11. By letter dated 14 July 2003, the Applicant furnished a response to the charges by objecting to charge (i) and proposed penalty; and denying charge (ii).

12. By letter dated 22 July 2003, the Respondent advised the Applicant of the implications of lodging an objection under s.85 of the Act and to give the Applicant the opportunity to either formally accept or deny the breaches of discipline.

13. By letter dated 28 July 2003, the Applicant objected to the breaches of discipline.

14. By letter dated 8 August 2003, the Respondent pursuant to s86 advised that:

(a) pursuant to s.83(1)(b) the Applicant would be charged with committing serious breaches of discipline, being:

- On Wednesday, 19 March 2003, at Queens Park Primary School, you opened a letter personally addressed to Ms Paula Gray, Principal, Queens Park Primary School, from a person known as Mrs Stinton, and read parts of the letter out aloud to staff members.
- On Wednesday, 19 March 2003, at Queens Park Primary School, you intercepted and shredded a letter personally addressed to Ms Paula Gray, Principal, Queens Park Primary School, from a person known as Mrs Stinton.

(c) pursuant to s.86(1)(c) the Applicant was given ten working days to furnish a response to the charges.

15. By letter dated 18 August 2003, the Applicant furnished a response denying the charges.

16. By letter dated 28 August 2003, Joe Baskwell of Insurance Support Services was appointed to hold a disciplinary inquiry pursuant to s.86(4) of the Act.

17. By letter dated 28 August 2003, the Applicant was advised that following the denial of the truth of the charges a disciplinary inquiry would be held pursuant to s.86(4) of the Act. The charges were:

- On Wednesday, 19 March 2003, at Queens Park Primary School, you opened a letter personally addressed to Ms Paula Gray, Principal, Queens Park Primary School, from a person known as Mrs Stinton, and read parts of the letter out aloud to staff members.
- On Wednesday, 19 March 2003 at Queens Park Primary School, you opened and shredded a letter personally addressed to Ms Paula Gray, Principal, Queens Park Primary School, from a person known as Mrs Stinton.

18. On 7 October 2003 the inquirer submitted his report and recommendations arising from the inquiry.

19. By letter dated 3 November 2003, the Applicant was advised that following the conclusion of the disciplinary inquiry the (sic) employment would be terminated pursuant to s86(9)(b)(ii) and 86(3)(b)(vi) of the Act.

20. On 21 November 2003 the Appellant made application to the Public Service Appeal Board."

(Exhibit 2)

Background

5 In November 2003 the Civil Service Association of Western Australia Incorporated ("the CSA") sought an urgent conference pursuant to s44 of the *Industrial Relations Act 1979* ("the Act") for the purpose of conciliating the appellant's employment with the respondent (PSAC 60 of 2003) and an interim reinstatement order was sought and granted pending the hearing and determination of a number of issues in dispute between the parties in relation to the appellant's termination (see *Civil Service Association of Western Australia Incorporated v Director General Department of Education and Training* [2004] 84 WAIG 564).

Appellant's Evidence

6 The appellant stated that as she was not given any notice that Ms Margaret Stinton would commence work experience at Queens Park Primary School ("the School") she told Ms Gray on the morning of 11 March 2003 that there was no work for Ms Stinton to undertake. Ms Gray responded by saying Ms Stinton could answer the telephone. The appellant told Ms Gray that she was annoyed that she had arranged for Ms Stinton to undertake work experience without consulting her and even though Ms Gray stated that she would later discuss this issue with the appellant, this did not occur. As the appellant had no time to instruct Ms Stinton and had a busy workload she allocated her telephone duties.

7 The appellant stated that during the morning of 11 March 2003 an incident happened between her and Ms Stinton involving a student enrolment form which caused tension between the appellant and Ms Stinton. The appellant stated that the necessary paperwork had been completed to enrol a student and she put the enrolment form next to the computer. The appellant understood that Ms Gray then gave Ms Stinton a number of jobs to complete including filing this form. The appellant stated that when she told Ms Stinton not to file the form as the student's information had not been put into the computer Ms Stinton disagreed with the appellant's instruction and insisted on doing what Ms Gray had told her to do.

8 The appellant stated that she did not believe she was rude to Ms Stinton when she attended the School. The appellant stated that she had an intense work load at the time, she had been away from the School for two working days and as a result she did not have the time to train Ms Stinton. The appellant stated that if she had known beforehand that Ms Stinton would be undertaking work experience she would have prepared work for her. The appellant claimed that the only indication that she had that Ms Stinton was attending the School was via a note left for her on the morning of 11 March 2003 by the School Officer.

9 The appellant stated that Ms Stinton was cool, business like and bristly and had a strange demeanour given that she was being assisted to undertake work experience.

10 The appellant stated that when opening the mail on 19 March 2003 she opened and read the letter from Ms Stinton, which was addressed to Ms Gray. The appellant conceded that she then read aloud those comments in the letter which related to herself to three colleagues who were in the office at the time. The contents of this letter are as follows (formal parts omitted):

> "I am writing to thank you very much for giving me the opportunity to attend your school to obtain some work experience.
>
> As I explained in my phone call to you, I have been out of the workforce for some 14 years while raising my family and I am looking to return to part time clerical work. I am currently studying at TAFE and I felt as though some practical office experience after such a long absence from the workforce would be most beneficial.
>
> I am therefore reluctant to inform you that I will not be returning to your school in this capacity. Your Registrar, who I know as Kay, made it very difficult for me and also quite clear that I was nothing short of an inconvenience to her. I am very disappointed that she felt it necessary to treat me in this way as I only hoped to be of help rather than a hindrance to her.
>
> I would like to add though that the other members of your staff whom I met both during the morning at reception and while on my morning tea break were all very supportive and welcoming.
>
> I thank you once again for your kindness and for giving me this opportunity."
>
> (Exhibit A1.1)

11 The appellant stated that she then tore the letter's envelope in half and put it in the bin which was her usual practice. The appellant stated that she was upset at the time that Ms Stinton had formed a wrong opinion of her and objected to comments in the letter about her.

12 The appellant stated that she was authorised to open all of the School's mail, including mail addressed to the Principal as long as she did not open any personal mail addressed to staff or any letters marked private and confidential. The appellant stated that the envelope used by Ms Stinton did not have private and confidential written on it (Exhibit R2). As Ms Gray expected her to open and read correspondence sent to the School the appellant believed that she had not breached any of the School's policies when she opened and read the letter from Ms Stinton.

13 The appellant claimed that at the time she read parts of Ms Stinton's letter to her colleagues on the morning of 19 March 2003 she did not mention Ms Stinton's name.

14 The appellant stated that after reading Ms Stinton's letter she wanted to respond to Ms Stinton about her complaint. She therefore took a photocopy of Ms Stinton's letter. The appellant testified that as she sorts the mail in order of importance for Ms Gray, she put the original of Ms Stinton's letter in a bundle of junk mail for review by Ms Gray on the basis that she did not believe the letter to be important to the running of the School. The appellant stated that when she put the letter in Ms Gray's junk mail pile she was not intentionally trying to hide the letter from Ms Gray. The appellant then put the photocopy of Ms Stinton's letter into her handbag so that she could compose a response to Ms Stinton that evening. As the appellant was upset about Ms Stinton's letter she contacted her partner Mr Harry Smith and after discussing the matter with him she decided that it was not a good idea to write to Ms Stinton as the letter was not addressed to her. The appellant gave evidence that Mr Smith advised her to shred the photocopy of the letter and to let Ms Gray deal with Ms Stinton's complaint. The appellant stated that she then shredded the photocopy of Ms Stinton's letter just prior to leaving the School at around 3.30 or 4.00pm on 19 March 2003. The appellant denied that she shredded the original of Ms Stinton's letter. The appellant stated that it would not have made sense to shred the original of Ms Stinton's letter when she had already read parts of the letter to three staff, one of whom was a good friend of Ms Gray.

15 The appellant stated that from time to time Ms Gray misplaced documents and as a result some staff make copies of documents before giving them to Ms Gray. The appellant stated that Ms Gray's desk was always "busy".

16 The appellant stated that her relationship with Ms Gray was variable and not as good as it could have been. The appellant stated that she had limited communication with Ms Gray, occasionally their relationship was tense and she described Ms Gray as being autocratic and non inclusive. The appellant believed that Ms Gray was unfamiliar with the role of the Registrar. The appellant also described Ms Gray as being a confident and exuberant person who at times shoots from the hip, she sometimes makes decisions without thinking, and that Ms Gray makes decisions without consultation and she prides herself on her power to manipulate people. As an example of lack of consultation the appellant stated that from time to time she was required to attend professional development courses arranged by Ms Gray without being consulted (Exhibit A1.2). The appellant stated that due to Ms Gray's limited communication about what was happening at the School embarrassing incidents sometimes occurred.

17 The appellant stated that in 2002 Ms Gray spoke to her about two complaints involving the appellant being rude. Even though the appellant and Ms Gray discussed these complaints Ms Gray did not tell the appellant the names of the complainants.

18 The appellant stated that subsequent to Ms Gray laying the complaints against her she understood Ms Gray spoke to a Principal within the local school district about the charges and as a result the appellant lodged a complaint about this which was investigated by the respondent's Complaints Management Unit ("the CMU"). The appellant stated that she was unaware of the outcome of this investigation.

19 When the appellant received the letter from the respondent dated 7 April 2003 outlining the two allegations against her she understood the whole thing had been a mistake because she knew she had shredded a photocopy of Ms Stinton's letter. As the appellant was confused and thought a mistake had occurred she emailed Ms Gray on 16 April 2003 as follows:

> "Just to clear up the matter of the "letter".
>
> I was quite upset when I read the letter and I allowed other staff members to read it too. I wanted to write a reply to the lady explaining the circumstances – that I had come back after a day off, which was quite harrowing, to be informed by note from the school officer that I was to have a work experience person for the day. It is only common courtesy to ask me or at least inform me of your intentions as my workload was horrendous. I had no time to show her anything or had any work that I could possibly give her to do except answer the phone – so I basically ignored her and went about my work. The only time we spoke was when you had asked her to file an enrolment form but I asked her not to file it as it had not been put on the system. She curtly told me that you had instructed her to and therefore she was going to do it. I asked her to give me the form – her attitude was very abrupt and not at all suitable for a school office.
>
> I realise from your words on Tuesday morning when I spoke to you about Mark Williams coming to see me that the whole thing was possible (sic) set up by you because you knew how I would react and that you had asked the lady to send in a letter knowing full well that I would be the one opening it. You told me then that you had been waiting for the letter because "youn (sic) wanted it".
>
> I photocopied the letter to take home to do a reply and placed the original on your desk. I then decided that it wasn't worth getting so upset about it so **I shredded the copy before leaving that day**. As you were away for several days at that time the letter is no doubt still on your desk under a pile of paperwork.
>
> Can I please ask why you did not confront me about the letter – why go to this degree when you know that I have had a past grievance with a Principal – I have worked hard at Queens Park PS (sic) and have wonderful references from my past two Principals there. I obviously upset you somewhere along the way and you won't be happy until you see me gone.
>
> I really didn't see this coming as you have been outwardly friendly to me and we have been working well together and I have also been working quite long hours on different projects required for the renovation of the office.
>
> I will never understand why this has happened and the effect it has had on me has affected my health, physically and mentally."
>
> (Exhibit A1.4)

20 The appellant understood that the whole issue would be sorted out when the respondent realised that she had shredded the photocopy of Ms Stinton's letter.

21 The appellant stated that she was not aware that the original of Ms Stinton's letter had been shredded until she was informed by Mr Peter Burgess who had been appointed by the respondent to investigate the charges against her.

22 The appellant stated that she received a copy of the transcript of her interview with Mr Joe Baskwell, who was the Inquirer appointed by the respondent, on or about 1 October 2003 and she made amendments to Mr Baskwell's summary of her evidence and then forwarded the statement to him. The appellant stated that on advice from the CSA she did not sign the statement she gave to Mr Baskwell. The appellant confirmed that Mr Baskwell's report did not include a copy of her most up to date statement (Exhibit A1.7).

23 The appellant admitted having a verbal altercation with the Principal of Kewdale Primary School in the last days of school term in 1999 and agreed that as a result a grievance was lodged against her. The appellant stated that the matter was investigated and that this lead to the appellant being transferred to the School in 2000 (Exhibit A1.8).

24 Under cross-examination the appellant was asked if she was angry when Ms Stinton arrived to undertake work experience. The appellant stated that she was upset more than angry because Ms Gray had not informed her that Ms Stinton would be attending the School. The appellant was asked why she did not tell Mr Burgess who was standing in the School office when she read out parts of Ms Stinton's letter on 19 March 2003. The appellant stated that she did not recall who was in the office at the time. The appellant conceded that she would have been the last person to handle Ms Stinton's letter prior to putting it on Ms Gray's desk on 19 March 2003. The appellant stated that it was problematic having people undertake work experience in a school because of the issue of confidentiality and the requirement for staff to have a police clearance in order to work at a school.

Respondent's Evidence

25 Mr Baskwell undertook an inquiry into the charges against the appellant and generated a report summarising his investigations, his findings and his recommendations (Exhibit R1). Mr Baskwell stated that on the basis of the evidence before him he concluded that on the balance of probabilities the appellant shredded Ms Stinton's letter. Mr Baskwell stated that he made his recommendations about proposed action against the appellant taking into account that the relationship between the appellant and Ms Gray was generally positive and that the appellant had been employed as a registrar for 23 years. The issues he investigated appeared to be a one off matter and on this basis he decided that the appellant being demoted was the appropriate penalty.

26 When asked why he did not include the appellant's amended statement in his final report Mr Baskwell stated that this was an issue for his office and Mr Baskwell stated that he was aware that the appellant refused to sign her statement. Mr Baskwell confirmed that prior to commencing his inquiry he was given a copy of the Burgess Report as well as copies of letters and other relevant documentation. Mr Baskwell maintained that he made his findings and recommendations based on the evidence he collected and not on any information contained in Mr Burgess' report.

27 Under cross-examination Mr Baskwell confirmed that he did not sight the original of Ms Stinton's letter or the letter's envelope as he understood these items were held by the respondent. Mr Baskwell confirmed that he did not have any discussions with Ms Gray about the signature on Ms Stinton's letter and whether or not the signature on the letter was in blue or black pen. After reviewing the envelope containing Ms Stinton's letter Mr Baskwell stated that he was now aware that Ms Stinton's name was not on the back of it, which was contrary to the evidence given to him by Ms Gray and as detailed in his report. Mr Baskwell agreed that it could be possible that Ms Gray could have found a photocopy of Ms Stinton's letter in the shredder.

28 Mr Baskwell stated that even though the Burgess Report contained information about issues relevant to the charges against the appellant he stated that the content of this report did not influence his findings. Mr Baskwell maintained that he wrote his report from scratch and his report was based on the evidence he collected. Mr Baskwell stated that he reached the conclusion that the appellant shredded the original of Ms Stinton's letter based on the weight of evidence.

29 Under re-examination Mr Baskwell confirmed that if he was aware that the appellant had committed a previous offence it may have influenced his recommendations to the respondent about penalty.

30 Mr Peter Denton is the Manager of the respondent's CMU which deals with disciplinary matters which arise across the respondent's operations. Mr Denton confirmed that the CMU's role is to ensure that the requirements of the *Public Sector Management Act 1994* ("the PSM Act") are followed and he confirmed that the unit works within set guidelines (Exhibit R4). Mr Denton stated that at each stage of the disciplinary process information is given to the Director General for him to decide if a matter should continue. Mr Denton stated that it was his understanding that under the PSM Act the Director General is obliged to accept the findings made by the Inquirer but not recommendations about further action and he stated that it is not the CMU's role to test the veracity of the factual information and the evidence obtained by the Investigator and/or Inquirer.

31 Mr Denton stated the CMU was under no obligation to release the reports completed by Investigators and Inquirers to any relevant party however, it is the respondent's current policy to do so. Mr Denton understood that a copy of the Inquirer's report was given to the appellant when the appellant was required to admit or deny the charges against her. Mr Denton stated that he understood that Mr Baskwell did not have access to information about the appellant's previous disciplinary matter prior to making his recommendations.

32 Mr Denton confirmed that Exhibit R5 contains correspondence between the appellant and the respondent from 7 April 2003 when the initial letter about the charges against the appellant was sent to the appellant, through to 3 November 2003 when the respondent terminated the appellant.

33 Mr Denton stated that he reviewed the appellant's personal file and previous investigation file before making a recommendation to the Director General about possible disciplinary action against the appellant. Mr Denton acknowledged that his recommendation to the Director General formed the basis of the Director General deciding to terminate the appellant (Exhibit R6). Mr Denton stated that when deciding on a penalty when a breach has been found to have been committed the respondent can take into account previous behaviour and the appellant was advised of this possibility in 2000 (Exhibit A1.8). Mr Denton confirmed that the email sent by Ms Gray to the CMU dated 20 March 2003 was the complaint that the respondent acted upon against the appellant (Exhibit A5). Mr Denton understood that the shredded original of Ms Stinton's letter was provided by Ms Gray for the first time when she was interviewed by Mr Burgess on or about 30 May 2003.

34 Ms Gray has been the Principal at the School for two and a half years. She has worked with the respondent for 26 years, variously as a classroom teacher, in one of the respondent's district offices, in the respondent's central office and as a Deputy Principal and Principal. Ms Gray maintains that as a result of her wide experience with the respondent she has a good understanding of the role of a school registrar. Ms Gray stated that there are 26 staff at the School, one Registrar who works four days per week and a School Officer who works one day a week. Ms Gray stated that the School is a challenging, difficult and a tough environment within which to work. Ms Gray stated that prior to March 2003 she had a good working relationship with the appellant and she stated that the appellant was competent at her job. Apart from a discussion with the appellant in term three 2002 about complaints relating to her treatment of three people there were no other major disciplinary issues involving the appellant prior to March 2003.

35 Ms Gray stated that Ms Stinton was an acquaintance through her son's association with a basketball team. Ms Gray stated that Ms Stinton approached her about undertaking work experience and informed her on 10 March 2003 that she was available for work experience the following day. Ms Gray stated that she had previously discussed the idea of having parents undertake work experience at the School with the appellant. Ms Gray confirmed that she did not discuss Ms Stinton undertaking work experience with the appellant as the appellant was not working on 10 March 2003 however she stated that she left a written note with the School Officer about Ms Stinton attending the School the following day.

36 Ms Gray understood that the appellant was upset when Ms Stinton arrived at the School on 11 March 2003. Ms Gray gave evidence that during the morning of 11 March 2003 she asked Ms Stinton to file an enrolment card and she conceded that she did not check to ensure that the card's details had been entered into the School's computer. Ms Gray instructed Ms Stinton to undertake this task and other duties as she assumed the appellant would not be providing her with any assistance. Ms Gray stated that she was aware that there was tension between Ms Stinton and the appellant and that as there was an unpleasant atmosphere in the office she tried to be pleasant to both the appellant and Ms Stinton. Ms Gray stated that she suggested to Ms Stinton that she leave the School at lunch time.

37 Ms Gray stated that two days after undertaking work experience at the School Ms Stinton telephoned her and told her she was upset about the appellant's behaviour towards her. Ms Stinton also felt that the appellant had been rude to her. Ms Gray gave evidence that she then explained the choices available to Ms Stinton if she wanted to follow up these concerns. Ms Stinton later contacted Ms Gray to inform her that she had sent her a letter about the appellant. As the letter had not arrived by the afternoon of Wednesday 19 March 2003, Ms Gray checked the appellant's desk for the letter but it was not there. Ms Gray stated that she then found Ms Stinton's envelope, which was torn in half, in the appellant's bin. Ms Gray stated that she had never noticed used envelopes previously torn in this way. Ms Gray stated that she then checked the shredder's contents and found the original of Ms Stinton's letter which was shredded. Ms Gray stated that she was shocked by this discovery and as she needed advice she rang Mr Bruce Macauley at the respondent's local District Office who advised her to contact the CMU. The CMU then asked Ms Gray to send details to the CMU about the matter and to retain Ms Stinton's letter. Ms Gray was then advised not to raise the issue with the appellant.

38 Ms Gray conceded that the appellant was entitled to open and read Ms Stinton's letter and Ms Gray conceded that her desk top was not always tidy. Ms Gray stated that she had not set up the appellant, nor had she shredded the original of Ms Stinton's letter and that she did not find a photocopy of Ms Stinton's letter in the shredder. Ms Gray described her management style as collaborative whilst acknowledging at times that as Principal she is required to be authoritative when making decisions. Ms Gray understood that there were some concerns with her management style soon after she commenced at the School and as a result she held a staff meeting to encourage a positive attitude. Ms Gray also personally spoke to each staff member to address any leadership concerns.

39 Ms Gray stated that most professional development at the School was undertaken at the request of staff.

40 Ms Gray confirmed that she was the subject of a disciplinary process in September 2003 and she understood that this issue had been finalised.

41 Ms Gray stated that all employees attending the School are required to have a police clearance and if someone is coming onto school property and does not possess one they can fill out a confidentiality declaration. Ms Gray was unaware if a confidentiality declaration was signed by Ms Stinton as this was a role normally fulfilled by the appellant. Ms Gray understood that Ms Stinton had completed the appropriate documentation to obtain a police clearance.

42 It was Ms Gray's view that the appellant could not be reinstated to work at the School given the breakdown in her relationship with the appellant.

43 Under cross-examination it was put to Ms Gray that even though she was told not to speak to anyone about the incident involving the appellant she spoke to Ms Julie Johnsen and that this discussion is referred to in Ms Johnsen's transcript of interview with Mr Burgess (Exhibit R1 page 150). Ms Gray maintained that Ms Johnsen initiated the conversation about Ms Stinton's letter.

44 Ms Gray was asked why she looked for the letter from Ms Stinton on 19 March 2003. Ms Gray stated that she was expecting Ms Stinton's letter and she became aware that Ms Stinton had sent a letter to the School that day as she had found Ms Stinton's envelope in the bin. Contrary to what she had stated to Mr Baskwell Ms Gray conceded that Ms Stinton's name was not on the envelope containing Ms Stinton's letter. Ms Gray stated that as she was aware of Ms Stinton's address on the envelope she therefore knew Ms Stinton had sent in a letter. Ms Gray was asked if she was aware that the appellant sorted the mail in order of importance. Ms Gray stated that she was not aware that this was done, that she had not discussed this issue with the appellant and that she was unaware where the appellant placed items such as pamphlets and leaflets when sorting the mail. However, after being pressed she conceded that the appellant normally put leaflets at the bottom of the pile of correspondence given to her by the appellant and that the most important items were placed on the top of this pile.

45 Ms Gray was asked what happened when she checked the shredder on 19 March 2003. Ms Gray stated that when she pulled out paper from the shredder's bin she was able to identify Ms Stinton's letter as some of the shredded paper had Ms Stinton's address on it and parts of the letter were still joined together. Ms Gray stated that she then located the rest of the letter and put it back together. Ms Gray stated that she did not find this process difficult and it took her between ten and fifteen minutes. Ms Gray stated that she rang Mr Macauley before putting all of the letter together.

46 Ms Gray gave evidence at the hearing that she did not ask Ms Stinton to write the letter complaining about the appellant despite stating in her original complaint to the CMU that she had done this. Ms Gray gave evidence that when she spoke to Ms Stinton about lodging a complaint against the appellant she gave Ms Stinton three options, either lodge a verbal complaint, to do nothing or to put in a written complaint.

47 Ms Gray gave evidence that she left a note for the appellant on the appellant's desk about Ms Stinton coming for work experience prior to Ms Stinton arriving on 11 March 2003.

48 Under re-examination Ms Gray stated that when she checked her desk for Ms Stinton's letter on 19 March 2003 she went through her desk thoroughly but could not find Ms Stinton's letter.

49 Ms Stinton stated that she met Ms Gray through her association with her son's basketball team. Ms Stinton stated that she did not mix socially with Ms Gray. Ms Stinton confirmed that she had no association with the School, apart from knowing Ms Gray. Ms Stinton is currently employed undertaking casual work with the respondent since May 2003. Prior to commencing work with the respondent, apart from some casual night fill work, Ms Stinton was of the work force for fourteen years raising a family. Ms Stinton stated that as she wanted to work in school administration she asked Ms Gray about the possibility of undertaking work experience at the School and as a result Ms Gray arranged for her to do work experience on Tuesday 11 March 2003. When Ms Stinton arrived at the School she stated that she was not welcomed by the appellant. Ms Stinton stated that the appellant was rude to her and Ms Stinton formed the impression that the appellant did not want her to be there. Ms Stinton stated that the appellant only spoke to Ms Stinton twice when she was at the School and that the appellant was also rude to other people in the office that morning. Ms Stinton stated that she wanted to work the full day at the School but during the morning Ms Gray indicated to her that as there was a lot of information to take in it was best that she only work a half day. Ms Stinton stated that when Ms Gray told her that she had better go home at lunch time she was relieved to leave the School. Towards the end of that week Ms Stinton rang Ms Gray and informed her that she would not be returning to the School and she thanked her for the opportunity to undertake work experience. When Ms Stinton advised Ms Gray that the appellant had been rude and abrupt to her Ms Gray advised Ms Stinton that she could lodge a verbal or written complaint about the appellant. Ms Stinton stated that as she decided to lodge a written complaint so that something would be done about the appellant's behaviour she sent a letter to Ms Gray the following Monday, 17 March 2003.

50 Under cross-examination Ms Stinton stated that she complained about the appellant because she believed the appellant's behaviour was unacceptable. Ms Stinton conceded that the appellant was not offensive towards her and she was unaware that the appellant had not been at work for the previous two working days. Ms Stinton stated that she was not aware that the appellant was busy as the appellant did not raise this with her. Ms Stinton stated that she did not deserve to be treated as a nuisance as she wanted to help the School as well as learn skills. Ms Stinton could not recall the appellant telling her that she had nothing prepared for her to do and she could not recall contacting Ms Gray to inform her that she had sent her a letter of complaint about the appellant. Ms Stinton stated that she could not recall if she signed her letter of complaint in blue biro. Ms Stinton confirmed that she did not have a police clearance to work at the School on 11 March 2003. Ms Stinton stated that Ms Gray gave her a form to apply for one on the day she attended at the School.

51 Mr Burgess conducted the Investigation into the allegations against the appellant. He is a Human Resources Consultant and has had a lengthy history working in human resource management. As part of Mr Burgess' investigations he found that opening mail at the School, including the Principal's mail, was part of the Registrar's normal duties. Mr Burgess was aware that Ms Johnsen knew that the letter the appellant read out aloud on 19 March 2003 was from a person who had undertaken work experience at the School.

52 Under cross-examination Mr Burgess was asked about the basis on which he found the appellant had shredded the letter sent by Ms Stinton to Ms Gray. Mr Burgess stated that on the facts before him at the time he came to the conclusion that Ms Stinton's letter had been shredded by the appellant. Even though he was faced with differing accounts by the appellant and Ms Gray as to what happened he preferred Ms Gray's version of events as being more plausible and Mr Burgess took into account that the appellant was angry that Ms Stinton had complained about her.

53 Mr Burgess could not recall if he was given a copy of the original complaint lodged by Ms Gray with the respondent's CMU. Mr Burgess conceded that he did not ask Ms Gray what time she found the letter in the shredder as he did not see this issue as being significant. Nor did he inquire of Ms Gray if her desk was tidy on the day of the incident. However Mr Burgess recalled Ms Gray stating that she checked her desk for the letter on 19 March 2003 and could not find it. Mr Burgess stated that even though he did not give consideration to a number of scenarios as to why Ms Stinton's letter could have been shredded he still believed that the appellant shredded the original of Ms Stinton's letter and that his decision was the correct one.

54 When asked why he decided that it was inappropriate for the appellant to read the letter addressed to Ms Gray aloud to other staff members Mr Burgess stated that he reached this view because Ms Stinton's letter was addressed to Ms Gray.

55 Under re-examination Mr Burgess stated that he only interviewed a limited number of people as part of his investigation because nobody witnessed the document being shredded. Mr Burgess stated that his role was to collect facts and present them to the respondent and to make a finding as to whether or not a breach occurred and if so whether it was minor or serious. Mr Burgess stated that as a result of his investigations he established that the appellant was authorised to open Ms Stinton's letter and Mr Burgess stated that he did not find that the appellant intercepted the letter as alleged in the first and second allegations as she had the right to open the Principal's mail. Mr Burgess stated that he took into account that the envelope containing the letter had been torn in half when making his decision that the appellant had shredded Ms Stinton's letter. Mr Burgess confirmed that he did not refer to the appellant committing any specific breaches of the PSM Act or the *School Education Act 1999* ("the SE Act"), the Public Sector Code of Ethics or the respondent's Staff Conduct Policy when finding that the appellant had committed breaches.

Submissions

56 The appellant maintains that her dismissal was unfair and that the respondent terminated her in an oppressive and unreasonable manner. The appellant argues that there was sufficient evidence before the Board to demonstrate that she did not shred the original of Ms Stinton's letter on 19 March 2003.

57 In support of her claim that she was unfairly dismissed the appellant argues that she never contested that she opened the letter from Ms Stinton and she maintains that she only read remarks about herself from Ms Stinton's letter. The appellant argues that she was consistent in her evidence that she did not shred the original of Ms Stinton's letter and there is no evidence to directly support the respondent's finding that the appellant shredded Ms Stinton's letter. As the appellant gave consistent evidence that she shredded the photocopy of Ms Stinton's letter it is plausible to assume that the letter found by Ms Gray in the shredder was a photocopy of the original of Ms Stinton's letter. Further, the appellant argues that it is highly unlikely and improbable that she would have shredded Ms Stinton's letter because she had read the letter aloud to other employees. Ms Gray did not show anyone the original of Ms Stinton's shredded letter until she was interviewed by Mr Burgess and Ms Gray's complaint to the CMU (Exhibit A5) does not refer to the letter being signed with a blue biro or it being an original letter. The appellant argues that when Ms Gray rang the CMU on 19 March 2003 she had not seen the original of Ms Stinton's letter and would not have known if it was signed in blue or black biro. The appellant maintains that after Ms Gray became aware that the shredded letter was a photocopy it would have been humiliating for Ms Gray to withdraw her complaint and claims that Ms Gray continued with her complaint about the appellant even though she was aware that the letter was a photocopy.

58 The appellant argues that the Board should take into account that the respondent found her to be honest and acted in a forthright manner when responding to the complaint against her in January 2000 and that this honesty was reflected in the appellant's initial response to the allegations against her (see the appellant's letter dated 28 April 2003 Exhibit R5).

59 The appellant argues that the two allegations against her contradict each other. On the one hand the appellant is being charged with making the content of Ms Stinton's letter public and the appellant is then accused of trying to prevent Ms Gray from receiving the letter.

60 The appellant maintains that the respondent's failure to comply with the statutory scheme relating to disciplinary proceedings under the PSM Act renders the whole process null and void (see *Civil Service Association of WA Incorporated v Director General, Department of Consumer and Employment Protection* (2002) 82 WAIG 952). The appellant maintains that the Investigation and the Inquiry were not separate processes which were conducted independently of one another. Further, as Mr Baskwell admitted he had read the Burgess Report prior to commencing his Inquiry this compromises his report.

61 The appellant maintains that both the Investigation and the Inquiry do not deal adequately with all relevant aspects of the evidence. Mr Baskwell did not sight the original of the shredded letter and this denotes a less than rigorous approach required to carry out a proper and comprehensive inquiry. The appellant maintains that Mr Baskwell selectively interpreted the SE Act as the appellant only read out those parts of Ms Stinton's letter that referred to herself, behaviour which was sanctioned under s242(1)(d) of the SE Act. When the appellant read parts of Ms Stinton's letter aloud she did so without any intent to unduly disclose information to the detriment of the respondent and in any event no material detriment to the respondent resulted. The appellant also argues that Mr Baskwell did not give sufficient weight to the appellant's evidence and the Burgess Report does not reflect a clear and comprehensive reasoning process to justify the conclusions reached.

62 The appellant argues that the respondent did not give sufficient weight to the fact that neither the Investigator nor the Inquirer recommended that the appellant be dismissed and the appellant was not advised that the previous disciplinary matter she was involved in would be taken into account when deciding on a penalty. The appellant maintains that when deciding to dismiss her the respondent failed to give proper consideration to the appellant's substantial, loyal and long term employment history of almost 23 years.

63 The appellant maintains that she was denied natural justice and procedural fairness as she was not provided with full copies of the reports completed by the Investigator and the Inquirer until after her dismissal.

64 The appellant submits that the alteration of the charge by the deletion of the word 'intercept' does not contribute to the appellant's termination being unfair but argues that this accusation may have influenced the view of the appellant's actions by those investigating the complaints against her.

65 In summary the appellant maintains that she was not given 'a fair go all round' and was treated oppressively, unjustly and unfairly. As the Board has the power to adjust a decision to dismiss an employee following a *de novo* hearing of the issues in dispute the appellant maintains that the Board should quash the respondent's decision to dismiss her and that she should be reinstated with no loss of salary, continuity of service or entitlements.

66 The respondent submits that as the appellant was found to have committed serious misconduct in relation to two matters the Board should approach any review of that decision with some caution.

67 Even though the wording of the charge against the appellant was different to the original charge (the word 'intercepted' was removed from the charge) when the appellant was advised about the appointment of the Inquirer the respondent submits that this change did not materially alter the substance of the charges against the appellant as the respondent submits that the issue of interception of Ms Stinton's letter was not central to the complaints. It was common ground that the appellant opened and read Ms Stinton's letter aloud and this was the charge brought against the appellant. The respondent therefore argues that the omission of the word 'intercepted' from the charges does not fundamentally flaw the process embarked upon by the respondent.

68 The respondent concedes that the appellant admitted that she read aloud parts of the letter from the outset. The respondent however disagrees that this was an inconsequential misdemeanour as:

> "a. the writer was identified;
>
> b. the appellant was not the addressee;
>
> c. the appellant did not have authority of the addressee to divulge the content of the letter;
>
> d. the appellant did not have the authority of the writer to divulge any of the content;
>
> e. the appellant deliberately sought the attention of others in order to disclose that content;
>
> f. the appellant's position of Registrar carries with it the responsibility for the receipt and opening of mail;
>
> g. the position therefore carries an onus of trust and integrity when dealing with correspondence that is of a sensitive nature including complaints."
>
> (Respondent's Final Submissions 22 October 2004)

69 In relation to the appellant's actions the respondent relies on s242 of the SE Act which states:

> "**242. Confidentiality**
>
> (1) A person must not disclose or make use of information to which this section applies except –
>
> (a) in the course of duty;
>
> (b) for the purpose of proceedings for an offence against this Act;
>
> (c) under and in accordance with this Act or any other law;
>
> (d) with the authority of the Minister of all persons to whom the information relates; or
>
> (e) in other prescribed circumstances.
>
> Penalty: $5000.
>
> 2) This section applies to information contained in any register or document of or in the possession or under the control of -
>
> (a) the Minister;
>
> (b) the chief executive officer or the chief executive officer referred to in section 151, as is relevant to the case;
>
> (c) the department or the department referred to in section 228, as is relevant to the case;
>
> (d) the principal of a government school; or
>
> (e) a panel appointed for the purposes of this Act."

70 As the letter from Ms Stinton was a document in the possession of or under the control of the respondent, the Chief Executive Officer or the Principal the respondent maintains that the appellant therefore breached s242 of the SE Act. Additionally s242(1)(d) of the SE Act requires the permission of all parties prior to any information being released and this includes the addressee and the writer. The respondent submits that the appellant's actions also breached ss 7, 9 and 80 of the PSM Act as well as breaches of the Public Sector Code of Ethics with respect to justice, respectful persons and responsible care as well as the following principles under the respondent's Staff Conduct Policy:

> "1. We will perform, to the best of our abilities, our roles and responsibilities within the framework of the law, lawful work instructions, the limits of our ability and resources – dot point 1 and 2;
>
> 2. We will respect the uniqueness and dignity of individuals and act accordingly in a fair, courteous and sensitive manner – dot points 1 and 2;
>
> 3. We will accept the responsibilities arising from the trust placed in us by students, the community and our colleagues – dot point 1;
>
> 4. We will perform our duties with integrity, honesty and impartiality – dot point 1 and 3;
>
> 5. …Not applicable;
>
> 6. We will maintain appropriate confidentiality of personal and official information – dot point 2 and 3."
>
> (Respondent's Final Submissions 22 October 2004)

71 Even though Ms Gray conceded that the issue of bringing a work experience person into the School could have been better handled a school's principal has the right to manage the work place and as Ms Stinton's letter was withheld from Ms Gray this impacted on her ability to effectively manage the appellant.

72 The respondent maintains that there was sufficient evidence to demonstrate that in all probability the appellant shredded Ms Stinton's letter. The respondent maintains that after the appellant received Ms Stinton's letter she was angry. Further, it was not until the hearing that she claimed to have placed the original letter on the Principal's desk amongst the junk mail. The

appellant was less than helpful when interviewed about the allegations against her and she withheld information about who was present when she read aloud parts of Ms Stinton's letter. As the letter from Ms Stinton was adverse to the appellant and she was the last person to have handled the letter from Ms Stinton the appellant had motive and opportunity to shred Ms Stinton's letter. The respondent therefore submits that it was unlikely and highly improbable that Ms Stinton's letter was ever given to Ms Gray. As in all probability the appellant shredded Ms Stinton's letter this was a wilful act of gross misconduct on the part of the appellant.

73 The respondent maintains that at all stages it complied with the procedures outlined in Part 5 of the PSM Act and that this process was distinguishable from the circumstances outlined in *Trudy Ruth Cull v Commissioner State Revenue Department* (2002) 82 WAIG 377. Both the Investigation and the Inquiry were separate and each adopted their own processes.

74 The respondent maintains the appellant was not denied natural justice even though she did not have access to all relevant documentation. The respondent maintains that the appellant was given a reasonable opportunity to respond to the issues in question prior to any conclusions and decisions being made by the respondent and if there was a fault with the process, it was not fatal to the outcome as the respondent did not withhold anything of substance from the appellant nor was she denied an opportunity to be heard. The only detail not supplied to the appellant was a statement and references to a witness who was present when parts of Ms Stinton's letter were read out by the appellant and as this issue was not controversial there was therefore no detriment or prejudice to the appellant. Further, the allegations and charges against the appellant were detailed with sufficient detail and clarity as required by regulations 16 to 20 of the PSM Act.

75 When both the Inquirer and Investigator assessed whether or not the appellant shredded Ms Stinton's letter there was sufficient detail and circumstantial evidence to lead a reasonable person to believe that in all of the circumstances it was more probable than not that the appellant shredded the letter. The respondent maintains that the only matter not put to the appellant was that her past employment history was to be considered by the respondent when deciding on the penalty. The respondent maintains that as the appellant wilfully misconducted herself in 2000 and was warned at the time that any further disciplinary proceedings would inevitably lead to her termination it was appropriate to terminate the appellant. Even though there was a three year time lapse between the two events, given the gravity of the appellant's actions in January 2000 it was not inappropriate for the respondent to take this matter into account. Furthermore the two incidents indicate a pattern of behaviour of wilfulness on the part of the appellant.

76 In conclusion the respondent maintains that as the appellant's actions warranted a serious penalty the Board should not intervene in this matter and should not adjust the respondent's decision. The respondent provided the appellant with 'a fair go all round', it ensured that the investigative processes were procedurally fair, it did not deny the appellant natural justice and the penalty decided on by the respondent in this instance was appropriate to the gravity of the misconduct when taking into account the appellant's previous behaviour.

Findings and Conclusions

Credibility

77 The Board listened carefully whilst the witnesses gave their evidence. In our view the appellant gave her evidence confidently and we found her evidence to be plausible and consistent and her evidence was not broken down during extensive cross-examination. The appellant's evidence was also corroborated by substantial documentation. We do not have the same confidence in the evidence given by Ms Gray. In our view Ms Gray's evidence as a whole was unconvincing. For example Ms Gray was clearly uncomfortable and hesitant when she disputed Ms Johnsen's statement to Mr Burgess that Ms Gray initiated a discussion with Ms Johnsen about Ms Stinton's letter. Further, Ms Gray modified her answers to questions when pressed, for example when asked whether the appellant put 'junk' mail on her desk. Parts of Ms Gray's evidence was inconsistent with evidence she gave to both the Investigator and the Inquirer. For example, Ms Gray stated at the hearing that she gave Ms Stinton a range of options if she wanted to complain about the appellant which was different to what she stated in the original complaint to CMU and the evidence she gave to Mr Burgess and Mr Baskwell (see transcript page 205, Exhibit A5, Exhibit R1 - Burgess Report, Summary of Evidence of Paula Gray page 3 and Exhibit R1 - Baskwell Report, Statutory Declaration of Paula Gray point 25). Also, Ms Gray gave evidence at the hearing that when she found the envelope containing Ms Stinton's letter it only had Ms Stinton's address on it, however, this was different to the information she gave to Mr Baskwell (see Exhibit R1 - Baskwell Report, Statutory Declaration of Paula Gray point 30). Given these inconsistencies we therefore doubt the veracity of Ms Gray's evidence, in contrast to our view about the appellant's evidence. In the circumstances we conclude that where there is any inconsistency in the evidence given by the appellant and Ms Gray the appellant's evidence should be preferred to the evidence given by Ms Gray. We take no issue with the evidence given by the other witnesses in these proceedings as in our view they gave their evidence honestly and to the best of their recollection.

78 The Board deals with appeals as a hearing de novo and is therefore required to consider all of the circumstances of the issues and finally decide the matter before it (see *Civil Service Association of Western Australia Incorporated v Director General, Department of Family and Children's Services* [2002] 83 WAIG 390). As the Board is required to deal with the fairness and merit of the matter as well as the process, the Board is therefore able to conclude whether or not the appellant acted in the manner found by the respondent, whether that conduct constituted a breach of discipline and if so whether the penalty imposed was appropriate.

79 Paragraphs three and four of this decision set out the relevant agreed facts and chronology of events in relation to this matter.

80 There was no dispute and we find that the appellant was a government officer within the meaning of s80C of the Act and that this issue relates to a dismissal, which constitutes an industrial matter.

81 The respondent decided to terminate the appellant for committing two breaches after taking into account the appellant's prior employment history with the respondent, in particular her actions at the end of 1999 which resulted in the appellant being disciplined by the respondent.

Did the appellant commit the breaches as claimed by the respondent?

First Breach

82 The first allegation that was put to the appellant in April 2003 was as follows:

> "1. On 19 March 2003, you intercepted a letter personally addressed to the Principal of Queens Park Primary School, from a person known as Mrs Stinton, and read parts of the letter out aloud to staff members. This allegation, if proven, is in breach of section 242(1) of the *School Education Act 1999*; section 9(b) of the *Public Sector Management Act 1994*; principles two and three of the *Western Australian Public Sector Code of Ethics;* and principles one and six of the Department's *Staff Conduct* policy."
>
> (Exhibit R5 letter dated 7 April 2003)

This allegation was altered by the respondent in August 2003 when the respondent changed the word "intercepted" to "opened" prior to referring this alleged breach to the Inquirer for investigation and the breach the appellant was found to have committed following the inquiry was as follows:

> "On Wednesday, 19 March 2003, at Queens Park Primary School, you opened a letter personally addressed to Ms Paula Gray, Principal, Queens Park Primary School, from a person known as Mrs Stinton, and read parts of the letter out aloud to staff members."

(Exhibit R5 letter dated 3 November 2003)

83 Even though the appellant conceded that she read out parts of Ms Stinton's letter to colleagues on 19 March 2003 it is the Board's view that the appellant should not be disciplined for her actions in relation to this breach.

84 The Board accepts the appellant's evidence that she opened the mail as usual on 19 March 2003 and that she was authorised to open mail addressed to Ms Gray which was not marked private and/or confidential. It is therefore clear that the appellant did not 'intercept' Ms Stinton's letter as initially alleged by the respondent. We find that after reading Ms Stinton's letter the appellant was genuinely shocked and upset by the comments made about her by Ms Stinton. It is the Board's view that the appellant had good reason to be upset by Ms Stinton's comments as we find that there were mitigating circumstances surrounding the appellant reading out parts of Ms Stinton's letter on 19 March 2003. We accept that on the morning Ms Stinton attended the School for work experience the appellant was annoyed that Ms Gray had unilaterally arranged for Ms Stinton to undertake work experience and that no notice other than a note left for the appellant on the morning of 11 March 2003 was given to the appellant that Ms Stinton would be undertaking work experience that morning. We accept that the appellant did not have time to train Ms Stinton when she unexpectedly arrived at the School due to the lack of notice from Ms Gray. The Board also accepts that the appellant had a heavy work load at this time as the appellant had not been at the School the two previous working days and that as a result the appellant did not give Ms Stinton the attention and training that Ms Stinton expected. We find that in the circumstances the appellant was justified in being annoyed at Ms Stinton's presence even though the appellant could have been more pleasant towards Ms Stinton. We find that Ms Gray further exacerbated the difficulties between the appellant and Ms Stinton when she allocated a filing task to Ms Stinton which led to a minor altercation between Ms Stinton and the appellant. We find that this situation only arose because Ms Gray inappropriately instructed Ms Stinton to file this card prior to the information being entered into the computer. It is within the context of this background that we find that when the appellant read Ms Stinton's complaint about her on 19 March 2003 she was genuinely upset and aggrieved at Ms Stinton's comments about her behaviour such that after opening and reading Ms Stinton's letter, and on the spur of the moment, she read those parts of the letter referring to her to three colleagues who happened to be in the School's office at the time. In reaching the view that the appellant should not be disciplined for reading out part of Ms Stinton's letter to her colleagues we also take into account that when the appellant read out a part of Ms Stinton's letter she did not identify Ms Stinton by name, Ms Stinton was not associated with the School and it is clear that the appellant never disputed the respondent's claim that she read aloud parts of Ms Stinton's letter to three colleagues in the office on 19 March 2003 after she opened and read the letter even though she disagreed that she had intercepted the letter, a charge which was later dropped by the respondent. We find that the appellant showed a lack of judgement when she read aloud that part of the letter relating to her to her colleagues, however in all of the circumstances we find that her actions were not serious enough to warrant either investigation or any disciplinary action. If the appellant's actions were to warrant any disciplinary action (which we do not concede) it is the Boards' view that a reprimand at most would have been the appropriate penalty.

Second Breach

85 When taking into account our views on witness credit and after reviewing the evidence in these proceedings we cannot reach the same conclusion reached by both the Investigator and the Inquirer that the appellant shredded the original of Ms Stinton's letter and that the letter found by Ms Gray in the shredder on 19 March 2003 was the original of Ms Stinton's letter.

86 The second breach put to the appellant in April 2003 reads as follows:

> "2. On 19 March 2003, you intercepted and shredded a letter personally addressed to the Principal of Queens Park Primary School, from a person known as Mrs Stinton. This allegation, if proven, is in breach of section 242(1) of the *School Education Act 1999*; section 9(b) of the *Public Sector Management Act 1994*; principles two and three of the *Western Australian Public Sector Code of Ethics;* and principles one and six of the Department's *Staff Conduct* policy."

(Exhibit R5 letter dated 7 April 2003)

Again, this allegation was altered by the respondent in August 2003 when the respondent substituted the word "intercepted" with "opened" and the breach that the appellant was found to have committed was as follows:

> "On Wednesday, 19 March 2003 at Queens Park Primary School, you opened and shredded a letter personally addressed to Ms Paula Gray, Principal, Queens Park Primary School, from a person known as Mrs Stinton."

(Exhibit R5 letter dated 3 November 2003)

87 On the evidence before the Board and taking into account our views on witness credit we find that after the appellant opened Ms Stinton's letter on 19 March 2003 and after being shocked and upset by the complaint made by Ms Stinton the appellant photocopied Ms Stinton's letter with a view to responding to Ms Stinton, but decided against this course of action after discussing her intentions with her partner later that day. We accept the appellant's evidence that she then placed Ms Stinton's letter in the bundle of 'junk' mail and then placed this bundle as well as other mail on Ms Gray's desk. We find that the appellant then shredded the copy of Ms Stinton's letter just prior to leaving the School that day as she had decided that she would not respond to Ms Stinton.

88 It appears that Ms Gray was expecting Ms Stinton's letter to arrive on or about 19 March 2003 and when Ms Gray did not find the letter on her desk that day she checked the appellant's desk and then the appellant's rubbish bin where she found the envelope with Ms Stinton's address on it. We find that Ms Gray then checked the School's shredder where she found the shredded photocopy of Ms Stinton's letter and that it was on the basis of finding this photocopy of Ms Stinton's letter that Ms Gray made a complaint later that afternoon to the CMU about Ms Stinton's letter being shredded. We find that this chain of events is plausible given our acceptance of the appellant's evidence in preference to that of Ms Gray's evidence, and on the basis that Ms Gray would have been unaware when she found the letter in the shredder that the original of Ms Stinton's letter was signed by Ms Stinton using blue ink. We also find it implausible that the appellant would seek to destroy Ms Stinton's letter after having read parts of the letter aloud to three colleagues on the morning of 19 March 2003, and after leaving the letter's envelope in her bin. It is possible that subsequent to making the complaint to the CMU Ms Gray found the original of Ms Stinton's letter on her desk as we accept the evidence of both the appellant and Ms Gray that Ms Gray's desk was not

always tidy and that around this period Ms Gray had some time off work which may well have impacted on the amount of correspondence that Ms Gray had on her desk at the time.

89 As we find that Ms Gray found the photocopy of Ms Stinton's letter in the shredder on 19 March 2003 and that this was the letter which formed the basis of her complaint to the CMU about the appellant we therefore find that the appellant did not commit the second breach as claimed by the respondent.

90 As we have found that the appellant should not have been disciplined for her actions in relation to the first breach and that the appellant did not commit the second breach the appellant's appeal is therefore upheld. However, if the Board is wrong in reaching this conclusion (which we do not concede) it is the Board's view that the Investigation and Inquiry conducted into the two breaches was flawed such that the respondent could not rely on their findings. The Board is also of the view that the respondent failed to comply with parts of the statutory scheme's requirements under Part 5, Division 3 of the PSM Act and in doing so denied the appellant procedural fairness and natural justice as provided for under administrative law principles.

91 When dealing with suspected breaches of discipline, such breaches must be the subject of investigative and disciplinary proceedings which follow the statutory path laid down by Part 5, Division 3 of the PSM Act, which includes the mandatory requirements laid down by s86 of the PSM Act for charging an employee with a breach of discipline.

92 The specific sections of the PSM Act relevant for the purposes of these proceedings are ss 80, 81, 83, 85 and 86. These provisions are set out as follows:

"**80. Breaches of discipline**

An employee who —

(a) disobeys or disregards a lawful order;

(b) contravenes —

(i) any provision of this Act applicable to that employee; or

(ii) any public sector standard or code of ethics;

(c) commits an act of misconduct; or

(d) is negligent or careless in the performance of his or her functions,

commits a breach of discipline.

81. Procedure when breach of discipline suspected

(1) An employing authority may, when it suspects that a person has committed a breach of discipline whilst serving as an employee in its public sector body and has given the person such notice in writing of the nature of the suspected breach of discipline as is prescribed, give the person a reasonable opportunity to submit an explanation to the employing authority.

(2) After having given the respondent the reasonable opportunity referred to in subsection (1), the employing authority may —

(a) if it is not the Minister, investigate or direct another person to investigate; or

(b) if it is the Minister, direct another person to investigate,

the suspected breach of discipline in accordance with prescribed procedures.

(3) A person to whom a direction is given under subsection (2) shall comply with that direction.

(4) A direction shall not be given under subsection (2) to the Commissioner.

83. Powers of employing authority other than Minister after investigation of alleged breach of discipline

(1) If, following the investigation of an alleged breach of discipline under section 81, an employing authority which is not the Minister finds, whether as a result of its own investigation or that of a person directed under section 81(2)(a), that —

(a) a minor breach of discipline was committed by the respondent, that employing authority may in accordance with prescribed procedures —

(i) reprimand the respondent;

(ii) impose on the respondent a fine not exceeding an amount equal to the amount of remuneration received by the respondent in respect of the last day during which he or she was at work as an employee before the day on which that finding was made; or

(iii) both reprimand, and impose the fine referred to in subparagraph (ii) on, the respondent;

(b) a serious breach of discipline appears to have been committed by the respondent, that employing authority shall cause the respondent to be charged in accordance with prescribed procedures with having committed that alleged breach of discipline; or

(c) no breach of discipline was committed by the respondent, notify the respondent of that finding and that no further action will be taken in the matter.

(2) For the purposes of this section, a breach of discipline committed as a result of disobedience to, or disregard of, a lawful order referred to in section 94(4) is a serious breach of discipline.

85. Procedure if respondent objects to certain findings or actions

If a respondent objects by notice in writing addressed to an employing authority —

(a) to any finding by the employing authority under section 83 or 84 that he or she committed a minor breach of discipline; or

(b) to any action taken by the employing authority in relation to him or her under section 83(1)(a) or 84(2)(b)(i),

within 7 days after being notified in writing of that finding or action, as the case requires, that finding or action is cancelled by virtue of this section and the respondent may be charged in accordance with the prescribed procedures with having committed the alleged breach of discipline.

86. Procedure when charge of breach of discipline brought

(1) A charge under section 83(1)(b), 84(2)(b)(ii) or 85 shall —

(a) be in writing;

(b) contain the prescribed details of the alleged breach of discipline; and

(c) require the respondent to indicate within such period of not less than 7 days as is specified in the charge whether or not he or she admits or denies the charge.

(2) A respondent charged under section 83(1)(b), 84(2)(b)(ii) or 85 shall admit or deny the charge within the relevant period referred to in subsection (1)(c).

(3) Subject to section 89, if a respondent admits a charge under subsection (2) and the employing authority finds the charge to be proved, the employing authority —

(a) shall, if the charge is a charge of committing a breach of discipline consisting of disobedience to, or disregard of, a lawful order referred to in section 94(4), dismiss the respondent; or

(b) may —

(i) reprimand the respondent;

(ii) transfer the respondent to another public sector body with the consent of the employing authority of that public sector body or, if the respondent is an employee other than a chief executive officer or chief employee, transfer him or her to another office, post or position in the public sector body in which he or she is currently employed;

(iii) impose on the respondent a fine not exceeding an amount equal to the amount of remuneration received by the respondent in respect of the period of 5 days during which he or she was at work as an employee immediately before the day on which the finding of a breach of discipline was made;

(iv) reduce the monetary remuneration of the respondent;

(v) reduce the level of classification of the respondent; or

(vi) dismiss the respondent,

or, except when the respondent is dismissed under subparagraph (vi), take action under any 2 or more of the subparagraphs of this paragraph.

(4) If a respondent denies a charge under subsection (2) and the employing authority is not the Minister, the employing authority may —

(a) hold, or direct a person to hold, a disciplinary inquiry into the charge in accordance with prescribed procedures; or

(b) if it considers that a special disciplinary inquiry should be held into the charge, request the Minister to direct that a special disciplinary inquiry be held into the charge by a person named in that direction.

(5) A directed person shall, subject to subsections (6) and (7), comply with the relevant direction given under subsection (4)(a).

(6) If, at any time after the commencement of a disciplinary inquiry held under subsection (4)(a), the employing authority or directed person considers that a special disciplinary inquiry should be held into the charge, the employing authority may request the Minister to direct that —

(a) a special disciplinary inquiry be held into the charge by a person named in that direction; or

(b) the disciplinary inquiry be converted into a special disciplinary inquiry and that the person holding the disciplinary inquiry hold the resulting special disciplinary inquiry.

(7) If the Minister complies with a request made under subsection (4)(b) or (6) and makes a direction referred to in —

(a) subsection (4)(b), the person named in that direction shall comply with that direction;

(b) subsection (6)(a), the person named in that direction shall comply with that direction and the relevant disciplinary inquiry being held under subsection (4)(a) is terminated; or

(c) subsection (6)(b), the disciplinary inquiry concerned is converted into a special disciplinary inquiry and the person holding that disciplinary inquiry shall hold the resulting special disciplinary inquiry.

(8) If a directed person finds at the conclusion of a disciplinary inquiry that —

(a) a breach of discipline was committed by the respondent, the directed person shall submit that finding to the employing authority and recommend to the employing authority that it act in relation to the respondent under subsection (3) as if the respondent had admitted the charge under subsection (2); or

(b) no breach of discipline was committed by the respondent, the directed person shall submit that finding to the employing authority and recommend to the employing authority that it notify the respondent of that finding and that no further action will be taken in the matter.

(9) On receiving a finding and recommendation under subsection (8), the employing authority shall —

(a) accept the finding; and

(b) in the case of a recommendation made under —

(i) subsection (8)(a) in relation to a charge of committing a breach of discipline consisting of disobedience to, or disregard of, a lawful order referred to in section 94(4), dismiss the respondent;

(ii) subsection (8)(a) in relation to a charge other than a charge referred to in subparagraph (i), accept that recommendation and act accordingly in relation to the respondent, or decline to

accept that recommendation and take such other action in relation to the respondent as could have been recommended under that subsection; or

(iii) subsection (8)(b), accept that recommendation and act accordingly in relation to the respondent.

(10) If an employing authority finds at the conclusion of a disciplinary inquiry held by itself that —

(a) a breach of discipline was committed by the respondent, the employing authority shall act under subsection (3) as if the respondent had admitted the charge under subsection (2); or

(b) no breach of discipline was committed by the respondent, the employing authority shall notify the respondent of that finding and that no further action will be taken in the matter.

(11) If a respondent denies a charge under subsection (2) and the employing authority is the Minister, the Minister shall direct a person to hold a special disciplinary inquiry into the charge and the person shall comply with that direction.

(12) A direction shall not be given under this section to the Commissioner.

(13) In this section —

"directed person" means person directed under subsection (4)(a) to hold a disciplinary inquiry into the charge concerned;

"disciplinary inquiry" means disciplinary inquiry held or directed to be held under subsection (4)(a)."

93 As the rights, duties and obligations between employers and employees in the public sector are governed by statute, where it is established that mandatory statutory requirements have not been met, steps taken and decisions arrived at may well be held to be ultra vires and invalid (see *Re Kenner; Ex-Parte Minister for Education* [2003] WASCA 37 at para 24 per Olsson AUJ [Parker and Templeman JJ agreeing] and also *Civil Service Association of WA Incorporated v Director General, Department of Consumer and Employment Protection* [op cit]).

94 As stated, it is the Board's view that the conduct of the Investigation and the Inquiry were seriously flawed such that the respondent could not rely on the findings of both the Investigator and the Inquirer. It is the Board's view that the Investigator's report should not have been relied upon by the respondent to form the view that the appellant committed the breaches as initially alleged by the respondent as the Investigator did not reach any conclusions about which sections of the PSM Act, the SE Act, the Public Sector Code of Ethics or the Staff Conduct Policy were breached by the appellant when he found that the appellant had committed two breaches when she read out Ms Stinton's letter and then shredded it. It is also the Board's view that the Inquiry conducted by Mr Baskwell was seriously deficient and his finding in relation to the second breach was not open to him and should not have been relied upon by the respondent as Mr Baskwell did not sight the original of Ms Stinton's letter which Ms Gray claimed she found in the shredder. Clearly this letter was fundamental to his inquiry given the appellant's claim that she had shredded a copy of Ms Stinton's letter and that this was the letter she believed Ms Gray found in the shredder on 19 March 2003. As Mr Baskwell did not satisfy himself that the letter found by Ms Gray in the shredder was the original of Ms Stinton's letter, the Inquiry was therefore fundamentally flawed.

95 We find that when the respondent significantly altered both of the allegations it alleged the appellant had committed after the Investigation was completed and before the Inquiry took place the respondent breached the statutory scheme it was required to follow. It is the Board's view the statutory scheme does not allow an employer to initiate an investigation pursuant to s81(2) in relation to a particular allegation and then lay charges pursuant to s83(1)(b) and/or s85 which are materially different to the alleged breach to which the appellant has already responded. When sections 81, 83, 85 and 86 are read in conjunction with s83(1), the statutory scheme requires that if after an investigation has been completed an employer considers that an employee has committed the alleged breach the employer is required, if the employee objects to the finding, to charge the person with having committed that particular breach of discipline, as the investigation is the basis on which a decision to lay disciplinary charges is based. Both allegations that were initially put to the appellant on 7 April 2003 refer to the appellant intercepting Ms Stinton's letter and the appellant responded to both allegations on the basis that the respondent alleged that she had intercepted Ms Stinton's letter. However, on 28 August 2003 the appellant was advised that an inquiry would be held pursuant to s86(4) of the PSM Act in relation to the following charges:

"● On Wednesday, 19 March 2003, at Queens Park Primary School, you opened a letter personally addressed to Ms Paula Gray, Principal, Queens Park Primary School, from a person known as Mrs Stinton, and read parts of the letter out aloud to staff members.

● On Wednesday, 19 March 2003 at Queens Park Primary School, you opened and shredded a letter personally addressed to Ms Paula Gray, Principal, Queens Park Primary School from a person known as Mrs Stinton."

(Exhibit R5)

96 It is the Board's view that when the respondent changed the word "intercepted" to "opened" in both charges (see letters from the respondent to the appellant dated 7 April 2003 and 28 August 2003 - Exhibit R5) the respondent breached the statutory scheme as the respondent initiated an Inquiry into charges which were materially different to those charges which the Investigator reviewed. It is the Board's view that the serious allegation that the appellant 'intercepted' school correspondence, which was the initial allegation that the appellant was required to meet, and did so when the two breaches were first put to her, could not be dropped from the allegations after the Investigation was completed and before the Inquiry took place. In dropping this allegation completely against the appellant prior to initiating the Inquiry into both breaches it is the Board's view that the charges against the appellant were altered to such an extent that the disciplinary process was compromised.

97 This matter was further confused when the respondent advised the appellant that the Inquirer would investigate whether the appellant had 'intercepted' Ms Stinton's letter in relation to the second breach, prior to requesting the Inquirer to investigate whether the appellant had 'opened' Ms Stinton's (see Exhibit R5 letter dated 8 August 2003).

98 It is also the Board's view that it was not open to the respondent to maintain that the appellant had intercepted Ms Stinton's letter after the Investigator made no such finding. After completing his investigation Mr Burgess made the following findings:

"I find that Mrs. Dallimore did read out parts of a letter that Mrs. Stinton sent to Ms Gray to at least one staff member and in so doing committed a minor breach of discipline.

I find that Mrs. Dallimore did shred a letter from Mrs. Stinton to Ms Gray and in so doing committed a serious breach of discipline."

(Exhibit R1 page 180)

Clearly the Investigator did not make any finding that the appellant 'intercepted' the letter from Ms Stinton yet the respondent continued to maintain that the appellant had 'intercepted' Ms Stinton's letter and continued to advise the appellant that this was the allegation to which she was required to respond, until the breaches were referred to the Inquirer for investigation.

99 The Board concludes that the appellant was denied procedural fairness when the respondent altered the breaches by deleting the word 'intercepted' and replacing it with 'opened' and did not alter the specific breaches of the PSM Act, the SE Act, the Public Sector Code of Ethics or the Staff Conduct Policy the respondent initially claimed the appellant had committed in relation to both breaches when the respondent wrote to the appellant about both breaches in April 2003. As a result the appellant was denied the opportunity to respond to the specific breaches the respondent alleged the appellant had committed. It is the Board's view that the appellant should have been informed of the changes to the sections of the relevant acts, code and policies she was found to have breached after the breaches were altered by the deletion of the work 'intercepted' so that the appellant could respond to the revised allegations against her. As the appellant was not advised of any changes to the breaches the respondent claimed she had committed during the disciplinary process the appellant was thus denied procedural fairness.

100 During the disciplinary process the respondent charged the appellant with committing a serious breach after the Investigator found that she had committed a minor breach in relation to the first allegation. When the respondent wrote to the appellant on 8 August 2003 it upgraded the first charge against the appellant from a minor breach to one of a serious breach under s83(1)(b) of the PSM Act and no reason was given to the appellant at the time for the respondent now regarding this alleged breach as a serious breach. We find that as the respondent incorrectly charged the appellant with committing a serious breach under s83(1)(b) instead of charging the appellant with a breach under s85 the respondent again did not comply with the requirements on it under the statutory scheme. Further, if the appellant was aware that the first breach against her was to be upgraded to a serious breach it may have influenced her response to this charge.

101 The Board is concerned that the appellant was not provided with full copies of the reports completed by both the Investigator and the Inquirer so that she could properly respond to the basis upon which the respondent arrived at the view that the appellant had committed the breaches as alleged. In our view this defect constituted a serious denial of procedural fairness towards the appellant.

102 We find that the respondent's failure to give the appellant the opportunity to be heard on the issue of penalty following its finding that the appellant was guilty of two breaches of discipline constituted a denial of natural justice. Even though this omission would not necessarily render the whole process invalid, the appellant is entitled to have the opportunity to put submissions to the employer for consideration on this issue, particularly in a case such as this whereby the respondent was considering terminating the appellant. Furthermore, the appellant was not given the opportunity to respond to the respondent's decision that her behaviour in 1999 would be taken into account.

103 For the reasons set out above we conclude that the flaws in the disciplinary process, including the respondent's failure to adhere to the statutory requirements in Part 5 of the PSM Act and the omissions of both the Investigator and the Inquirer, were not merely technical and minor but were so significant as to bring into question the whole process and the conclusions relied on by the respondent to terminate the appellant such that the respondent's decision to terminate the appellant should be rendered void.

104 As we have found that the appellant did not commit the second breach and there were mitigating circumstances in relation to the appellant's behaviour in relation to the first breach such that the appellant should not have been disciplined in relation to this breach, (even when taking into account that the appellant was subject to serious disciplinary proceedings in early 2000) it is the Board's view that the appellant's appeal ought to be upheld, and the findings of the disciplinary process be quashed, as should the penalty.

105 The appellant is seeking reinstatement to her former position with no loss of salary and entitlements or continuity of service. The parties are directed to confer and advise the Board within seven days of the date of this decision as to an appropriate order to give effect to these reasons for decision.

2005 WAIRC 02812

AGAINST THE DECISION TO DISMISS MADE ON 20/11/2003

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KAY DALLIMORE
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION ANDTRAINING
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER J L HARRISON - CHAIRPERSON
	MR B HEWSON - BOARD MEMBER
	MS C BREUDER - BOARD MEMBER
DATE	THURSDAY, 13 OCTOBER 2005
FILE NO	PSAB 11 OF 2003
CITATION NO.	2005 WAIRC 02812

Result Order issued

Order

WHEREAS the Public Service Appeal Board ("the Board") issued Reasons for Decision on 24 February 2005 in the above application declaring that appellant's appeal be upheld and the findings of the disciplinary process be quashed; and

WHEREAS the parties were directed to confer and advise the Board within seven days of the date of the reasons for decision as to an appropriate order to give effect to the reasons for decision; and

WHEREAS as the parties were unable to reach agreement about a proposed order a hearing was held on 18 April 2005 and the parties provided submissions in relation to an appropriate order to issue and also advised the Board that negotiations in relation to the applicant's workers' compensation claim against the respondent were ongoing; and

WHEREAS the Board requested that an update on the workers' compensation claim be provided to it and on 10 May 2005 the Board was advised that an *in principle* settlement of the workers' compensation claim has been reached; and

WHEREAS as any agreement reached in relation to the workers' compensation claim would impact on the order that the Board issued the parties were advised that once the settlement of the workers' compensation claim had been finalised the Board would then issue orders that it saw as appropriate in the circumstances; and

WHEREAS the applicant's representative provided several updates to the Board as to the status of the workers' compensation claim; and

WHEREAS on 19 September 2005 the applicant advised the Board that the parties had settled all outstanding issues and sought leave to discontinue the appeal; and

WHEREAS the Respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

(Sgd.) J L HARRISON,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 33 of 2004	William Peter Wear	Minister for Health in Right of the Western Australian Country Health Service	Scott C.	Discontinued	10/10/2005
PSA 37 of 2004	Dean Anthony Clair	Minister for Health in Right of Metropolitan Health Service,	Scott C.	Dismissed	04/10/2005
PSA 134 of 2004	William Peter Wear	Minister for Health in Right of the Western Australian Country Health Service	Scott C.	Discontinued	10/10/2005

NOTICES—Union Matters—

NOTICE

FBM No. 11 of 2004

NOTICE is given of an application by the "Baking Industry Employers' Association of Western Australia" to the Full Bench of the Western Australian Industrial Relations Commission for an alteration to its eligibility by proposed changes to Rule 4 - Membership and Rule 5 - Divisions

The existing rules relating to the Rule 4 Membership and Rule 5 are proposed to be altered as set out below:

Rule 4 - Membership

By including in the second paragraph of Clause 4 of the Rules a new category "Associate Members"

Rule 4 – Membership as proposed

The first members of the Association are those who are entered in the Register of Members of the Association as members under the old rules and subsequent members shall be those persons who being eligible shall after the date when these Rules come into force by duly elected in such manner and upon such conditions as may be prescribed from time to time by the Rules of the Association.

The Association shall consist of:-

Ordinary Members

Life Members; and

Associate Members.

Rule 5 - Divisions

Amend Rule 5 as follows:

(a) By deleting the first paragraph under the heading "Ordinary Members"

(b) By adding a new heading of "**Associate Members"** and an explanatory paragraph at the end:

Rule 5 –Divisions as proposed

(note the sub rule on "Life members" remains unchanged and the text relating to it is therefore omitted here)

There shall be three divisions of membership of the class known as Ordinary Members. They shall be:

- Category 1 as defined in Rule 3
- Category 2 as defined in Rule 3
- Category 3 as defined in Rule 3

ORDINARY MEMBERS

Any sole trader, partnership or company engaged in the Bread Industry and Pastrycooking Industry and who manufactures and distributes bakery products within the State of Western Australia shall be eligible for ordinary membership of the Association.

If an Ordinary member ceases to carry on the business of the manufacture of bakery products as aforesaid during any year of membership, he/she shall cease to be an Ordinary Member of the Association.

A representative may be changed or an alternative representative appointed by a member on its giving written notice in that behalf to the Executive Director.

LIFE MEMBERS –(unchanged)

ASSOCIATE MEMBERS

Any person, firm, association, joint venture, corporation or other legal entity carrying on a bona fide business that is actively engaged in the manufacture, distribution or supply of goods or services to the Bread Industry and Pastrycooking Industry with the State of Western Australia and who is not eligible for ordinary membership of the Association shall be eligible for membership as an Associate Member.

Associate Members may attend meetings of the Association but are not entitled to vote at any meeting or to hold any office within the Association.

A copy of the Rules of the organisation and the proposed rule amendment may be inspected on the 16th Floor, 111 St Georges Terrace, Perth.

Any organisation registered under the Industrial Relations Act 1979, or any person who satisfies the Full Bench that he/she has a sufficient interest or desires to object to the application may do so by filing a notice of objection in accordance with the "Industrial Relations Commission Regulations 2005".

This matter will be listed before the Full Bench on a date to be set, but no earlier than 30 days from this publication. Organisations or persons who have filed a notice of objection shall be provided with a notice of hearing.

D. MacTIERNAN
DEPUTY REGISTRAR 12th October 2005

OCCUPATIONAL SAFETY AND HEALTH ACT
—Matters Dealt With—

2005 WAIRC 02641

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS-WESTERN AUSTRALIAN BRANCH AND OTHERS
	APPLICANTS
	-v-
	CBI CONSTRUCTORS AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
HEARD	MONDAY, 22 AUGUST 2005
DELIVERED	MONDAY, 19 SEPTEMBER 2005
FILE NO.	OSHTA 7 OF 2005
CITATION NO.	2005 WAIRC 02641

CatchWords	*Occupational Safety and Health Act 1984* – s 28(2) referral to Tribunal for payment for refusal to work over health issue – s 26(1) – imminent and serious harm to health – order issued granting payment – relationship to *Industrial Relations Act 1979* .
Result	Order issued for payment
Representation	
Applicants	Mr C Saunders on behalf of the Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers-Western Australian Branch Ms K Scoble (of counsel) on behalf of The Construction, Forestry, Mining and Energy Union of Workers Mr L Edmonds (of counsel) on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal Plumbing and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch
Respondents	Ms L Gibbs (of counsel) on behalf of CBI Constructors, Downer Engineering, South West Group and Modern Industries

Reasons for Decision

1 At the conclusion of the hearing into this matter the Occupational Safety and Health Tribunal ("the Tribunal") ordered payment to be made as claimed and stated it would issue its reasons for decision later. These are those reasons.

Background

2 The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers – Western Australian Branch ("the AMWU") referred a claim on 16 August 2005 to the Tribunal seeking pay and benefits for anyone performing work, whether as an employee, contractor, sub-contractor or employee of sub-contractor, (to be referred to in these reasons as "employees"), of the respondents on 11 and 12 August 2005 at the Burrup Fertiliser site ("the site"). The application was referred under s 28(2) of the *Occupational Safety and Health Act 1984* ("the Act"). The Tribunal convened a conference for the purpose of conciliating between the parties on the issue of pay and entitlements for some 700 employees on 11 and 12 August 2005 who ceased work over an alleged occupational safety and health issue at the site.

3 At the conclusion of the conciliation conference the parties remained in dispute and the Tribunal, having regard to the powers conferred on it by the *Industrial Relations Act 1979,* listed for hearing and determination, of its own motion, the question of whether the employees on the site ought receive pay and entitlements for 11 and 12 August 2005, whether on day shift or night shift.

4 Prior to the hearing an order was issued dividing application OSHT 7 of 2005 into two parts; OSHTA 7 of 2005 and OSHTB 7 of 2005, to enable those respondents with employees on site who were not present at the conciliation conference to have access to conciliation and/or arbitration by way of a separate application, namely OSHTB 7 of 2005.

5 The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch ("the CEPU") and The Construction, Forestry, Mining and Energy Union of Workers ("the CFMEU") sought leave to be joined to the application. Leave was granted by the Tribunal and the additional applicants were joined by consent to OSHTA 7 of 2005 and OSHTB 7 of 2005.

6 The AMWU lodged an amended application properly identifying the respondents on the site and counsel for CBI Constructors informed the Tribunal the relevant respondents under OSHTA 7 of 2005 were CBI Constructors, Modern Industries, Downer Engineering and South West Group ("the respondents").

Issue for determination by the Tribunal

7 It is for the Tribunal to determine whether, on balance, that the refusal to work by the employees on 11 and 12 August 2005 resulted from a genuinely held belief that to continue to work would expose them, or others, to the risks mentioned in s 26(1) of the Act. The test in matters of this kind is not whether the employee in question believes that it is unsafe to work, but whether he or she has reasonable grounds to believe that to continue to work would expose themselves or other persons to a risk of imminent and serious injury or imminent and serious harm to their health.

Submissions by the Applicants

8 The AMWU, the CFMEU and the CEPU ("the applicants") seek payment on behalf of the employees of the respondents as if they had worked on Thursday and Friday, 11 and 12 August 2005 respectively. The applicants submitted there were reasonable grounds for the employees of the respondents to believe that it was unsafe to continue to work following a series of events at the site leading up to the afternoon of 11 August 2005.

9 Sometime prior to 10 August 2005, an employee of CBI Constructors (one of the respondents) isolated a substance he considered to be carcinogenic and requested the substance be analysed. The occupational safety and health representative on the site passed the substance on to SNC Lavalin (SA) Inc (the site construction manager) and sometime before 10 August 2005, an analysis was undertaken.

10 On Wednesday 10 August 2005 it was reported by the supervisors to the site occupational safety and health representatives and to the delegates that the substance had been analysed and identified as asbestos. WorkSafe was informed of developments by the AMWU and an inspector undertook to visit the site as soon as possible.

11 On 11 August 2005 the safety committee on site met and attempted to identify the risk to any employees in the area. Up until this stage work continued as normal. At approximately 1600 hours the employees on site met and were informed by the respondents that asbestos had been identified on site. Further information was provided to the workforce indicating it was not possible to identify those areas where asbestos might be located.

12 The AMWU submitted Mr Stephen Young, the manager of CBI Constructors, then advised the workforce there was no alternative work available even though the employees made themselves available. This submission was not contested by the respondents.

13 The AMWU submitted Mr Stephen Young, was unable at any stage to inform the workforce where the asbestos was located on the project. The AMWU went on to submit Mr Young appreciated the employees' concerns and advised the respondents had

contracted MPL (an asbestos contractor) to undertake a comprehensive audit for asbestos related products at the site on Friday, 12 August 2005.

14 The applicants submitted, on the basis of the information provided, the employees, in accordance with the provisions of the Act, then left the site on the basis they had reasonable grounds to believe that to continue to work might expose themselves to imminent and serious harm to their health. Prior to leaving the site the employees made themselves available for work in alternative areas.

15 The AMWU submitted this situation continued through until the commencement of shifts on the morning of 13 August 2005. It was not until this point that safe procedures for working with the asbestos were in place across the site and employees were notified by the respondents that it was possible, in the applicants' view, for a safe return to work.

16 It was submitted by the applicants that the circumstances were such that the employees had reasonable grounds to believe that to continue to work might expose the workforce to a risk of imminent and serious injury to their health on 11 August 2005. The issue of asbestos related diseases in Australia is a major problem and most persons are aware that exposure to the potential inhalation of fibres can lead to life threatening illnesses.

17 When WorkSafe inspected the site on 11 August 2005 an improvement notice was issued to SNC Lavalin (SA) Inc requiring certain procedures to be implemented to deal with the asbestos issue. On Friday, 12 August 2005 MPL arrived on the site at approximately 8.30 in the morning and undertook an asbestos audit, reporting back to the safety committee in the afternoon. All representatives on the safety committee made themselves available and a number of shop stewards assisted in the audit process.

18 By approximately 1600 hours on 12 August 2005 the respondents, on the basis of the report from MPL, declared the site was safe and the workforce could return to work as normal, commencing morning shift, Saturday, 13 August 2005.

19 The AMWU submitted that all contractors on the site, including the client, were notified by CBI Constructors that asbestos had been found on site, MPL had been engaged to undertake an audit of the site and remove and encapsulate the asbestos, where appropriate. The AMWU placed some emphasis on a commitment by the State Government, prior to the commencement of the project, that the site would be asbestos free.

20 On that basis the AMWU submitted that on the morning of Saturday, 13 August 2005 the employer held further meetings, advised that MPL had been on site, that an asbestos audit had been undertaken, that the asbestos in question had been encapsulated and those areas where asbestos had been located had either been removed or isolated so that workers would not be exposed. In the case where asbestos was located but could not be removed an appropriate safe working programme had been put in place by MPL and at the time of the matter coming before the Tribunal a final report had yet to be issued by MPL to the respondents.

21 The requirement on an employee who refuses to work under s 26(1) of the Act is to notify their employer. The AMWU submitted that did occur on 11 August 2005 and the contractors were notified through the AMWU site delegate, Mr Michael Dayes.

22 The AMWU submitted that the circumstances applying at the site on the afternoon of 11 August 2005 did not require the employees to obtain the authorisation of their employer as required under s 26(2)(a) of the Act as these were circumstances where s 26(2)(b) applied. The relevant section of the Act is as follows:

> "**26. Refusal by employees to work in certain cases**
>
> (1) Nothing in section 25 prevents an employee from refusing to work where he or she has reasonable grounds to believe that to continue to work would expose him or her or any other person to a risk of imminent and serious injury or imminent and serious harm to his or her health.
>
> (1a) In determining whether an employee has reasonable grounds for the belief referred to in subsection (1) it is relevant to consider whether an inspector has attended the workplace upon being notified under section 25(1) of the risk and whether —
>
> (a) the measures, if any, required by the inspector to be taken to remedy the matters giving rise to the risk have been taken;
>
> (b) the requirements, if any, of the inspector to remedy the matters giving rise to the risk have ceased to have effect; or
>
> (c) the inspector has determined that no action is required to be taken under this Act.
>
> (2) An employee who refuses to work as mentioned in subsection (1) shall forthwith notify his or her employer and, if there is a safety and health representative for the workplace concerned, such safety and health representative, and the matter shall be regarded as an issue to which section 24(1) applies.
>
> (2a) An employee who refuses to work as mentioned in subsection (1) shall not leave the workplace concerned until the employee has notified the employer under subsection (2) and that employer has authorised the employee to leave that workplace.
>
> (2b) Subsection (2a) does not apply if the employee has reasonable grounds to believe that to remain at the workplace concerned would expose the employee to a risk of imminent and serious injury or imminent and serious harm to his or her health."

23 The AMWU submitted that, in the case of employees leaving the site, no meeting had occurred, there was no vote, there was no instruction issued by any union for workers to leave the site. What did occur was employees were given a briefing by their employer that asbestos had been found on the site and the respondents were unsure of its location. On the basis of this report employees considered there was a risk and they had reasonable grounds to believe that to continue to work would expose them to a risk of imminent and serious injury or imminent and serious harm to their health. The employees withdrew their labour from those areas the employer was unable to identify as being free of asbestos, in essence the whole site. At the time of ceasing work there was no safe working procedure on the site for asbestos.

24 The AMWU submitted the employer could not make alternative work available on either Thursday 11 or Friday 12 August 2005 whether day shift or night shift. No further alternative work was offered to employees by the respondents until the morning of Saturday, 13 August 2005 at the normal start time.

25 In conclusion, the AMWU submitted that the employees of the respondents were entitled to those earnings they would have earned on 11 and 12 August 2005 whether on day shift or night shift. The CFMEU and the CEPU supported and relied on the submissions made by the AMWU in the proceedings before the Tribunal.

Submissions by the respondent

26 Counsel submitted that the employees of the respondents were not entitled to pay and benefits for 11 and 12 August 2005 as if the employees had worked, given it was the respondents' submission there was no serious and imminent risk to the employees' health arising from the identification of asbestos on the site.

27 The respondents submitted that up until the afternoon of 10 August 2005 the respondents were unaware there was asbestos on the site. On the morning of 11 August 2005 the respondents held discussions with the safety and union representatives to deal with the asbestos issue and work continued as usual throughout the day.

28 WorkSafe attended the site on the afternoon of 11 August 2005 and an improvement notice was issued against SNC Lavalin (SA) Inc requiring the construction manager to implement a safe system of work. The implementation of a safe system of work was to include the conduct of an audit to locate any product(s) that may contain asbestos and the requirement for those identified asbestos products to be handled and/or removed in accordance with the relevant codes of practice. The date of compliance imposed on the construction manager for the improvement notice was 25 August 2005, some 12 days after the days in question before the Tribunal. The respondents formed the opinion there was no serious and imminent risk to the health of the employees on site. In the respondents' view, WorkSafe had the same belief.

29 The respondents submitted that at the same time as the improvement notice was issued the employees left the site without conferring with, or requesting the permission of, their employer. Such action did not conform with s 26(2)(a) of the Act.

30 It was the submission of the respondents:

> "Now despite my clients' opinion that there was no serious and imminent risk to health, it is conceivable that the employees may have believed that there existed a serious an (sic) imminent risk to health." (Transcript page 14)

Conclusions of the Tribunal

31 Significant sections of the applicants' submissions were uncontested by the respondents.

32 Relevant to the consideration by the Tribunal is whether an inspector had attended the workplace. In the case of the site in question, Mr Neilson an inspector from WorkSafe attended in the afternoon of 11 August 2005 and issued an improvement notice relating to the safety issue in question. The Tribunal has taken into consideration the measures encompassed by the improvement notice to remedy the risk at the site.

33 Whether, on the days in question, reasonable alternative work was available is a mixed question of fact and law, in so far as applying the relevant sections of the Act. The Tribunal finds that on the day in question the respondents advised the employees no alternative work was available on the site and that continued through until commencement of day shift on Saturday 13 August 2005. The applicants' uncontested submissions, that the employees made themselves available for reasonable alternative work in those areas of the site where it was safe to do so, as is required by the provisions of s 26(3) of the Act, are accepted by the Tribunal. In other words, the employees concerned who attended the site on 11 August 2005 were ready and available for alternative work.

34 The Tribunal finds on 11 and 12 August 2005 it was impossible to determine which areas were safe to work in, if any. Up until the afternoon of 10 August 2005 it was the understanding of the respondents that the site was asbestos free. The unsafe areas were not delineated until such time as MPL had undertaken its audit, encapsulation and removal of products containing asbestos. It was therefore not possible for the employees, the respondents or indeed WorkSafe, to determine which areas were safe.

35 The Tribunal finds on 11 and 12 August 2005, whether day shift or night shift, there were reasonable grounds to believe that to continue to work on the site would expose the employees to a risk of imminent and serious harm to the employees' health. The site was, and remained, subject to an improvement notice. Importantly, the respondents' submissions acknowledged it was "conceivable that the employees may have believed that there existed and imminent risk to health". In making its decision the Tribunal has had regard for the definition of "reasonable grounds to believe" as considered in *George v Rockett* (1990) 170 CLR 105 at 116 by Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ:

> "The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition on the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture."

36 It was the respondents' submission that the employees left the site without authorisation contrary to s 26(2)(a) of the Act. Such a submission is indeed accurate however s 26(2)(b) exempts the operation of such a provision where the employees concerned have reasonable grounds to believe that to remain at the site would expose them to an imminent and serious risk to their health. Having regard for the circumstances at the site and in accordance with equity, good conscience and the substantial merits of the case, the Tribunal finds that in terms of the site on the days of 11 and 12 August 2005, there was no known safe place of work.

37 In making its decision the Tribunal has had regard for the principles reflected by His Hon. P.J. Sharkey in the Full Bench decision *Transfield Pty Ltd v Building Trades Association and Others* 70 WAIG 3023. Having regard to s 51I of the Act, it is open to the Tribunal after first hearing argument, to resolve the matter in a manner consistent with s 26(1) of the *Industrial Relations Act 1979*, provided that if a matter is capable of being referred under the Act to the Tribunal, then it may be heard and determined as if it were a matter in which jurisdiction were conferred on the Tribunal by the *Industrial Relations Act 1979*. Such a matter therefore extends to the exercise of the Tribunal's jurisdiction. The powers of the Tribunal to settle a claim referred under s 28(2) are limited only by the restrictions reflected in s 51I of the Act –

> "**51I. Practice, procedure and appeals**
>
> (1) The provisions of sections 22B, 26(1), (2) and (3), 27, 28, 31(1), (2), (3), (5) and (6), 33, 34(1), (3) and (4), 36 and 49 of the *Industrial Relations Act 1979* that apply to and in relation to the exercise of the jurisdiction of the

Commission constituted by a Commissioner apply to the exercise of the jurisdiction conferred by section 51G —

(a) with such modifications as are prescribed under section 113 of that Act; and

(b) with such other modifications as may be necessary or appropriate.

(2) For the purposes of subsection (1), section 31(1) of the *Industrial Relations Act 1979* applies as if paragraph (c) were deleted and the following paragraph were inserted instead —

" (c) by a legal practitioner. "."

38 In considering the claim for payment as filed the Tribunal has exercised its powers under s 26(1) of the *Industrial Relations Act 1979*.

39 The Tribunal finds that the employees "had reasonable grounds to believe that to continue to work would expose themselves or any other persons to a risk of imminent and serious injury or imminent and serious harm to health". The Tribunal therefore finds that the employees on the site ought receive pay and entitlements for 11 and 12 August 2005, whether on day shift or night shift.

2005 WAIRC 02469

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS AND THE COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH
	APPLICANTS
	-v-
	CBI CONSTRUCTORS, MODERN INDUSTRIES, DOWNER ENGINEERING AND SOUTH WEST GROUP
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 25 AUGUST 2005
FILE NO/S	OSHTA 7 OF 2005
CITATION NO.	2005 WAIRC 02469

Result	Order issued.
Representation	
Applicants	Mr C. Saunders on behalf of the Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers – Western Australian Branch
	Ms K. Scoble (of counsel) on behalf of the Construction, Forestry, Mining and Energy Union of Workers
	Mr L. Edmonds (of counsel) on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division
Respondents	Ms L. Gibbs (of counsel) and with her Mr P. Stillman on behalf of CBI Constructors, Downer Engineering, Modern Industries and South West Group

Declaration and Order

WHEREAS on 16 August 2005 the Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers – Western Australian Branch ("the applicant") applied to the Tribunal for a conference pursuant to s.28(2) of *Occupational Safety and Health Act 1984* ("the Act");

AND WHEREAS pursuant to s.51J of the Act the Tribunal convened a conference for the purpose of conciliating between the parties in relation to the dispute;

AND WHEREAS the dispute related to the issue of pay and entitlements for employees and subcontractors on 11 and 12 August 2005 regarding an occupational health and safety issue at the Burrup Fertilisers site;

AND WHEREAS at the conclusion of this conference the parties remained in dispute over the issue and the Tribunal referred the issue of pay and entitlements for hearing and determination;

AND WHEREAS the matter was heard on Monday 22 August 2005 and for the reasons set out in the transcript of proceedings and yet to be published;

NOW THEREFORE, the Occupational Safety and Health Tribunal, pursuant to the powers conferred on it under the *Occupational Safety and Health Act* 1984 hereby declares and order -

(1) THAT that those employees and subcontractors of the respondents employed on the Burrup Fertilisers site are, entitled to pay and benefits as if they had carried out their normal work.

(2) THAT each employee and subcontractor of the respondents to this application on the Burrup Fertilisers site who were rostered to work on Thursday, 11 August 2005 and/or Friday, 12 August 2005, whether day shift or night shift, be paid in accordance with the terms outlined in Clause (3) of this Order.

(3) THAT payment for day shift or night shift on Thursday, 11 August 2005 and Friday, 12 August 2005 be for the entire shift, as if those hours had been worked.

[L.S.] (Sgd.) S M MAYMAN,
Commissioner.

2005 WAIRC 02728

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT** **-v-** JOHN HOLLAND PTY LTD **RESPONDENT**
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 30 SEPTEMBER 2005
FILE NO/S	OSHTA 6 OF 2005
CITATION NO.	2005 WAIRC 02728

Result	Directions order suspended
Representation	
Applicants	Mr T Kucera (of counsel) on behalf of The Construction, Forestry, Mining and Energy Union of Workers Mr L Edmonds (of counsel) on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering & Electrical Division
Respondent	Mr S Harben (of counsel) on behalf of John Holland Pty Ltd

Order

WHEREAS a directions order was issued in this matter on 12 September 2005;

AND WHEREAS the directions order was to remain in effect until the hearing and determination of the matters in dispute between the parties;`

AND WHEREAS liberty to apply was reserved for either party to apply to vary the terms of the order;

AND WHEREAS the applicant and the respondent have, by consent, sought to exercise the liberty to apply to suspend the operation of the directions order until further notice;

NOW THEREFORE, the Occupational Safety and Health Tribunal, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984* hereby orders –

(1) That the operation of directions order issued in OSHTA 6 of 2005 on 12 September 2005 is suspended until further notice.

(2) That liberty to apply is reserved to either party to apply to vary the terms of this order.

[L.S.] (Sgd.) S M MAYMAN,
Commissioner.